



IAC-FH-AR-V1

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

Appeal Numbers: IA/40777/2014
IA/40779/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 2 March 2016
EX TEMPORE JUDGMENT**

**Decision & Reasons Promulgated
On 18 March 2016**

Before

UPPER TRIBUNAL JUDGE COKER

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

[M W]

[R M]

(ANONYMITY DIRECTION NOT MADE)

Respondents

Representation:

For the Appellant: Mr S Kandola, Senior Home Office Presenting Officer
For the Respondent: Mr S Karim, counsel, instructed by Law Lane solicitors

DECISION AND REASONS

1. The Secretary of State was granted permission to appeal by First-tier Tribunal Judge Holmes on 12 January 2016. I shall refer to the two respondents as appellants, as they were called in the First tier Tribunal.

The grounds relied upon by the Secretary of State are essentially that the First-tier Tribunal Judge in his decision following a hearing on 24 July 2015 failed to take into account the features of the case, in particular that the minor appellant is not a British citizen. The Secretary of State relies on *Zoumbas* [2013] UKSC 74 and *EV (Philippines)* [2014] EWCA Civ 874 and that there is no universal right to education to non-British citizens. The Secretary of State submits that the judge afforded undue weight to the education of the second appellant who is now 16 and was nearly 16, coming towards the end of his secondary education at the date of the hearing.

2. The second ground relied upon by the Secretary of State is that there has been an inaccurate focus on the private life of the second appellant. He would be returning to Jamaica with his mother and he does not meet Appendix FM; nor does he meet paragraph 276ADE of the Immigration Rules and the judge has failed to attach little weight to any private life established as required by s117B Nationality Immigration and Asylum Act 2002.
3. The Secretary of State makes reference to what he has characterised as a speculative basis that the first appellant would be able to support herself and her son. They were not financially independent at the date of the hearing, the judge failed to have regard to the education costs and the financial burden on the State. The SSHD refers to what she submits is trite law that Section 117A-D should be taken into account in every case where human rights are considered.
4. The appellant's submissions in response are that the weight placed by the judge on the issues was in accordance with guidance in *Zoumbas* and *EV (Philippines)*. Mr Karim refers to the self-directions given by the judge to *EV (Philippines)* to Article 8, to *SS (Congo)* [2015] EWCA 387, and to Sections 117A-D in coming to his conclusions. He submitted that the appeal was not allowed solely on the basis of the child's education but included the relationships that the child has formed, the stability that has been offered to the child and the progress that has been made by the child whilst in the UK. In response to a question from me to be referred to the evidence that as before the First tier Tribunal on that issue he referred to the child's statement that he likes his school and has friends here and to the mother's evidence that he has two friends here.
5. Mr Karim also referred to the learning disabilities suffered by the second appellant, that the first Tribunal refers to the various reports that were submitted including the fact that the child is of particular vulnerability. The judge sets out in his determination paragraphs 35 and 36 of *EV (Philippines)* and in particular in paragraph 35 to the number of factors. This is of course a non-exhaustive list of the factors that should be taken into account and includes age, length of time they have been here, how long they have been in education, the stage the education has reached, to what extent they have been distanced from the country to which it is

proposed that they return, how renewable their connection with it may be, to what extent they will have linguistic, medical or other difficulties in adapting to life in that country, the extent to which the course proposed will interfere with their rights if they have any as British citizens.

6. Paragraph 36 refers to the longer the child has been in the country in question and the more deleterious the consequences of return, then the greater the weight that falls into one side of the scales. If it is overwhelmingly in the child's best interests that he should not return, the need to maintain immigration control may well not tip the balance. By contrast if it is in the child's best interests to remain but only on balance then the result maybe the opposite.
7. Mr Karim quite correctly said that the First tier Tribunal decision should only be overturned if the conclusions reached by the First-tier Tribunal Judge could be characterised as perverse.
8. The second appellant has learning difficulties. He has two friends, Joshua and Justin, and according to the evidence the system in the UK is meeting his educational needs. He can read, he has developed a routine, has stability and the teachers in the school in the UK are excellent. It was submitted he had no potential in Jamaica.
9. The judge in his conclusions refers to not having been provided with evidence as to the special educational needs provision in Jamaica. The evidence that was before him was the appellants have referred to him being fact that he was bullied because of his condition in Jamaica. There was some information about a School of Hope in Jamaica but there was no indication as to whether the second appellant would be admitted there, not least because of his age and whether the first appellant could afford for him to go there.
10. In paragraph 28 the judge states:

“Thus there are real issues about whether the appellant would be able to afford appropriate education for the second appellant, even if it is available, which is also unclear. The second appellant would certainly miss out on the stability which he has achieved here particularly through his educational provision with his mother. I find on the balance of probabilities that the second appellant's prospect of living an independent life in the future will be considerably diminished if he is returned to Jamaica.”

11. A problem with that finding by the judge is that in *EV (Philippines)* paragraph 60 the Court of Appeal say:

“That is a long way from the facts of our case. In our case none of the family is a British citizen. None has the right to remain in this country. If the mother is removed, the father has no independent right to remain. If the parents are removed, then it is entirely reasonable to expect the children to go with them. As the immigration judge found it is obviously in their best interests to remain with their parents. Although it is, of course a question of fact for the tribunal, I cannot see that the desirability of being educated at public expense in the UK can outweigh

the benefit to the children of remaining with their parents. Just as we cannot provide medical treatment for the world, so we cannot educate the world.”

12. The judge in this appeal commenced his conclusions on the basis that it was unlikely that the second appellant would be able to attend the sort of school that he needed even if it was available. Although Mr Karim relies on the fact that the child has expressed a desire to remain in the educational system in the UK and has friends in the UK, it is plain given the paucity of evidence of other factors that make up the second appellant’s private life, the basis of the decision by this judge is the second appellant’s learning difficulties.
13. Although the judge has identified the matters that he should take into account he has not done what paragraph 35 of *EV (Philippines)* says which is to go through all those various factors. There is no indication about the stage of education that this child has reached. There is no assessment of the extent to which the child has become distanced from the country to which it was proposed that he return. There is no assessment of how renewable the connection with that may be, given that he has been living with his mother for the last six years. And there is no indication other than the very brief finding that there was little evidence as to whether or not they would be able to afford appropriate education for him.
14. Therefore although the judge referred himself to these issues upon which he had to take a decision, he has actually not applied that fact finding to his own decision making.
15. It is correct, as Mr Karim says, that this appeal by the Secretary of State would only apply if it could be said that the decision of the First-tier Judge was perverse. The judge looked at the provisions of Section 117, confirmed that they speak English and made a finding which was open to him that the first appellant would be able to support herself and her son if she was allowed to work, given the history that is reported. He then says that the potentially negative factors do not apply.
16. He then directs himself to say that he is required by s117B to give little weight to private life that is established at a time when an applicant’s private life is precarious and although he says that this applies in fact he has not given any weight at all to that self-direction. It may be that the stricture as regards the weight to be attached to private life acquired by a minor should not have the same resonance as for an adult given that the development of private life of a minor may be out of his control. Similarly where the applicant is a vulnerable adult. But in this case the judge simply said he had to take account of this but then manifestly failed to do so.
17. This decision is based upon a 16 year old young man with special needs. It is simply not overwhelmingly in the child’s best interests that he should not return. There has been no adequate evidence put forward as to the effective or suitable educational facilities for him in Jamaica. To conclude that the fact that he has made excellent progress here renders removal

disproportionate is perverse. It may well be that there are no effective and/or suitable educational facilities for him in Jamaica but the judge has failed to identify why it is on the basis of the evidence that was before him that this minor could not return to Jamaica with his mother as part of that family. The simple basis upon which the judge reached his decision was no more than that the second appellant's educational needs were being met in the UK and he would continue to thrive if he remained here. That is simply inadequate and perverse. There has been no proper proportionality assessment undertaken.

18. I am therefore satisfied that in this particular case the decision of the First-tier Tribunal Judge to allow the appeal on human rights grounds was perverse.

Notice of Decision

19. As a result of that I set aside the decision for it to be remade. Given the lack of findings by the judge on the matters that would be required and in particular the facilities that would be available to him in Jamaica and the impact that that would have upon him on being sent back to Jamaica it is appropriate for this case to be sent back to the First-tier for a fresh decision to be taken.

20. No anonymity direction is made.



Signed

Date 9th March 2016

Upper Tribunal Judge Coker