



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

Appeal Number: IA/06008/2014  
IA/06013/2014  
IA/06018/2014

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 14<sup>th</sup> May 2015**

**Determination Promulgated  
On 26<sup>th</sup> May 2015**

**Before**

**THE HONOURABLE MR JUSTICE EDIS  
DEPUTY UPPER TRIBUNAL JUDGE DAVIDGE**

**Between**

**GELA LEKVEISHVILI  
NINO LEKVEISHVILI  
MAIA LEKVEISHVILI  
(ANONYMITY DIRECTION NOT MADE)**

**Appellants**

**and**

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

**Respondent**

**Representation:**

For the Appellants: Mr. J. Plowright, Counsel instructed by Gulbenkian Andonian Solicitors

For the Respondent: Ms. E. Savage, Home Office Presenting Officer

**DECISION AND REASONS**

1. This is an appeal by the appellants against a decision of the First-tier Tribunal (FTT), Judge Plumtre of the First-tier Tribunal, which was promulgated on 15<sup>th</sup> October 2014. The FTT Judge refused their appeals against a refusal by the Secretary of State (SSHD) to grant leave to remain (LTR) outside the Immigration Rules (the Rules) and against immigration notices to remove them as illegal entrants. The letter of refusal was dated 17<sup>th</sup> January 2014 and the removal notices the 16<sup>th</sup> January.
2. The appellants are Georgian nationals. The first appellant (A1) is the husband of the third appellant (A3) and the second appellant (A2) is their daughter, now 8 years old. She was born in the United Kingdom and has lived here ever since, which is a period of more than 7 years. This means that she is a “qualifying child” as defined by section 117D(b) of the Nationality, Immigration and Asylum Act 2002. We shall return to the significance of that below.
3. A1 entered the United Kingdom on 1<sup>st</sup> July 2002 as a visitor and has remained here since then. He had suffered a brain tumour which had been treated in Georgia but he has required extensive treatment in this country since. He was arrested as an overstayer on 4<sup>th</sup> November 2008 and made two unsuccessful applications under Article 8 of the EHCR. A3 entered as a student on 12<sup>th</sup> November 2002 and had LTR until 30<sup>th</sup> June 2009 since which time she has been unlawfully in this country.

#### **The decision of the SSHD**

4. The SSHD considered the applications under the new Rules, applying Appendix FM and Rule 276ADE. The applications under the Rules were all rejected and no appeal is pursued against that decision, and it is not necessary to set out that lengthy process in full. Some brief detail is necessary, because failure under the Rules is a relevant factor to be considered in deciding the Article 8 claims outside the Rules.
5. The appellants were found to meet the suitability requirements of the Rules (one aspect of which is that A1 was not found to have accumulated a NHS debt in excess of £1,000). Neither A1 nor A3 qualified under the partner rules, because although they had a settled relationship neither was a British Citizen, they did not have settled status in the UK, and did not have leave to remain in the UK as a refugee or humanitarian protection. They did not qualify under the parent rules because neither is the sole carer for the child and they are entitled to apply under the partner rules (unsuccessfully). They therefore could not rely on EX.1, but even if they could, they would fail because the child A2, had not lived continuously in the UK for not less than 7 years at the date of the application and it would be reasonable to expect the child to leave the UK with her parents. It was accepted that education in Georgia is less good than it is in the UK, but A2 would be no more disadvantaged than any other child in Georgia. The SSHD said that the new Rules had been drafted to reflect the duty of the SSHD under section 55 of the Borders, Citizenship, and Immigration Act 2009 and Article 8. The claim under paragraph 276ADE failed because the parents had been here for 11 years rather than 20 years, and had not lost all ties with Georgia. Claims based on A1’s medical condition failed for reasons which are not relevant to his appeal.

## The decision of the FTT

6. There are two grounds of challenge to the decision. The second requires an explanation of the structure of the decision in a little detail. The grounds are
  - a. That the Judge erred in her application of a decision of the UTT in *Azimi-Moayed and Others (Decisions Affecting Children; Onward Appeals); Azimi-Moayed v Secretary of State for the Home Department* [2013] I.N.L.R. 693.
  - b. That the Judge acted unfairly in pursuing and relying on her own conviction that despite the finding recorded above, A1 had in fact accumulated a debt to the NHS in excess of £1,000.
7. These are discrete grounds which do not involve an attack on the whole of the decision. The FTT Judge heard evidence and made findings of fact which are not, for the most part, challenged. She canvassed the law relating to A1's claim to LTR based on his continuing need for medical care, and her conclusion adverse to him on that issue is not challenged. Predominantly, the argument before her centred on the child. She referred to the relevant law.
  - a. She applied the well-known dictum of Baroness Hale in *ZH (Tanzania)* at paragraph 34:-

“Further, it is clear from the recent jurisprudence that the Strasbourg court will expect national authorities to apply article 3.1 of UNCRC and treat the best interests of a child as “a primary consideration”. Of course, despite the looseness with which these terms are sometimes used, “a primary consideration” is not the same as “the primary consideration”, still less as “the paramount consideration””.
  - b. She reminded herself of section 55 of the Borders, Citizenship and Immigration Act 2009 which provides:-

***“55 Duty regarding the welfare of children***

(1) The Secretary of State must make arrangements for ensuring that –

(a) the functions mentioned in subsection (2) are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom”
  - c. When weighing the public interest she set out the terms of section 117B(6) of the 2002 Act:-

“(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.”
  - d. The Judge reminded herself of the 5 stage test in *Razgar v. SSHD* [2004] 2 ACR 368.

- e. The Judge then set out part of the headnote from *Azimi-Moayed and Others (Decisions Affecting Children; Onward Appeals); Azimi-Moayed v Secretary of State for the Home Department* [2013] I.N.L.R. 693. This reads:-

“(1) The case law of the Upper Tribunal has identified the following principles to assist in the determination of appeals where children are affected by the appealed decisions:

i) As a starting point it is in the best interests of children to be with both their parents and if both parents are being removed from the United Kingdom then the starting point suggests that so should dependent children who form part of their household unless there are reasons to the contrary.

ii) It is generally in the interests of children to have both stability and continuity of social and educational provision and the benefit of growing up in the cultural norms of the society to which they belong.

iii) Lengthy residence in a country other than the state of origin can lead to development of social cultural and educational ties that it would be inappropriate to disrupt, in the absence of compelling reason to the contrary. What amounts to lengthy residence is not clear cut but past and present policies have identified seven years as a relevant period.

iv) Apart from the terms of published policies and rules, the Tribunal notes that seven years from age four is likely to be more significant to a child than the first seven years of life. Very young children are focussed on their parents rather than their peers and are adaptable.”

8. In relation to the relevance of the child, the Judge observed that she found paragraph 1(iv) of the headnote from *Azimi-Moayed* to be of particular significance, and also said that (i) and (ii) apply to the facts of the appeal before her. She then took account of *The Secretary of State for the Home Department v Gulshan* [2013] UKUT 00640 (IAC) and directed herself that the child’s need for education was not a compelling factor justifying LTR under Article 8 outside the Rules. That, in itself, is not challenged before us. Her ruling in relation to the child and the other appellants’ cases based on the child is as follows:-

“46. When considering the five questions posed by Lord Bingham in *Razgar*, whilst I accept that there will be an interference with the appellants’ rights to family and private life and that Article 8 is engaged, I find that the interference is in accordance with the law because the appellants cannot meet any of the requirements of the Immigration Rules for leave to remain. I further find that such interference is necessary in a democratic society both for the economic wellbeing of the country and for the protection of the rights and freedoms of others and that the interference is proportionate to these legitimate public ends on the facts of this appeal.

“47. Mr. Davidson set out some powerful factors to be taken into account as to why it was disproportionate to remove the appellant child Nino at paragraph 22 and in

24 of his skeleton argument and in particular paragraph 23. I am not persuaded that “the test is whether removing Nino would affect her educational interests detrimentally judged absolutely, not relative to other Georgians.” And particularly when no up-to-date evidence in relation to schools has been cited by either party including the appellants and the only evidence before me relates to 2009 immediately after the civil war between Georgia and Ossetia.

“48. For the avoidance of doubt I accept that the appellant child Nino has lived in the UK for nearly eight years, that she speaks English, that she has never lived in Georgia and may or may not have minimal familiarity with that country. I also accept that she has been educated in the UK and is doing well and that she will have social ties in the UK although no details were provided other than her attendance at school. I am unable to accept paragraph 23(f) that the SSHD’s claim that Nino has cultural links to Georgia is unfounded and speculative in the light of the oral evidence that she speaks to her relatives in Georgia over the telephone.”

9. While addressing the claim based on the health needs of A1, the Judge had embarked upon a series of remarks about the cost of his treatment to date. This give rise to the second ground of appeal and we must therefore explain how it arose. As we have said, the Judge rejected the claim for LTR outside the Rules because of A1’s present and future medical needs relying on settled law which she cited. At paragraph 15, while giving an account of the hearing before her, she said this

“He [A1] stated that he had paid privately for some medical treatment but after a while had, as he put it, been granted NHS treatment. I expressed surprise that the SSHD conceded that he did not have a debt of over £1,000 to the NHS. The Presenting Officer said she wished to withdraw that finding to which Mr. Davison understandably objected stating that there were no good reasons for the SSHD to withdraw this statement at such a late stage during the proceedings.”

10. It appears to us that this exchange is the result of a natural enquiry by a Judge on hearing evidence of a long series of substantial medical interventions and at the same time a concession that the cost of the treatment to the NHS had not exceeded £1,000. That sum arose because it is specified in Appendix FM under the suitability requirements.

“S-LTR.2.3. One or more relevant NHS body has notified the Secretary of State that the applicant has failed to pay charges in accordance with the relevant NHS regulations on charges to overseas visitors and the outstanding charges have a total value of at least £1000.”

11. However, although it was a relevant requirement for consideration under the Rules, A1’s claim under the Rules had failed on other grounds. Thus, whether he should have been allowed through this filter or not was a matter of historical interest only. The fact that he had been dependent to a degree on the NHS while unlawfully in the country was no doubt a relevant consideration for the Article 8 assessment, although it was not likely to be a very significant one, given the presence of a qualifying child for the purposes of section 117B(6) of the 2002 Act. It was perhaps, therefore a natural enquiry which ought to have been relegated on mature reflection to its proper place. Instead, the Judge returned to it after summarising the treatment which A1 had received since at least 2008 from the

NHS. This had included three MIR scans, a number of consultant appointments, a craniotomy and numerous GP appointments. She then said this:-

“41. In the light of that evidence I am at a loss to understand why the SSHD was willing to agree to state that the appellant has incurred a debt of less than £1,000 to the NHS which as a matter of common sense I cannot accept. Even though Mr. Davison was entitled to object to the late withdrawal of this statement by the Presenting Officer at the hearing I would in any event not have accepted it given the detailed medical evidence before me. I consider there to be no unfairness to the appellant in reaching a different conclusion from that of the SSHD in the light of the medical evidence the appellants have chosen to disclose.

“42. It is clear from a letter at page 133 that [A1] returned to see Doctor Richard Perry in July 2012 at the neurology clinic for advice on a different type of headache and that analgesia overuse had been a concern. Further this appellant had another MRI scan in September 2012.

“43. For the avoidance of doubt I have considered the bank statements from pages 168-206 which confirm that the appellants have not been in receipt of any state benefits. I remain at a loss to understand how they are able to pay utility and electricity bills sometimes amounting to £184 given the modest deposits into their Halifax and Lloyds TSB bank accounts.”

12. The Judge then returned to the issue which she was actually deciding at this stage in the Decision, namely whether the medical evidence showed any “compelling or compassionate” reason why A1’s application for LTR outside the Rules should succeed. In paragraph 44, on proper grounds, she concluded that it did not. She had, in fact, already decided this issue twice previously, at paragraphs 31 and 37-38. It is not clear from any of these decisive paragraphs that the Judge’s concerns about the funding of A1’s treatment, or the source of the family funds, played any part in the decision.

### **Discussion and Decision**

13. It appears to us that Ground 1 is without substance. The submission is that in reaching the decision she did about the significance of the child the Judge ignored the second paragraph of the headnote in *Azimi-Moayed* which we have set out above. Given that she said that it applied but did not follow it, this is said to be an error of law. This argument is misconceived. To say that a consideration “applies” in this context merely means that it arises for consideration. It does not mean that it is the decisive factor. It will be recalled that the Judge said that paragraph (iv) was “significant” and that (i) and (ii) also applied. They point in different directions and cannot therefore all be decisive: (i) suggests that if the parents are going to be removed the starting point is that the children should leave too; (ii) suggests that children should have stability and should grow up in the country to which they belong; (iv) suggests that older children are more likely to be settled than younger ones because very young children are focussed in their parents rather than their peers and are adaptable. Mr. Plowright, who appeared for the appellants at the appeal before us did not draft this Ground of Appeal, but valiantly did his best with it. The relevant factors from the evidence were fully set

out in the Decision and briefly summarised in paragraph 48 when rejecting the submission that this child should be permitted to stay.

14. We therefore reject the Ground of Appeal which was advanced. We are, however, concerned that the decision in relation to the relevance of the child was not taken in quite the right way. At a much earlier point in the Decision, at paragraph 8, the Judge had referred to section 117B(6) of the 2002 Act, which she recited. She noted that the child A2 was a “qualifying child”. This means, by statute, that if it would not be reasonable to expect her to leave the United Kingdom then it was not in the public interest to require her parents’ removal either. That was, therefore, the principal question which the Judge had to decide. Was it reasonable to expect the child to leave the United Kingdom, in circumstances where her parents were liable to be removed? This engages the first paragraph of the headnote of *Azimi Moyaed*, and also *EV (Philippines) and others v Secretary of State for the Home Department* [2014] EWCA Civ 874. Those cases were both decided before the amendment which introduced sections 117A-D came into force on 28<sup>th</sup> July 2014. However, there is no reason to suppose that the considerations which prevailed there are irrelevant to a decision as to what it is “reasonable to expect”. Further, the same question arises under paragraph 276ADE(1)(i) of the Rules which provides
- “276ADE (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 7 years (discounting any period of imprisonment) and it would not be reasonable to expect the applicant to leave the UK;”
15. The factual situation in which the reasonableness of the removal of A2 is to be judged is one where both parents are leaving the UK with her, since that is the only circumstance in which she might leave.
16. Although not specifically raised as a ground of appeal, in our judgment it is an error of law to decide a case of this kind without specific regard to the test in section 117B(6) and 276ADE(1)(iv). It is true that the Judge did mention the former provision, but did not thereafter refer to it or explain how it applied. In particular, she neither posed nor in terms answered the question which required answering in order for her properly to assess the role of the public interest in the case. On the face of it, if it was not reasonable to expect the child to leave the UK even with her parents then they were entitled to remain, as was she. For this reason, we would set aside the decision.
17. The second Ground of Appeal gives rise to a different concern. It appears to us that the Judge, with respect to her, became embroiled in a factual issue which was of little importance. As we have remarked above, whether or not there was a debt to the NHS in excess of £1,000 was important to a claim under the Rules. It was not entirely irrelevant to a claim outside the Rules, but was only ever relevant at all to the claims to LTR of A1. The puzzlement expressed by the Judge about the

family's source of income at paragraph 43 was also relevant to the claim of the parents. Those claims failed on other grounds and it would have been far better not to take these concerns into account at all, and certainly not to give them the prominence which they achieved by their location in the Decision. Although, as we have said, they are not referred to in the paragraphs which follow where the decision is actually given, it is obvious that the Judge considered that they had some part to play in the outcome of the case. Given that the SSHD had accepted that the suitability criteria under the Rules had been met by the appellants, they would not have come to the hearing prepared to address an attack on that issue and we cannot exclude the possibility that, contrary to what the Judge said, there may have been some procedural unfairness in the way in which these issues were dealt with. The principal concern, however, is that the Judge's findings on these questions were either entirely irrelevant, or at least of little significance in any objective assessment of the case overall. The Judge did not explain what weight she gave them or what their relevance was. Therefore, we consider that the reasons she gives give rise to a real possibility that an irrelevant consideration was allowed to play a significant part in the outcome, or that a factor of limited weight was allowed to assume far too much importance. Having introduced these considerations by a route which risked procedural unfairness, in our judgment it was necessary to reason the part they played in the outcome with particular care. Given that we do not know what part this consideration played in the outcome, it is impossible to say that this Ground does not disclose a material error. For this reason also, we set aside the decision.

### **The decision re-made**

18. The findings of fact of the FTT Judge are not challenged, except for those about the NHS debt and, perhaps, the family income as described at paragraph 43 of the Decision. We give no weight at all to those matters and leave them entirely out of account. Without them, the claim of A1 to LTR on medical grounds fails for the reasons given by the Judge.
19. Therefore, as we have explained the issue for us, under paragraph 276ADE(i)(iv) and section 117B(6) of the 2002 Act is whether it is reasonable to expect the child to leave the United Kingdom with her parents.
20. We conclude that it is. She was born in the United Kingdom and speaks English. She is doing well at school and has only a distant relationship with her extended family in Georgia. These are the factors which count in favour of it being unreasonable to expect her to leave. The education she will receive in Georgia will be less good than that which is available here, and she may be expected to take some time to settle, given that her command of the language in which she will be educated will be far less good than her peer group. However, she is not a complete stranger to the language and the Judge noted that she received oral evidence that the family do speak some Georgian at home. Both parents have family members in Georgia and there is, therefore, a wider family there who may be expected to provide support to her.



21. There is no principle of law which holds that young children are adaptable, but it is the common experience of parents everywhere that this is so. Children commonly move schools when young and sometimes sever social ties when they do so. The process of growing up is a process of moving slowly away from being entirely dependent on parents and other close family into a world where an independent life is formed. The earlier in that process an upheaval occurs the more readily it will be accommodated in the life of the child. This is especially so where the child will have the support of two loving parents who will themselves have no language difficulties as a result of returning home to the land where they grew up and have lived most of their lives. Any change in the life of a child may have unforeseen effects and may go well or badly. Things can turn out better than expected, as well as worse. A judgment as to what is reasonable in all the circumstances does not involve assuming the worst possible outcome if the *status quo* is changed.
22. We find that the best interests of the child require that she is brought up by her parents. We are willing to assume it would be in her best interests if that occurred in the UK, but that is a less important factor compared to the maintenance of the family unit. In any event, her interests are a primary factor in the Article 8 decision and not the primary or paramount factor, see the citation from Baroness Hale above.
23. Applying *EV (Philippines) and others v Secretary of State for the Home Department* [2014] EWCA Civ 874 and having regard to section 55 of the Borders, Citizenship, and Immigration Act 2009 we conclude that it is reasonable to expect A2 to leave the United Kingdom and that therefore she should not be granted LTR under paragraph 276ADE(1)(iv) of the Rules. This also means that the public interest in the removal of her parents as part of an effective system of immigration control is not negated by section 117B(6) of the 2002 Act. In our judgment, balancing the adverse consequences to A2 resulting from her removal against that public interest we consider that her removal is not disproportionate, applying the *Razgar* 5 stage test.
24. For these reasons we dismiss these appeals against the decision of the SSHD.

**Notice of Decision**

The appeal is dismissed

No anonymity direction is made.

Signed

Date

Mr Justice Edis

**TO THE RESPONDENT**  
**FEE AWARD**

We have dismissed the appeal and therefore there can be no fee award.

Signed

Date

Mr Justice Edis