
**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: IA/46963/2014
IA/46971/2014
IA/46977/2014

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision and Reasons Promulgated** |
|---|---|
| **On 09 December 2015** | **On 22 January 2016** |

**Before**

**UPPER TRIBUNAL JUDGE CANAVAN**

**Between**

**DEVIKA SURNAM**
**MADAN GOPALSATE**
**N (ONE CHILD DEPENDENT)**

Appellants

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**
For the Appellant: Mr M. Harris, Counsel instructed by Raj Law Solicitors
For the Respondent: Mr S. Whitwell, Home Office Presenting Officer

**DECISION AND REASONS**

**Background**

1. The appellants appealed against the respondent's decision to refuse leave to remain on human rights grounds. The first and second appellants are

the parents of the third appellant "N" who is now 13 years old. They are no longer married but continue to live as a family unit and to raise their child together.

2. The first appellant entered the UK on 10 April 2004 with entry clearance as a student that was valid until 10 October 2004. The second appellant says that he entered the UK in June 2004 with entry clearance as his wife's dependent. The first appellant had left her son N in the care of her sister. She says that her sister migrated to Canada in 2007 so they decided that he should join them in the UK. He was four and a half years old on arrival in the UK in February 2007. The first appellant was granted further leave to remain as a student with her husband and son as dependents until 31 January 2011. Three applications for further leave to remain as a student were either refused or rejected during 2011. It is said that during 2012 the second appellant and his son made at least two applications each for leave to remain but those applications were refused or rejected. On 22 July 2013 the first appellant applied for leave to remain on human rights grounds with her husband and child as dependents. The application was refused without a right of appeal on 10 October 2013 because it was considered reasonable to expect them to return to Mauritius as a family unit. The respondent agreed to reconsider the application following the settlement of judicial review proceedings by way of a Consent Order dated 20 September 2014. The application was refused in a further decision dated 07 November 2014 with a right of appeal.

3. First-tier Tribunal Judge C. H. O'Rourke ("the judge") dismissed the appeal in a decision promulgated on 16 April 2015. The judge did not accept the first appellant's claim that she had come to the UK in order to study and concluded that, in the absence of sufficient evidence of any educational achievements, that she had used this as a "smokescreen" to enable her and her family to remain in the UK. The judge concluded that the parents' intentions were to remain in the UK permanently by whatever means available to them [14(ii)]. The judge concluded that there was little evidence of any particularly strong or compelling private life established by the parents in the UK. The first appellant didn't work and the second appellant worked illegally part-time [14(iii)].

4. The crux of the appeal turned on whether it would be reasonable to expect the child to leave the UK for the purpose of paragraph EX.1 of Appendix FM and paragraph 276ADE(iv) of the immigration rules. The judge accepted that N clearly had a "well-established private life in the UK" but considered that he could reasonably "recreate" that life in Mauritius. The judge noted that many 12 year olds move countries with their parents and had to make new friends. His parents would be able to assist him to learn French or Creole, and in any event, English is widely spoken in Mauritius. The judge found that it is his country of origin and he would be able to successfully reintegrate. The judge noted that N expressed a wish to remain in the UK but concluded that his best interests lay in remaining with his parents. Although the parents are divorced they continued to live with one another and the judge could see no reason why they could not

continue with the same arrangement in Mauritius despite their protestations that it would be more difficult for them to do so there. The judge concluded that the fears expressed by the parents as to the risk to the child as a result of a family feud were not "particularly persuasive". The events occurred ten years ago and there was no evidence of a current feud. The judge also took into account the fact that four of the eight years that N had lived in the UK were during a time when his leave was precarious albeit through no fault of his own. For these reasons the judge concluded that it would be reasonable to expect the child to leave the UK with his parents [14(iv)].

5. The appellants seek to appeal the decision on the following grounds:

   (i) The First-tier Tribunal erred in attaching less weight to the child's private life because it was established at a time when his immigration status was precarious despite the fact that the judge recognised that it was through no fault of his own: *Zoumbas v SSHD* [2013] UKSC 74 referred. It was argued that there is a tension between section 117B(4) and section 117B(6) of the Nationality, Immigration and Asylum Act 2002 ("the NIAA 2002").

   (ii) The First-tier Tribunal failed to give adequate weight to the best interests of the child in accordance with the principles outlined by the Tribunal in *Azimi-Moayed* [2013] UKUT 197 and the Court of Appeal in *EV (Philippines) v SSHD* [2014] EWCA Civ 894.

## Decision and reasons

*Findings relating to error of law*

6. After having considered the grounds of appeal and oral arguments I satisfied that the First-tier Tribunal decision involved the making of an error on a point of law.

7. While the judge took into account a number of relevant factors, in my assessment, the considerations outlined in paragraph 14 of the decision focus largely on whether there are likely to be any practical obstacles to the appellants returning to Mauritius with their son and failed to give adequate consideration to the nature of the ties that the third appellant has established in the UK. While the judge accepted that the child has a "well-established" private life in the UK what seems lacking is any evaluative assessment of the strength of those ties in order to assess whether it would be reasonable to remove the child from an environment in which he is now well established. Although the judge considered that it was in the best interests of the child to remain with his parents the assessment of the best interests of a child is not confined solely to that issue and should have involved a more well-rounded assessment of his interests, including whether it was in his best interest to remain in the UK. In doing so the principles outlined in *ZH (Tanzania) v SSHD* [2011] UKSC4, *Zoumbas v SSHD* [2013] UKSC 74 and *EV (Philippines) and others v SSHD* [2014] EWCA Civ 874 needed to be addressed in substance. For these

reasons I conclude that the First-tier Tribunal decision involved the making of an error on a point of law and I set aside the decision.

*Findings relating to the remaking of the decision*

8. The central issue in this appeal is whether it would be reasonable to expect the child to leave the UK. At the date of the application for leave to remain on 22 July 2013 N had not yet lived in the UK for a continuous period of seven years. The original reasons for refusal letter dated 10 October 2013 did not consider whether he met the private life requirements contained in paragraph 276ADE of the immigration rules. The respondent subsequently agreed to reconsider the decision and made a fresh decision on 07 November 2014. At that date the second reasons for refusal letter the respondent accepted that N had lived in the UK for a continuous period of seven years but considered that it would be reasonable to expect him to leave the UK. It is unclear whether the respondent specifically waived the requirement contained in paragraph 276ADE(1) for the appellant to have accrued seven years continuous residence "at the date of application". On the face of the chronology, I conclude that the third appellant did not meet the strict requirement of paragraph 276ADE(1) as required at the date of the application.

9. However, in this particular case it makes no material difference whether N's appeal is considered within the context of paragraph 276ADE(1)(iv) of the immigration rules or outside the rules given that the test set out in the public interest consideration contained in section 117B(6) of the Nationality, Immigration and Asylum Act 2002 ("NIAA 2002") is in essence the same test as that contained in paragraph 276ADE(1)(iv) and paragraph EX.1 of Appendix FM. The only difference is that paragraph 276ADE(1) requires the applicant child to have accrued seven years continuous residence "at the date of the application" while section 117B(6) focuses on the relationship between the parents and a "qualifying child". The test for a "qualifying child" is set out in section 117D(1) but is not limited to the date of application. Nevertheless, the main thrust of all three provisions is an assessment of whether it would be "reasonable" to expect a child who has lived in the UK for a continuous period of at least seven years to leave the UK.

10. In *Zoumbas v SSHD* [2013] UKSC 74 the Supreme Court summarised the applicable principles drawn from earlier cases such as *ZH (Tanzania) v SSHD* [2011] UKSC4 and *H(H) v Deputy Prosecutor of the Italian Republic* [2013] 1 AC 338:

> "(1) The best interests of a child are an integral part of the proportionality assessment under article 8 ECHR;
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> (2) In making that assessment, the best interests of a child must be a primary consideration, although not always the only primary consideration; and the child's best interests do not of themselves have the status of the paramount consideration;

(3) Although the best interests of a child can be outweighed by the cumulative effect of other considerations, no other consideration can be treated as inherently more significant;

(4) While different judges might approach the question of the best interests of a child in different ways, it is important to ask oneself the right questions in an orderly manner in order to avoid the risk that the best interests of a child might be undervalued when other important considerations were in play;

(5) It is important to have a clear idea of a child's circumstances and of what is in a child's best interests before one asks oneself whether those interests are outweighed by the force of other considerations;

(6) To that end there is no substitute for a careful examination of all relevant factors when the interests of a child are involved in an article 8 assessment; and

(7) A child must not be blamed for matters for which he or she is not responsible, such as the conduct of a parent."

11. The Supreme Court went on to add these further qualifications to those existing principles:

> "13. ... First, the decision-maker is required to assess the proportionality of the interference with private and family life in the particular circumstances in which the decision is made. The evaluative exercise in assessing the proportionality of a measure under article 8 ECHR excludes any "hard-edged or bright-line rule to be applied to the generality of cases": *EB (Kosovo) v Secretary of State for the Home Department* [2009] AC 1159, *per* Lord Bingham at para 12. Secondly, as Lord Mance pointed out in *H(H)* (at para 98) the decision-maker must evaluate the child's best interests and in some cases they may point only marginally in one, rather than another, direction. Thirdly, as the case of *H(H)* shows in the context of extradition, there may be circumstances in which the weight of another primary consideration can tip the balance and make the interference proportionate even where it has very severe consequences for children. In that case an Italian prosecutor issued a European arrest warrant seeking the surrender of a person who had earlier broken his bail conditions by leaving Italy and ultimately seeking safe haven in the United Kingdom and had been convicted of very serious crimes. This court held that the treaty obligations of the United Kingdom to extradite him prevailed over his children's best interests. The third principle in para 10 above is subject to the first and second qualifications and may, depending on the circumstances, be subject to the third. But in our view, it is not likely that a court would reach in the context of an immigration decision what Lord Wilson described in *H(H)* (at para 172) as the "firm if bleak" conclusion in that case, which separated young children from their parents."

12. The Court of Appeal in *EV (Philippines) and others v SSHD* [2014] EWCA Civ 874 also considered what factors should be considered in assessing the weight to be given to the best interests of a child:

> "34. In determining whether or not, in a case such as the present, the need for immigration control outweighs the best interests of the children, it is necessary to determine the relative strength of the factors which

make it in their best interests to remain here; and also to take account of any factors that point the other way.

35. A decision as to what is in the best interests of children will depend on a number of factors such as (a) their age; (b) the length of time that they have been here; (c) how long they have been in education; (c) what stage their education has reached; (d) to what extent they have become distanced from the country to which it is proposed that they return; (e) how renewable their connection with it may be; (f) to what extent they will have linguistic, medical or other difficulties in adapting to life in that country; and (g) the extent to which the course proposed will interfere with their family life or their rights (if they have any) as British citizens.

36. In a sense the tribunal is concerned with how emphatic an answer falls to be given to the question: is it in the best interests of the child to remain? The longer the child has been here, the more advanced (or critical) the stage of his education, the looser his ties with the country in question, and the more deleterious the consequences of his return, the greater the weight that falls into one side of the scales. 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. By contrast if it is in the child's best interests to remain, but only on balance (with some factors pointing the other way), the result may be the opposite.

37. In the balance on the other side there falls to be taken into account the strong weight to be given to the need to maintain immigration control in pursuit of the economic well-being of the country and the fact that, *ex hypothesi*, the applicants have no entitlement to remain. The immigration history of the parents may also be relevant e.g. if they are overstayers, or have acted deceitfully."

13. In the same case Lord Justice Lewison made the following observations:

"58. In my judgment, therefore, the assessment of the best interests of the children must be made on the basis that the facts are as they are in the real world. If one parent has no right to remain, but the other parent does, that is the background against which the assessment is conducted. If neither parent has the right to remain, then that is the background against which the assessment is conducted. Thus the ultimate question will be: is it reasonable to expect the child to follow the parent with no right to remain to the country of origin?

59. On the facts of *ZH* it was not reasonable to expect the children to follow their mother to Tanzania, not least because the family would be separated and the children would be deprived of the right to grow up in the country of which they were citizens.

60. That is a long way from the facts of our case. In our case none of the family is a British citizen. None has the right to remain in this country. If the mother is removed, the father has no independent right to remain. If the parents are removed, then it is entirely reasonable to expect the children to go with them. As the immigration judge found it is obviously in their best interests to remain with their parents. Although it is, of course a question of fact for the tribunal, I cannot see that the desirability of being educated at public expense in the UK can outweigh the benefit to the children of remaining with their parents.

> Just as we cannot provide medical treatment for the world, so we cannot educate the world."

14. In *Azimi-Moayed (decisions affecting children; onward appeals)* [2013] UKUT 00197 the Tribunal emphasised that it is normally in the best interests of children to be with both parents. If both parents are being removed from the United Kingdom then the starting point is that dependent children should also be removed unless there are reasons to the contrary. In general it is in the interest of children to have stability and continuity of social and educational provisions, which may have developed over a long period of residence. The Tribunal observed that the period of seven years from the age of four is likely to be a more significant period in a child's life than the first seven years of life where very young children are more likely to be focussed on their parents rather than their peers.

15. I begin by making an assessment of the best interests of the child in this case. In assessing N's best interests I have taken into account the above principles as well as the statutory guidance "UKBA Every Child Matters: Change for Children" (November 2009), which gives further detail about the duties owed to children under section 55 of the Borders, Citizenship and Immigration Act 2009. In that guidance the UKBA acknowledges the importance of a number of international instruments relating to human rights including the UN Convention on the Rights of the Child (UNCRC). The guidance goes on to confirm: "*The UK Border Agency must fulfil the requirements of these instruments in relation to children whilst exercising its functions as expressed in UK domestic legislation and policies."* I take into account the fact that the UNCRC sets out rights including a child's right to survival and development, the right to know and be cared for by his or her parents, the right not to be separated from parents and the enjoyment of the highest attainable standards of living, health and education without discrimination. The UNCRC also recognises the common responsibility of both parents for the upbringing and development of a child.

16. N was brought to the UK by his parents when he was only four years old. He is now 13 years old. He has lived in the UK for a continuous period of nine years. During that time he started school and has completed his primary education. He has now moved on to secondary education. This is exactly the period of time envisaged by the Tribunal in *Azimi-Moayed* when a child is likely to begin to form ties in the UK outside his immediate family unit.

17. In his witness statement N says that he learnt English at school and has received a lot of merit certificates. His favourite subjects are maths, computing, drama, English and French. When he grows up he thinks that he would like to be a physiotherapist or a game designer. He loves football and supports Manchester United. N has made friends in the UK and he described the activities that they like to do together. He said that he doesn't remember Mauritius and it would now be unfamiliar to him. He feels more British than Mauritian and feels upset at the thought of having to leave the UK because he considers this country is his home. He would

miss his friends and his school if he had to leave and thinks that it would be hard to make new friends. His parents told him that they teach in French and Creole in Mauritius and for this reason he doesn't think he will be able to continue his studies.

18. As the First-tier Tribunal Judge made clear N has a "well-established private life in the UK". He has been attending school during an important developmental period of his life. Given his young age on arrival in the UK no doubt he has few memories of Mauritius. As far as he is concerned he has spent most of his life in the UK and feels well settled here. It is understandable that he would not want to leave his friends and is worried about what a new life in Mauritius would be like. His parents are no longer married but have been able to maintain stability in his life. They continue to live together as a family unit because they consider that it is in the best interests of the child. N increasingly has developed a private life outside the immediate family unit but is still a young adolescent. It is undoubtedly in his best interests to remain in a family unit with both parents. Although he has now started secondary education he is not yet at the stage where he has begun studying for significant qualifications such as GCSEs.

19. Little background evidence has been produced to show what the conditions are likely to be in Mauritius save for an internet print out relating to Mauritian languages. The website states that the administration of the former British colony is still conducted in English and that English is taught in schools at primary level albeit that French and Mauritian Creole are the most widely spoken languages. There is no evidence to suggest that N would not be able to access education or healthcare facilities in Mauritius or to show that his parents would be unable to provide for his day to day needs. It may be difficult for his parents to re-establish themselves and find work but there is no evidence to suggest that they would be unable to do so. They both spent their formative years in Mauritius. His parents would prefer to remain in the UK where there is likely to be greater economic opportunity but no good reasons have been given as to why they could not re-establish themselves in their country of origin. The First-tier Tribunal Judge found that there was no evidence to show that the child would be at any risk as a result of historic family arguments in Mauritius. It might be necessary for N to develop his existing French language skills in order to continue his education in Mauritius but he is still of an age that he is likely to be able to adjust with the assistance of his parents, who clearly want the best for their child.

20. In light of the above I find that it is likely to be in the child's best interests to remain in the UK with his parents. However, it is quite clear from the First-tier Tribunal Judge's findings, with which I agree, that there is very little evidence to show any practical obstacles to the family being able to re-establish themselves in Mauritius. No doubt it would be an upheaval after this length of time, but there is nothing to suggest that the child would face any significant hardship over and above the normal disruption that might be expected when a child moves to a new home or school. For this reason, I find that it is only marginally in the child's best interest to

remain in the UK because it would provide him with continuity and access to slightly better services, education and longer term opportunities.

21. For the reasons given above [8] I conclude that the third appellant does not meet the strict requirements of paragraph 276ADE(1)(iv) of the immigration rules because he had not lived in the UK for a continuous period of seven years at the date of the application in July 2013. As such, I turn to consider the appellants' right to private and family life under Article 8 outside the immigration rules.

22. Article 8 of the European Convention on Human Rights protects the right to private and family life. However, it is not an absolute right. The state is able to lawfully interfere with an appellant's private and family life as long as it is pursuing a legitimate aim and it is necessary and proportionate in all the circumstances of the case. The starting point is the basic principle that a state has the right to control the entry and residence of people within its borders. There is a strong public interest in maintaining an effective system of immigration control. This is done through the immigration rules and policies, which set out the requirements for leave to enter or remain in the UK. The immigration rules and policies are the main guide to what decisions are likely to be considered reasonable and proportionate. It is still possible for cases that fall outside those requirements to engage the operation of Article 8 but only if there are compelling circumstances that are not sufficiently recognised under the immigration rules: see *Huang v SSHD* [2007] UKHL 11, *Patel & Others v SSHD* [2013] UKSC 72, *R (on the application of MM & Others) v SSHD* [2014] EWCA Civ 985 and *SSHD v SS (Congo)* [2015] EWCA Civ 387.

23. All three appellants are Mauritian citizens and none of them have leave to remain in the UK. The right to family life would not be infringed by removal because all three appellants would be removed together as a family unit. They would be able to continue their family life together in Mauritius. The parents have lived in the UK for a period of 11 years but there is little evidence to show that they have developed any particularly strong ties to the UK. N has lived in the UK for a significant period of his young life and there is evidence to show that he is likely to have developed far stronger ties to the UK than his parents and that he is well settled. I bear in mind that, following the decisions in *AG (Eritrea) v SSHD* [2007] INLR 407 and *VW (Uganda) v SSHD* [2009] EWCA Civ 5, the threshold for showing an interference with an appellant's rights under Article 8 is not particularly high. In the circumstances I accept that the appellants' length of residence and other ties to the UK show that removal is likely to interfere with their right to private life in a sufficiently grave way as to engage the operation of Article 8 of the European Convention (questions (i) & (ii) of Lord Bingham's five stage approach in *Razgar v SSHD* [2004] INLR 349)

24. The appellants do not meet the requirements of the immigration rules and the normal course of action would be to require them to leave the UK. While the maintenance of effective immigration control is an important factor the balancing exercise under Article 8 is a complicated one and

must take into account a number of different factors balancing the public interest considerations against the specific circumstances of each individual.

25. In assessing what weight to place on the public interest, where relevant, the Tribunal must take into account section 117B (general) and 117C (deportation) of the Nationality, Immigration and Asylum Act 2002 ("NIAA 2002"), which outlines a number of factors that the Tribunal must consider when assessing whether an interference with a person's right to respect for private and family life is justified and proportionate.

26. In balancing the individual circumstances of this family against the public interest considerations I give due weight to the fact that the best interests of the child are a primary consideration. However, the best interests of the child can be outweighed by the cumulative effect of other factors. Due weight should also be given to the public interest in maintaining an effective system of immigration control. As outlined in *EV (Philippines)* the case must be assessed in the 'real world' situation where none of the family members have had leave to remain since January 2011. The assessment must also take into account the First-tier Tribunal Judge's negative finding that the first appellant effectively used her studies as a "smokescreen" to allow the family to remain in the UK for as long as possible. Since their leave to remain expired the parents made repeated and unsuccessful applications for leave to remain in order to avoid having to return to Mauritius.

27. It is likely that all three appellants speak English given that the first appellant studied in the UK and the second appellant is said to be working in the UK (albeit without permission). It is clear that N speaks good English. Indeed it is now likely to be his first language. While this is a factor I must take into account for the purpose of section 117B(2) of the NIAA 2002 it is merely neutral and does not add anything to the appellants' case: see *AM (s.117B) Malawi* [2015] UKUT 0260. Although the second appellant is said to be working there is little evidence to show how the family supports itself. Even if both parents would be in a position to work without becoming a burden on UK taxpayers, again, this is a factor that is merely neutral in the assessment under section 117B(3).

28. Prior to 2011 the appellants lived in the UK with limited leave to remain, and for the last four years, in the full knowledge that they had no leave to remain. In those circumstances their private life in the UK could not be described as anything other than precarious and by virtue of sections 117B(4) and (5) should be given little weight.

29. I take into account the fact that the third appellant is a child and bears no blame for his precarious immigration status. His best interests are nevertheless to be given primary consideration when I turn to consider section 117B(6) and whether it is reasonable to expect him to leave the UK. For the purpose of section 117B(6) the qualifying period is not restricted to seven years residence at the date of application and for this

reason I find that the third appellant is a qualifying child within the definition contained in section 117D(1) of the NIAA 2002.

30. I have given due weight to the fact that N is well settled in the UK and that it would cause an upheaval in his life if he had to leave and re-establish himself in, what he considers to be, a less familiar environment. However, I also have to take into account the fact that no member of the family is a British citizen or has leave to remain. The family would not be separated. Their status in the UK has at all times been precarious. The parents bear responsibility for bringing their son to the UK. It seems clear that they wish to remain on a long term basis because they consider that it would be in the best interests of their child. While that is entirely understandable the family does not meet the requirements of the immigration rules for leave to remain in the UK. There is no evidence to suggest that the parents or the child would face any particular difficulties in re-establishing themselves in Mauritius albeit that there would be an initial upheaval. There is no evidence to show that the child's welfare or safety would be significantly affected if he were to return to his country of origin with his parents. He may find it challenging to start at a new school but there is no evidence to suggest that he would be unable to access adequate education or healthcare in Mauritius.

31. The only issue of any note is the child's length of residence in the UK, but apart from that, the evidence does not disclose any compelling circumstances. I set aside the First-tier Tribunal decision because I considered that more consideration was needed to this aspect of the case. I have set out the guiding principles outlined in the relevant case law above. I do not seek to diminish the weight to be given to the length of time that N has lived in the UK. No doubt he now has a strong affinity to this country. However, he is not at a particularly crucial point in his education at the current time. His parents do not meet the requirements of the immigration rules and would normally be expected to leave the UK. A dependent child would normally be expected to accompany his parents. It seem to me that the circumstances in this case are not dissimilar to those considered in *EV (Philippines)* where the 'real world' situation was that none of the family members had leave to remain. I have concluded that it is only marginally in the best interest of N to remain in the UK with his parents and that there are no factors that point strongly in favour of it being in his best interest to remain in the UK e.g. health issues or any other compelling or compassionate circumstances.

32. After having weighed the particular circumstances of this case as a whole, giving primary consideration to the best interests of the child, I conclude that it would be reasonable to expect him to leave the UK with his parents. The cumulative effect of the public interest considerations are sufficient to outweigh the marginal best interest of the child to remain in the UK. While it is understandable that the first and second appellants would prefer to remain in the UK because they consider that this would provide the family with better long term opportunities, unfortunately, their desire to remain in the UK does not necessarily equate to a right to do so under the law. For

these reasons I find that removal in consequence of the decision would not amount to a disproportionate interference with the appellants' rights under Article 8 of the European Convention (points (iv) & (v) of Lord Bingham's five stage approach in *Razgar*).

33. I conclude that the First-tier Tribunal decision involved the making of an error of law and set aside the decision. I remake the decision and dismiss the appeal.

DECISION

The First-tier Tribunal decision involved the making of an error on a point of law

I re-make the decision and DISMISS the appeal

Signed  Date 21 January 2016

Upper Tribunal Judge Canavan