



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

Appeal Numbers: IA/29159/2014  
IA/31426/2014

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 9 February 2015**

**Decision & Reasons Promulgated  
On 16 March 2015**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE RIMINGTON**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

**Appellant**

**and**

**MRS LYDIA ADUSEI  
MASTER KAY BAASAAH OPPONG  
(ANONYMITY DIRECTION NOT MADE)**

**Respondents**

**Representation:**

For the Appellant: Mr P Nath, Home Office Presenting Officer  
For the Respondent: Mr W Evans, instructed by Templeton Legal Services

**DECISION AND REASONS**

1. The application for permission to appeal was made by the Secretary of State for the Home Department but nonetheless I shall refer to the parties as they were described before the First-tier Tribunal, that is Mrs Adusei and her child as the appellants and the Secretary of State for the Home Department as the respondent.

2. The appellants are mother and son, the mother being born on 4 August 1974 and her son born on 23 May 2007. They appealed against the decision of the respondent made on 28 June 2014 to refuse their applications for leave to remain and to remove them from the UK by way of directions under Section 10 of the Immigration and Asylum Act.
3. The first appellant came to the UK on 15 April 2000 with leave to remain until 20 November 2002 and the appellant's then partner came to the UK in 2003. An older child, a daughter, was born on 29 December 2003 in the UK and this child was not the subject of the appeal. Both children were born in the UK and the facts were such that the partner of the first appellant and father of both of the children had departed the family unit prior to the hearing before the First-tier Tribunal. The appellant applied for leave to remain on human rights grounds on 7 November 2007 with her partner and children as dependents but was refused on 20 August 2008 and served with removal directions. A further application was made by the appellant for leave to remain on 21 August 2012 and that application was refused and is the subject of this appeal. The respondent considered that none of the appellants were British citizens or settled in the UK and it was reasonable for them to return to Ghana as a family unit.
4. Judge Borsada allowed the appeal on 18 September 2014 and an application for permission to appeal was made on the basis that the judge had approached the appeal from the wrong direction, and, in the absence of any consideration as required by **EV (Philippines) and Others v SSHD [2014] EWCA Civ 874**, that neither parent would have any claim to remain in the UK independent of the children.
5. It followed from this that all findings made on the reasonableness of removing the children and their integration to life in Ghana were vitiated by a fundamental misdirection in law. It was submitted to be speculative and premature to allow the appeal on the partial basis that one family member might soon become a British citizen. The facts before the Tribunal were that the older child was still subject to immigration control.
6. Further, the judge had failed to engage with the proper test for allowing an appeal outside the Rules approved at [42] of **Nagre [2013] EWHC 720 (Admin)** that there needed to be exceptional circumstances such that removal would result in unjustifiably harsh outcomes. This was good law following **Gulshan (Article 8 - new Rules - correct approach) [2013] UKUT 640 (IAC)** and undisturbed by **MM (Lebanon) [2014] EWCA Civ 985**.
7. In addition, the judge had allowed the appeal on the basis that Section 117B(6) of the 2002 Act operated to nullify the public interest in removal and this was a misapplication of that provision. It was submitted that "does not require" could not be read to mean "defeats". This was at best a "neutral provision which must be read in conjunction with the other provisions of part 5A of the 2002 Act".

8. Permission to appeal was granted by First-tier Tribunal Judge Coates who stated that all grounds were arguable.
9. Mr Nath at the hearing referred to paragraph 58 and 60 of **EV (Philippines)** and that it was important for the judge to have considered the position of the parents. The judge needed to address the issue of **Gulshan** and **Nagre** and the fact that the family would return as a unit. The judge had concentrated on the best interests of the child and merely gone straight into a consideration of Article 8 without considering the Immigration Rules. There was nothing exceptional in the circumstances of this family such that they could not be returned. The judge had not considered that the public interest and **Gulshan** was still good law.
10. Mr Evans submitted that the Secretary of State had twice considered the appeal on the basis of the wrong Immigration Rule. In August 2012 when this application was filed with the Secretary of State, a requirement of reasonableness in relation to the child in Rule 276ADE was not there. If there was an error of law in the determination it was that the parent was not allowed under the Immigration Rules. The parent could succeed under the Immigration Rules because she had a valid application for leave to remain as the parent, had not been rejected under the suitability requirements and in fact met the eligibility requirements because of EX.1. The parent had a genuine and subsisting relationship with a child who had been in the UK for seven years and it was not reasonable to expect that child to leave.
11. Secondly, the judge did not say that the public interest was nullified by Section 117D(6) [[5] of the determination]. The judge had considered all aspects of Article 8 and on the balanced assessment had made it clear that it was in the interests of the child to remain in the UK. By way of additional information Mr Evans submitted that the first child was now a British citizen.
12. Mr Nath submitted that paragraph 12 of the judge's determination lacked clarity particularly in relation to his reference to findings in a previous paragraph. There was a failure to analyse and set out correctly the matters to be considered.
13. I note that the judge set out at length the respondent's reasons for refusal and in particular identified that the respondent considered that in relation to the second appellant, the son, it was not considered unreasonable for him to go to Ghana with both his parents who were both Ghanaian citizens as a family and his parents would be able to help him adjust to change and provide him with maintenance and accommodation [Paragraph 276ADE(1)(iv)]. The same reasoning was applied to the appellant's daughter's case.
14. I find the judge also set out why the respondent thought that there would be no unjustifiably harsh consequences for the individual should they have to return. The judge also clearly set out the response to that by the appellants, not least that the second appellant and the sibling had spent their entire life in the UK and were both in full-time education. The judge recorded that the older daughter had submitted an application in August 2012 and had fulfilled the requirements for leave to remain

under the version of paragraph 276ADE that was then in force which was simply that a child needed to show that they had lived continuously for a period of seven years in the UK to qualify. It was submitted that the children had spent all their lives and formative years in the UK.

15. Although Mr Evans submitted that the appeal should have been allowed under the Immigration Rules because when the application was filed the Rules had been less stringent the relevant date for the applicability of the rules is the date of decision. The decision was in fact made on 28<sup>th</sup> June 2014. The judge made a finding that the Immigration Rules were not satisfied. There was no cross challenge by the appellants in this case.
16. The judge set out that the first appellant's daughter was now applying for UK citizenship, having spent the first ten years of her life in the UK.
17. On reading the determination as a whole I am not persuaded that the judge has failed to comply with Gulshan and Nagre as set out in the application for permission to appeal. In MF (Nigeria) v SSHD [2013] EWCA the Court of Appeal referred to Sales J who found that in precarious cases "it is likely to be only in the most exceptional circumstances that the removal of the non-national family will constitute a violation of Article 8". MF continued however:

"In our view that is not to say that a test of exceptionality is being applied. Rather it is that in approaching the question of whether removal is a proportionate interference with an individual's Article 8 rights the scales are heavily weighted in favour of deportation and something very compelling 'which will be exceptionally' is required to outweigh the public interest in removal."

18. MM Lebanon and Others R on the Application of the Secretary of State for the Home Department [2014] EW Civ 985) confirmed that the Immigration Rules do not displace Strasbourg jurisprudence and also referred to the Secretary of State's guidance as follows:

52. In the same paragraph it explains "exceptional" in the following terms (which are not set out in the Section 3.1):

" 'Exceptional' does not mean 'unusual' or 'unique'. Whilst all cases are to some extent unique, those unique factors do not make them exceptional. For example, a case is not exceptional just because the criteria set out in EX.1 of Appendix FM have been missed by a small margin. Instead 'exceptional' means circumstances in which refusal would result in unjustifiably harsh consequences for the individual such that refusal of the application would not be proportionate. That is likely to be the case only very rarely".

53. The same paragraph then stipulates that the decision maker must consider all relevant factors and gives two examples: the circumstances around the applicant's entry to the UK and cumulative factors'

19. Thus the test exceptional means circumstances in which the consequences are such that the application would not be proportionate.

20. That said, the judge at paragraph 11 confirmed that the appellants could not succeed under the Immigration Rules but he did note that the daughter's application for registration as a British citizen had not been processed and he added "I cannot take account of this with regard to the parent route under the Immigration Rules"
21. Thus, importantly, the judge did not proceed on the basis that the daughter was a British citizen or indeed that her claim to remain in the UK was speculative. Indeed it is clear that the judge did not allow the appeal on this basis alone. He took into accounts the facts as they were cumulatively. He accepted at paragraph 12 that the family were likely to have developed a strong private life in the UK and made findings at paragraph 9 with respect to the children that he had very good documentary evidence of the daughter's private life and further that:

"It is also the case they have spent all of their lives in this country and have no direct experience of another culture or society. As at the date of applications, the appellant's daughter has been in the UK for more than seven years and the son over five years. These periods of time are of enormous significance in the assessment of the strength and depth of these children's private lives and have weighed heavily in my consideration of this case".
22. The judge took into account the fact that the mother and her partner had an immigration status which was precarious. He did however omit to identify and this is a factor which goes against the respondent's case, that the father had in fact left the family home. In other words the family would not be returning as a family unit and the mother would be returning alone with two children. The judge took into account the fact that their status was precarious but he also noted that blame should be attached to the respondent for the delays in the decision making after 2012 which contributed to the accumulation of the children's rights and further entrenchment of those rights.
23. It is clear that the judge noted that the appellants' appeal did not succeed under the Immigration Rules but gave reasons for finding compelling circumstances.
24. The judge also applied, in effect correctly, **Beoku-Betts v SSHD** [2008] UKHL 39 and found that the sister would "experience profound difficulty in adjusting to life in a different country even with the assistance of their parents. The judge found that the circumstances of the sister and the appellant would be unduly harsh should they be returned as he noted that the children had known no other life outside the UK and "given their ages would have therefore fully assimilated both culturally and socially in UK society".
25. Although the judge did not address **EV (Philippines)**, the children in that case entered the UK in 2011 and had been born abroad and came to the UK at the ages of 9, 7 and 5 respectively. That is not the case in this appeal and although it is right to say that the assessment of the best interests of the children must be made on the facts as they are in the real world as per **EV Philippines**, and as cited at [58] *'if one parent has no right to remain but the other does that is the background against which the assessment is conducted. If neither parent has the right to remain, then that is the background against*

*which the assessment is conducted*'. The judge did look at the background the fact is that one of the children in this case did have leave to remain and that was a fact that was extant and before the judge and which he was entitled and did take into account.

26. **EV (Philippines)** is clear that the interests of the other family members need to be considered and that together with the best interests of the children and "in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled" **Üner and the Netherlands [2007] 45 EHRR 14 [55 of EV (Philippines)]**.
27. **EV (Philippines)** does not depart from the concept of whether it is reasonable to expect the children to depart with the person being removed [52]. **MF (Nigeria) v SSHD [2013] EWCA Civ 1192** clarified that all the relevant article 8 criteria should be taken into account and the court confirmed that the test of exceptionality had not been revived

'At para 40, Sales J referred to a statement in the case law that, in "precarious" cases, "it is likely to be only in the most exceptional circumstances that the removal of the non-national family member will constitute a violation of art 8". This has been repeated and adopted by the ECtHR in near identical terms in many cases. At paras 41 and 42, he said that in a "precarious" family life case, it is only in "exceptional" or "the most exceptional circumstances" that removal of the non-national family member will constitute a violation of article 8. In our view, that is not to say that a test of exceptionality is being applied'.[42]

28. That said in **Nagre** at paragraph 14 Sales J identified that

'The definition of "exceptional circumstances" which is given in this guidance [Home Office guidance] equates such circumstances with there being unjustifiable hardship involved in removal **such that it would be disproportionate** – i.e. would involve a breach of Article 8. The practical guidance and illustrations given in the passage quoted above support that interpretation. No challenge is brought to the lawfulness of this guidance. In my view, it gives clear and appropriate guidance to relevant officials that if they come across a case falling outside the new rules, they nonetheless have to consider whether it is a case where, on the particular facts, there would be a breach of Article 8 rights if the application for leave to remain were refused'.

29. Overall there was an assessment of proportionality in this case and the judge did not in my view cite Section 117B(6) of the Nationality, Immigration and Asylum Act 2002 as 'defeating' the public interest. Throughout the determination it was clear that the judge was aware of the immigration history of the appellant but found overall that there was a disproportionate interference with the private lives of the children to leave the country even allowing "that the family group would be returning together i.e. it would be unduly harsh" [12]. The judge adopted for clarity sake the submissions of the appellant as they appeared at paragraph 55 and this merely stated that the public interest did not require the removal of the appellant or her son, particularly in circumstances in which a parental relationship was shared with a child whom it would be unreasonable to expect to leave the UK.

30. Clearly the judge found it was unreasonable for the child and the remaining family to leave the UK and as such took into account Section 117B(6) but made no mention that it defeated the respondent's claim. That said, if the public interest does not 'require' removal I am not persuaded that the fourth test in **Razgar** can be satisfied. The question is this

'is such interference **necessary** in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?

31. If the removal is not required I am not persuaded that the interference is necessary.

**Notice of Decision**

32. I therefore find no error of law and the decision shall stand.

No anonymity direction is made.

Signed

Date **16 March 2015**

Deputy Upper Tribunal Judge Rimington