



IAC-AH-DP-V1

**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Numbers: IA/46031/2014
IA/46029/2014
IA/46025/2014
IA/46019/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 15th March 2016**

**Decision & Reasons Promulgated
On 5th April 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

E A (1)

A A (2)

W A (3)

J A (4)

(ANONYMITY ORDER MADE)

Respondents

Representation:

For the Appellant: Mr T Wilding, Senior Home Office Presenting Officer

For the Respondents: Mr D Jones of Counsel instructed by M K Suri & Co

DECISION AND REASONS

Introduction and Background

1. The Secretary of State appeals against a decision of Judge Thew of the First-tier Tribunal (the FtT) promulgated on 8th September 2015.

2. The Respondents before the Upper Tribunal were the Appellants before the FtT and I will refer to them as the Claimants.
3. The first and second Claimants are married and are the parents of the third and fourth Claimants who were born on 30th October 2003 and 17th May 2006 respectively. The Claimants are nationals of Brazil. The first and second Claimants arrived in the United Kingdom on 27th February 2003 with visit visas valid until 27th July 2003. They overstayed without leave. The third and fourth Claimants were born in this country.
4. Following unsuccessful applications, a further application was made for leave to remain on 6th August 2013 which resulted in the applications being refused on 27th October 2014. The Claimants appealed to the FtT against that refusal.
5. The appeals were heard together on 14th August 2015. The FtT found that the appeals of the third and fourth Appellants should be allowed under the Immigration Rules pursuant to paragraph 276ADE(1)(iv) because they are under 18 years of age, they had lived continuously in this country in excess of seven years at the date of application, and it would not be reasonable to expect them to leave the United Kingdom.
6. The appeals of the first and second Claimants were allowed under Article 8 of the 1950 European Convention on Human Rights (the 1950 Convention) outside the Immigration Rules, on the basis that it would be disproportionate to remove the parents, when it had been found that it would not be reasonable to expect the children to leave the United Kingdom.
7. The Secretary of State applied for permission to appeal to the Upper Tribunal. In summary it was contended that the FtT had focused almost exclusively on the potential disruption to the children's education, and this had been afforded undue weight.
8. Reliance was placed upon Zoumbas [2013] UKSC 74 at paragraph 24, and EV (Philippines) [2014] EWCA Civ 874 at paragraphs 59, 60 and 61. It was contended that the FtT had erred in failing to consider the cost of educating the children in the overall proportionality assessment, and had reached a conclusion that was too favourable to the Claimants, and the public interest in an effective immigration control had not been afforded sufficient weight.
9. Permission to appeal was granted by Judge Colyer of the FtT. Following the grant of permission the Claimants did not submit a response pursuant to rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008.
10. Directions were issued making provision for there to be a hearing before the Upper Tribunal to decide whether the FtT decision contained an error of law such that it should be set aside.

Oral Submissions

11. I recorded the submissions made by both representatives in my Record of Proceedings and will summarise them briefly here.
12. Mr Wilding relied upon the grounds contained within the application for permission to appeal and submitted that the FtT had taken a one dimensional view when considering whether it was reasonable to expect the third and fourth Claimants to leave the United Kingdom. It was submitted that the FtT had concentrated exclusively on the education of their children, and had not taken into consideration that if removed, the family would return to Brazil together.
13. Mr Jones conformed that there was no skeleton argument, but that it was contended that the FtT had not erred in law.
14. Mr Jones observed that the weight to be attached to evidence would rarely give rise to an error of law, and in this case it could not be said that the FtT's decision was perverse.
15. Mr Jones also relied upon the decisions in Zoumbas and EV (Philippines) and pointed out that distinctions could be drawn when those cases were considered, in that neither case had the children acquired seven years' residence, whereas both the third and fourth Claimants had been resident in the United Kingdom for in excess of seven years.
16. Mr Jones submitted that the FtT had taken all material issues into account, and had not neglected to consider the immigration history of the first and second Claimants, in that they had remained in the United Kingdom without leave.
17. Mr Jones pointed out that in this case, the third and fourth Claimants could succeed under the Immigration Rules, that being paragraph 276ADE(1) because they had acquired in excess of seven years' residence, which was not the case with the children in either Zoumbas or EV (Philippines), who could not succeed under the Rules.
18. I was asked to accept that the FtT had taken all relevant matters into account, and the finding that it would not be reasonable to expect the third and fourth Claimants to leave the United Kingdom, was a finding which was open to the FtT to make on the evidence, and that sustainable reasons had been given.
19. At the conclusion of submissions I reserved my decision.

My Conclusions and Reasons

20. In my view the FtT did not err in law for the following reasons.

21. The FtT did not ignore the principles in Zoumbas, to which there is a specific reference in paragraph 25 of the FtT decision. The FtT had in mind the correct legal principles, in that while the best interests of a child are a primary consideration, they are not the only primary consideration, neither are they a paramount consideration. The best interests of a child can be outweighed by the cumulative effect of other considerations, and a child must not be blamed for matters for which he or she is not responsible, such as conduct of a parent.
22. Although there is no specific reference to EV (Philippines) the FtT did not ignore the principles contained therein.
23. The FtT was correct to focus (paragraph 29) on whether it was reasonable to expect the children to leave the United Kingdom and return to Brazil with their parents.
24. I find that it is relevant that the circumstances of the children considered in Zoumbas and EV (Philippines) can be distinguished from the circumstances of the third and fourth Claimants. For example in Zoumbas, although the children had been born in the United Kingdom, none had acquired seven years' residence.
25. The children in EV (Philippines) had not been born in the United Kingdom, and again had not acquired seven years' residence.
26. Unlike the children considered in Zoumbas and EV (Philippines) the Claimants could potentially satisfy the requirements of the Immigration Rules because they were under 18, and had resided in the United Kingdom for in excess of seven years at the date of application for leave to remain.
27. In summary the Court of Appeal in EV (Philippines) at paragraphs 34-37 stated that in considering whether the need for immigration control outweighs the best interests of children, the relative strength of the factors which makes it in the best interests of the children to remain must be determined, and also account must be taken of any factors that point the other way. The Court of Appeal found the following factors to be relevant when considering the best interests of children;
 - their age;
 - the length of time that they have been here;
 - how long they have been in education;
 - what stage their education has reached;
 - to what extent they have become distanced from the country to which it is proposed they return;
 - how renewable their connection with it may be;

- to what extent they will have linguistic medical or other difficulties in adapting to life in that country;
 - the extent to which the course proposed will interfere with their family life or their rights (if they have any) as British citizens.
28. The Tribunal should be concerned with how emphatic an answer falls to be given to the question as to whether it is in the best interests of a child to remain. Greater weight should be placed on one side of the scales the longer a child has been in this country, the more advanced or critical at this stage of his education, the looser his ties with the country in question, and the more deleterious the consequences of return. If it is overwhelmingly in the child's best interests that he should not return, the need to maintain immigration control may well not tip the balance, but if it is only just in the child's best interests to remain, the result may be the opposite.
29. Account must be taken of the strong weight to be given to the need to maintain immigration control, and the fact that the applicants have no entitlement to remain. The immigration history of the parents may also be relevant for example if they are overstayers or have acted deceitfully.
30. I conclude that the FtT has taken into account the factors set out above. It is clear that the FtT took into account the poor immigration history of the first and the second Claimants and reference is made (paragraph 10) that they have been in the United Kingdom without leave or a considerable period of time. There is further reference (paragraph 12) the first and second Claimants choosing to remain illegally in the UK when they did not have a right to do so.
31. The FtT conclusions in relation to the third and fourth Claimants are set out in paragraphs 30-36. The FtT takes into account their age, and the fact that they were born in the United Kingdom and have always lived here. Their education is considered, together with their lack of ties to Brazil, and it is noted that they have never visited that country. It is noted that they are able to speak Portuguese, although not read and write in that language, and the FtT notes at paragraph 33 that their parents would be returning to a country "where they are entirely familiar with the language and culture given the length of time that they lived there". The FtT is clearly aware that the third and fourth Claimants are not British citizens, but observes at paragraph 35 that the third Claimant could make an application pursuant to the British Nationality Act 1981, on the basis that he has lived in the United Kingdom for the first ten years of his life.
32. The FtT recognises that there would be no interference with the family life of the third and fourth Claimants, as they would be removed with their parents.

33. I conclude that it cannot fairly be said that the FtT concentrated almost exclusively on the potential disruption of the education of the third and fourth Claimants. The FtT, in fact, concentrated on the relevant principles set out in EV (Philippines) and did not omit to consider any material factor. The FtT was entitled to conclude that it would not be reasonable to expect the third and fourth Claimants to leave the United Kingdom, even though weight was attached to the poor immigration history of their parents.
34. The conclusions reached by the FtT are supported by sustainable reasons, and the grounds submitted by the Secretary of State, while disclosing a disagreement with those conclusions, do not disclose any material error of law.

Notice of Decision

The making of the decision of the FtT did not involve the making of an error on a point of law such that the decision must be set aside. I do not set aside the decision. The appeal of the Secretary of State is dismissed.

Anonymity

No anonymity direction was made by the FtT. In view of the fact that the third and fourth Claimants are minors, I make an anonymity order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008. Unless and until a tribunal or court directs otherwise, the Claimants are granted anonymity. No report of these proceedings shall directly or indirectly identify them. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date: 16th March 2016

Deputy Upper Tribunal Judge M A Hall

TO THE RESPONDENT FEE AWARD

As the decision of the FtT stands, so does the decision not to make a fee award.

Signed

Date: 16th March 2016

Deputy Upper Tribunal Judge M A Hall