



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

Appeal Number: IA/06519/2014  
IA/06520/2014  
IA/06521/2014

**THE IMMIGRATION ACTS**

**Heard at North Shields**

**On 9 July 2014**

**Determination**

**Promulgated**

**On 31 October 2014**

**Before**

**UPPER TRIBUNAL JUDGE DEANS**

**Between**

**E L I  
E J I  
D F U I**

Appellants

**and**

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

Respondent

**Representation:**

For the Appellants: Mr L Latif, Latif Solicitors

For the Respondent: Mr P Mangion, Home Office Presenting Officer

**DETERMINATION AND REASONS**

- 1) The appellants are a family from Nigeria. They comprise a couple and their young son, born on 29 June 2006. They appeal with permission against a decision by Judge of the First-tier Tribunal Duff dismissing their appeals on human rights grounds.

- 2) The appellants' immigration history is as follows. The first appellant entered the UK in September 2004 with leave as a student. This leave was extended on successive occasions until 30 November 2011. He was then granted leave as a Tier 1 HS Migrant from November 2011 until November 2013. The second appellant entered the UK in November 2004 as a dependant. The third appellant was born in the UK on 29 June 2006. An application for all the appellants for further leave to remain was refused on 13 January 2014 with removal directions made under section 47 of the Immigration, Asylum and Nationality Act 2006.
- 3) At the hearing before the First-tier Tribunal the parties were agreed that the outcome of the appeals would turn on the question of "reasonableness" in relation to the removal of the third appellant, having regard to paragraph 276ADE of the Immigration Rules and section 55 of the Borders, Citizenship and Immigration Act 2009, as well as under Article 8 of the Human Rights Convention. There were nevertheless individual factors in relation to each of the appellants to be considered in relation to the issue of proportionality and the family unit had to be looked at together.
- 4) The Judge of the First-tier Tribunal was addressed on the educational disadvantages that the child might face by returning to Nigeria. Submissions were also made in relation to the health of the first appellant and his position as a serving soldier in the Nigerian Army and whether he would face consequences on return for his absence from duty. On this last point the judge took the view that there was no clear evidence that the first appellant was regarded by the Nigerian Army as a deserter but, even if this was so, it was not accepted that he would not receive a fair hearing from a Nigerian court martial. It was not established that he would be sentenced to a term of imprisonment on return and the outcome of the proceedings was entirely speculative.
- 5) So far as medical services were concerned the judge accepted that medical services in Nigeria were not of the same standard as in the UK and might not be available free of charge but nevertheless services existed. The first appellant had substantial family connections and there was no reason to suppose that his health would suffer significantly on return.
- 6) The Judge of the First-tier Tribunal looked at the return of the family as a unit and, at paragraph 16 of the determination, gave particular attention to the best interests of the third appellant as a child. The most important single factor in relation to those best interests was that the third appellant should remain in the care of his parents and should not be separated from them. The child was Nigerian, as were his parents. At the time of the hearing he had spent just short of eight years in the UK, spoke only English, and was well integrated into society here and doing well at school. It would undoubtedly cause him hardship so far as both the third appellant and his parents were concerned to leave the UK. It would take the third appellant time to adjust to life in Nigeria and he might encounter problems in doing so. Nevertheless he was still young and at an adaptable age and would

have the support of his parents and his wider family in Nigeria. There had never been any expectations that the family would remain in the UK and, notwithstanding that the third appellant had been here for more than seven years, the overall circumstances made it reasonable to expect the third appellant to leave the UK and accompany his parents to Nigeria.

- 7) Permission to appeal was granted on the basis that the judge arguably erred by not giving the child's best interests sufficient weight and by not differentiating between consideration of Article 8 within and outwith Appendix FM. It was further arguable that the judge did not follow the guidance in Zoumbas [2013] UK SC 74 in not identifying whether the child's best interests lay in staying in the UK before considering whether these interests were outweighed.

## **Submissions**

- 8) At the hearing before me Mr Latif relied on the grounds of the application for permission to appeal. According to the application, the judge took the view that as the first two appellants did not qualify to remain under the Immigration Rules, it would be reasonable to expect the third appellant to leave the UK with them as he is a Nigerian national. In making this finding the judge omitted to make a proper assessment under paragraph 276ADE and also a proper assessment of proportionality under Article 8, on the basis that the third appellant had been here for 7 years as a child. This should have been the primary consideration.
- 9) It was further pointed out in the application that as originally drafted paragraph 276ADE did not include a requirement of reasonableness. It was observed that the child concession policy in DP5/96 was withdrawn in December 2008 on the basis that children in these circumstances were adequately protected by Article 8. The judge had not given primary consideration to the best interests of the child nor had given adequate weight to the fact the child had been here for 7 years. The judge placed considerably more weight on the fact that the child's parents were Nigerian nationals who were not qualified to remain under the Immigration Rules and would not succeed on the basis of proportionality in their own right.
- 10) It is further submitted in the application that the judge did not properly distinguish between consideration of Article 8 under Appendix FM and consideration of the proportionality test in the case of Razgar. These were different tests and the judge had confused the test of exceptionality under Appendix FM with the test of proportionality under Razgar. The judge did not explain why he was considering the third appellant under Razgar and if so why the removal would not be disproportionate given the third appellant had been in the UK for more than 7 years and where the interests of the child should be the primary consideration.
- 11) Mr Latif further referred to the case of Zoumbas. The primary reason that the third appellant did not succeed according to the judge, was that his parents did not succeed. The judge should have considered the appeals

under paragraph 276ADE and under proportionality. The judge should have had proper regard to the length of residence and the disruption to the child's education. The child was born here. He spoke only standard English. The period of 7 years was a considerable period for a child and could be compared with the 20 year period required for adults to establish a private life claim in terms of paragraph 276ADE.

- 12) For the respondent Mr Mangion submitted that the judge had given proper consideration to the issues. It had been submitted on behalf of the appellants that the judge considered first the situation of the parents and then considered the position of the child. This was the order in which the judge had addressed the issues but it did not follow from this that the judge did not properly consider the interests of the child at paragraph 16. In Zoumbas the court said that the proper approach was to consider the parents' situation and then to consider if the position of the child altered the balance of proportionality. This was the approach followed by the judge.
- 13) Mr Mangion continued that the judge had considered paragraph 276ADE and referred to the child having been here for his whole life. The judge applied the test of reasonableness even if this was not in the specific context of paragraph 276ADE. The position in terms of paragraph EX.1 had been considered in the reasons for refusal letter. The respondent's decision of 13 January 2014 was made after paragraph 276ADE was amended to include the test of reasonableness. Mr Mangion further referred to the recent case of EV (Philippines) [2014] EWCA Civ 874 at paragraph 60. He submitted in terms of this the disruption to the child's education should not be given great weight. Mr Mangion further referred to the case of Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 640. He submitted there was no specific procedure to be followed according to Zoumbas. The best interests of the third appellant were properly considered at paragraphs 16 and 17 of the determination.
- 14) In response Mr Latif relied on his earlier submission and emphasised the proper approach to residence of 7 years by a child.

## **Discussion**

- 15) I note that early in the determination, at paragraph 6, the Judge of the First-tier Tribunal identified the principal issue he had to decide, which was whether it was reasonable to expect the third appellant to leave the UK, given his length of residence here. The judge correctly identified that the relevant provisions under which this issue was to be considered were paragraph 276ADE and Article 8, having regard to the duty under section 55 of the 2009 Act to have regard to the best interests of the child as a primary consideration.
- 16) Having thus directed himself the judge then went on to look at the circumstances of the family as a whole and then, at paragraphs 16 and 17,

to consider where the best interests of the child lay in relation to the other members of the family and the child's own circumstances.

- 17) In the case of Zoumbas it was submitted that the Secretary of State approached the best interests of the child in the wrong way but this argument was not accepted by the Court. The Court found that although the wellbeing of the children was a primary consideration, this did not mean that this had to be considered first with every possible countervailing issue considered thereafter. The Secretary of State's decision letter had to be read as a whole and the substance of the decision had to be analysed. I approached the determination by the Judge of the First-tier Tribunal in these appeals in the same manner.
- 18) It was further argued in Zoumbas that the assessment of the best interests of the children was flawed because it was assumed that the parents would be removed. The Court found that it was legitimate for the Secretary of State to ask herself first whether it would have been proportionate to remove the parents if they had no children and then, in considering the best interests of the children, ask whether their wellbeing altered that provisional balance in the proportionality exercise. This is to a large extent the approach taken by the Judge of the First-tier Tribunal in deciding these appeals.
- 19) It must be accepted, of course, that the immigration history of these appellants is very much more favourable than the immigration history of the appellants in Zoumbas. These appellants have been here with leave throughout the period of their residence and the third appellant's period of residence has been continuous and exceeds 7 years in length.
- 20) Nevertheless, the judge was entitled to find that the best interests of the third appellant were to remain with his parents. He made the finding that there was nothing disproportionate in itself about the removal of the parents, putting the interests of the child to one side, and then considered whether the best interests of the child altered the balance of proportionality. The judge was entitled to follow this approach. The judge accepted that there would be significant disruption to the child's education but pointed out that he would have the support of his parents and of the extended family in Nigeria, which was the country of his nationality. This was a conclusion that the judge was entitled to reach for the reasons which were given.
- 21) It was submitted that the judge failed to distinguish properly between the test of reasonableness under paragraph 276ADE and the test of proportionality under Razgar. Reference was made to the case of Gulshan, in terms of which, after applying the requirements of the Rules, only if there might arguably be good grounds for granting leave to remain outside the Rules was it necessary to go on to consider under Article 8 whether there were compelling circumstances not sufficiently recognised under the Rules.

- 22) In these appeals the judge rightly considered the same factors would be relevant in relation to proportionality as were relevant to the issue of reasonableness under paragraph 276ADE. The judge did not take a different approach to the issue of reasonableness under paragraph 276ADE from the approach to the issue of proportionality under Article 8. Although the judge might be criticised in theory for not going through a two stage process, first under the Rules and then under Article 8, it has not been shown that the judge applied the wrong test in law, either under paragraph 276ADE or under Razgar, or that the judge neglected to take into account any relevant factor or took into account an irrelevant factor. The judge found, in effect, that in the circumstances of this appeal the application of the test of reasonableness under paragraph 276ADE and the application of the proportionality test under Razgar reached the same result, namely that it was neither unreasonable nor disproportionate for the family to be removed to Nigeria.
- 23) Since this appeal was heard before the First-tier Tribunal, section 19 of the Immigration Act 2014 has come into force inserting a new section 117B into the 2002 Act. This states that in considering the balancing exercise under Article 8, where a person is not liable to deportation, the public interest does not require a person's removal where -
- a) the person has a genuine and subsisting parental relationship with the qualifying child, and
  - b) it would not be reasonable to expect the child to leave the United Kingdom.
- 24) The terms "qualifying child" includes a person under 18 who has lived in the United Kingdom for a continuous period of 7 years or more, whether or not a British citizen.
- 25) Under this provision the third appellant would have been a qualifying child on the basis of his length of residence. The test to be applied in relation to proportionality under Article 8, however, would under this statutory provision be the same as the test applied by the judge, namely whether it would not be reasonable to expect the child to leave the United Kingdom.
- 26) This emphasises that the approach of the judge was the correct one - the issue was one of reasonableness and the judge was entitled to find that it would not be unreasonable to expect the child to leave the UK with his parents.
- 27) For the reasons I have given above, I am not satisfied that the Judge of the First-tier Tribunal erred in the conclusions which he reached and accordingly his decision shall stand.

## **Conclusions**

- 28) The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

29) I do not set aside the decision.

**Anonymity**

30) The First-tier Tribunal made an order for anonymity and, for the reasons given by the Tribunal, I continue that order (pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008).

Signed

Date

Judge of the Upper Tribunal

**31 October 2014**