



**Upper Tribunal  
(Immigration and Asylum Chamber)**  
IA/12410/2014

Appeal Numbers:

IA/12414/2014  
IA/12418/2014  
IA/12426/2014

**THE IMMIGRATION ACTS**

**Heard at: Manchester  
On: 9<sup>th</sup> January 2015**

**Decision Promulgated  
On 3<sup>rd</sup> March 2015**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE BRUCE**

**Between**

**Secretary of State for the Home Department**

Appellant

**and**

**Mr Wang Yan Chang  
Mrs Shuxian Chang  
Master Alex Chang  
Master Jason Chang  
(no anonymity direction made)**

Respondents

For the Appellant:  
For the Respondent:

Ms Johnstone, Senior Home Office Presenting Officer  
Mr Hammond, Counsel instructed by Rahman & Company  
Solicitors

**DECISION AND REASONS**

1. The Respondents are all nationals of Guyana. They are respectively a husband, wife and their two minor sons. On the 9<sup>th</sup> July 2014 the First-tier Tribunal (Judge Ransley) allowed their linked appeals against decisions to remove them from the United Kingdom under s10 of the Immigration and Asylum Act 1999. The Secretary of State now has permission<sup>1</sup> to appeal against that decision.

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<sup>1</sup> Permission granted by First-tier Tribunal Judge Kelly on the 29<sup>th</sup> July 2014

2. This case concerns a family who applied for leave to remain in the United Kingdom on 'private life' grounds. Their applications were made on the 13<sup>th</sup> March 2013 and so fell to be considered under the 'new rules', in particular paragraph 276ADE. Reliance was specifically placed on the fact that the two children were born in the UK and have never lived anywhere else. The eldest was born on the 8<sup>th</sup> December 2005 and so at the date of the application was aged 7 years and 3 months. He therefore fell for consideration under 276ADE(iv):

(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; or

3. The Secretary of State rejected the applications<sup>2</sup>. In a refusal letter dated the 20<sup>th</sup> February 2014 consideration was given to paragraph 353B of the Rules, Appendix FM ('partner' and 'parent' routes), paragraph 276ADE and s55 of the Borders, Citizenship and Immigration Act 2009. The approach taken was to first refuse the adults (since neither had leave the other could not found a case under FM) and to then reach the following conclusion in respect of the children:

"as his parents applications under Appendix FM have also been refused, removal to Guyana is felt to be proportionate in his case. Therefore the Secretary of State is not satisfied that he can meet the requirements of Rule 276ADE(1)(iv)".

4. When the matter came before the First-tier Tribunal Judge Ransley took a different approach. She noted that the applications made in March 2013 had made clear that the main applicant under 276ADE was Alex, who had lived in the UK over seven years. She found that he was entitled to consideration of his application and proceeded to deal with the appeal in the opposite order from that taken in the refusal letter. She first considered Alex's appeal. She found that he is well integrated into the school system here, that he has friends and close family members (grandparents, aunts and uncles) in the UK and by contrast none in Guyana. She had heard argument that in Guyana they had faced discrimination as an ethnic minority. The determination gives consideration to the fact that the adult appellants are both overstayers. Mr Chang had arrived in June 2000 as a visitor, had never sought to vary his status and had simply remained without leave. Mrs Yang arrived on a 24 hour transit visa on the 2<sup>nd</sup> November 2004 and also remained. Judge Ransley also found as fact that they had deliberately waited until Alex had passed his seventh birthday before they had sought to regularise their position. That said, she

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<sup>2</sup> The refusals had not initially been accompanied by an immigration decision giving rise to a right of appeal. Judicial review proceedings had been launched which were settled by consent, with a s10 notice being issued to each Respondent on the 20<sup>th</sup> February 2014

found that the “two children are not to be blamed for their parents’ misconduct, viz. breach of UK immigration law”. She found that Alex met the requirements of 276ADE(iv) and allowed his appeal on that basis. Then, having found it to be contrary to his best interests to be separated from either his brother or parents, she found their removal to be disproportionate and the appeals of the rest of the family were allowed under Article 8.

### **Error of Law: Grounds and Response**

5. The Secretary of State appeals on the ground that the term “reasonable” in paragraph 276ADE (iv) imports a proportionality consideration into the rule:

“The reasonability criterion imposes a consideration both of the child’s best interests, and any other factors in the migrant’s favour, and a consideration of the public interest. It is akin to the proportionality evaluation demanded by the fifth question in Razgar [2004] UKHL 27”

6. It is submitted that the determination thereby contains an error of law in that “only the factors weighing on the appellant’s side of the balance” are considered in the context of the rule. The Secretary of State submits that ‘best interests’ cannot be determinative of an appeal. Reliance is placed on EV (Philippines) [2014] EWCA Civ 874. Per Christopher Clarke LJ:

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.

And Lewison LJ at 58-60:

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.

7. In summary, the Secretary of State submits that the First-tier Tribunal decision in respect of Alex was flawed for failure to weigh his parents' lack of status against him (or to attach sufficient weight to that fact); the appeals of his parents and brother fell to be dismissed because none of them qualified under the Rules and there were not sufficiently "compelling reasons" to allow them under Article 8.
8. Mr Hammond submits that this appeal is nothing more than an attempt to re-argue the case. He points out that the Tribunal set out its reasons and that it would appear that the credibility of the witnesses had been accepted as to why it would be unreasonable for Alex to go to Guyana. He argues that the 'child first' approach taken by the Tribunal is to be preferred to the 'adult first' order of the refusal letter. Considering the position of the child first ensures that the decision making process is consistent with s55 of the Borders, Citizenship and Immigration Act 2009.

### **Legal Framework**

9. What is the correct approach to 276ADE(iv)? Does the term 'reasonable' import a *Razgar* proportionality balancing exercise into the Rule as contended in the grounds of appeal?
10. I look first to the rule itself:

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:

(i) does not fall for refusal under any of the grounds in Section S-LTR 1.2 to S-LTR 2.3. and S-LTR.3.1. in Appendix FM; and

(ii) has made a valid application for leave to remain on the grounds of private life in the UK; and

(iii) has lived continuously in the UK for at least 20 years (discounting any period of imprisonment); or

(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; or

(v) is aged 18 years or above and under 25 years and has spent at least half of his life living continuously in the UK (discounting any period of imprisonment); or

(vi) subject to sub-paragraph (2), is aged 18 years or above, has lived continuously in the UK for less than 20 years (discounting any period of imprisonment) but there would be very significant obstacles to the applicant's integration into the country to which he would have to go if required to leave the UK

11. There are four alternative provisions contained within the rule. Two of them simply require a period of residence: any applicant who has had 20 years continuous residence or a young person between the age of 18 and 25 who has spent at least half of his life in the UK will *prima facie* succeed. Whether they do will depend of whether they meet the 'suitability requirements' set out in S-LTR 1.1-2.3 and S-LTR 2.3 and 3.1. So, for instance, the applicant who arrived on her 9<sup>th</sup> birthday and made an application the week after she turned 18 could only succeed if she does not fall foul of any of those diverse criteria set out in Appendix FM (matters failing under the heading 'suitability' range from being under a deportation order to failing without good reason to attend an interview). On the face of it the 'residence' provisions set down the minimum requirements for strength of private life needed to engage the UK's responsibility, whilst the 'suitability' requirements are the countervailing matters that that Secretary of State considers must weigh against an applicant. That suggests that if anywhere, 276ADE (i) is where the decision-maker is invited to consider proportionality.
12. The two remaining alternatives within 276ADE are (iv), pertaining to children, and (vi), applicable to those adults who have neither the qualification by way of age nor long residence to immediately found a claim under 'private life'. The Secretary of State has consistently emphasised the high threshold inherent in (vi). An adult applicant who cannot show that he has been here for a sufficiently long period of time must instead show that he has lost "all ties" to his country of origin, or in the new formulation, show that there would be "very

significant obstacles to the applicant's integration into the country to which he would have to go if required to leave the UK". That reflects the Secretary of State's view that an adult who has not been here for a very long period will ordinarily be expected to give up any private life that he has managed to establish in that time and re-establish a new one somewhere else. The rule requires such an adult to give very weighty reasons why his private life in the UK has assumed a greater significance than it would otherwise be afforded. The high threshold therefore applies to whether Article 8(1) rights are even engaged. As with other applicants under the Rule, the 'proportionality exercise' is reflected in the Appendix FM suitability requirements.

13. That leaves children, who must now show a set period of long residence *and* that it would not be reasonable to expect them to leave the UK. Given the structure of the rest of the paragraph there would not appear to be any rationale for imposing an additional proportionality test on the child. If the requirement is to be read in the context of the rule as a whole, 'reasonable', as in 'very significant obstacles to integration' goes to strength of private life, rather than the public interest factors which militate against leave being granted. I would suggest that as with all other 'private life' applicants, these are contained in Appendix FM.
14. That reading of the rule is supported by the statutory framework of section 117B of the Nationality, Immigration and Asylum Act 2002 (as amended by the Immigration Act 2014):

*117B Article 8: public interest considerations applicable in all cases*

- (1) The maintenance of effective immigration controls is in the public interest.
- (2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—
  - (a) are less of a burden on taxpayers, and
  - (b) are better able to integrate into society.
- (3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—
  - (a) are not a burden on taxpayers, and
  - (b) are better able to integrate into society.
- (4) Little weight should be given to—
  - (a) a private life, or

(b) a relationship formed with a qualifying partner,

that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

**(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.**

[emphasis added]

15. As a matter of construction, the interpretation of the rule now advanced by the Secretary of State in this appeal would seem to run counter to the statutory scheme and the stated purpose as set out above. If 'reasonable' were to be read as 'proportionate' section 117B would introduce some rather circular reasoning. If the meaning of 'reasonable' is as the Secretary of State contends, then it is difficult to see how and where the specified countervailing factors are weighed against the child applicant. It does not, for obvious reasons, appear to be the Secretary of State's case that the public interest is to be factored in twice.
16. I am satisfied, having regard to the plain wording of the rule and the statute, that 'reasonable' does not import a *Razgar* proportionality balancing exercise into the rule. What then, does it mean?
17. The genesis of this provision was the concession known as DP5/96. That policy, and those which followed, created a general, but rebuttable, presumption that enforcement action would "not normally" proceed in cases where a child was born here and had lived continuously to the age of 7 or over, or where, having come to the United Kingdom at an early age, 7 years or more of continuous residence had been accumulated<sup>3</sup>. As the policy statement<sup>4</sup> which accompanied the introduction of paragraph 276ADE (1)(iv) puts it: "a period of 7 continuous years spent in the UK as a child will generally establish a sufficient level of integration for family and private life to exist such that removal *would normally not* be in the best interests of the child" [my emphasis]. The current guidance reaffirms that this is the starting point for consideration of the rule. The Immigration Directorate Instruction 'Family Migration: Appendix FM Section 1.0b

<sup>3</sup> For a detailed history of the rule and its development see Dyson LH in *Munir v SSHD* [2012] UKSC 32 paras 9-13

<sup>4</sup> The Grounds of Compatibility with Article 8 of the ECHR: Statement by the Home Office (13 June 2012) at 27.

*Family Life (as a Partner or Parent) and Private Life: 10-Year Routes'* ("the IDI") gives the following guidance:

11.2.4. Would it be unreasonable to expect a non-British Citizen child to leave the UK?

The requirement that a non-British Citizen child has lived in the UK for a continuous period of at least the 7 years immediately preceding the date of application, recognises that over time children start to put down roots and integrate into life in the UK, to the extent that being required to leave the UK may be unreasonable. The longer the child has resided in the UK, the more the balance will begin to swing in terms of it being unreasonable to expect the child to leave the UK, and *strong reasons will be required in order to refuse a case with continuous UK residence of more than 7 years.*

The decision maker must consider whether, in the specific circumstances of the case, it would be reasonable to expect the child to live in another country.

The decision maker must consider the facts relating to each child in the UK in the family individually, and also consider all the facts relating to the family as a whole. The decision maker should also engage with any specific issues explicitly raised by the family, by each child or on behalf of each child.

18. I have had regard to the Hansard record of the debate in the House of Lords on the introduction of section 117B (6) NIAA 2002 (as amended by the Immigration Act 2014) in which Home Office Minister Lord Wallace of Tankerness explained the government's thinking on the significance of the seven year mark:

"we have acknowledged that if a child has reached the age of seven, he or she will have moved beyond simply having his or her needs met by the parents. The child will be part of the education system and may be developing social networks and connections beyond the parents and home. However, a child who has not spent seven years in the United Kingdom either will be relatively young and able to adapt, or if they are older, will be likely to have spent their earlier years in their country of origin or another country. When considering the best interests of the child, the fact of citizenship is important but so is the fact that the child has spent a large part of his or her childhood in the United Kingdom"<sup>5</sup>.

19. All of this guidance recognises that after a period of seven years residence a child will have forged strong links with the UK to the extent that he or she will have an established private life outside of the immediate embrace of his parents and siblings. It is that private life which is the starting point of consideration under this Rule. The relationships and understanding of life that a child develops as he grows older are matters which in themselves attract weight. The fact

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<sup>5</sup> At column 1383, Hansard 5<sup>th</sup> March 2014



that the child might be able to adapt to life elsewhere is a relevant factor but it cannot be determinative, since exclusive focus on that question would obscure the fact that for such a child, his “private life” in the UK is everything he knows. That is the starting point, and the task of the Tribunal is to then look to other factors to decide whether, on the particular facts of this case, these displace or outweigh the presumption that interference with that private life will normally be contrary to the child’s best interests. Those factors are wide-ranging and varied. The IDI gives several examples including, for instance, the child’s health, whether his parents have leave, the extent of family connections to the country of proposed return. The assessment of what is “reasonable” will call for the Tribunal to weigh all of these matters into the balance and to see whether they constitute “strong reasons” - the language of the current IDI - to proceed with removal notwithstanding the established Article 8 rights of the child in the UK.

20. It follows that the guidance in EV (Philippines) is not directly relevant to the question of what is “reasonable”. That case concerns Article 8 entirely outside of the Rules, the children in question falling far short of seven years residence. “Reasonable” in the context of 276ADE is not to be equated with *Razgar* proportionality. Although both involve consideration of the same set of facts, the starting point is quite different. An appeal can only be allowed with reference to Article 8 ‘outside of the Rules’ where there are some particular compelling circumstances not adequately reflected in those Rules: see EV. By contrast it is the Respondent’s stated policy that “strong reasons” will be required to *refuse* leave to a child who has accrued seven years continuous residence.

### **My Findings**

21. It follows from the foregoing that I do not find any merit in the submission that the First-tier Tribunal erred in failing to conduct a *Razgar* style proportionality assessment within the context of 276ADE(iv). Nor do I accept that the Tribunal should have treated as determinative the fact that the adult appellants before it had no leave. Judge Ransley’s starting point was the fact that Alex had lived in the UK at that point all of his eight and half years. He had never in fact been to his “home” country of Guyana, and apart from his nationality, had no discernible links with it. It was expressly accepted that none of his extended family remain there, and that his grandparents, aunts and uncles are here. It is something of a stretch for Mr Hammond to submit that the determination contains positive findings of fact that this family experienced racial discrimination in Guyana, but it is correct to say that it was evidence recorded that was not rejected: see paragraph 12 of the determination. The matter of

ethnicity was also relevant, to paraphrase the IDI, as to whether Alex would be familiar with the culture there – there was no evidence to suggest that the UK hosts any significant diaspora of Chinese origin Guyanese nationals. Overall the findings of Judge Ransley were open to her on the evidence. There were no particular features of the evidence to suggest that it would be reasonable to expect this child to leave the UK. The fact that his parents and brother would be going with him to the new and strange environment in Guyana was not in itself sufficient to rebut the presumption created by his long residence and established private life.

22. As for the remaining appellants before the First-tier Tribunal it is difficult to see how the Secretary of State can contend that the decision should have been otherwise, since section 117B(6) expressly provides that in an Article 8 appeal – as theirs was – the public interest does not require the removal of parents who have a genuine and subsisting parental relationship with a qualifying child and it would not be reasonable for that child to be removed. The appeals of the adult appellants therefore fell to be allowed with reference to that statutory provision. I presume that it is not contended that it would be an error of law to allow Jason’s appeal in those circumstances.

### **Decisions**

23. The determination of the First-tier Tribunal does not contain an error of law and it is upheld.

Deputy Upper Tribunal Judge Bruce  
30<sup>th</sup> January

2015