IAC-FH-AR-V1

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/19992/2014
IA/19993/2914
IA/19994/2014
IA/19995/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 6th January 2016	**On 25th January 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

DRITAN CAKA
SUSANA RAQUEL QUINTEROS SANABRIA
AMCQ
ARCQ
(ANONYMITY DIRECTION NOT MADE)

Respondents

Representation:
For the Appellant: Mr S Kotas, Home Office Presenting Officer
For the Respondents: Miss R Moffat, Counsel, instructed by Irvine Thanvi Nata Solicitors

DECISION AND REASONS

1. Although this is an appeal by the Secretary of State I refer to the parties as they were before the First-tier Tribunal.

2. The first Appellant is an Albanian citizen, his partner, the second Appellant, is a Bolivian citizen and their two children are also Bolivian citizens. They appeal against the decision of the respondent of 15th April 2014 to refuse their applications for leave to remain on the basis of their private and family life in the UK. First-tier Tribunal Judge Adio allowed the appeals of the third and fourth Appellants (the children) under paragraph 276ADE (1) (iv) of the Immigration Rules and the appeals of the first and second Appellants (the parents) on human rights grounds. The Secretary of State appeals with permission to this Tribunal.

3. The background to this appeal is that the first Appellant entered the UK in 1999 illegally. His asylum application was refused that year and his appeal against that decision was dismissed in 2004. The first and second Appellants met in 2002 in the UK when the second Appellant was also in the UK unlawfully. Their first child was born in April 2003. When she was pregnant with their second child the second Appellant and their first child returned to Bolivia for a period of eighteen months and the fourth Appellant was born there. The second Appellant and the children returned to the UK on 10th March 2005 and all of the appellants have resided together with in the UK since then.

4. The First-tier Tribunal Judge heard oral evidence from the first and second Appellants and firstly considered the best interests of the children and decided that both the children met the requirements of paragraph 276ADE(1)(iv) in that it would not be reasonable to expect them to leave the UK after spending over ten years here. The judge went on to consider the first and second appellants and, given his finding that it would not be reasonable to expect the children to leave the UK, the judge found that it would be disproportionate to remove the first and second Appellants under Article 8 paying particular attention to the provisions of Section 117B(6) of the Nationality, Immigration and Asylum Act 2002.

5. The Secretary of State challenged that decision. The grounds note that the father's removal directions were set for Albania, his country of nationality, and the mother and children's removal directions were set for their country of nationality, being Bolivia. It is contended that the reasons for refusal letter and the submissions made by the Presenting Officer at the hearing pointed to the possibility of the Appellants obtaining appropriate visas such that they could live together in either Albania or Bolivia. However, despite this it is contended that the judge proceeded to determine the appeal on the basis that the only possible outcome was that the father returned to Albania on his own when the mother and children went to Bolivia. It is contended that the judge was required to consider whether the family could live together in Albania or Bolivia and not simply whether it was reasonable for them to be removed to separate countries. It is contended that, in ignoring this point, the judge misdirected himself in law and failed to resolve the conflict of opinion on a material matter. It is further contended that in considering 276ADE (1) (iv) the judge erred in

finding that the poor immigration history of the family is irrelevant. The Secretary of State accepted that a child does not need to have been in the UK lawfully in order to meet this Rule but contended that it is clear that the question of reasonableness is a holistic exercise that requires the judge to look at all factors both for and against the Appellant which must necessarily include the poor immigration history and, in disregarding this weighty issue, the judge misdirected himself in law in a material way.

Error of Law

6. At the hearing before me Mr Kotas submitted that it is the Secretary of State's position that the family unit can go to Albania or to Bolivia. He also submitted that the immigration status of the parents is very much part of the consideration as to whether it is reasonable to expect the children to leave the UK. He submitted that the length of time the children have resided in the UK should not be the only factor.

7. Miss Moffatt relied on her skeleton argument. In relation to the first ground she submitted that the First-tier Tribunal did not expressly make the finding as to whether the family unit could live together within Bolivia or Albania following the initial separation upon removal but that this submission is not material to the conclusions on the reasonableness of requiring the children to leave the UK. She submitted that the judge was correct to consider the case on the basis that the father would be returned to Albania and the other family members to Bolivia because those countries where the removal directions were set and it is the only logical conclusion from the removal directions that the family would be split as they would be removed separately. She submitted that the issue in relation to visas for travel to Albania or Bolivia were speculative and arise only after removal to different countries. She submitted it was therefore right for the judge to find that if they were to be removed the family would be split. She emphasised that the issues in relation to the possibility of obtaining visas to Albania or Bolivia was speculation.

8. Paragraph 276ADE (1) (iv) provides as follows;

> ‘276ADE (1). The requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that at the date of application, the applicant:
>
> …
>
> (iv) is under the age of 18 years and has lived continuously in the UK for at least 7 years (discounting any period of imprisonment) and it would not be reasonable to expect the applicant to leave the UK; …’

9. In my view it would have been preferable had the First-tier Tribunal Judge actively considered the possibility of the family unit living in Albania or Bolivia. I accept that there is an element of speculation in terms of the

availability of visas for the father to go to live in Bolivia or for the other family members to go to live in Albania. However the judge did hear evidence from the father and the mother in relation to some enquiries they had made about the availability of visas although it appeared that no substantive or detailed enquiry had been made.

10. However I take into account Miss Moffatt's submission that the removal directions had been set and that any issue of either party residing in the other's country was a longer term issue which would have had to be considered after removal and to this extent there was an element of speculation involved.

11. In any event, I do not consider that any error in relation to this issue is material. This is because I accept that paragraphs 25 and 26 of the decision the judge makes clear that the finding that it would not be reasonable for the children to leave the UK was based mainly on the children's integration in the UK, their progress at school and their length of residence in the UK. The judge found that their removal would affect them "emotionally, psychologically and educationally" [26] and it is clear that the judge found that it would not be reasonable to expect them to leave the UK regardless of which country they would be removed to. Accordingly I accept that the question as to whether the children could live in Albania or Bolivia along with both parents was not relevant or not material, given the judge's clear finding that it is not reasonable to expect the children to leave the UK regardless of where they were going.

12. The second ground put forward by the Secretary of State contends that in considering 276ADE (1) (iv) the judge erred in finding that the poor immigration history of the family is irrelevant. However I accept that it was open to the judge to find at paragraph 24 that fault cannot be attached to the children in relation to their unlawful residence in the UK as this was not something over which they had any control. He noted that 'the issue of [the children] living here unlawfully does not arise as Parliament has not made a distinction for children under 7 years as to whether they lived here unlawfully'. In my view it was open to the judge to find that the fact that the children did not have lawful residence in the UK did not preclude them from meeting the requirements of paragraph 276ADE(1) (iv). The judge did deal with the immigration status of the adults at paragraph 29. The judge referred to their immigration history as 'appalling' and weighed that in the balance in considering proportionality. The judge decided, however, that their appalling immigration history did not outweigh the best interests of the children. In my opinion the judge did take into account the adverse immigration history of all of the appellants.

13. In these circumstances I am satisfied that the judge made no material error of law.

Notice of Decision

14. The judge made no material error of law. The decision of the First-tier Tribunal shall stand.

15. No anonymity direction is made.

Signed Date: 22 January 2016

Deputy Upper Tribunal Judge Grimes

TO THE RESPONDENT
FEE AWARD

No fee is paid or payable and therefore there can be no fee award.

Signed Date: 22 January 2016

Deputy Upper Tribunal Judge Grimes