



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

Appeal Number: IA/41340/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 21 July 2015**

**Decision and Reasons
Promulgated
On 24 July 2015**

Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**DAVID ELIAS ALARCON COLQUE
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr S. Kandola, Home Office Presenting Officer

For the Respondent: Mr J. Trumpington, Counsel instructed by Howe & Co.

DECISION AND REASONS

1. For the sake of continuity I will refer to the parties as they were before the First-tier Tribunal although the Secretary of State is technically the appellant in the appeal before the Upper Tribunal.

Background

2. The appellant appealed against the respondent's decision to refuse to grant him and his dependent family members leave to remain on human rights grounds. First-tier Tribunal Judge McMahon allowed the appeal in a decision promulgated on 31 March 2015. The Secretary of State was granted permission to appeal to the Upper Tribunal.
3. The grounds of appeal argue that the First-tier Tribunal Judge failed to give adequate reasons to explain why the family should not be removed and that he failed to explain why it would be unreasonable to expect the appellant's two children to leave the UK. The grounds went on to allege that the First-tier Tribunal Judge failed to have proper regard to sections 117A-D of the Nationality, Immigration and Asylum Act 2002 ("NIAA 2002"). The grounds argue that the First-tier Tribunal Judge failed to give sufficient weight to countervailing factors and in particular the fact that their private life in the UK was established at a time when the family remained in the United Kingdom unlawfully. As such their private life should be accorded little weight. The Secretary of State's grounds of appeal went on to argue that there were in fact no exceptional factors to show why this family should not be removed.
4. The appeal comes before the Upper Tribunal to decide whether the First-tier Tribunal decision involved the making of an error on a point of law.

Decision and reasons

5. After having considered the grounds of appeal and submissions made by both parties I conclude that the First-tier Tribunal decision does not disclose an error of law.
6. The First-tier Tribunal Judge wrote a clear and detailed decision in which he took into account all of the relevant factors. It was quite clear that the judge was aware of the immigration history of the family including the fact that the parents and children entered and remained in the UK unlawfully. The First-tier Tribunal Judge took into account the fact that they had never been granted leave to remain and remained here unlawfully as well as the fact that the appellant and his wife had been working in the UK and in all likelihood had paid no income tax or national insurance contributions [13].
7. However, the First-tier Tribunal Judge went on to consider the position of the appellant's two sons. He noted the young age that the children arrived in the UK. The oldest child was 7 years old when he arrived and the youngest was 3 years old. The children had lived in the UK for the last nine years and therefore spent the majority of their childhood here. The First-tier Tribunal Judge went on to consider the ties that the family had established in the UK. In considering the best interests of the children he quite properly referred himself to the decisions in *ZH (Tanzania) v SSHD* [2011] UKSC 4, *Zoumbas v SSHD* [2013] UKSC 74 and

the Tribunal decision in *JO and Others (section 55 duty) Nigeria* [2014] UKUT 00517.

8. The First-tier Tribunal Judge then went on to consider whether the two children met the requirements of paragraph 276ADE(1)(iv) of the immigration rules and correctly identified that the main issue was whether or not it was reasonable to expect the children to leave the UK. In assessing this issue the First-tier Tribunal Judge not only took into account the ties that the two boys have to the UK, which he found to be substantial, but also took into account whether there were any countervailing factors that might nevertheless make it reasonable to expect the children to leave the UK [29].
9. The First-tier Tribunal Judge quite clearly gave weight to the fact that the parents had shown a blatant disregard for the immigration rules by remaining in the UK without leave [29]. However, he found that there were few other countervailing factors that might be relevant. The parents had been able to support the family (albeit through work that was done without permission) and had not been reliant on public funds.
10. Even though the First-tier Tribunal Judge considered that he was not obliged to take into account the factors referred to in sections 117A and 117B NIAA 2002 in relation to the assessment under the immigration rules, which is likely to be correct, he nevertheless took into account those factors. In particular he made clear that the maintenance of effective immigration control is in the public interest. He took into account the fact that that the two children had a good standard of English and that their parents spoke reasonable English. The two children were also very well integrated into UK society. He mentioned once again that the family members had never held immigration status [31].
11. After having taken into account all of the relevant circumstances the First-tier Tribunal Judge concluded that it would not be reasonable to expect either of the children to leave the UK and as a result they met the requirements of paragraph 276ADE of the immigration rules [33].
12. The grounds of appeal do no more than set out disagreements with the First-tier Tribunal Judge's decision. It is quite clear that the judge took into account all of the circumstances of the case when considering whether it would be reasonable for the children to leave the UK. The decision shows that the fact that the family had no leave at any point was quite clearly at the forefront of the First-tier Tribunal Judge's mind. He took this into account amongst all the other relevant factors. In the circumstances of this case I find that it was open to the judge to conclude that the children now had such close ties to the UK that it would be unreasonable to expect them to leave. For these reasons I find that the First-tier Tribunal decision relating to the two children does not disclose any material error of law.

13. The First-tier Tribunal Judge went on to consider whether the parents, who did not meet the requirements of the immigration rules, nevertheless succeeded under Article 8 outside the immigration rules. The First-tier Tribunal Judge correctly referred to the step by step analysis set out in *Razgar v SSHD* [2004] INLR 349. He went on to consider the public interest consideration set out in section 117B of the NIAA 2002 and gave specific recognition to the requirement for little weight to be given to a private life established at a time when a person has been in the UK unlawfully [37].
14. He went on to consider section 117B(6), which relates to parental relationships with a qualifying child. In essence the “reasonableness” test was the same as that contained in paragraph 276ADE. The First-tier Tribunal Judge had already given adequate reasons to explain why it would not be reasonable to expect the children to leave the UK. As such it was open to him to conclude that, despite the fact that substantial weight must be given to the need to maintain an effective immigration policy [39], the best interests of the children still outweighed the public interest considerations. I am satisfied that the First-tier Tribunal Judge took into account all of the relevant factors and weighed them carefully before coming to his conclusions. The findings were open to him to make on the evidence and could not be said to be irrational or perverse.
15. For these reasons I conclude that the decision of the First-tier Tribunal did not involve the making of an error of law and the decision shall stand.

DECISION

The First-tier Tribunal decision did not involve the making of an error on a point of law

The First-tier Tribunal decision shall stand

Signed 

Date 23 July 2015

Upper Tribunal Judge Canavan