



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Numbers: IA/35552/2014  
IA/35557/2014  
IA/35561/2014

**THE IMMIGRATION ACTS**

Heard at Field House  
On 8 February 2016

Decision & Reasons Promulgated  
On 17 March 2016

Before

UPPER TRIBUNAL JUDGE O'CONNOR

Between

(1) MRS ROSIANE CONCEICAO GOMES ALBUQUERQUE  
(2) MR RANGEL FRANCA ALBUQUERQUE CARREIRA  
(3) MISS RAFAELA GOMES ALBUQUERQUE  
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellants: Mr S Canter, instructed by Proficient Immigration Services  
For the Respondent: Mr D Clarke, Senior Presenting Officer

**DECISION AND REASONS**

**Introduction**

1. The appellants are Brazilian nationals. The first and second appellants are husband and wife but are separated although not divorced; such separation occurring in 2010. The third appellant is their minor daughter born in December 2005. There has been no request for an anonymity direction to be given, and none is made.

2. The second appellant entered the UK as a visitor on 7 September 1999 with leave conferred until 7 March 2000. On 15 February 2002 he submitted a student application and leave was thereafter granted until 31 December 2002. He has remained unlawfully in the United Kingdom since that time.
3. On 19 August 2003 the first appellant entered the UK as a visitor with leave conferred until 19 February 2004. She was subsequently granted entry clearance as a visitor on two further occasions, leave last being conferred upon her until 31 January 2005. She has remained in the United Kingdom unlawfully since that date.
4. On 14 December 2005 the third appellant was born in the United Kingdom and she has resided here ever since. She is now a British citizen; however, at the time of both the Secretary of State's, and First-tier Tribunal's, decisions she was not.
5. On 7 July 2012 the second appellant submitted a human rights application, naming the first appellant and their daughter as his dependants. The Secretary of State refused this on the 7 August 2013. This decision was the subject of an application for judicial review, which was compromised by way of an order sealed on 23 May 2014 - the Secretary of State agreeing to undertake further consideration of the appellants' claims and to make removal decisions should those claims be refused.
6. On 23 August 2014 the respondent made a decision to remove each of the appellants pursuant to Section 10 of the Immigration and Asylum Act 1999. The appellants brought appeals against such decisions to the First-tier Tribunal and those appeals were heard together by First-tier Tribunal judge Henderson on 2 July 2015. Each was dismissed on all grounds in a combined decision promulgated on the 28<sup>th</sup> of the same month.
7. Permission to appeal to the Upper Tribunal was granted by First-tier Tribunal judge Baker on 20 November 2015 and thus the matter came before me.

### **Grounds of Appeal**

8. The grounds of appeal can be summarised thus:
  - (i) the First-tier Tribunal's consideration of whether it would be reasonable to require the third appellant to leave the United Kingdom is inadequate, illogical and irrational;
  - (ii) the First-tier Tribunal's conclusion that the appellants' family life would be disrupted by their removal is unclear and confused;
  - (iii) the conclusion that the consequences of the appellants' removal would not be of sufficient gravity to engage Article 8 is unlawful, in light of the decision of the Court of Appeal in AG (Eritrea) [2007] EWCA Civ 801;
  - (iv) there is an unlawfully inadequate consideration of the assessment of whether the respondent could justify interfering with the third appellant's private life.

## Discussion

9. In its decision the FtT correctly set out the matrix of the appellants' applications and immigration histories [6 to 9], a summary of the respondent's refusal decision [10 to 16] and the burden and standard of proof [21 to 23]. At paragraph 19 the FtT said this:

"I have also taken into account the following documents that have been placed before me:

- (a) the written witness statements of the first and second appellants (dated 2 July 2015) which they each adopted as their evidence-in-chief;
- (b) the appellants' bundle of documents including: a letter from [the third appellant] to the Home Office dated 15 December 2014; letters from [the third appellant's] doctors (pages 60 to 75); [the third appellant's] school reports and a reference from her school (pages 80-108); letters from [the third appellant's] friends (pages 120-126) and various photographs. ...
- (c) the respondent's bundle of documents including the RFRL dated 23 August 2015;
- (d) the appellants' Counsel's skeleton argument."

10. Paragraphs 24 to 40 of the FtT's decision contain a lengthy recitation of the evidence provided by the appellants. Thereafter, under the heading "Conclusions", which is to be found immediately preceding paragraph 41 of the decision, the FtT engages in a consideration of the application of paragraph 276ADE of the Immigration Rules as applied to the first and second appellants claims - finding that neither could make out the requirement in paragraph 276ADE(1)(vi) that there would be "very significant obstacles" to them re-integrating into life in Brazil.

11. Turning its attention to the third appellant's case under the Immigration Rules, the FtT said this;

"42. As regards [the third appellant], the relevant paragraph is 276ADE(1)(iv) and the key question is whether it 'would not be reasonable' to expect her to leave the UK. I heard no evidence to support this assertion. [The third appellant's] health is no longer an issue. She receives regular checkups but according to the first appellant's evidence, is only occasionally in any pain or discomfort and is not on any medication. She has lived all her life in the UK and has received all her education here. However, at the age of 9½, she is still at a sufficiently young age to be able to adapt to a new education system and way of life, especially with the support of her parents.

43. It would, of course, be disruptive and no doubt upsetting for [the third appellant] to have to leave her school and friends in the UK, but this does not mean that it would be unreasonable to require her to do so."

12. In his grounds, and at the hearing, Mr Canter made much of the statement in the paragraph 42 of the FtT's decision that it "*heard no evidence to support*" of the claim

that it would not be reasonable to expect the third appellant to leave the United Kingdom.

13. The grounds of appeal seek to identify a number of features of the appellants' evidence which it is said are relevant to such a consideration, but which were not taken account of by the FtT:
  - (a) the third appellant has all the traits and habits of a British girl;
  - (b) the quality of her spoken Portuguese is poor;
  - (c) she is not able to read or write in Portuguese;
  - (d) all of her friends are in the United Kingdom;
  - (e) the third appellant calls the UK home;
  - (f) her parents' decisions to remain in the United Kingdom were not taken by her;
  - (g) the third appellant stressed in her letter that she did not want to leave the UK because all of her friends are here.
14. As a consequence Mr Canter maintained that the FtT had erred in law in failing to take into account material matters when considering the third appellant's appeal by reference to paragraph 276ADE of the Immigration Rules.
15. I reject this submission for the reasons which follow.
16. If paragraphs 42 and 43 of the FtT's decision are read in isolation there is much to be said for Mr Canter's submission; however, it is trite that a decision of the FtT must be read as a whole. In my view, if paragraphs 42 and 43 are read in the round and in the context of paragraphs 18, 19 and 24 to 40 of the decision, it is clear that the FtT did not leave out of account those matters identified in the grounds. Although poorly expressed, it is plain that in paragraph 42 the FtT was simply articulating its conclusion that the evidence before it did not lead to an acceptance of the appellants' claim that it would not be reasonable to expect the third appellant to leave the United Kingdom.
17. In paragraphs 18 and 19 of its decision the FtT set out in general terms the evidence taken into account, which included the evidence of the 'witnesses'. At the outset of paragraph 24 the FtT finds the appellants to be generally credible and honest. Thereafter, in paragraph 31, the FtT specifically alludes to the fact that the third appellant is doing well at school, has many friends, is popular and that she can speak Portuguese but cannot read or write the language. Reference is subsequently made, in paragraph 40, to a letter authored by the third appellant, in which she states that she wishes to remain in the United Kingdom because she likes being in a cold country and because all of her friends are here.

18. At the hearing Mr Canter also commended to the Tribunal that the FtT had erred in its conclusion that the third appellant had not demonstrated that it would be reasonable for her to leave the UK, given its finding at paragraph 43 that to do so would be disruptive and upsetting for her. This in reality is an issue of weight. It my conclusion it was proper for the FtT to take the aforementioned features of the third appellant's circumstances into account when coming to its conclusions on the issue of the reasonableness of her moving to Brazil; however, the fact that the FtT did not treat them as determinative in the instant case comes nowhere near being irrational.
19. I find that when read as a whole the FtT's decision in relation on the application of the Immigration Rules displays sufficient reasoning to enable the appellants to understand why they were not successful in their appeals in this regard. I do not accept that the FtT excluded any relevant matters from its considerations under the Rules and I find that its conclusions were open to it on the available evidence.
20. Turning to the second discreet ground relied upon by the appellants, which as with the third and fourth grounds relates to the FtT's consideration of Article 8 ECHR outwith the regime under the Rules.
21. In order to succeed before the FtT in this limb of their appeals the appellants were required to demonstrate the existence of compelling circumstances over and above those considered within the confines of the Immigration Rules. When considering the issue of proportionality the FtT was mandated by s.117 of the Nationality, Immigration and Asylum Act 2002 to take account of certain matters referred to therein.
22. In paragraph 46 of its decision the FtT properly directed itself to the **Razgar** 5-stage approach and then said as follows, in paragraphs 47 to 49:

“47. On the basis of the evidence in this case, it is clear that the appellants do enjoy a family life in the UK which would be interfered with by their removal to Brazil. Furthermore, even though the first and second appellants are separated, they both have sufficiently close involvement with the third appellant and with each other in relation to matters affecting the third appellant, so as to constitute a family unit.

48. The question as to whether the proposed removal would have grave consequences so as to engage the operation Article 8 is a more difficult one. It could be argued that removal to Brazil would not affect their current family life, such as they experience it. The third appellant would still live with her mother and her father would still be able to visit her. I did not hear any evidence as to where in Brazil the first or second appellants might live, so I do not know if it would be feasible for the second appellant to visit [the third appellant]. However, this point was not raised by the appellants or their Counsel.

49. On that basis I find that the consequences of removal would not have such gravity as to engage Article 8. However, if I am wrong on that point, I will go on, in any event, and consider the remaining questions in **Razgar** relating to the proportionality assessment.”

23. It is to paragraph 48 that the second ground specifically pertains. Whilst I see merit in Mr Canter's submission that it is difficult to understand the rationale underpinning the FtT's conclusion that the appellants' family life would be interfered with by their removal to Brazil, it does not follow that this provides reason to set aside the FtT's decision. The appellants will be removed together to Brazil and, as the FtT found in paragraph 48, the third appellant would live there with the first appellant and the second appellant would still be able to visit her – much as the situation is in the UK. It is worthy of observation that the appellants did not seek to suggest the position would be otherwise upon return to Brazil (see paragraph 48 of the FtT's decision).
24. It is clear that in such circumstances there would not be an interference with the appellants' respective family lives as a consequence of their removal, and thus the FtT erred in concluding to the contrary. However, this error did not act to the detriment of the appellants and, consequently, does not lead me to set aside the FtT's decision.
25. As to the third ground I agree with Mr Canter that the FtT's conclusion, found in paragraph 49 of its decision, that Article 8 is not engaged is irrational. In AG (Eritrea) v SSHD [2007] EWCA Civ 801 Sedley LJ stated:
- “It follows, in our judgment, that while an interference with private or family life must be real if it is to engage Article 8(1), the threshold of engagement (the minimum level) is not a specially high one.”
26. In the instant case each of the appellants has built up a private life in the United Kingdom, the third appellant having spent the entirety of her life here (that being nine and a half years as of the date of the First-tier Tribunal's decision). The extent of that private life is such that on the evidence and information accepted by the First-tier Tribunal there was only one answer to the question of whether the consequences of removal would have sufficient gravity to engage Article 8, that being that it would.
27. Once again, however, I am not persuaded that this is an error capable of affecting the outcome of the appeal, given that in paragraph 49 of its decision the FtT prefaces all that is said thereafter, with the following:
- “On that basis I find that the consequences of removal would not have such gravity as to engage Article 8. However, if I am wrong on that point, I will go on, in any event, and consider the remaining questions in Razgar relating to the proportionality assessment.” (emphasis added)
28. Moving on to consider the last of the pleaded grounds, which pertains to the FtT's consideration of the issue of proportionality. The FtT conclusions on this issue must be viewed in the context of sections 117B(4)(a) and (5) of the 2002 Act, which identify that little weight must be attached to private life established whilst a person is in the UK unlawfully or whilst that person's leave is precarious. This is of direct application to all of the appellants in the instant appeal, for reasons which are obvious.

29. Nevertheless, following the decision of the President of this Tribunal in Treebhawon and Others (section 117B(6)) [2015] UKUT 00674 if the requirements of s.117B(6) of the 2002 Act are met by the adult appellants, then it is likely they will succeed in demonstrating that their removal would be disproportionate.
30. The FtT considered the application of s.117B(6) in paragraphs 53 and 54 of its decision. It is not in dispute that the third appellant is a qualifying child and, therefore, the operative question is whether it would be reasonable to expect the third appellant to leave the UK. The FtT approached this issue by reference to its earlier conclusion made in relation to paragraph 276ADE(1)(iv) of the Rules, a conclusion that I have found to be lawful. Such an approach is entirely consistent with that commended by the Vice Presidential panel in AM (Section 117B) Malawi [2015] UKUT 02600.
31. Looking at the FtT's consideration and conclusions on the issue of proportionality as a whole it is clear to me that it had in mind all of the relevant features of the third appellant's claim - including that the best interests of the child must be ascertained and treated as a primary consideration. Although the grounds did not take specific objection to how the FtT dealt with this latter consideration Mr Canter asserted in oral argument that the decision gave an inadequate analysis to such matter. I do not accept this to be the case, if the decision is read as a whole. The conclusion at paragraphs 54 therein, i.e. that the best interests of the third appellant is to remain with her mother and have access to her father, was open to the First-tier Tribunal; as was the conclusion that it was proportionate to require this to be in Brazil.
32. Looking at the evidence before, and the factual conclusions of, the FtT I find that in all the circumstances of the case it was open to the First-tier Tribunal to conclude that removal of these three appellants' would be proportionate to the legitimate aim of maintaining immigration control. Indeed, I would go as far as to say that on the basis of such factual matrix I would have come to exactly the same conclusion.
33. For all these reasons I dismiss the appellants' appeals, and the decision of the First-tier Tribunal is to remain standing.

Signed:



Upper Tribunal Judge O'Connor