Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/38869/2014
IA/38870/2014
IA/38871/2014
IA/38872/2014
IA/38873/2014

THE IMMIGRATION ACTS

Heard at Field House
On 29 April 2016

Decision Promulgated
On 11th May 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

KUBENDRAN PILLAY
NADEEMA DOMINIQUE SAMUELS
NAZNEEN SAMUELS
[M P]
[Z P]
(Anonymity direction not made)

Respondents

Representation:
For the Appellant: Mr N Bramble, Senior Home Office Presenting Officer
For the Respondent: Mr J Harding (Counsel) instructed by Bhogal partners, Solicitors

DECISION AND REASONS

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of these Appellants. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. The Secretary of State for the Home Department brings this appeal but in order to avoid confusion the parties are referred to as they were in the First-tier Tribunal. This is an appeal by the Secretary of State against a decision of First-tier Tribunal Judge Head-Rapson, promulgated on 23 July 2015, which allowed the Appellants' appeals

Background

3. The Appellants are all members of the same family. The third, fourth and fifth appellants are the children of the first and second appellants. The first appellant was born on 10 March 1975. The second appellant was born on 13 June 1978. The third appellant was born on 27 November 1998. The fourth appellant was born on 7 November 2005. The fifth appellant was born on 21 March 2011. All five appellants are South African nationals.

4. The first and second appellants entered the UK (from South Africa) in July 2003. The third appellant is the second appellant's daughter. She entered the UK in January 2004 and has lived in the UK since then. On 11 January 2013 the appellants submitted applications for leave to remain in the UK. The respondent refused those applications on 10 April 2013. Those refusals did not carry a right of appeal. The appellants then embarked on judicial review procedure, as a result of which consent orders were signed by the parties and were sealed by the court on 25 June 2014.

5. On 17 September 2014 the Secretary of State reconsidered her decision but adhered to the original decision to refuse to grant the appellants leave to remain in the UK.

The Judge's Decision

6. The Appellants appealed to the First-tier Tribunal. First-tier Tribunal Judge Head-Rapson ("the Judge") allowed the appeals against the Respondent's decision.

7. Grounds of appeal were lodged and, on 31st October 2015, Judge Foudy gave permission to appeal stating *inter alia*

> *"3. The Judge found that some of the minor appellants met paragraph 276ADE by virtue of the length of their presence in the UK. However, it is arguable that the Judge applied the incorrect version of the Rules when he reached that decision, ignoring the requirement that it be unreasonable to expect that Appellants to leave the UK. This is an arguable error of law.*
>
> *4. The Judge allowed the appeal under Article 8 ECHR. It is not clear what factors weighed in the Judge's mind when he conducted the balancing exercise between the interests of the Appellant and the public. This lack of reasoning is an arguable error of law."*

8. In a decision promulgated on 25 February 2016 the Upper Tribunal set aside the Judge's decision, finding that it contained material errors of law, and directed that the case should be considered of new at a resumed hearing of the Upper Tribunal.

The Resumed Hearing

9. All five appellants were present in court. Mr Harding told me that he intended to take evidence from the first three appellants only. His intention was that the first and second appellants would adopt their witness statements, dated 9 April 2015, before being offered for cross-examination, and that the third appellant would adopt her witness statement dated 9 April 2015 and her updated (handwritten) statement, prepared for today's hearing. Mr Bramble told me that he had no intention of asking any questions in cross-examination. The hearing proceeded on the basis that the first three appellants adopted the terms of each of their witness statements, so that the hearing swiftly moved to parties' agents' submissions.

10. (a) Mr Harding, for the appellants, told me that he would rely on the case of PD and others and the respondent's own immigration directorate instructions on family migration. He told me that the first and second appellants cannot succeed under the immigration rules and that, in truth, the focus in this case is on the third and fourth appellants. He reminded me that the third appellant was born in 1998 and came to the UK in January 2004. She is now 17 ½ years of age and has lived in the UK for over 12 years. Mr Harding drew my attention to the fact that, if the third appellant was just six months older, there would be no "reasonableness" test to be satisfied because she would be an adult who had been in the UK for more than half of her life.

(b) Mr Harding took me to para. 11.2.4 of the respondent's IDI dated August 2015. He quoted the last sentence of the first paragraph of that section of the guidance, which says

> "*... the longer the child has resided in the UK, the more the balance will begin to swing in terms of it being unreasonable to expect the child to leave the UK, and strong reasons will be required in order to refuse a case with continuous UK residence of more than 7 years.*"

He told me that the strong reasons required by the respondent's own guidance do not exist in this case.

(c) Mr Harding told me that all the evidence indicated that it is unreasonable for the third appellant to face the disruption, stress and significant upheaval which would be caused by the removal from the UK.

(d) Mr Harding turned to the case of the fourth appellant, reminded me that she was born on 7 November 2005 in the UK. She has only ever lived in the UK. In terms of the British Nationality Act 1981, the fourth appellant is entitled to a British passport. He told me that the third and fourth appellants fulfil the requirements of paragraph 276 ADE(iv)

(e) Mr Harding turned to the fifth appellant's case. He explained that the fifth appellant is a six-year-old boy, born in the UK in 2011. He is too young to meet the requirements of 276 ADE (iv). Mr Harding urged me to follow the guidance given in PD and others, & find that - because it is unreasonable for the third and fourth appellant's to leave the UK, then the first and second Appellants succeed under s. 117B(6) of the 2002 Act, and that, inevitably, means that the fifth appellant's appeal succeeds on article 8 ECHR grounds.

11. Mr Bramble graciously conceded that Mr Harding had set out the law and the arguments for all five appellants fairly. He agreed that first two appellants cannot succeed under the immigration rules and that the focus in this case is on the third & fourth appellant's. He also relied on the case of PD and others, and urged me to consider the appeals of the first and second appellants in the context of sections 117A & 117B of the 2002 Act. He reminded me that I must consider s.55 of the Borders Citizenship & Immigration Act 2009 when considering the appeals of the third, fourth and fifth appellants.

Findings of Fact

12. The first and second appellants entered the UK from South Africa in July 2003. The third appellant is the second appellant's daughter. She entered the UK in January 2004 and has lived in the UK since then. The fourth and fifth appellants were born in the UK. Neither the fourth nor the fifth appellants have ever been to South Africa. The third and fourth appellants are all engaged in the UK education system. The third appellant has been to primary school and has now almost finished secondary education or UK.

13. None of the appellants have left the UK since 2003. Between September 2003 and July 2013 the first appellant worked for a plastic manufacturer. He was promoted a number of times, so that by the time he had to leave work in 2013 his salary had almost doubled.

14. In September 2008 the second appellant started studying to become a nurse. She qualified as a nurse in September 2012.

15. The third appellant has lived in the UK since she was 5 years old. She is now in her penultimate year of secondary school and is studying for her A levels. She is an intelligent, gifted student, with a close circle of friends. She has no real memory of life in South Africa, and neither friends nor relatives there. Her teachers speak highly of her.

16. The fourth appellant is now 11 years old. She has only ever lived in the UK. Because she was born in the UK and has lived here for more than 10 years, she is entitled to a British Passport. She is a pupil at [H Academy] where she is doing well (and working hard). She is an intelligent, gifted student, with a close circle of friends. She knows nothing of life in South Africa, and has neither friends nor relatives there. She speaks with a London Accent.

17. The fifth appellant was born in the UK. He has now started at primary school where he has settled well.

Analysis

18. In EM and Others (Returnees) Zimbabwe CG [2011] UKUT 98 the Upper Tribunal stated:

> *"2. Guidance is also given on the assessment of the private and family life of a Zimbabwean national present in the United Kingdom for over 11 years with children born and/or resident most of their lives in the United Kingdom.*
>
> *3. In the absence of countervailing factors, residence of over seven years with children well-integrated into the educational system in the United Kingdom, is an indicator that the welfare of the child favours regularisation of the status of mother and children".*

19. Paragraph 276 ADE(1) (iv) of the Rules says:-

> *"(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 seven years (discounting any period of imprisonment) and it would not be reasonable to expect the applicant to leave the UK".*

20. Section 117B of the 2002 Act provides:

> *"117B Article 8: public interest considerations applicable in all cases*
>
> *(1) The maintenance of effective immigration controls is in the public interest.*
>
> *(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English –*
>
> *(a) are less of a burden on taxpayers, and*
>
> *(b) are better able to integrate into society.*
>
> *(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons –*
>
> *(a) are not a burden on taxpayers, and*
>
> *(b) are better able to integrate into society.*
>
> *(4) Little weight should be given to –*
>
> *(a) a private life, or*
>
> *(b) a relationship formed with a qualifying partner,*
>
> *that is established by a person at a time when the person is in the United Kingdom unlawfully.*

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where –

(a) the person has a genuine and subsisting parental relationship with a qualifying child, and

(b) it would not be reasonable to expect the child to leave the United Kingdom."

The third and fourth Appellants have the status of "qualifying child" within the Part 5A regime because they have each lived in the UK for more than 7 years.

21. In Treebhawon and others (section 117B(6)) [2015] UKUT 00674 (IAC), section 117B(6) was analysed and construed in [12] – [23]. This Tribunal expressed its conclusions in the following terms, at [20] – [21]:

"20. In section 117B(6), Parliament has prescribed three conditions, namely:

(a) the person concerned is not liable to deportation;

(b) such person has a genuine and subsisting parental relationship with a qualifying child, namely a person who is under the age of 18 and is a British citizen or has lived in the United Kingdom for a continuous period of seven years or more; and

(c) it would not be reasonable to expect the qualifying child to leave the United Kingdom.

Within this discrete regime, the statute proclaims unequivocally that where these three conditions are satisfied the public interest does not require the removal of the parent from the United Kingdom. Ambiguity there is none.

21. Giving effect to the analysis above, in our judgment the underlying Parliamentary intention is that where the three aforementioned conditions are satisfied the public interests identified in section 117B(1) – (3) do not apply."

22. For the purposes of these appeals, the test in terms of paragraph 276 ADE(1)(iv) & (vi) and the test for consideration of article 8 ECHR outside the rules amounts to the same question. Is it reasonable to expect the third, fourth and fifth appellants to leave the UK? The answer to that question is determinative of the appeals of both the third and fourth appellants.

23. In PD and Others (Article 8 – conjoined family claims) Sri Lanka [2016] UKUT 00108 (IAC) it was held that when considering the conjoined Article 8 ECHR claims of multiple family members, decision-makers should first apply the Immigration Rules to each individual applicant and, if appropriate, then consider Article 8 outside the Rules. This exercise will typically entail the consideration and determination of all claims jointly, so as to ensure that all material facts and considerations are taken into account in each case.

24. The third and fourth appellants are qualifying children in terms of s.117 of the 2002 Act. The first & second appellants are not liable to deportation and have a genuine parental relationship with the remaining appellants.

25. The respondent's own guidance calls for "*strong reasons ... to refuse a case with continuous UK residence of more than 7 years*". Even after considering each strand of evidence on this case, I cannot see what strong reasons the respondent relies on.

26. The fourth appellant has no connection at all to South Africa, and thinks of herself as a Londoner. She is entitled to a British Passport. The third appellant has almost completed her passage through secondary education. She has been immersed in the UK educational system since she was 5 years old, and clearly has potential to proceed to tertiary education. Both the third and fourth appellant's have established and developed significant friendships in the UK (and nowhere else).

27. I have no hesitation in finding that it is unreasonable to remove the third and fourth appellants from the UK. Their removal would snatch from them their only secure established way of life and force them to go to a country they know nothing about. They know no-one there, and, although citizens of South Africa, would be outsiders there, struggling to understand new customs and practices while trying to establish friendships & routines - and trying to integrate into a different educational system. The respondent does not point to "*strong reasons*" to refuse their application, and rests solely on the statutory presumption that Immigration control is in the public interest.

28. The third and fourth appellant's therefore meet the requirements of paragraph 276ADE(1)(iv) of the Immigration Rules. In this case (as in PD & others) the four persuasive factors are

(i) their length of residence in the UK

(ii) their full integration into UK society

(iii) their age and

(iv) their lack of ties to South Africa

29. It is beyond dispute that the first, second and fifth appellants cannot succeed under the Immigration rules. In SS (Congo) and Others [2015] EWCA Civ 387 Lord Justice Richards said at paragraph 33 "*In our judgment, even though a test of exceptionality does not apply in every case falling within the scope of Appendix FM, it is accurate to say that the general position outside the sorts of special contexts referred to above is that compelling circumstances would need to be identified to support a claim for grant of LTR outside the new Rules in Appendix FM. In our view, that is a formulation which is not as strict as a test of exceptionality or a requirement of "very compelling reasons" (as referred to in MF (Nigeria) in the context of the Rules applicable to foreign criminals), but which gives appropriate weight to the focused consideration of public interest factors as finds expression in the Secretary of State's formulation of*

the new Rules in Appendix FM. It also reflects the formulation in Nagre at para. [29], which has been tested and has survived scrutiny in this court: see, e.g., Haleemudeen at [44], per Beatson LJ".

30. In line with the case of PD & others, there are compelling reasons for considering this case outwith the rules.

31. The first and second appellants have resided in the UK unlawfully since the start of 2004. They are the parents of the remaining appellant's. Setting aside considerations of immigration law, they are law-abiding, fluent in English and self-sufficient. I remind myself of AM (S 117B) Malawi [2015] UKUT 0260 (IAC)

32. The focus in the appeals of the first and second appellants is firmly on s.117B (6) of the 2002 Act. The third and fourth appellants are Qualifying children. I have already found that it is not reasonable for either of them to leave the UK. By analogy, the first and second appellants benefit from the terms of s.117B(6) of the 2002 Act. The statutory presumption that immigration control is in the public interest is displaced.

33. Family life and private life within the meaning of article 8 ECHR are both engaged in these appeals. The respondent's decision amounts to interference with those rights. The burden of proving that that interference is proportionate rests with the respondent. S.117B(6) indicates that there is no public interest in the removal of the first and second appellants. The respondent's decision is therefore a disproportionate breach of their right to respect for both private and family life. The appeals of the first and second appellants therefore succeed on article 8 ECHR grounds

34. The best interests of the fifth appellant are a primary consideration. In ZH (Tanzania) (FC) (Appellant) *v* Secretary of State for the Home Department (Respondent) [2011] UKSC 4 Lady Hale noted Article 3(1) of the UNCRC: which states that "*in all actions concerning children, whether undertaken by … courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration*." Article 3 is now embodied in section 55 of the Borders, Citizenship and Immigration Act 2009 which provides that, in relation, among other things, to immigration, asylum or nationality, the Secretary of State must make arrangements for ensuring that those functions "*are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom*".

35. It has long been established that it is in the interests of children to remain with their parents. The best interest of the fifth appellant are served by ensuring that he remains with his family (the first four appellants). As the first four appellant's appeals are allowed, then the fifth appellant must succeed on article 8 ECHR grounds.

Decision

36. The decision of the first tier tribunal was set aside by my decision promulgated on 25 February 2016

37. I substitute the following decisions

38. The appeals of the third and fourth appellants are allowed under the immigration rules.

39. The appeals of all five appellants are allowed on article 8 ECHR grounds.

Signed Date 2 May 2016

Deputy Upper Tribunal Judge Doyle