



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

**Appeal Number: IA/23994/2014
IA/23998/2014
IA/24002/2014**

THE IMMIGRATION ACTS

Heard at Field House
On 1st October 2015

**Decision Promulgated
On** 6th October 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

Mr ANDRIY DMYTRENKO

First Respondent

Mrs OLHA DMYTRENKO

Second Respondent

Miss BOHDANA SHASHOK DMYTRENKO

Third Respondent

(Anonymity Direction Not Made)

Representation:

For the Appellant: Ms A Brocklesby-Weller, Senior Home Office Presenting Officer

For the Respondent: Ms N Nnamani (counsel), instructed by AH Law Ltd.

DECISION AND REASONS

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. The Secretary of State for the Home Department brings this appeal, but, in order to avoid confusion, the parties are referred to as they were in the First-tier Tribunal. This is an appeal by the Secretary of State against a decision of First-tier Tribunal Judge Swaniker, promulgated on 12 May 2015, which allowed the third Appellant's appeal under the Immigration Rules, and allowed the appeals of the first and second appellants on Article 8 ECHR grounds.

Background

3. The first and second appellant are husband and wife, the third appellant is their daughter. The first appellant was born on 28 October 1979. The second appellant was born on 13 April 1978. The third appellant was born in the UK on 20 February 2008.

4. The first appellant entered the UK on 16 August 2002 as a seasonal worker with an employment visa valid to 30 November 2002. He has remained in the UK since then. The second appellant entered the UK clandestinely on 21 September 2003. The third appellant was born in the UK is only ever lived in the UK.

5. On 5 October 2010 the appellant submitted applications for leave to remain in the UK outside the immigration rules. Those applications were refused without the right of appeal 4 November 2010. The appellants submitted an application for reconsideration of that decision, and, on 14 May 2014, the respondent adhered to the decision dated 4 November 2010, and decided to remove each of the appellants from the UK.

The Judge's Decision

6. The Appellants appealed to the First-tier Tribunal. First-tier Tribunal Judge Swaniker ("the Judge") allow the third appellant's appeal under the immigration rules and allow the first and second appellant appeals on Article 8 ECHR grounds.

7. Grounds of appeal were lodged, and on 9 July 2015 Judge Lever gave permission to appeal stating inter alia

"The grounds assert that the judge erred on the application of the relevant part of para. 276 ADE, and did not adequately conduct the test of reasonableness of return home.

"It is arguable that at [15] the judge erroneously found the third appellant child to be a qualifying child by reference to qualification at the date of hearing and that decision then infected the decision in respect of the adult appellants."

The hearing

8. (a) Ms Brocklesby-Weller, for the respondent, told me that there are two challenges to the decision and that she would rely on the cases of EV Philippines, and Zoumbas. She argued that the first challenge was to the judge's decision to allow the appeal of the third appellant under paragraph 276 ADE (iv), because at the date of application the third appellant had not yet reached her seventh birthday. Even though the third appellant's seventh birthday passed at the date of hearing, the length of residence had to be calculated by reference to the date of application only.

(b) Ms A Brocklesby-Weller told me that the judge's assessment of proportionality (when considering Article 8 out-with the rules) was flawed because its foundation rested on the incorrect finding that the third appellant satisfied the requirements of the immigration rules. Ms A Brocklesby-Weller was critical of the balancing exercise carried out by the judge because it focused almost entirely on the interests of the third appellant (a young child) and ignored the immigration history the first and second appellants. She told me that an inadequate balancing exercise had been carried out by the judge so that the decision was tainted by material errors of law.

9. Ms N Nnamani for the appellants adopted the terms of the rule 24 note and urged me to dismiss the appeal and to allow the decisions to stand. Ms Nnamani argued that the decision was a careful, well-reasoned decision setting out careful consideration of all material factors before reaching findings and conclusions which were well within the range of conclusions available to the judge. Ms Nnamani conceded that the judges application of paragraph 276 ADE (1)(iv) is incorrect, but argued that that is just a mistake and is not a material error of law. She told me that a full and fair reading of the judge's decision demonstrates that all material considerations have been taken fully into account, that there is no material error of law and that the decision should stand.

Legal Framework

10. In AM (S 117B) Malawi [2015] UKUT 260 (IAC) the Tribunal held that when the question posed by s117B(6) is the same question posed in relation to children by paragraph 276ADE(1)(iv), it must be posed and answered in the proper context of whether it was reasonable to expect the child to follow its parents to their country of origin; EV (Philippines). It is not however a question that needs to be posed and answered in relation to each child more than once.

11. The error that the judge made is that his starting point was considering the third appellant's appeal in isolation. The judge is correct that the third appellant is a qualifying child for the purposes of Section 117B(6) of the 2002 Act, but the consideration of whether or not it is reasonable for the third appellant to leave the UK did not take account of the facts and circumstances of all family members. The judge did not adequately consider the immigration history of each of the appellants nor did he consider the position of the first and

second appellants before coming to the conclusion that the second appellant faced the prospect of return alone.

12. At paragraph 13 of the rule 24 response, and in Ms Nnamani's oral submissions, it is conceded that the judges interpretation of 276 ADE (1)(iv) is incorrect, and that the third appellant does not fulfil the requirements of that subsection of the paragraph. Although it is argued for the appellants that that error is not material. I find that it is, in fact, a material error of law. The fulcrum of the decision can be found at [16], in the middle of which the judge says "*I accordingly conclude that the third appellant meets the requirements of paragraph 276 ADE(iv)*". That is the basis on which the third appellant's appeal was allowed under the immigration rules. It is common ground that the appellant has not meet the requirements of paragraph 276 ADE(1)(iv). The crucial part of the decision in the third appellant's case is fundamentally flawed. When that one quoted sentence is taken out of the decision, the third appellant cannot succeed under the immigration rules.

13. It is only once the judge decided that the outcome of the appeal for the third appellant that she moved on to consider the first and second appellants. The flawed decision in relation to the third appellant was determinative of the appeals of the first and second appellants. The judge effectively made the first and second appellants dependent upon the appeal of the third appellant, which is an incorrect approach.

14. Although it is clear from the decision that the judge considered Section 117B(6) of the 2002 Act, it is not clear that she considered the other balancing factors set out in Section 117B of the 2002 Act. It therefore appears that an inadequate balancing exercise has been undertaken. I therefore find that the decision contains material errors in law and requires to be remade.

My Findings of Fact

15. The first and second appellant are spouses. The third appellant is their daughter. The first appellant entered the UK as a seasonal worker on 16 August 2002. His visa expired on 30 November 2002. He has remained in the UK since then. Before coming to the UK the first appellant married the second appellant. The second appellant entered the UK clandestinely on 21 September 2003.

16. On 5 October 2010 the appellants submitted applications for leave to remain in the UK outside the immigration rules. Those applications were refused without the right of appeal 4 November 2010. The appellants submitted an application for reconsideration of those decisions, and on 14 May 2014 the respondent adhered to the decisions dated 4 November 2010, and decided to remove each of the appellants from the UK.

17. Between 2002 and 2007 the first appellant was employed as a carpenter. He was made redundant in 2007 and started to trade on his own account. He continues to trade as a carpenter. In or about 2007 the first and second appellants invested all of their savings and some borrowed funds in an energy company. That investment was unsuccessful and has left them both with debts

which they continue to repay. The first appellant maintains a bank account with Halifax Bank of Scotland. There is normally a credit balance in that account.

18. The second appellant's brother is a naturalised British citizen. He lives in the UK with his wife and child. There is regular contact between each of the appellants and the second appellant's brother's family.

19. The third appellant did not speak English until she started nursery school. After starting nursery school she quickly mastered the English language and was speaking it fluently by the time she started primary school. The third appellant attended a local primary school where she is doing well. She is a promising pupil and has a good circle of friends.

20. The appellants live in a two bedroomed flat which they rent. Neither the first nor the second appellants have claimed DWP benefits whilst in the UK. All of the appellants bilingual and speak fluent English.

The Immigration Rules

21. The first & second appellants cannot succeed under Appendix FM of the Immigration Rules because they do not meet the requirements of E-LTRPT 1.2 to 1.12 & 2.1; it is beyond dispute that all three appellants are present in the UK in breach of immigration laws. The respondent correctly goes on to consider whether or not Paragraph EX.1 applies.

22. It is a matter of concession that the first & second appellants have a genuine and subsisting parental relationship with the third appellant, but at the date of application and the date of reconsideration, the third appellant had lived in the UK for less than seven years. The appellants cannot satisfy the requirements of paragraph EX.1 (a) (cc). The appellants cannot satisfy the requirements of appendix FM of the Immigration Rules. I look beyond the immigration rules to consider what interference would be caused to family life by the respondent's decisions.

23. The respondent's decisions would cause upheaval for all three appellants. The effect of the respondent's decision would be that all three appellants would return to Ukraine as one family unit. They will have their own mutual support but, on return to Ukraine, they will enter the country without a home to go to and without a source of income and will have to start from the very beginning.

24. There is, however, no evidence before that any of the appellants would face anything more than a period of upheaval. There is no reliable evidence placed before me to indicate that any of the appellants would face destitution on return to Ukraine. The first & second appellants have already demonstrated that they are sufficiently resourceful to travel from Ukraine to the UK and to establish themselves in the UK. There is no evidence placed before me to indicate that the first & second appellants' resourcefulness has diminished with the passage of time.

25. The third appellant is a child. I am mindful of Section 55 of the Borders, Citizenship and Immigration Act 2009, and the case of [ZH \(Tanzania\) v SSHD \[2011\] UKSC 4](#).

26. I remind myself of the cases of [Azimi-Moayed and others \(decisions affecting children; onward appeals\) \[2013\] UKUT 00197](#). It is the intention of the SoS to ensure that the Appellants remain together. It has long been established that it is in the interests of children to remain with their parents. The Respondent's decision maintains the unity of this family and does not separate the third appellant from her parents. The interests of the child are served because the integrity of the family unit is not challenged.

27. There is insufficient evidence to enable me to make a finding in fact that it would be unreasonable for the third appellant to return to the Ukraine. That therefore reinforces my conclusion that the appellants cannot succeed under Appendix FM.

Paragraph 276ADE

28. Because of the ages of each of the appellants and the length of time they have been in the UK, none of the appellants can fulfil the requirements of Paragraph 276ADE(1)(iii) to (v) of the Immigration Rules. In order to succeed under Paragraph 276ADE(1)(vi), the appellants would have to demonstrate that they have no ties (including social, cultural or family) with Ukraine.

29. The first appellant has been in the UK for 13 years. The second appellant has been in the UK for 12 years. No reliable evidence to indicate either that that cultural ties to Ukraine have been broken or that there are insurmountable obstacles to return to Ukraine is placed before me. I can only therefore come to the conclusion that the appellants cannot fulfil the requirements of Paragraph 276ADE(1)(vi). The appellants cannot succeed under the Immigration Rules.

Article 8 ECHR

30. In [Zoumbas v SSHD 2013 UKSC 74](#) it was held that there was no *"substance in the criticism that the assessment of the children's best interests was flawed because it assumed that their parents would be removed to the Republic of Congo. ... It was legitimate for the decision-maker to ask herself first whether it would have been proportionate to remove the parents if they had no children and then, in considering the best interests of the children in the proportionality exercise, ask whether their well-being altered that provisional balance. When one has regard to the age of the children, the nature and extent of their integration into United Kingdom society, the close family unit in which they lived and their Congolese citizenship, the matters on which Mr Lindsay relied did not create such a strong case for the children that their interest in remaining in the United Kingdom could have outweighed the considerations on which the decision-maker relied in striking the balance in the proportionality exercise (paras 17 and 18 above). The assessment of the children's best interests must be read in the context of the decision letter as a whole."* 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".

31. In the case of EV (Philippines) and Others v SSHD [2014] EWCA Civ 874 Lord Justice Lewison, stated that the best interests of the children must be made on the basis that the facts are as they are in the real world and if neither parent has the right to remain, then that is the background against which the assessment is conducted. Thus Lord Justice Lewison thought that the ultimate question was whether it was reasonable to expect the child to follow the parent who had no right to remain to the country of origin.`

32. The respondent's decisions will not separate this family. It is the respondent's intention to ensure that this family remain together. There cannot therefore be any interference with family life as a result of the respondent's decisions.

33. Section 117 is a factor to be taken into account in determining proportionality. I appreciate that as the public interest provisions are now contained in primary legislation they override existing case law, Section 117A(2) requires me to have regard to the considerations listed in Sections 117B and 117C. I am conscious of my statutory duty to take these factors into account when coming to my conclusions. I am also aware that Section 117A(3) imposes upon me the duty of carrying out a balancing exercise. In so doing I remind myself of the guidance contained within **Razgar**.

34. Section 117B(1) provides that the maintenance of effective immigration control is in the public interest. I consider Section 117B(6) because the third appellant is now a qualifying child, but I have already found that it would not be unreasonable to expect each of the appellants to leave the UK. I therefore have to find that the third appellant does not benefit from the operation of Section 117B(6).

35. The appellants all speak English and so the public interests set out in Section 117B(2) are met. The first and second appellants are financially independent, but the evidence demonstrates that the third appellant has access to health care and free schooling, services to which she is not entitled,

and so she cannot be said to be financially independent. At best, section 117B(3) is neutral in effect.

36. The appellants are all in the UK unlawfully. Section 117B(4) operates against them. Section 117B(5) operates against the appellants for the same reason.

37. There are therefore more factors in Section 117B weighing against each of the appellants than in their favour.

38. The effect of the respondent's decision would be that the private life that the appellants have established in the UK would come to an end. They would have to move from their home, they would be separated from their friends, the third appellant would be removed from the UK education system and would have to start afresh in Ukraine. However, that private life has been established almost by stealth whilst the appellants have been in the UK illegally. The first & second appellants have already demonstrated that they are resourceful healthy adults. The third appellant is young, intelligent and able. The appellants face a big change in their life but there is nothing before me to indicate that it is a change to which they cannot adapt.

39. I therefore find that the respondent's decision is not a disproportionate breach of any of the appellants' Article 8 ECHR rights.

Conclusion

40. I therefore have to find that the respondent's decision is not a disproportionate breach of any rights that the appellants might have in terms of Article 8 ECHR.

Decision

41. The decision promulgated on 24 November 2014 contains a material error of law. I therefore set it aside.

42. I remake the decision.

43. The appeals of all three appellants are dismissed under the Immigration Rules.

44. The appeals of all three appellants are dismissed on Article 8 ECHR grounds.

45. There is no need for an anonymity direction.

Signed

6th October 2015

Deputy Upper Tribunal Judge Doyle