



IAC-FH-AR-V2

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

Appeal Numbers: IA/23427/2014
IA/23389/2014
IA/23390/2014
IA/23391/2014

THE IMMIGRATION ACTS

**Heard at Birmingham
On 14 September 2015
Prepared 14 September**

**Decision & Reasons Promulgated
On 10 December 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE DAVEY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**ENK (FIRST RESPONDENT)
KNM (SECOND RESPONDENT)
GNM (THIRD RESPONDENT)
SNM (FOURTH RESPONDENT)
(ANONYMITY DIRECTION MADE)**

Respondents

Representation:

For the Appellants: Ms R Petterson, Senior Presenting Officer
For the Respondent: Mr B Bedford, Counsel

DECISION AND REASONS

1. In this decision the Appellant is referred to as the Secretary of State and the respondent's as the Claimants.

2. The Claimants, nationals of Kenya, dates of birth respectively 24 September 1975, 30 March 2006, 1 October 2007 and 10 October 1978 appealed against the Secretary of State's decisions dated 27 May 2014 to make removal directions, the form IS151A having been served on 27 May 2014. Asylum and human rights claims having been dismissed.
3. The first Claimant and her husband the fourth Claimant have two children, the second and third Claimants, who are nationals of Kenya and have no rights to remain in the United Kingdom. Their appeals came before First-tier Tribunal Judge P J M Hollingworth (the judge) who on 26 November 2014 allowed their appeals reliant upon Article 8 ECHR and also purported to allow the appeals by an exercise of discretion that the Appellants should have been granted leave to remain outside of the Rules.
4. The Secretary of State had considered such claims outside of the Rules but decided not to exercise any discretion. Accordingly the judge's purported exercise of discretion outside of the Rules was an error of law.
5. The judge's decisions were appealed by the Secretary of State in grounds dated 1 December 2014 and permission to appeal was granted by First-tier Tribunal Judge C Andrew on 16 January 2015. Permission was given on the grounds "... complain that the judge gave insufficient weight to the public interest and had not taken into account the cases of Zoumbas [2013] UKSC 74 and EV (Philippines) [2014] EWCA Civ 874". The judge correctly noted that in the light of Section 117B(1)(b) that the removal of the children KNM and GNM was not required although their time in the UK was very close to identified thresholds because of their age: Thus their removal was not required. However the judge plainly failed to consider: first, the children had no basis to remain, nor indeed did the first and fourth Claimants; Secondly, their financial circumstances had arisen from them working unlawfully and that the best interests of the children in the light of Section 55 BCIA 2014 were important factors rather than determinative of the claims to remain. The fact of the matters partly as the judge recorded was that the first and fourth Claimants had been unlawfully in the United Kingdom for a number of years and not regulated their immigration status. Secondly the judge had made an error on the issue of self-support which error in turn fed into an assessment of Section 117 of the Immigration Act 2014. At the date of the judge's decision the third Claimant was just 7 years of age and had been in the United Kingdom for less than six years.
6. The weight to be given to involvement in school life and the commencement of education was to be understood in the context of the case of Azimi-Moayed [2013] UKUT 197. Evidently the Appellants had some form of private life in the United Kingdom and essentially the question arose as to whether the children's interests outweighed other relevant factors.

7. It was submitted by Mr Bedford that Zoumbas [2013] UKSC 74 did not assist as it was not country guidance and matters of approach arising from Zoumbas and EV (Philippines) [2014] EWCA Civ 874 gave rise to considerations that were not raised with the judge.
8. I was satisfied that the judge's decision did not show a balance had been struck between a number of factors, particularly the best interests of the children as Kenyan nationals, the parents' conduct, past costs and future costs to the taxpayer, foreign nationals taking the benefit of the UK system and the public interest both for the purposes of Article 8(2) but also in the sense of the maintenance of a fair and sustainable immigration system. I cannot see on the judge's analysis how the judge could reach the view that the first and fourth Claimants were financially independent. In the circumstances I find that there was not a proper and adequately reasoned decision to justify the view taken by the judge that Article 8 was engaged and that the Secretary of State's decision was disproportionate.
9. For the avoidance of doubt the financial circumstances of the first and fourth Claimants, ENK and SNM, remained something of a mystery, not least given their status in the United Kingdom.
10. In these circumstances I do not find that there has been a correct assessment of the relevant issues when making the judgment as to whether or not the Secretary of State's decisions are ECHR compliant and in particular whether or not they are proportionate.
11. The original Tribunal decision cannot stand and the matter will have to be remade in the First-tier Tribunal.

ANONYMITY ORDER

An anonymity order is made in respect of the second and third Claimants

DIRECTION REGARDING ANONYMITY - RULE 14 OF THE TRIBUNAL PROCEDURE (UPPER TRIBUNAL) RULES 2008

Unless and until a Tribunal or court directs otherwise, the second and third Claimants are granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the Claimants and to the Secretary of State. Failure to comply with this direction could lead to contempt of court proceedings.

The delay in promulgation has been caused by the case file being miss-located.

Signed

Date 2 December 2015

Deputy Upper Tribunal Judge Davey

DIRECTIONS

- 1) Remake in First-tier Tribunal before any Judge other than Mr PJM Hollingworth .
- 2) No interpreter.
- 3) Time estimate 2 hours.
- 4) Any further documents or statements relied upon to be served not less than 10 working days before the hearing to remake the appeal.

Signed

Date

Deputy Upper Tribunal Judge Davey