



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

Appeal Numbers: IA/28541/2013
IA/28544/2013
IA/28546/2013
IA/28547/2013
IA/28548/2013

THE IMMIGRATION ACTS

Heard at Field House

On 17 November 2014 & 23 January 2015

**Determination
Promulgated**

On 12 March 2015

Before

**UPPER TRIBUNAL JUDGE ALLEN
DEPUTY UPPER TRIBUNAL JUDGE BRUCE**

Between

**MICHAEL ADESINA ADEKOLA
CECILIA MONTUNKAYO ADEKOLA
MICHAEL ADERAYO ADEKOLA
RACHEL OYINLADE ADEKOLA
EMILY ADEWUNMI OREOLUWA OLUWATUMININU
(ANONYMITY DIRECTIONS NOT MADE)**

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr S Karim, instructed by M A Consultants (London)

For the Respondent: Mr N Bramble, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellants are nationals of Nigeria. They appealed to a Judge of the First-tier Tribunal against the respondent's decision of 21 June 2013 refusing leave to remain in the United Kingdom. The decision of the judge was to dismiss the appeals. However the appellants challenged that decision, and in a determination promulgated on 30 July 2014 Judge Bruce found errors of law in the decision such that the matter required to be reheard.
2. The hearing of this appeal before us took place initially on 17 November 2014 when, as on this occasion, we heard submissions from Mr Karim on behalf of the appellants and Mr Bramble on behalf of the respondent.
3. In light of Mr Bramble's concession at that hearing that the third appellant could succeed under paragraph 276ADE(1)(iv) of the Immigration Rules, on the basis that he was required to show no more than he had lived in the United Kingdom for at least seven years and that was accepted to be the case, we said that we proposed to allow his appeal and as a consequence to allow the other appeals.
4. Subsequently we received an email from Mr Bramble stating that in fact he had drawn our attention to the wrong provision (HC 760) and that HC 820, which had been laid before Parliament on 12 December 2012, introduced an additional requirement of reasonableness into such a case. We invited submissions from Mr Karim as a consequence of which we concluded that the only option open to us was to reconvene the hearing and hear argument on the point as to whether the respondent was bound by the concession which she had made and if she was not, what the consequences of that were.
5. Mr Bramble reminded us that the application had been made on 13 September 2012. Under HC 670 all that was necessary to be shown with respect to the oldest child was that he was under 18 and had lived for seven years continually in the United Kingdom, the application having been made before 13 December 2012. He had accepted that on that basis the eldest child would succeed and under the terms of section 117B(6) of the 2002 Act, as amended, this would benefit the parents.
6. However it was clear from HC 820 that there was an additional requirement to show that it would not be reasonable to expect the applicant in such a case to leave the United Kingdom and it was clear from the preamble to HC 760 that if an application for entry clearance or leave had been made before 13 December 2012 and the application had not been decided before that date, it would be decided in accordance with the Rules in force on 12 December 2012. HC 820 came into force on 13 December 2012, and the decision was not made until 21 June 2013. It was therefore an erroneous concession. There was a question as to whether there had been a decision by the Tribunal at the time where it said it was

going to allow the appeal. Mr Bramble drew our attention to the decisions in NR (Jamaica) [2009] EWCA Civ 856 and Secretary of State v Davoodanah [2004] EWCA Civ 106, which were to the effect that where a concession has been made it could be withdrawn if there was good reason in all the circumstances to do so and the object was to try and obtain a fair and just result. It would be relevant if there were prejudice to one of the parties and matters such as the nature of the concession and the timing might also be relevant.

7. Mr Karim referred to what had been said in his reply to Mr Bramble's representations, relying on what had been said by the Tribunal in Kishver [2011] UKUT 410 (IAC), referring to Rule 45 of the Upper Tribunal Procedure Rules and the ability of the Tribunal to review its decision, and arguing that the relevant date was the date of application. He argued that there would be clear prejudice to the appellants if the concession was allowed to be withdrawn. The Tribunal had made a decision at the earlier hearing and all that would come thereafter in the written document would be the reasons for that decision.
8. Mr Bramble had not been obliged to make the concession. The appellants had been left thinking that they had won. There was a need for stability in respect of their future. The withdrawal of the concession denied that. Mr Karim accepted that the concession had been wrongly made and it seemed that if the decision were taken after 13 December 2012 then there was the reasonableness element.
9. After consideration we stated that we would allow Mr Bramble to withdraw the concession. The first point is the question whether we had actually made a decision and were therefore functus officio at the point when Mr Bramble's withdrawal of the concession was made, on the day after the hearing. We do not think that the indication that we gave at the end of the hearing can properly be regarded as the Tribunal's decision. The Tribunal's decision is the document which is promulgated setting out the reasons for the decision subsequent to a hearing. It is regrettable on all sides, and apologies are due and are made to the appellants, for the fact that nobody appreciated the timing of the impact of HC 820 before Mr Bramble drew it to our attention on the day after the hearing. Clearly if we had realised that there was the additional reasonableness element to be addressed, then the hearing would have had to proceed to consider that point and we would have been likely to reserve our determination.
10. As regards the question of whether a concession can be withdrawn, we have considered the authorities put before us by Mr Bramble in NR and Davoodanah. We note what is said there about the circumstances in which a concession can be allowed. The concessions for example in NR (Jamaica) were first that if the appellant was a lesbian there was a real risk on return to Jamaica and the second concession was that she was a

lesbian. These were concessions of fact, and in each case the circumstances could allow a concession to be withdrawn. So much more must it be the case where the concession is a matter of law. It seems to us quite impossible to prevent a concession on a matter of law from being withdrawn since the consequence of not accepting that would be to proceed on an entirely false legal basis in determining the appeal. There is a prejudice to the appellants in the sense that for a short period of time they believed that they had been successful in their appeal, but the difficulty that arose was identified within 24 hours of the hearing and the fact that the matter was to be reheard was communicated to the parties by way of directions sent out on 5 December 2014.

11. Accordingly, regrettable though it is no doubt it is, in particular from the appellants' point of view, we must assess the claim in the context of HC 820 rather than HC 760, and the issue of whether or not it would be reasonable to expect any child in this appeal who is under 18 and has lived continuously in the United Kingdom for at least seven years to leave the United Kingdom has to form part of our evaluation.
12. On the substantive issue Mr Karim referred us to paragraphs 26 onwards of his skeleton. In LD [2010] UKUT 278 (IAC) it had been said that very weighty reasons were needed to justify separating a parent from a minor child or a child from a community in which he or she had grown up and lived for most of his/her life. More recently, in Azimi-Moayed [2013] UKUT 197 (IAC), among other things it was noted that seven years from the age of 4 was likely to be more significant to a child than the first seven years of life. He argued that the residence of the third and fourth appellants was in excess of the seven years threshold and strong reasons would be needed to justify removing them from the United Kingdom where they have lived either all of their lives or the vast majority of their lives. The eldest child had been in the United Kingdom for nearly ten years and the second child who had been born on 24 March 2006 would qualify for registration next year. It was a question of whether it was reasonable to expect the two children to return. It was also relevant to take account of the amount of time beyond the seven years minimum as a relevant factor. The eldest child was doing particularly well at school and it could be seen from the bundle that he had been assessed as suitable for attending a Kent grammar school.
13. As regards the decision in EV [2014] EWCA Civ 874, relied on by Mr Bramble, that was very different on its facts, being concerned as it was with a family that had only been in the United Kingdom for four years. It was a case concerned with the Razgar guidance rather than reasonableness within the Rules.
14. There needed to be a public interest in removing the children. As regards the relevance of the parents' behaviour, the Rule did not say that it would

be unreasonable for the family to return, just the child. The ordinary meaning of the term “reasonableness” applied. It would be necessary to factor in the best interests of the child as a primary consideration. The Rules focussed solely on the child and not on what the parents had done and that was sensible because parents made decisions for children over which they had no choice. It was a question of whether for this particular appellant it would be reasonable for him to return.

15. However Mr Karim did not argue that it would be necessary to disregard entirely the actions of the parents. It was a balancing exercise. The appellants' individual circumstances weighed heavily. It could be seen from EV that there was a spectrum of best interests. It might be a question of whether it would be reasonable to expect the child to return to Nigeria with the family without having factored into that the actions of the parents.
16. Section 117B(6) of the 2002 Act (as amended) was relevant. Again the emphasis was on the child and that said a lot about the thinking of Parliament. If it would be unreasonable to expect the child to return it would be unreasonable to expect the parents to return. The authorities suggested that there had to be very weighty reasons in respect of children who were settled in the United Kingdom.
17. As regards the parents, they would benefit from section 117B(6). Subparagraphs (1) to (5) all set out factors which were intended to detract weight from the family and private life. This was a special category. Reasons had been given why the children could not return. This is a case where section 117B(6) bit, so the parents could not be removed. The issue of the false document could not be a determinative factor. The significant factors were those referring to the children. If the first four appellants could not be removed then nor could the fifth.
18. In his submissions Mr Bramble relied on his skeleton argument. He argued that it appeared to be common ground that the appellants could not succeed under Appendix FM. The Tribunal was referred to the findings of the First-tier Tribunal Judge. The Tribunal was also referred to the suitability requirements concerning such matters as false information and representations and failures to disclose as being relevant.
19. There were various components of paragraph 276ADE. As regards the eldest child, it was a question of his age at the date of application under the Rules and the application had been made on 13 September 2012 and he had been born on 11 September 2003. He had been in the United Kingdom since March 2005 so he was eligible at the application date. The second child, who had been born on 24 March 2006, had only been in the United Kingdom for six and a half years at the date of application. Only

the eldest child therefore (the third appellant) fell for consideration as having lived in the United Kingdom for seven years at the relevant date.

20. There was then the question of the suitability requirements. On the judge's findings if they were applicable it appeared that the appellant would not get to paragraph 276ADE(i)(iv) as the eldest child's application was impacted on by the parents' application. It was accepted that this was not in the decision but it had come out after the judge's findings.
21. Mr Bramble accepted that the suitability criteria potentially set out the public interest. Appendix FM encompassed the public interest and was part of reasonableness also. Each case had to be determined on its own factors. He accepted that the suitability criteria did not list all the factors that were relevant to the public interest. If the Tribunal agreed with his submissions then the eldest child could not succeed and nor could the others. It was, as set out at page 10 of the skeleton, a two stage process. There was a section 55 aspect, and seven years was a benchmark and thereafter it went in favour of the child. It would be necessary to consider their circumstances and it seemed that the educational attainments of the eldest child were in particular relied on here. It was argued that the decision in EV was relevant. Schooling was not a factor on its own in the child's favour.
22. It was also necessary to consider the countervailing factors, the public interest. It was relevant to consider for example if the parents had a poor immigration history. A child on its own could not just be left in a compartment but it was all part of the balance.
23. EX1 could only be accessed if the other parts of the Rules had been gone through. The public interest factor had therefore been dealt with. With regard to section 117B(6), it was possible for the parent to piggy back on the child. There was a reference to a qualifying child and that brought in the paragraph 276ADE requirements. Under section 117B(6) it seemed it was enough that the child was under 18 and had lived in the United Kingdom for seven years together with the reasonableness criterion. It was argued that that criterion looked not just at the child but at the family unit also, including the circumstances of the parents.
24. With regard to the argument that the issue was that of reasonableness of return with the family rather than the factoring in of parental misbehaviour, section 117(B)(6) did not enable a person to ignore the actions of other parties. The list set out in section 117B was not a complete list so it was not possible just to ignore the action of the parents. Otherwise this was caught up in the reasonableness element.
25. We asked Mr Bramble whether he saw a conflict in the terms of the IDI of November 2014 in which on the one hand it was said that strong reasons

would be required in order to refuse a case with continuous UK residence of a child of more than 7 years; and elsewhere that it was generally the case that it was in a child's best interests to remain with their parent(s) and unless special factors applied it would generally be reasonable to expect a child to leave the United Kingdom with their parents especially if the parent had no right to remain in the United Kingdom.

26. Mr Bramble said it was a problem with the case law and referred to section 55. The family unit was a strong factor. After seven years the balance shifted in favour of the child. He might need to seek clarification on whether there was an inconsistency in the IDI. Strong reasons would be needed to refuse if the child had been in the United Kingdom for more than seven years. The family unit would not always trump the seven years point.
27. By way of reply Mr Karim referred to the decision of the Supreme Court in Mahad [2009] UKSC 16 where it was said that the Rules had to be construed sensibly. The suitability requirement could not apply to the eldest child as there was no onus on him to disclose that his father had been working illegally and the reasonableness factor existed in the case of such a child but was not applied for example to adults seeking to satisfy the 20+ years test and that was because they would have to satisfy the suitability element. It was a matter of common sense. Also the focus had to be on the child. The parents would have had to have done something wrong. Section 117B(6) had been enacted because the child's best interests were to be with their parents and the provision was there to defeat the argument that because the parents were going the child could go. The parent could piggy back on the child. It was unqualified. It protected a child with seven years' residence from the argument that they could be removed because their parents were being removed. It could not be said that it was reasonable to return a child because the parents were being returned. Parliament had said no to that. Reasonableness was a matter of balance. In addition it was relevant to note that the appellant had been disadvantaged because of the timing of the decision on the application which had meant that the reasonableness element came into play whereas it would not have been had the decision been made earlier.
28. We reserved our determination.
29. It is common ground that the appellants cannot succeed under Appendix FM. The matters at issue are paragraph 276ADE of HC 395 and section 117B of the 2002 Act as amended. Also relevant of course is section 55 of the Borders, Citizenship and Immigration Act 2009.
30. Understandably, in his skeleton argument and submissions Mr Karim concentrated on the position of the third and fourth appellants. He accepted that the first and second appellants could not come within

paragraph 276ADE and nor could the fifth appellant as she had not spent at least seven years in the United Kingdom. His contention was that the third and fourth appellants could, and that they satisfied paragraph 276ADE(iv). However, as Mr Bramble argued, although Michael, the eldest child, had spent more than seven years in the United Kingdom at the relevant time, the same cannot be said for Rachel, the next in age. This is because the relevant date is the date of application, and whereas Michael, who was born on 11 September 2003 and has been in the United Kingdom since March 2005 can qualify, given that the date of application was 7 September 2012, the same cannot be said of Rachel who was born on 24 March 2006.

31. Mr Karim argued that the focus had to be placed on section 55 and the best interests of the children, noting such relevant decisions as those of the Tribunal in LD [2010] UKUT 278 (IAC) and Azimi-Moayed [2013] UKUT 197 (IAC). In LD it was said that very weighty reasons were needed to justify separating a parent from a minor child or a child from a community in which he or she had grown up and lived for most of her life, and in Azimi-Moayed it was noted that past and present policy had identified seven years as a relevant period in connection with the inappropriateness of disrupting lengthy residence in a country other than the state of origin in the absence of compelling reasons to the contrary.
32. With regard to EV (Philippines) [2014] EWCA Civ 874, Mr Karim argued that the appellants there did not come within the seven years provision and therefore the situation was factually significantly different. He argued also that the longer a child had been in the United Kingdom beyond the seven year period, the greater the weight to be attached to the period of time.
33. We see force to these points, although we note what was said at paragraph 58 in EV that the question to be answered is whether it is “reasonable to expect the child to follow the parent with no right to remain to the country of origin”.
34. At the heart of this appeal is the question what is meant in paragraph 276ADE(iv) by the words “and it would not be reasonable to expect the applicant to leave the United Kingdom”. This provision is mirrored in the legislation, at section 117B(6) “it would not reasonable to expect to expect the child to leave the United Kingdom”. The same formula is to be found at EX1. This has relevance both to the eldest child in seeking to fulfil the requirements of 276ADE(iv) and also his parents with regard to EX1 and section 117B(6).
35. An initial point we should address is that made by Mr Bramble in submissions that the suitability requirements are applicable to the child appellants. We do not accept this submission essentially for the reasons

given by Mr Karim by way of reply. The matters set out at section S-LTR are not applicable to the third appellant bearing in mind the particular point made by Mr Bramble concerning S-LTR2.2 which says as follows:

“Whether or not to the applicant's knowledge -

- (a) false information, representations or documents have been submitted in relation to the application, (including false information submitted to any person to obtain a document used in support of the application); or
- (b) there has been a failure to disclose material facts in relation to the application.”

36. It is not clear what false information, representations or documents or failure to disclose material facts is or are relied on, but we have identified none which can be said to be at all attributable to the third appellant even bearing in mind that these provisions are relevant whether or not it was to his knowledge. The false information, failure etc. have to have been in relation to the application, and therefore matters such as the false national insurance number employed by the first appellant do not fall within this, and as we say, no relevant matters meeting the criteria set out in S-LTR2.2 have been identified in this case.
37. We also see force in the point made by Mr Karim concerning the absence of a reasonableness requirement in respect of an adult who has satisfied the temporal requirement of twenty years' residence, and who, of course, is subject to the suitability requirements, whereas it seems to us, as Mr Karim argues, less appropriate to argue that the suitability requirements apply in any event to a child bearing in mind that they have to satisfy the reasonableness criterion. That having been said, we agree with Mr Bramble that the matters set out in the suitability requirements do not list all the factors that are relevant to the public interest or indeed to the issue of reasonableness.
38. In our view the question of what is meant by “reasonable” cannot be equated with a proportionality assessment in respect of an Article 8 claim outside the Rules. For a start the matter is to be considered within the rules, and therefore to that extent what was said by the Court of Appeal in EV (Philippines) is not strictly on point, although clearly not without relevance. But we do not think that reasonableness necessarily entails the question of whether it is reasonable to expect the child to follow the parent with no right to remain to the country of origin. The wording of section 117B(6) makes it clear that where the person is not liable to deportation the public interest does not require their removal where they have a genuine and subsisting parental relationship with a qualifying child and it would not be reasonable to expect the child to leave the United

Kingdom. This must apply whether the matter falls within or outside the Immigration Rules. A significant element of the proportionality balance that would otherwise exist in an Article 8 case outside the rules case is taken away.

39. That does not mean, however, that the matter is entirely one-sided. Mr Karim, very properly, accepted that, the situation and conduct of the children's parents were relevant, and in particular the conduct of the first appellants' father who was castigated by the judge, for example at paragraph 15 of his determination in these terms "his behaviour whilst in the United Kingdom has been devious, dishonest and knowingly unlawful". But clearly weight must be attached, bearing in mind the need to take into account his best interests, to the situation of the third appellant and the impact on him, taking into account his promising performance at school and the amount of time that he has been in the United Kingdom. It is not in our view appropriate to set out relevant factors that might be appropriate to an assessment of reasonableness as this will be very case specific, except to remind ourselves of the point made above that it is not just a matter of looking at the matter from the child's point of view but there must be an element of objectivity about this. Equally we do not consider that it is as simple as Mr Bramble suggests it is, to follow what was said in EV (Philippines) and define the question as being whether it is reasonable to expect the child to follow the parent with no right to remain to the country of origin. We think that the term "reasonable" must be interpreted in a commonsense manner and attaching particular weight to the child's interests but bearing in mind also the conduct and status of other family members and other matters relevant to the claim in the balance that is the proper approach.
40. In light of what we consider the proper approach is, we apply this to the facts of this case. We bear in mind the judge's remarks summarising the conduct of the first appellant and the fact that he and the other family members cannot succeed under the Immigration Rules, against the particular situation of the third appellant, including his promising performance at school and the amount of time he has been in the United Kingdom, and bearing in mind also what was said in decisions such as Azimi-Moayed about the interests of children albeit that that was not in the context of section 117B(6).
41. In our view it would not be reasonable to expect the third appellant to leave the United Kingdom. As a consequence this means that he succeeds under paragraph 276ADE(1)(4), and bearing in mind the terms of the subsection therefore the public interest does not require the removal of his parents, both of whom have indisputably a genuine and subsisting parental relationship with him. In the circumstances where their parents and elder brother have succeeded in their appeals, it seems to us to follow

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axiomatically that the appeals of the fourth and fifth appellants must also be allowed under Article 8.

42. These appeals are therefore all allowed.

Notice of Decision

The appeals are allowed on human rights grounds.

No anonymity direction is made.

Signed

Date **11 March 2015**

Upper Tribunal Judge Allen