



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

Appeal Number: IA/30193/2013  
IA/30194/2013  
IA/30195/2013  
IA/30196/2013  
IA/30197/2013

**THE IMMIGRATION ACTS**

**Heard at Birmingham  
on 11<sup>th</sup> April 2014**

**Determination  
Promulgated  
on 30<sup>th</sup> April 2014**

**Before**

**UPPER TRIBUNAL JUDGE HANSON**

**Between**

**C A B (1)**

**T A B (2)**

**E A B (3)**

**E A B (4)**

**J A B (5)**

**(Anonymity direction in force)**

Appellants

**and**

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

Respondent

**Representation:**

For the Appellant: Mr Peer of Peer and Co

For the Respondent: Mr Smart – Senior Home Office Presenting Officer.

## **DETERMINATION AND REASONS**

1. This is an appeal against a determination of First-tier Tribunal Judge P.J. Holmes promulgated on 19 December 2013, following a hearing at Stoke on 6<sup>th</sup> December 2013, in which he dismissed the linked appeals of the first appellant, a married woman born on 18<sup>th</sup> December 1977, her husband J A B born on 2<sup>nd</sup> August 1973 and their children born on 23 December 2006 (T A B), 31<sup>st</sup> May 2008 (E A B [A3]), and 18<sup>th</sup> October 2004 (E A B [A4]). All are citizens of Ghana.
2. The appeal is against a refusal to grant leave to remain, said by the Appellants to arise from an application made on 30<sup>th</sup> November 2011 outside the Immigration Rules on the basis of their family and private life.
3. The Judge sets out his findings between paragraphs 15 to 27 of the determination. Permission to appeal was granted by Designated Judge of the First-tier Tribunal Campbell on 15<sup>th</sup> January 2014. Judge Campbell noted that it was contended in the grounds that the Judge failed to consider whether the requirements of the Rules in their pre-9<sup>th</sup> July 2012 form were met. The application for leave to remain in form FLR(O) was said to have been made on 25<sup>th</sup> November 2011. Although representations were made on the Appellants' behalf in July 2012, following a refusal to grant leave, it was said to be arguable that the immigration decision giving rise to the appeal, including a further rejection of the applications made by the Appellants made only on 3<sup>rd</sup> July 2013, meant the Appellants' were therefore entitled to the benefit of the transitional provisions contained in HC 194.
4. The grounds also argued that in any event the requirements of paragraph 276ADE were in fact met.

## **Discussion**

5. The Judge noted in his determination that some of the paperwork that had been provided in respect of the appeal was lacking. For example neither party before the Judge provided a copy of the completed application form although the Judge was able to ascertain the nature of the application made in November 2011. It is not disputed that the application made on the 30<sup>th</sup> November 2011 was refused by the Secretary of State in a refusal letter dated 4<sup>th</sup> July 2012. The Judge was not provided with a copy of this document either although Mr Smart has now provided a copy for the purposes of these proceedings.
6. In the 4<sup>th</sup> July 2012 letter the Secretary of State sets out in detail her consideration of the immigration history, family life which is accepted between the first appellant, her husband, and three dependent

children, section 55 relating to the best interests of those children, and their private life. As the date of consideration was prior to the introduction of the new Immigration Rules the case was considered by reference to the case law that existed and was relevant at that time. Following the Secretary of State's conclusions that it was proportionate and reasonable in all the circumstances for the family to return to Ghana the letter contains a statement that there is no right of appeal against the decision as the first appellant had no leave to remain when she submitted her application. The letter notes that the family are illegal overstayers and that they should arrange to depart voluntarily.

7. On 18<sup>th</sup> July 2012 a letter headed "proposed claim for judicial review" was written by Peer and Co to the decision maker. It refers at length to the letter of 4<sup>th</sup> July 2012 and challenges the conclusion that there was no right to appeal against the decision on the basis that, although the first Appellant did not have leave to remain at the time of the application, the applications were not made under any specific immigration rule but under Article 8 ECHR. It was argued that if section 82 (2) (d) was to be interpreted as requiring existing leave to remain such a requirement can only be restricted to applications under the Immigration Rules and could not apply to applications outside the Rules.
8. It was also submitted that there is no requirement for there to be a removal direction in place before the applicant is entitled to exercise a right of appeal and on this basis it was asserted that the decision was unlawful.
9. The challenge to the decision not to make an immigration decision conferring a right of appeal has no arguable merit. The decision is a refusal to grant leave to remain as a result of the Applicant having no lawful leave to remain at the time the application was made. This is not an immigration decision, as that term is defined in section 82 of the 2002 Act, and so there is no right of appeal. It is also settled case law that the Respondent is not required to grant a right of appeal in all cases and no arguable legal error is proved - see Murdoch Daley [2011] EWCA Civ 161 and Patel [2013] UKSC 72. The grounds fail to establish a requirement to grant a right of appeal at this stage based upon either law or policy. The refusal refers to the fact an immigration decision giving rise to a right of appeal may be issued at a later date.
10. There is no arguable merit in the claim there is no need for a removal direction to be in place before an applicant is entitled to exercise a right of appeal as many decisions such as a refusal to grant asylum or leave to remain are not immigration decisions conferring a right of appeal in themselves. Such a right often only arises as a result of the removal direction made consequent upon such as a refusal.

11. The additional submissions contained in the letter were, however, considered by the case worker as further representations giving rise to a further refusal letter dated 3<sup>rd</sup> July 2013 and the issuing of removal directions under section 10 of the Asylum and Immigration Act 1999 to Ghana which conferred upon the Appellant's a right of appeal to the First-tier Tribunal.
12. I find no merit in the assertion the Judge erred when considering the decision by reference to the provisions of the current Immigration Rules which came into force after 9<sup>th</sup> July 2012. It is settled law that it is the Rules in force at the date of decision which are those applicable to an appeal, in the absence of transitional provisions, if there has been a change in the Rules between the application and consideration. In this appeal the application that led to the decision was the further submissions to be found in the letter dated 18<sup>th</sup> July 2012 made after the 9 July 2012 and so the Appellants' are not assisted by the recent Court of Appeal decision in Edgehill v Secretary of State for the Home Department [2014] EWCA Civ 402 which is a case which very much turned on its facts. It was a case in which there was a tension between an application made and considered under Appendix FM in relation to a person who made the application prior to the Rules coming into force whereas, in respect of the applicant JE who already had fourteen years' residence in the United Kingdom, there was a pre-existing Rule which may have made a material difference to the outcome.
13. It is also clear from reading **Edgehill** that the Court of Appeal did not give express consideration to a number of aspects of the Immigration Rules. I refer in this regard to the fact the judgment does not deal with paras A277-A280 and so in broad terms does not arguably apply to applications made under the old Part 8 to which Appendix FM applies except where the provisions of Part 8 are preserved and continue to apply as set out in A280. Changes have also been made to the Immigration Rules in 276A0 (and Appendix FM Gen 1.9) which will mean that such issues can be considered in any event.
14. I find no legal error proved in relation to the jurisdictional aspects. I find no arguable merit in the claim the First-tier Tribunal materially erred or misdirected themselves in law in relation to the relevant applicable provisions.
15. Ground (b) refers to the provisions of paragraph 276ADE (iii) requiring a person to make a valid application for leave to remain on the grounds of private life in the UK. The grounds argued that as the first appellant made the application at a time when this paragraph was not in force it could not possibly be said that the child applicants had

made a valid application and so the conclusions reached by the Judge at paragraph 16 to 18 of the determination are flawed.

16. I find no merit in this argument. The date of application has been found to be after 9<sup>th</sup> July 2012 and so the provisions of the Rules in force prior to 9<sup>th</sup> July 2012 would not have benefited any of the Appellants'. Whilst 276 ADE as originally drafted had the requirement referred to in the grounds for a valid application those rules were amended as from April 2013 to include 276A0 which is in the following terms:

276A0. For the purposes of paragraph 276ADE the requirement to make a valid application will not apply when the Article 8 claim is raised:

- in
- (i) as part of an asylum claim, or as part of a further submission person after an asylum claim has been refused;
  - (ii) where a migrant is in immigration detention;
  - (iii) where removal directions have been set pending an imminent removal;
  - (iv) in an appeal; or
  - (v) in response to a (one stop) notice issued under section 120 of the Nationality, Immigration and Asylum Act 2002.

17. As the Article 8 claim was made in the appeal the requirement for a valid application is arguably not a bar to the Judge considering 276 ADE in relation to this matter and so no misdirection or misapplication of the law is established.
18. The Grounds also challenge the conclusions at paragraph 20 of the determination in relation to consideration of the best interests of the child appellants' asserting that the Judge considered this issue as a freestanding matter rather than as part of the overall assessment of proportionality under Article 8 ECHR, and further allege the reasoning and conclusions reached by the Judge failed to indicate the evidence taken into account in arriving at such findings.
19. I am satisfied the Judge considered all the material made available with the degree of care required in an appeal of this nature, that of anxious scrutiny, and has given adequate reasons in support of the findings made. Accordingly the weight to be given to the evidence, which it was submitted before the Upper Tribunal was "wrong", was a matter for the Judge.

20. In Zoumbas v Secretary of state for the Home Department [2013] UKSC 74, at paragraph 10, the Court paraphrase the principles arising from the cases of ZH (Tanzania) [2011] 2 AC 166, H v Lord Advocate [2012] SC (UKSC) 308 and H(H) v Deputy Prosecutor of the Italian Republic [2013] 1 AC 338, as follows:

- (1) The best interests of the child are an integral part of the proportionality assessment under article 8 ECHR;
- (2) In making that assessment, the best interests of the 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 the 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 the 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 the 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 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 the 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.

21. In paragraph 20 the Judge sets out his findings in relation to the best interests of the child appellants and clearly considered the period of time they have lived in the United Kingdom together with their circumstances in the this country which were referred to in the first Appellant's witness statement. It was noted E A B [A4] has been in the United Kingdom for seven years as was the claim that he could satisfy the requirements of 276ADE(iv) whereas the other children could not. The Judge referred to relevant case law and noted there was no evidence to suggest any of the children have any particular

difficulty, special educational needs, special ability or particular dependency on any provision made by the school or evidence of health problems. The Judge concluded "Weighing up these various factors, I find that no significant grounds exist in the case of any of these children to depart from the proposition that it is in the best interests of the child to live with and be brought up by his or her parents, in whatever country they may be".

22. The Judge is criticised for not setting out the information he considered or for not making specific findings on the benefits for the children of remaining in the United Kingdom. As stated I am satisfied the Judge did consider all the evidence together with circumstances in the United Kingdom and any submissions made regarding the benefit to the children of preserving the status quo. The Judge is not required to set out findings on each and every aspect of the evidence and I find that the approach that was adopted, evidence considered, and reasons given, to be in accordance with the guidance provided in Zoumbas and other relevant case law. It was found in Zoumbas that there was no "irrationality in the conclusion that it was in the children's best interests to go with their parents to the Republic of Congo. No doubt it would have been possible to have stated that, other things being equal, it was in the best interests of the children that they and their parents stayed in the United Kingdom so that they could obtain such benefits as health care and education which the decision-maker recognised might be of a higher standard than would be available in the Congo. But other things were not equal. They were not British citizens. They had no right to future education and health care in this country. They were part of a close-knit family with highly educated parents and were of an age when their emotional needs could only be fully met within the immediate family unit. Such integration as had occurred into United Kingdom society would have been predominantly in the context of that family unit. Most significantly, the decision-maker concluded that they could be removed to the Republic of Congo in the care of their parents without serious detriment to their well-being".
23. In relation to paragraph 276 ADE (iv) this was considered in paragraph 24 of the determination. This paragraph contains two elements the first being that the person concerned is under the age of 18 and has lived continuously in the UK for seven years, which it is not disputed E A B [A4] can satisfy, but also that it would not be reasonable to expect him to leave the United Kingdom. The Judge went on to consider whether it was reasonable to expect him to leave the UK as part of the general proportionality issue for which his findings are set out later in the determination. The conclusion is that it is proportionate in all the circumstances. Indeed in paragraph 27 the Judge finds that he was satisfied it was reasonable to expect each of the child appellants to accompany their parents in order to continue to

enjoy family life together as a family unit. It was not disputed that there will be some degree of temporary disruption but it was also found that with the protection and assistance of their parents the children will be able to integrate into Ghanaian life, language and culture. Ties with friends and distant relatives in the United Kingdom did not involve relationships of a particular dependency and contact can be maintained with such individuals. It is clear that the best interests of the children were afforded proper weight and incorporated into the Article 8 assessment and not artificially separated such as to amount to a structural failure as alleged in the Grounds.

24. I find that the Judge undertook a proper consideration of the competing interests as part of the proportionality exercise albeit this was considered outside the Immigration Rules. In accordance with the guidance set out by the Court of Appeal in MF (Nigeria) [2013] EWCA Civ 1192, the High Court in Nagre [2013] EWHC 720 (Admin) and by the Upper Tribunal in Gulshan [2013] UKUT 640, as confirmed by Shahzad (Art 8: legitimate aim) [2014] UKUT 00085 (IAC), the Judge was required to consider the question of proportionality in the context of the Immigration Rules first with no need to go on to a specific assessment under Article 8 if it is clear from the facts that there are no particular compelling or exceptional circumstances requiring that course to be taken. That approach is consistent with what the Court of Appeal said in MF (Nigeria) and with the approach of the House of Lords, particularly in cases such as Huang [2007] UKHL 11 and Razgar [2004] UKHL 27. In Shahzad it was found that where an area of the Rules does not have an express mechanism such as that found in the provisions relating to deportation appeals, the approach in Nagre ([29]-[31] in particular) and Gulshan should be followed: i.e. after applying the requirements of the rules, only if there may be arguably good grounds for granting leave to remain outside them is it necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under them.
25. The starting position for the Judge was to look at the Rules and see whether the Appellants' are able to meet such requirements. They are not and so the next question to be considered should have been whether the decision would lead to a breach of Article 8 but in the context of whether there are factors not covered by the Rules which give rise to the need to consider Article 8 further.
26. Whilst the Judge failed to identify whether all the circumstances of this case are issues not covered by the Rules, and chose to conduct an 'old style' Article 8 ECHR assessment, it is clear that the final decision is proportionate is also a finding that it had not been established that the removal of this family unit will result in compelling circumstances giving rise to unjustifiably harsh consequences for the Applicant or any family member, such as to establish an arguable case at this time.



Accordingly I find no legal error material to the decision to dismiss the appeal under either the Rules or on human rights grounds has been established.

27. The Judge's conclusions are in accordance with the law, have not been shown to be susceptible to challenge on public law grounds, nor to be perverse or irrational. The conclusions are within the range of findings the Judge was entitled to make on the evidence. As Patten LJ stated in *NN (South Africa) & Anor v Secretary of State for the Home Department* [2013] EWCA Civ 653 "Judges are not required to elevate the disruption and inconvenience which inevitably flows from a move abroad to a breach of the child's Article 8 rights."

## **Decision**

28. **There is no material error of law in the First-tier Tribunal Judge's decision. The determination shall stand.**

Anonymity.

29. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make that order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 to protect the identity of the minor children.

Signed.....  
Upper Tribunal Judge Hanson

Dated the 29<sup>th</sup> April 2014

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