



IAC-AH-KRL-V1

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

Appeal Numbers: IA/43380/2014  
IA/43400/2014  
IA/43409/2014  
IA/43423/2014

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 14 December 2015**

**Decision & Reasons Promulgated  
On 11 January 2016**

**Before**

**UPPER TRIBUNAL JUDGE MCGEACHY**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**GHW  
OLT  
COT  
DOT**

Respondents

**Representation:**

For the Appellant: Mr S Walker, Senior Home Office Presenting Officer  
For the Respondents: Ms K Cronin, of Counsel, instructed by Bindmans and Partners

**DECISION AND REASONS**

1. The Secretary of State appeals, with permission, against a decision of Judge of the First-tier Tribunal Colvin who in a determination promulgated on 9 June 2015 allowed the appeals of Ms GHW and her husband OLT, and

their children Miss COT and Master DOT. Although the Secretary of State is the appellant before me I will for ease of reference refer to her as the respondent as she was the respondent in the First-tier. Similarly I will refer to Ms GHW, Mr OLT, Miss COT and Master DOT as the appellants as they were the appellants in the First-tier.

2. Ms GHW and Mr OLT are citizens of Jamaica. The third appellant, Miss COT ("C") was born in Britain on 14 May 2005 and the fourth, Master DOT ("D"), was born here on 2 October 2008. OLT entered Britain on 9 October 1996 on temporary admission and remained without permission thereafter. Ms GHW entered on 23 January 2003 with a visitor visa and remained. They married in Britain on 18 August 2007. An application for leave to remain under Article 8 of the ECHR was made in June 2010 and refused the following month. A further application was made in September 2011 and refused in November that year. Letters were then written to the respondent asking for a removal decision to be made and on 22 August 2013 the respondent agreed to reconsider the decision which had been made on 10 November 2011. That led to a further refusal. The appellants appealed that decision but before the appeal was due to be heard in August 2014 the respondent withdrew the refusal decision in order to reconsider. A further refusal was made on 15 October 2014 and it is against that refusal that the respondents appealed.
3. All appellants relied on the provisions of Article 8. The fourth appellant also relied on the provisions of Article 3 of the ECHR and the third appellant relied on the terms of the Immigration Rules. There was no appearance by or on behalf of the Secretary of State at the hearing in the First-tier Tribunal.
4. At the time of the hearing the third appellant had made an application for registration as a British citizen. She has now been granted British nationality.
5. The first and second appellants gave evidence which largely turned on the special needs of the fourth appellant who was diagnosed at the age of 6 months with West Syndrome, a form of epilepsy. He was initially having fits up to ten times a day and suffered brain damage and has now been diagnosed as also suffering from autism. He is severely short-sighted and has mobility problems and sees a large number of specialists; he also has one to one support at school. The judge recorded his mother's evidence as being:-

"D's needs dominate their family life from first thing in the morning until last thing at night. He needs to be watched at all times by an adult as he is a danger to himself. He is very unsteady on his feet and is hyperactive. He is now provided with transport to get him to school. They receive seven hours' respite care each week from Social Services and there is one carer called ED at the present time. They also have 60 hours of short break respite available too. He is easily unsettled by noise and activity. She looks

after him after school which is exhausting as he does not sit down unless he is strapped into a chair.

His epileptic fits are not as frequent but they can be very bad. They often happen when he is sleeping. They give him emergency medication by syringe to the back of his mouth but they also call the paramedics so that he is checked to see whether he needs additional treatment or hospitalisation if they have been prolonged seizures. ... He has a statement of special educational needs and sees many of the specialists through the Hackney Ark, the Child Development Centre. ... D knows the hospitals and clinics and his physicians and they know how to respond to him. He receives daily medication for the fits which is sodium valproate liquid. He is now working with a psychotherapist from CAMHS. Any change in routine for D is extremely difficult which is not unusual for autistic children. He hates even small changes and causes him real distress. He simply cannot understand when there is a loss or substitution of a carer."

6. It was GWT's evidence that she did not believe that D would be able to manage with the change of leaving Britain and going to live in Jamaica: he simply would not manage with a huge change of moving countries, home, school, carers, treatment or routine. She did not believe that he would ever recover from being uprooted. She worried about the loss of medical treatment and expertise and support as there would not be this help and support in Jamaica. The family and D would be criticised and excluded. They struggle to manage with D even with all the professional support. She is not sure that the family would cope and believed she would be thrown into despair.
7. GWT's evidence was that COT was aged 10 and had good friends in Britain and was making reasonable progress academically. She suffered because of her brother's needs and it was impossible to imagine the impact of her having to leave Britain as she had never been to Jamaica and had no connections there.
6. There were a number of professional reports submitted which included letters from a consultant community paediatrician and from Disabled Children's Services in Hackney, occupational therapy advice, the SEN statements, reports from the educational psychologist for the Hackney Learning Trust and reports from Queensbury Primary School. Details of those reports were set out by the judge in paragraphs 16 onwards. A detailed report from an independent social worker who had spoken to other professionals involved in D's care said that:-

"It is the opinion of professionals involved in D's life that he would be severely negatively impacted if his family were to be returned to Jamaica and I would share that opinion. I have further concerns about the impact of such a move on C who has grown up in the UK and where everything is familiar to her and where she is settled and happy".

7. Having set out the terms of the letter of refusal and the submissions made to her by Ms Cronin who also represented the appellants in the first-tier, the judge set out at length a detailed self-direction regarding the burden and standard of proof under the Immigration Rules and Articles 3 and 8 of the ECHR.
8. In paragraphs 31 onwards the judge set out her findings of fact and her conclusions. She noted that the Secretary of State had been aware of the second appellant since 2003 and that the first appellant had been seeking to regularise the family status since at least 2010.
9. She referred to the determinations in **MK (best interests of child) India [2011] UKUT 00475** and the judgments in **ZH (Tanzania) [2011] UKSC 4** and **EV (Philippines) [2014] EWCA Civ 874**, quoting the various factors set out in that judgment which should be taken into consideration. She commented that the Section 55 consideration letter of refusal was wholly inadequate, pointing out that it made no mention of the fourth appellant's severe autism or special educational needs nor any mention of the third appellant's education or established social life or indeed her own wishes as a 10 year old child.
10. She then dealt with the position of the third appellant, C and stated in accordance with the Rules in force on 12 December 2012 the issue was whether or not it was reasonable to expect her to leave Britain. She stated that there is no doubt that C met the requirements of the Immigration Rules in terms of her private life but also taking into account her best interests in a Section 55 assessment. She referred to the independent social worker's report which, although it had concentrated on the fourth appellant, did refer to C's vulnerability and the difficulties she would face if the family returned to Jamaica. She noted that that opinion had not been challenged. She therefore concluded that it was in C's best interests that she remain in Britain.
11. With regard to the fourth appellant she again referred to the background documentation and quoted from Ms Cronin's skeleton argument in which she had written with regard to the fourth appellant that:-

"He will lose his known and safe routine, his known and trusted carers, will suffer a frightening and highly distressing plane journey to Jamaica and in Jamaica will be presented with completely foreign, noisy and incomprehensible surroundings, strange people and places. All his safe methods for negotiating the world will have been removed".

She noted that when considering the threshold for Article 3 there was a clear difference between the application of Article 3 to children as opposed to adults. She stated that:-

"After careful consideration of all the evidence relating to *D* I am fully satisfied that due to the level, duration and intensity of the permanent distress that such a move to Jamaica would cause *D* that this amounts to

inhuman and degrading treatment of a severely disabled child in all the circumstances so as to be at real risk of breaching Article 3”.

12. However she also considered the position of D under Section 55 and Article 8, stated that she agreed with Ms Cronin:-

“That D’s private life is so significant as to be essentially lifesaving for him. And it is clear that the carefully constructed and nurtured assistance that had been put in place from both in and outside of school is what is giving him the optimum life chances. On the background information on Jamaica, whilst there may be medication available to D for his epilepsy, I am in no doubt that these other support systems are most unlikely to be available and certainly not to the degree that it is said he requires. Without this support it is the view of the professionals that he would”.

13. The judge then turned to the position of the first and second appellants and referred to the delay in resolving the position relating to the family’s immigration status since 2010 and further to the independent social worker’s report which indicated that the first appellant’s mental health could be at risk because of the stress of any attempt at relocation. She stated that would cause great harm to the children. She went on to say, having referred to the **Razgar** tests that:-

“There is no doubt that family life is engaged as the interference of removal will have consequences of such gravity. The key issue is whether removal will be proportionate when considering the wider public interest in maintaining effective immigration controls And Section 117B is relevant to the consideration of public interests in this context”.

14. She referred to the parents’ genuine and subsisting relationship with their children and the fact that she had considered that C was a qualifying child as defined in Section 117D(1) in that she lived in Britain for a continuous period of seven years or more. Given that the children could not leave Britain she concluded that the public interest did not require the removal of the first and second appellants.

15. She then stated that she allowed the appeals of each of the appellants on human rights grounds, the fourth appellant, D was allowed also under Article 3 of the ECHR and the third appellant was allowed under the Immigration Rules.

16. The Secretary of State appealed, arguing that with regard to the third appellant the judge should have applied a “reasonableness” test as it was required by the amendments in HC 760 and HC 820 and that in considering the position of the third appellant she had not properly considered the public interest. That would include the overstaying of the family which is relevant to the broader proportionately of the decision and significant financial impact of the family remaining stemming from D’s requirement for extensive treatment. Moreover the judge had erred in not taking into account an appropriate proportionality assessment when considering the issue of the best interests of the children. Finally it was

stated that at the date of the application – the relevant date C had only been 6 years old and not reached the seven year threshold required by the Rules.

17. The grounds went on to argue that the judge had been wrong to state that there was a difference in assessing the Article 3 rights of a child, rather than an adult and then referred to the judgment of the Court of Appeal in **GS (India) [2015] EWCA Civ 40** and the judgment in **D and N [2005] UKHL 31**. Again it was asserted that the judge did not take into account the public interest when assessing the best interests of the fourth applicant.
18. With regard to the overall assessment it was argued that there had been no engagement with the significant consequences to the public purse for a child to remain permanently in Britain. The grounds further emphasised the first two appellants' immigration history.
19. At the hearing before me Mr Norton relied on the grounds of appeal. His further comment was that the public interest issue had not been taken into consideration and that therefore the decision was not a balanced one.
20. Ms Cronin first pointed out that the Secretary of State when refusing the application had not engaged with the evidence of the independent social worker, and that the decision made by the Secretary of State was clearly inadequate. In any event, turning to the issue of the Article 3 rights of D she stated that what had been submitted had not been put forward as a loss of medical treatment but it had been on the basis that the ill-treatment would be suffered by D because he would be removed from all the support he had had here and the environment he was used to. The judgments in **GS, D and N** were clearly not appropriate the application of the ratios of those judgments simply did not engage with the facts relating to the fourth appellant.
21. More generally she pointed out that the Secretary of State appeared to regard the children as overstayers when that was not the case. Under the provisions of paragraph 302 of the Rules the reality was that their status was unresolved – they were not illegal entrants as they had been born here. The Section 117 presumptions did not apply when dealing with the children. In any event she pointed out that C was now British and could not be removed. She argued moreover that the reference in the grounds of appeal to the relevant provisions of paragraph 276 were incorrect as there had been multiple proceedings and new decisions on the new information that had been put forward in this case. It was not therefore the case that the third appellant did not benefit from the seven year provisions because of the date of application as the further information had been put forward after she was aged 7. The reality was that the judge had found that it was not reasonable to expect her to leave Britain and that had not been challenged in the grounds. She referred to the very detailed self-direction by the judge in the determination and stated that

that showed that the judge had in the forefront of her mind all relevant details, including that of the public interest. Her directions had been properly made and those directions and indeed the application of those directions had not been challenged by the Secretary of State.

22. She referred to the detailed evidence from the independent social worker and his conclusions, pointing out that nowhere had the evidence of the independent social worker been challenged. She took me through that report and stated that on the basis of what the judge considered would happen should the fourth appellant be removed did amount to Article 3 harm. The difficulties that he would face because of changes to his regime, having to travel by plane and being taken away from all his support mechanisms here was treatment which would cross the Article 3 threshold. She referred to the case of **Pretty v UK [2002] ECHR 427** at paragraphs 52 and 53 which showed that suffering caused by of lack of treatment could amount to Article 3 ill-treatment.
23. She added, with reference to the determination in **Akhalu (health claim: ECHR Article 8) [2013] UKUT 00400 (IAC)** that the judge had been entitled to find that the Article 8 rights of D would also be infringed under Article 8 as the consequences of removal for his health and the fact that he would not be able to access equivalent healthcare in Jamaica was a relevant question to the issue of proportionality. She argued moreover that the judge was correct to take into account the interests of the children when assessing whether or not the removal of the first two appellants would be proportionate.

## **Discussion**

24. I consider that the judge reached findings and conclusions which were fully open to her on the evidence before her and that there is no material error of law in her determination. Dealing first with the rights of C, I consider that there is merit in Ms Cronin's argument that although when the initial application was made in 2011 she was under the age of 7, the reality is that the application was renewed on a number of occasions as various decisions were made by the respondent and that by the time the decision was made, and indeed by the time the last set of submissions was made, she was over the age of 7 and the judge was entitled not only to take that into account but also take into account the effect on her of her removal. I consider therefore she was entitled to find that C met the requirements of the Rules. Even if I were wrong in that regard the reality is that C is now British and could not be removed in any event.
25. Turning to the position of D, what was put forward was that it would be Article 3 ill-treatment for him to be removed, given the support network he has here and his reaction to being without that support network, let alone the lack of support which he and the family would have in Jamaica and indeed the very real problems of him having to travel to Jamaica. To that extent the reliance by the Secretary of State on the judgments in **GS, D**

**and N** miss the relevant focus of the application that was being put forward. Having considered as indeed did the First-tier Judge the very considerable evidence put forward and having accepted that when assessing Article 3 ill-treatment I have to take into account that D is a child of 10, I can only conclude that the judge was entitled to find that his removal will be a breach of his rights under Article 3, as well as under Article 8 of the ECHR.

26. I note, of course, that the fact that C is now British and the first two appellants are her carers would mean under the provisions of the judgment of the European Court in **Zambrano** they would in any event be entitled to remain.
27. I therefore conclude that the removal of both children now would not be in accordance with the law. Moreover, I consider that the judge was entitled to take into account the needs of the children and, having reached conclusions with regards to those needs and the fact that their removal would breach their rights under the ECHR, the judge was entitled to conclude that the removal of the first two appellants would not be proportionate and therefore to allow their appeals under Article 8 of the ECHR.
29. I therefore conclude that there is no material error of law in the determination of the determination of the First-tier Judge and that her decision to allow these appeals under Article 8 in respect of all appellants, Article 3 in respect of the fourth appellant and under the Immigration Rules in respect of the third appellant contained no material error of law.

### **Notice of Decision**

The appeal of the respondent is dismissed and the decisions of the Judge in the First-tier shall stand.

Signed

Date

Upper Tribunal Judge McGeachy