



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/19054/2013
IA/51951/2013
IA/51945/2013
IA/51948/2013
IA/18814/2013

THE IMMIGRATION ACTS

Heard at: Manchester
On: 26th February 2015

Decision Promulgated
On: 18th March 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE BRUCE

Between

Secretary of State for the Home Department

Appellant

and

Dr Nagat Elmsallati
Dr Abdulbasit Salem Khushkhush
Master Abdullah Khashkhush
Master Abdulrahman Khashkhush
Mr Mohamed Khashkhush
(no anonymity direction made)

Respondents

Representation

For the Appellant:

For the Respondents:

Ms Johnstone, Senior Home Office Presenting Officer

Ms Aspinall, Counsel instructed by Craig Gee Solicitors

DECISION AND REASONS

1. The Respondents are all members of the same Libyan family. They are respectively a mother, father, and their three sons aged and 15, 17 and 20. When their linked appeals came before the First-tier Tribunal there had been another appellant, Mrs Alzahara Hamza Al Sokni; Mrs Al Sokni was the mother of Dr Elmsallati and at the date of the hearing before the First-tier Tribunal she was aged 93 and in ill-health. Since the determination was promulgated Mrs Al Sokni has died and her name has therefore been removed from these proceedings. For the avoidance of confusion I shall refer to the parties by their names. The linked appeals were allowed by the First-tier Tribunal (Judge Narayan) in a determination dated the 28th January 2014. On the 28th February 2014 First-tier Tribunal Judge Grimmett granted the Secretary of State permission to appeal to the Upper Tribunal.

Background

2. Dr Elmsallati first arrived on the 10th October 1994 with valid leave to enter as the dependent family member of a Tier 4 (General) Student Migrant, her husband Dr Khashkhush already being here. She extended her stay on various occasions and during her initial period of study their first two sons were born here. The family returned to Libya. Dr Elmsallati re-entered the UK in June 1999 leaving the children in Libya with their father. Her third son was born one month after her arrival. She and he remained in the UK until April 2001 when they both returned to Libya. He was under two at this point.
3. The family then remained in Libya until the 7th September 2006 when they all entered the UK with valid leave. Dr Elmsallati was once again given leave as a Tier 4 Migrant and her family members leave to enter as her dependents. The status of each was renewed so that when on the 13th April 2013 they applied to extend it once again, they all had extant leave. Dr Elmsallati made an application under the 'Doctoral Extension Scheme' and the remaining family members were once again treated as her dependents.
4. The applications were all refused on the 20th May 2013. Dr Elmsallati had relied on her previous CAS and as such it was not valid for this application. She was refused with reference to Appendix A of the Rules, and by extension, Appendix C. Her husband, mother and children were refused further leave because she had been.
5. On appeal to the First-tier Tribunal the family conceded that the CAS was not valid and that they did not therefore qualify for further leave to remain under the Points Based System. They did however submit that the decisions to refuse further leave and to remove them from the UK would be a disproportionate interference with their private lives in the UK. Reliance was placed on "the concessionary 7 year child policy" announced by the Under-Secretary for the Home Department,

Mr O'Brien, on the 24th February 1997, paragraph 276ADE of the Immigration Rules and s55 of the Borders Citizenship and Immigration Act 2009.

The Determination of the First-tier Tribunal

6. The determination begins by summarising the unchallenged evidence of each family member.
7. In respect of the appeal of Mohamad Khashkhush the First-tier Tribunal found that as he was now an adult he had made a separate application to the Respondent and had his own appeal. That appeal was allowed with reference to paragraph 276ADE of the Rules. Paragraph 39 indicates that the Tribunal also allows the appeal in the alternative with reference to Article 8 ECHR. The reasoning, set out at paragraphs 40-41, is that this is a young man who has spent a substantial period of his life lawfully in the UK, and has pursued his education with success. It may be that other reasons were considered, since reference is made to Counsel's skeleton argument. If there were, these are not elaborated in the body of the determination.
8. Turning to the appeals of Abdullah and Abdulrahman the Tribunal notes that the HOPO on the day, a Mr Malcom, had submitted "that they would qualify under the rules as applicants" under paragraph 276ADE. The appeals appear to have been allowed on that basis. As to the parents, their appeals are allowed "under Appendix FM" because they have a genuine and substantial relationship with their children, who have been in the UK longer than seven years and it would not be reasonable to remove them now. In the alternative these appeals are also allowed with reference to Article 8 ECHR. The reasoning is set out at paragraphs 44-48, and contains the following remarks:

"I find that all the Appellants have been in the United Kingdom with leave, forging and forming a useful and private life. I find the children have always been in education and have made substantial progress during their school lives. I find that the Appellant and her husband...have spent a large amount of time doing voluntary work and that their children....are all at important stages of their education. I would also have found that the Appellant has been in the United Kingdom for some eight years of legal residence and that the clock has not stopped in her case in respect of a ten year residence application. I would therefore have allowed the appeal of this Appellant and her spouse...under Article 8."

The Grounds of Appeal

9. The Secretary of State contends that the First-tier Tribunal made the following errors of law:

- i) None of the appeals could be allowed under paragraph 276ADE because none of the appellants before the First-tier Tribunal had made applications under that rule;
- ii) The determination does not give “adequate reasons” for allowing any of the appeals under Article 8. Even if it was in the children’s best interests to remain in the UK the Tribunal failed to consider that they had come here as Tier 4 dependents and so could have no reasonable expectation of being permitted to remain;
- iii) The Judge erred in equating “best interests” with “disproportionate”. This was an error. Children whose parents are here on a temporary basis can be expected to leave with their parents;
- iv) There was a failure to identify the “exceptional circumstances” which would render the removal of this family disproportionate.

The Reply

10. In a detailed reply dated 29th October 2014 Ms Aspinall points out that the best interests of the children was a primary consideration for the Tribunal, and it was a matter that the Tribunal was entitled to attach considerable weight to. It is submitted that the two minor appellants did qualify for leave to remain under paragraph 276ADE(1)(iv) and that their elder brother qualifies for under 276ADE(1)(v), apparently on the basis that he was “born in the UK and has lived here since birth”. In response to the point that the appellants could not succeed under the Rules because they had not made applications, Chikwamba is prayed in aid.

Error of Law

11. It was an error of law to allow any of these appeals outright under paragraph 276ADE of the Rules since none of the First-tier appellants had made applications under this rule, the second requirement of which is:
 - (ii) *has made a valid application for leave to remain on the grounds of private life in the UK;*
12. The remainder of the grounds relate to Article 8. The Secretary of State complains that there was a failure to identify “exceptional circumstances”. There is no test of exceptionality and the grounds are unhelpful insofar as they suggest that there is. What the Tribunal was required to do was to consider whether the Secretary of State had shown that the removal of this family – or each individual component of it – was justified as a necessary interference with their long-established private lives in the United Kingdom. This would involve balancing the public interest in removing migrants with no lawful leave to remain against the rights of the

migrants themselves. It is difficult to know from this determination whether that has been done in this case.

13. It would appear that the Tribunal had understood the HOPO to be conceding that the children met the requirements of paragraph 267ADE. If that was so it is axiomatic that the decision could not be shown to be proportionate, since there would be nothing weighing on the Secretary of State's side of the scales. The difficulty with that is that it would appear from paragraph 32 that the Tribunal may have misunderstood the HOPO's submissions – that is certainly the position adopted by Ms Johnstone – because Mr Malcolm did not concede that the children met all of the relevant requirements. He accepted that “there was nothing to say” that they would not qualify if they made applications, but that was a matter to be determined once the applications had been received. That is quite different from an outright concession that the Rules were met. There is a further difficulty in that the finding that it would not be “reasonable” for the children to leave – central to the consideration of 276ADE (1)(iv) – was not reasoned in any way.
14. The challenge in respect of s55 is less easy to understand. I can find nowhere in the determination which indicates that the “best interests” finding led inexorably to a finding that the removals were disproportionate. The determination makes reference to a number of factors, not all of which are connected to the children. I am nevertheless satisfied that the Article 8 findings overall cannot be safely extricated from the flawed findings in respect of the Rules and for that reason I set the decision aside to be remade.

The Re-Made Decision

15. These applications giving rise to these appeals were made on the 18th April 2013. Dr Elmsallati applied for further leave to remain as a Tier 4 (General) Student Migrant and her family applied as her dependents. They did not, at the time these applications were made, advance human rights grounds for the Secretary of State's consideration. Article 8 was raised only on appeal. Before me Ms Johnstone agreed that I was entitled to make findings on Article 8 without the matter being ‘remitted’ to the Secretary of State. However if the appeal is to be allowed it will only be on human rights grounds (ie any finding that an individual meets the requirements of the rules will only be relevant to the question of whether removal is proportionate).
16. The matter of whether the decision maker was correct to refuse leave under the Rules has already been dealt with: the Secretary of State was correct to refuse to grant further leave to remain as Tier 4 Migrants. This appeal is brought on human rights grounds alone.
17. I can move swiftly through the first four *Razgar* questions. It is accepted in light of the family's lengthy residence in the UK that each individual has an established

private life and that they share a family life with each other. I note that although Mohamed has now reached majority he is still living at home and that in these circumstances there is no “bright line” at the age of 18 which severs his familial relationship with his parents and siblings. It is accepted that the decision to remove the family would constitute an interference with their private lives in the UK of sufficient consequence that the Article is engaged. The decision to remove persons with no lawful leave to remain is rationally connected to the legitimate aim of protecting the economy and the decision is one that the Secretary of State is in law entitled to take.

18. I begin my assessment of proportionality with assessing the position of the children: s55 of the Borders, Citizenship and Immigration Act 2009. The case advanced by Ms Aspinall is that both Abdulrahman and Abdullah currently qualify for leave to remain under paragraph 276ADE. The only substantive matter in issue under that provision is (1)(iv). Each must show that he:

(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

19. What does “reasonable” mean?

20. 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 accumulated¹. As the policy statement² 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 *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

¹ For a detailed history of the rule and its development see Dyson LH in *Munir v SSHD* [2012] UKSC 32 paras 9-13

² The Grounds of Compatibility with Article 8 of the ECHR: Statement by the Home Office (13 June 2012) at 27.

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.

21. 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"³.

22. 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 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. "Reasonable" in the context of 276ADE is then not to be equated with *Razgar* proportionality. Although both

³ At column 1383, Hansard 5th March 2014

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 Singh and Khaled [2015] EWCA Civ 74. 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.

23. Against that legal framework I consider the facts that relate to these children.
24. The early chronology was not easy to decipher, since the dates provided in the witness statements were at variance from those given in Counsel's skeleton argument. I make these findings on the basis of the evidence before me. Abdulrahman was born in the UK on the 5th May 1997. He was taken to Libya in February 1998 and shortly thereafter came back with his mother whilst she completed her MSc. On the 8th July 1999 his brother Abdullah was born in the UK. They remained here until the 15th April 2001 when the whole family returned to Libya. I have attached minimal significance to this very early period in the boys' lives. They were infants, effectively living between the UK and Libya, and as very young children their world consisted primarily of each other, and their parents.
25. Both boys came back to the UK on the 21st October 2006. At that point Abdulrahman was 9 and Abdullah was 7. They have lived here continuously since then. At the date of this determination Abdulrahman is 17 and Abdullah is 15. As I note above the Secretary of State accepts, by way of her policy statements and those made on her behalf by ministers, that over a period of 8 and half years that those children will have put down roots to the point that it would normally be contrary to their best interests to remove them now. I have been provided with an enormous bundle of evidence attesting to the strength of the boys' private lives in the UK. This includes not only the usual confirmation of their attendance at school but truly glowing references from teachers and evidence of the children's outstanding educational achievement. Abdulrahman achieved excellent exam results at GCSE including an A* in Maths and Science. He is currently taking his 'A' levels in Chemistry, Maths, Biology and Physics. Abdullah's school reports consistently describe him as a hard-working, well-behaved student who has achieved "brilliant results". He is currently working at "above target" in his GCSEs. Both boys have produced evidence of volunteer work and Abdulrahman has undertaken work experience at Salford Royal Infirmary. They have produced numerous photographs of them playing sports and enjoying time with their many friends. I accept and find as fact that they have a long established private life in the UK.
26. Asked to identify the "strong reasons" why that private life should, after eight and a half years, be interfered with, Ms Johnstone submitted that they could continue their educations in Libya or alternatively apply to come back as students themselves. They can speak Arabic and they will have a familiarity with the

culture in Libya. Thankfully neither has any health concerns. The evidence would indicate that they still have connections and/or family in Libya, since they are living on remittances sent to the UK from Libya. Importantly they would be returned with their parents who could assist them in re-integrating. I have considered all of those factors. None in my view render it "reasonable" that these boys be removed now, even when weighed cumulatively. It also rather overlooks the fact that the security situation in Libya is deteriorating daily, that the airport is being intermittently shut due to shelling (there have been no forced removals for some time as a result). Armed militias, not answerable to any central government, are vying for control of territory and control checkpoints throughout the country. This situation may today fall short of a full-blown civil war but I do not find it reasonable to send two teenage boys back to a country teetering on the brink of one.

27. Having considered all of those factors I conclude that the boys presently meet all of the requirements of 276ADE bar sub-paragraph (ii) which requires that they have made valid applications. It is never in a child's best interests to delay resolution of his status and in view of Ms Johnstone's concession that I am seized of Article 8 I find that it would be entirely disproportionate to refuse to grant further leave to remain to Abdulrahman and Abdullah. There is nothing weighing on the Respondent's side of the scales since they meet the requirements of the Rules.
28. I now assess the position of their parents. Section 117B of the Nationality, Immigration and Asylum Act 2002 (as amended by the Immigration Act 2014) sets out the public interest considerations that I must have regard to in determining proportionality:
 - (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.

29. I have had regard to the fact that the maintenance of effective immigration controls is in the public interest. This is a family who have never, for as much as a day, been in the country unlawfully. They have always had lawful leave.
30. I have had regard to the fact that 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 are less of a burden on taxpayers, and are better able to integrate into society. That parliament was quite right to so legislate is amply illustrated by this family, all of whom speak English and all of whom have taken an active part in the academic and social life of the UK. Dr Elmsallati and Dr Khashkhush have both spent considerable time volunteering in various groups whilst completing their PhDs and are active members of their local communities.
31. There is no evidence at all that the family have ever claimed benefits, or that they have otherwise been a drain on the resources of public funds. Both Dr Elmsallati and Dr Khashkhush have paid private fees in their long years of study in the UK, and thus contributed to the funding of, *inter alia*, the University of Salford and the University of Essex. They are currently sustained by money sent to them from Libya.
32. Sub-clause (4) does not apply since the family have always had leave. Sub-clause (5) does, since "precarious" means anything short of settled status. That is the only part of the provision that diminishes the weight to be attached to the family's side of the scales. I note however that the terms of sub-clause (6) are such that this should not, in the case of Dr Elmsallati and Dr Khashkhush, be weighed against them at all. That is because they have a genuine and subsisting parental relationship with their sons, who are both qualifying children: I have found that it would not be reasonable to expect them to leave the UK. The terms of the statute are clear: in those circumstances the public interest does not require their removal. It would therefore be disproportionate to remove Dr Elmsallati and Dr Khashkhush.

33. That leaves Mohamed. In her submissions Ms Johnstone realistically conceded that in view of the fact that he is still part of the family unit, she had no separate submissions to make in respect of his position.
34. I begin by considering the Rules. Given my finding that the family still have some "ties" to Libya the only provision which could conceivably be applicable to Mohamed today is 276ADE(1)(v):
- (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
35. Mohamed was born in Bedford on the 18th January 1995. At the date of this determination he is aged 20 years and 2 months old. In order to succeed under this provision he would need to show that he has lived continuously in the UK for a period of 10 years and 1 month. Contrary to the statement made in the Rule 24 response, he has not lived here since birth. He last entered the UK on the 26th October 2006. He has not therefore yet passed the half way mark for the purpose of continuous residence. By my calculation he will not reach that point until the 5th August 2018⁴. He does not therefore meet the requirements of the Rules.
36. I am satisfied that there is good reason to go to look at Article 8 outside of the Rules. Mohamed spent the first three years of his life in the UK then returned here in 2006 when he was 10. He is now 19. I accept that during that time he has developed a substantial private life and that his removal would result in an interference with it such that Article 8 is engaged. As with the other members of his family there is no dispute that this is a decision that the Secretary of State is in law entitled to take.
37. The question is whether it is proportionate. As with his parents, I must consider in Mohamed's case the public interest factors set out in s117B. He too has always had lawful leave to remain in all of the 12 years that he has spent in the UK. He speaks fluent English and is financially self-sufficient. I bear in mind that he has never had settled status, and as such can never have had any expectation that he would be permitted to remain indefinitely in this country: the precarious nature of his status means that I must attach little weight to his private life.
38. In addition to the considerations set out in the statute I take the following matters into account when considering proportionality.
39. Much like his brothers, Mohamed is a credit to his parents. He has obviously worked very hard and achieved excellent grades at school, including an A* in Maths, Additional Science and perhaps unsurprisingly, Arabic. He is currently a

⁴ <http://www.timeanddate.com> : I have calculated that he was 11 years, 9 months and 8 days old when he arrived in October 2006. The 5th August 2018 will be 11 days, 9 months and 9 days from that date.

student at the University of Salford. I was provided with numerous documents relating to his private life in the UK, including many photographs of him with his close friends.

40. Although I am mandated to attach little weight to his private life, the statute is silent about his family life with his brothers and parents. They have succeeded in their appeals and I accept have no intention to return to Libya in the present climate. Removal today for Mohamed would mean a very significant interference with his family life. He remains part of the family unit and is still dependent upon his parents. Although he is reaching an age where young British men might move away from their family I appreciate that in Libyan culture that would not be so for a number of years, if at all.
41. Mohamed would be returning alone to a very unstable country to which he has not been since he was 11. The latest operational guidance on Libya lists the human rights abuses currently occurring as “extra-judicial killings, abduction, enforced disappearance, arbitrary detention, including in unofficial detention centres, torture, ill- treatment and death in detention”⁵. This is a family who were entirely funded in their studies in the UK by the Gaddafi regime: a letter from the Cultural Attaché confirms that their sponsorship included fees and a monthly allowance to cover all their expenses whilst they were here. There is no claim to international protection before me but I bear in mind that the security situation in Libya is poor and that Mohamed would be extremely concerned for his safety. The current guidance notes that those perceived to have been loyal to Gaddafi “have also experienced forced displacement, indiscriminate shelling, looting and the burning of homes....IDPs perceived to have supported Gaddafi experience harassment, violence, intimidation and discrimination”. I make no finding as to whether there is a real risk of serious harm, but I accept that Mohamed and his parents have a subjective fear which is not by any means fanciful.
42. I have considered all of those factors in the round, reminding myself that the public interest generally requires removal of persons who do not qualify for leave to remain under the Rules. Having done so I am satisfied that on the very particular facts of this case the Secretary of State cannot show the decision to be proportionate. Mohamed is technically an adult but he remains a child of this family, has spent as long here as his brothers, is well integrated and in time, I have no doubt, will be as much an asset to his community in Manchester as his parents are.

Decisions

43. The decision of the First-tier Tribunal contains an error of law and it is set aside.

⁵ OGN updated February 2015

44. The decision in the appeal is re-made as follows:

“The appeals are dismissed under the Immigration Rules.

The appeals are allowed on human rights grounds.”

45. I make no direction for anonymity because neither party has requested one and on the facts I do not consider such an order to be necessary.

Deputy Upper Tribunal Judge Bruce
17th March 2015