



IAC-TH-WYL-V1

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

Appeal Numbers: IA/28736/2014
IA/28740/2014
IA/28743/2014
IA/28746/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 27th November 2015**

**Decision & Reasons Promulgated
On 21st December 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE R C CAMPBELL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MR P S
MRS M K
MISS M K D
MISS P K D**

(ANONYMITY DIRECTION MADE)

Respondents

Representation:

For the Appellant: Mr S Kotas (Senior Home Office Presenting Officer)
For the Respondents: Mr R Sharma (Counsel)

DECISION AND REASONS

1. The appellants are citizens of India, the first and second being the parents of the third and fourth. Their appeals against decisions to remove them to India were allowed by First-tier Tribunal Judge Eames (“the judge”) in a decision and reasons promulgated on 6th February 2015. So far as the first and second appellants are concerned, the judge dismissed the appeals in relation to the Immigration Rules (“the rules”) but allowed them under Article 8 of the Human Rights Convention. So far as the third and fourth are concerned, he allowed the appeals under paragraph 276ADE of the rules and, additionally, under Article 8.
2. The first and second appellants became overstayers on expiry of visit visas issued to them in December 2003, with no leave to remain since June 2004. The third and fourth appellants were born here, in March 2005 and July 2007 and have lived in the United Kingdom continuously since then. The judge found that the children had lived here for at least seven years by the time their parents made applications on behalf of the whole family, in September 2012. He concluded that the private life ties established by the third and fourth appellants in the United Kingdom could only be properly secured by the presence of their parents and that, overall, the balance to be struck between the competing interests fell in favour of the family and against the Secretary of State.
3. The Secretary of State applied for permission to appeal, contending that the judge misdirected himself in law in several respects. He erred in taking into account and applying the version of the rules in force as at the date of the removal decisions in September 2013 (the same outcome resulting from a reconsideration by the Secretary of State subsequently, with supplementary decisions made in June 2014), rather than the version of the rules in force as at the date of the hearing in early 2015. The judge also erred in focusing on the interference in the private lives of the children, contrary to guidance given in EV [2014] EWCA Civ 874 and in failing to make a rounded assessment in the light of the circumstances of the family as a whole. In making an assessment outside of the rules, the judge erred in his approach to the balancing exercise required. He failed to give due weight to the fact that the third and fourth appellants had no lawful status in the United Kingdom and gave no reasons for finding that their interests outweighed the public interest. The judge’s approach to section 117A to D of the 2002 Act was also flawed. It was inaccurate to find in the children’s favour that for two years of their time here, their presence was “not unlawful” as they had never had any form of leave. Similarly, the finding that the unlawfulness in the family’s immigration history was not of their own making was also flawed, as was the judge’s positive finding that the public interest appeared to require that the children should stay in the United Kingdom. The absence of criminality was given undue weight and the judge failed to have regard to the requirement to consider whether or not the parties were financially independent.

4. Permission to appeal was refused by a First-tier Tribunal Judge on the basis that the correct version of the rules was applied and the remaining grounds amounted to a disagreement with the judge's findings. In a renewed application, the Secretary of State's case that the most up-to-date version of the rules fell to be applied was restated and it was contended that the judge's findings were incompatible with binding authority.
5. The Upper Tribunal granted permission on 23rd June 2015, on the basis that it was arguable that the judge erred in applying the wrong rules, may have erred in relation to section 117A to D of the 2002 Act and may have reached a decision which was contrary to authority.

Submissions on Error of Law

6. Mr Kotas said that the first ground, regarding the correct version of the rules to be applied, was not pursued. It was clear from the decision that the judge applied the pre-July 2014 rules, although the date of the hearing was January 2015, but the error was not material. It was clear from paragraph 35 of the decision that the judge's conclusion that the requirements of paragraph 276ADE were not met in the first and second appellants' cases was the correct outcome whichever version of the rules, pre or post-July 2014, was applied. The key issue was the position of the third and fourth appellants and the assessment of the reasonableness of expecting them to leave the United Kingdom.
7. The Secretary of State's case was, nonetheless, that the judge erred materially in law, particularly in failing to apply the ratio and guidance given by the Court of Appeal in EV. That judgment showed that a "real world assessment" was required, meaning a global or overall assessment, taking into account the best interests of the children and the reasonableness of expecting them to leave. The judge set out at paragraph 39 a series of bullet points in the children's favour and then made up his mind at paragraph 42. He did not properly take into account the absence of any leave, this factor forming no substantial part of his assessment.
8. The judge also erred, as appeared in the original grounds, in appearing to find that the public interest required the children to stay. Section 117B of the 2002 Act provided that there is a clear public interest in immigration control. The judge was required to show how that interest was outweighed.
9. It was clear from paragraph 74 of the decision that the judge assessed the position of the children first and then proceeded to find that removal of the entire family was unlawful and that all should remain. None of the appellants had ever had leave to remain and it was inaccurate for the judge to describe two years of the time spent here by the children as not unlawful.

10. Mr Sharma said in response that the Secretary of State disagreed with the judge's findings and conclusions but there was no material error of law. The error regarding the correct version of the rules was not material.
11. Neither of the two children in EV had been present in the United Kingdom for anything like seven years and so their cases could only be considered outside the rules. On the other hand, much of the guidance given in EV was helpful and supported the appellants' cases and the judge's assessment. Paragraph 35 of the judgment, for example, set out factors relevant to the best interests assessment and section 55 of the 2009 Act. It was clear from the decision that the judge addressed those questions and gave answers to them.
12. The judge set out his reasoning. The parents could not succeed under the rules, as was made clear at paragraph 36, in relation to Appendix FM and paragraph 276ADE. The judge properly went on to consider the position of the children. Paragraph 39 of the decision did indeed list features falling in their favour but there was no error in setting these out. All were relevant and taken into account. Nor was paragraph 39 the only place where the basis of the decision appeared. Paragraph 20 contained a summary of the evidence, relevant to the assessment. The judge found the witnesses reliable insofar as they gave consistent and credible accounts. It was clear from paragraphs 23, 24 and 25 that the judge had the appellants' cases fully in mind, as he did the adverse factors. Paragraph 35 contained cogent reasoning showing why the first and second appellants failed under the rules and it was clear that the judge did not consider the third and fourth appellants' cases in isolation.
13. The judge went on to consider the position of all of the appellants outside the rules, giving cogent reasons why this step was required.
14. Turning to the particular criticism that the judge appeared to give positive weight to a period of two years of the children's stay as "not unlawful", what the judge meant here was that moderating factors included a delay by the Secretary of State in dealing with the applications for leave, a further period of delay during judicial review proceedings and then the inevitable time it took for the decisions to be remade by the Secretary of State, as they were in June 2014. Overall, this period of some two years was a formative period in the children's development. The judge had in mind in this context guidance given in Azimi-Moayed [2013] UKUT 197, the children being over 4 years old at this stage. Paragraph 58 of the decision shows that the judge carefully considered the appropriate weight to be given to the public interest and he was clear that there had been abuse on the part of the first and second appellants. Notwithstanding that abuse, having weighed the competing interests, the judge concluded that the balance fell to be struck in the appellants' favour. His finding at paragraph 68 that the children's interests and the private life ties established by them had considerable weight was open to him and not irrational. At

paragraph 69, the judge went on to rationally conclude that removing the parents would mean removing the children too, this being a practical assessment of the position. He explained why this would be destructive in relation to the children's interests, at paragraphs 70 and 71, and plainly took into account guidance given in EV, expressly taking into account the costs involved in providing a British education for the children. His findings regarding the private life ties established by the third and fourth appellants were made in the light of the clear absence of any leave to remain and the poor immigration histories of the first and second appellants.

15. The overall conclusion at paragraph 74 was open to the judge. There was no possibility of success under Appendix FM, that part of the rules suggesting that only one parent could succeed in similar circumstances. Be that as it may, there was nothing in the decision amounting to a misdirection in law.
16. Mr Kotas said that although the decision was thorough, the judge compartmentalised the position of the children and the parents. The correct approach was to make a global assessment and the judge had failed to do this.

Conclusion on Error of Law

17. As is readily apparent from the decision, the judge has carefully constructed his assessment and, as Mr Kotas accepted, it is very thorough. The broad outlines are these: the judge set out the immigration history of the family, summarised the parties' cases and the evidence which emerged at the hearing and briefly set out the submissions made by the representatives. He then first assessed the requirements of the rules. The first and second appellants failed but the judge went on to allow the appeals of the third and fourth appellants, concluding that the requirements of paragraph 276ADE were met in relation to the children. After that, he considered family life under Appendix FM and then made an assessment outside the rules, in relation to all the appellants, dealing first with the children and then with their parents. The critical challenge made by the Secretary of State is that the assessment in relation to the children was flawed, as being too closely tied to their private lives and as falling short of a rounded or global assessment in the light of decided authority, most recently EV.
18. I accept the submission made by Mr Kotas on behalf of the Secretary of State that a rounded assessment is required, in relation to the best interests of the children and also the reasonableness of expecting them to leave the United Kingdom. On the other hand, it is obvious that paragraph 276ADE(iv) plainly applied in view of the years spent here by the children since their birth, in contrast with the position of the children in EV, ensuring that the focus was on the second part of that sub-paragraph and the reasonableness of expecting them to leave. It is true that paragraph

39 lists the features identified by the judge as showing the extent of the ties established by the children and is swiftly followed by a conclusion at paragraph 41 that the relevant requirements were met. However, it would be artificial and inappropriate to read this part of the decision in isolation. Paragraph 39 is plainly a summary, drawing on the evidence which was before the judge. Nor is it appropriate to exclude the careful reasoning which appears before and after paragraphs 39 and 41, in relation to the assessment of the best interests of the children and the position of the first and second appellants, their parents. There is, perhaps inevitably, a degree of repetition, with the judge drawing once again on the features identified in paragraph 39 later on, in paragraphs 49, 50 and 51 where he assessed the proportionality of the decisions under appeal. It is in this part of the decision that the judge took into account section 117B of the 2002 Act in relation to the children. There is no express mention of the importance of economic self-sufficiency but this absence is insufficient of itself to undermine the judge's reasoning. He correctly took into account guidance given in Azimi-Moayed and had regard also to what might broadly be described as the limited or qualified nature of the rights protected under Article 8, at paragraph 53, where he clearly had in mind Nazim [2014] UKUT 25 and Patel and Others [2013] UKSC 72, cases referred to in the Secretary of State's written grounds.

19. The assessment which immediately follows is one which has been carefully made. Paragraphs 54 and 55 show, for example, that the judge was well aware that the substantial period in which the children have resided in the United Kingdom is not a trump card or any "overriding right" as he described it.
20. It is also clear from the decision that the judge had clearly in mind and gave due weight to the very poor immigration history of the first and second appellants, overstayers for many years, since the expiry of their visit visas in June 2004. He made several adverse findings in relation to the parents, at paragraphs 35 and 73 of the decision. I accept that he erred in describing, at paragraph 57, two years which elapsed from the date of the applications for leave as time in which the children's presence was "not unlawful" but this is not a material error as, in context, he was merely describing moderating factors bearing on the precarious immigration status shared by all four appellants. In any event, the judge expressly found that a "very minimal degree of blame" attached to any delay occasioned by the Secretary of State so that this particular factor led to no substantial reduction in the weight to be given to the public interest in removal. Although the presence of the children in this country as active and engaged young citizens is not properly a matter of public interest to be found in section 117B, it is also plain that the judge was well aware of the public interest in the maintenance of immigration control, a factor which he expressly referred to in paragraph 50.

21. Read overall, the decision shows that the judge had in mind all the salient features of the parties' cases, made an assessment under the rules, albeit applying the wrong version but not erring materially in doing so, and came to a reasoned conclusion that the requirements of the rules were met in relation to the third and fourth appellants. Conscious that he was dealing with a family unit consisting of two parents and two young children, and taking into account his finding that the first and second appellants could not meet the requirements of the rules, he went on to make an Article 8 assessment outside them. In so doing, and bearing on at least part of his rules assessment in relation to the children, he made an assessment of the best interests of the third and fourth appellants and took into account relevant guidance from the decided authorities. Although his overall conclusion was one that other judges might not have reached, I find that it was a conclusion open to him. The judge did not focus solely on the interference in the private lives of the children in assessing whether it was reasonable to expect them to leave the United Kingdom. He took into account the position of their parents and, in fact, made an assessment fully consistent with the approach in EV. The technical errors regarding the immigration status of the children and the apparent identification of a positive public interest in their remaining here, are relatively minor and do not displace the salient findings or upset the analysis. Nor does the absence of any express mention of financial independence in relation to section 117B(3). The judge had the public interest in removal clearly in mind, revealed in part by what he described as the abuse shown in the first and second appellants' immigration histories.
22. In conclusion, the grounds fall short of indentifying a material error of law in the decision, which shall stand.

Notice of Decision

The decision of the First-tier Tribunal, containing no material error of law, shall stand.

Signed

Date

Deputy Upper Tribunal Judge R C Campbell

ANONYMITY

The judge made an anonymity direction, referring at the very end of the decision to "sensitive issues". He had in mind, no doubt, that the third and fourth appellants are still children and the circumstances of the family overall. The anonymity direction shall continue in force until this Tribunal or a court directs otherwise.

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Signed

Date

Deputy Upper Tribunal Judge R C Campbell