



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/00794/2020 (V)

THE IMMIGRATION ACTS

Heard at Cardiff Civil Justice Centre
Remotely by Microsoft Teams
On 8 July 2021

Decision & Reasons Promulgated
On 3 August 2021

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

PJA

(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Ms H Aboni, Senior Home Office Presenting Officer
For the Respondent: Mr S Lotay of Derby Immigration Aid Consultants

DECISION AND REASONS

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) I make an anonymity order. Unless the Upper Tribunal or court directs otherwise, no report of these proceedings shall directly or indirectly identify the respondent (PJA). This direction applies to both the appellant and to the respondent and a failure to comply with this direction could lead to Contempt of Court proceedings.

2. Although this is an appeal by the Secretary of State, for convenience I will refer to the parties as they appeared before the First-tier Tribunal.

Introduction

3. The appellant is a citizen of the Philippines who was born on 12 March 1990. On 25 May 2019, he made a human rights claim based upon Art 8 of the ECHR. That application was refused on 18 October 2019.
4. The appellant appealed to the First-tier Tribunal. Following a hearing, on 23 November 2020 the First-tier Tribunal (Judge V Jones) allowed the appellant's appeal under Art 8 of the ECHR.
5. The Secretary of State sought permission to appeal on a number of grounds and, on 17 December 2020, the First-tier Tribunal (Judge Grant) granted the Secretary of State permission to appeal.
6. The appeal was listed for a remote hearing by Microsoft Teams at the Cardiff Civil Justice Centre on 8 July 2021. I was present in court and Ms Aboni, who represented the Secretary of State, and Mr Lotay, who represented the appellant, joined the hearing remotely by Microsoft Teams.
7. Subsequent to the hearing, Mr Lotay emailed the appellant's bundles to me which were missing from the file.

The Judge's Decision

8. In allowing the appellant's appeal under Art 8 of the ECHR, the judge found that the public interest, in particular the maintenance of immigration control, was outweighed by the severity of the impact upon the appellant's family.
9. In particular, the evidence before the judge concerned the appellant's two children, K and P aged respectively 6 years and 4 months and 8 years and 1 month at the date of the hearing on 15 October 2020. K and P have been diagnosed with Autistic Spectrum Disorder ("ASD"). In allowing the appeal, highly significant to the judge's decision was her view as to the best interests of K and P and the impact upon them of returning to the Philippines.
10. Before the judge, was a letter of support from Ms Paul, the SEND Co-ordinator relating to the provision of support given to K and P at their school. The judge summarised the evidence as regards K at para 33 of her decision as follows:
 - "33. There was no objective evidence supporting the appellant's evidence that the Philippines does not have a system of providing for special education needs such as autism. But I am satisfied from the evidence of [K's] SEN Co-ordinator and consultant physician that he has wide ranging and complex educational needs arising from his ASD diagnosis and has characteristics suggesting that he has additional needs in relation to ADHD. He has an EHC Plan and is therefore receiving funding for additional support over and above the SEN support normally provided by

local authorities to schools with SEN pupils. The fact he has a Plan means his needs are at a very high level. He is making progress but he has significant speech and language delay, together with cognitive, sensory and behavioural needs. He is receiving 1:1 support and a differentiated curriculum. Whilst there was no evidence to support the appellant's submission that no school in the Philippines could provide additional support for [K], I was satisfied from the evidence from the school and medical professionals that the process of reassessing his needs there, together with the disruption of changing not only his school but his teachers, teaching assistants and therapists is highly likely to set his educational development back significantly. Not only this, but he will have to adjust to moving to a different country with a different language, whilst already struggling with language delay. I attach particular weight to the evidence of Ms Paul that his school has kept the same teacher and teaching assistants for [K] for the last two years precisely because of the significant emotional difficulties he experiences with change".

11. The judge then dealt with support provided by K's paternal grandmother outside school in para 34 of her decision:

"34. Outside school, the children receive additional support from their paternal grandmother who has professional experience of supporting children with additional needs. Having regard to [K's] age and significant speech and language difficulties, I find it would be very difficult for him to maintain the close relationship he has established with his grandmother through social media or other remote means of communication as the respondent suggests he can do. The loss of her support would be a further significant change which, on the evidence, he will struggle to adjust to and will have difficulty understanding".

12. Then at para 35, the judge dealt with the position of P, K's elder brother:

"35. [P] also has an ASD diagnosis and though his needs do not appear to be at the level requiring an EHCP, I accept the school's evidence that he too has difficulties adjusting to change and if he were to attend a school in a different country would struggle with the fact that lessons will be taught very differently. At present he is taught in a small class and benefits from a high level of teacher support".

13. Then at para 36, the judge reached the following finding in relation to K and P's best interests:

"36. Having carefully considered all the relevant factors I have concluded that the best interests of the appellant's two children lie in remaining in the UK with their parents so that they can continue their education here and maintain the close relationship and support they currently receive from their grandmother".

14. At para 37, the judge cited a passage from the judgment of Lord Kerr in ZH (Tanzania) v SSHD [2011] UKSC 4 concerning the best interests of a child being a primary consideration and that:

“What is determined to be a child’s best interests should customarily dictate the outcome of cases such as the present, therefore, and it will require considerations of substantial moment to permit a different result”.

15. At para 38, the judge reached her ultimate conclusion as follows:

“38. The maintenance of immigration control is a strong public interest consideration, in furtherance of the legitimate aim of maintaining economic well-being of the UK. Having balanced all the public interest considerations, with particular regard to the weight to be attached to the primacy of the best interests of the two children affected by this decision, I find that the severity of the respondent’s decision on the Article 8 rights of the appellant’s family outweigh the public interest of immigration control in this case. I have concluded the impact of the respondent’s decision on the appellant’s Article 8 rights is disproportionate to the public interest it seeks to pursue. I find the decision breaches Section 6 of the Human Rights Act 1998 and allow the appellant’s appeal”.

16. As a result, the judge allowed the appeal under Art 8.

The Respondent’s Submissions

17. The respondent relies upon four grounds which were developed by Ms Aboni in her oral submissions.

18. First, it is submitted that the judge failed to apply the correct test in assessing whether the appellant’s removal would be proportionate by failing to consider whether it would have “unjustifiably harsh consequences” for the appellant, his wife or children. It is further argued that in assessing the children’s best interests, the judge failed to take into account that there was no evidence to show that adequate care was not available in the Philippines. Finally, the report of Ms Paul, it was submitted, related that the impact upon K would be very upsetting and might lead to him lashing out if he were to move to a new school “without support” and there was no evidence that such support would not be available (Ground 1).

19. Secondly, the grounds contend that, in considering what weight to give to the appellant’s private life, the judge was wrong to apply by analogy the decision in CI (Nigeria) v SSHD [2019] EWCA Civ 2027 on the basis that the appellant had previously lived in the UK where he had entered aged 6 years of age and had had a permanent right of residence and would have obtained British citizenship but for the fact that his mother sent him back to live in the Philippines when he was 13 years of age (Ground 2).

20. Thirdly, the judge was wrong not to apply the approach in EV (Philippines) v SSHD [2014] EWCA Civ 874 at [58]–[60] that the decision should be made in the “real world” and that it would normally be reasonable to expect children to return to their own country when none were British citizens (Ground 3).

21. Fourthly, the judge gave too little weight to the public interest. The fact that he spoke English was a neutral factor but he was receiving a very high level of help paid for from the public purse and was therefore a burden on the taxpayer (Ground 4).

The Appellant's Submissions

22. On behalf of the appellant, Mr Lotay relied upon a skeleton argument and rule 24 response which he also developed in his oral submissions.
23. First, he submitted that the judge had not failed properly to direct herself. She had considered that the impact upon the appellant's family would be severe and, the dictionary definition of "severe" meant "rigorous or harsh treatment". Consequently, the judge had, in effect, decided that the impact would be harsh and unjustified because the public interest was outweighed.
24. Secondly, the judge had not failed properly to apply the approach in EV (Philippines), he had found that the best interests of the children (K and P) were to remain in the UK and that that tipped the balance against the public interest in the appellant's favour.
25. Mr Lotay submitted that I should only interfere with Judge Jones' finding if it was perverse or irrational. I should not interfere with the decision just because it might be generous and another judge might not necessarily come to the same conclusion.
26. Mr Lotay accepted that there was no evidence concerning what educational provision there would be in the Philippines but the judge had approached the impact upon the children on that very basis and had reached a reasonable and rational conclusion as to their best interests and that the decision was disproportionate.
27. As regards CI (Nigeria), Mr Lotay submitted that the judge was entitled to take that into account, by analogy, in assessing what weight to give to the appellant's private life. In this appeal, had the appellant's mother not sent him back to the Philippines aged 13, as the judge found, the appellant would in all likelihood have become a British citizen and that was relevant in assessing his claim under Art 8.
28. Mr Lotay submitted that the judge's finding in relation to proportionality was rational and reasonable and the Secretary of State's appeal should be dismissed.

Discussion

Grounds 1, 3 and 4

29. It is helpful to take Grounds 1, 3 and 4 together.
30. In assessing whether the appellant's removal would be disproportionate, the only misdirection put forward by Ms Aboni was the judge's failure explicitly to ask herself whether there were "unjustifiably harsh consequences" sufficient to outweigh the public interest. It is not suggested that the judge wrongly directed herself as regards the primary consideration being given to the best interests of K and P. The

judge correctly referred to s.55 of the UK Borders Act 2009 at para 7. At para 8 of her decision, the judge also cited ZH (Tanzania) and that the Supreme Court had concluded that the best interests of children were a primary consideration although they could be cumulatively outweighed by other factors in determining proportionality but no other factor was inherently more significant. Further, reference was made by the judge to the subsequent Supreme Court's decision in Zoumbas v SSHD [2013] UKSC 74 at para 8 of the decision.

31. Ms Aboni relied upon the terms of Appendix FM (para GEN.3.2(2)) which states that where an individual does not meet the requirements for entry clearance or leave under Appendix FM then the decision maker must consider:

“Whether there are exceptional circumstances which would render refusal of entry clearance, or leave to enter or remain, a breach of Article 8 of the European Convention on Human Rights, because such refusal would result in unjustifiably harsh consequences for the applicant, their partner, a relevant child or another family member whose Article 8 rights it is evident from the information would be affected by a decision to refuse the application”.

32. Mr Lotay also drew attention to GEN.3.3 which stated that in applying GEN.3.2:

“The decision-maker must take into account, as a primary consideration, the best interests of any relevant child”.

33. The Immigration Rules are, of course, only a statement of the Secretary of State's policy. In R (Agyarko and Another) v SSHD [2017] UKSC 11, the Supreme Court accepted that the terms, for example of GEN.3.2(2) were compatible with Art 8. However, the Supreme Court recognised that the test of proportionality under Art 8.2 required a fair balance to be struck between the competing public and individual interests. The “unjustifiably harsh consequences” test was not, in itself, part of the Strasbourg jurisprudence on applying Art 8 but was a domestic approach that was consistent with Art 8. At [60], Lord Reed said this:

“It remains the position that the ultimate question is how a fair balance should be struck between the competing public and individual interests involved, applying a proportionality test. The Rules and Instructions in issue in the present case do not depart from that position. The Secretary of State has not imposed a test of exceptionality, in the sense which Lord Bingham [in R(Razgar) v SSHD [2004] UKHL 27] had in mind: that is to say, a requirement that the case should exhibit some highly unusual feature, over and above the application of the test of proportionality. On the contrary, she has defined the word "exceptional", as already explained, as meaning "circumstances in which refusal would result in unjustifiably harsh consequences for the individual such that the refusal of the application would not be proportionate". So understood, the provision in the Instructions that leave can be granted outside the Rules where exceptional circumstances apply involves the application of the test of proportionality to the circumstances of the individual case, and cannot be regarded as incompatible with article 8. That conclusion is fortified by the express statement in the Instructions that "exceptional" does not mean "unusual" or "unique": see para 19 above.

34. At [57], Lord Reed emphasised that:

“The critical issue will generally be whether, giving due weight to the strength of the public interest in the removal of the person in the case before it, the Article 8 claim is sufficiently strong to outweigh it. In general, in cases concerned with precarious family life, a very strong or compelling claim is required to outweigh the public interest in immigration control”.

35. In R (MM (Lebanon)) v SSHD [2017] UKSC 10, Lady Hale and Lord Carnwath in their joint judgment at [61]:

“As we have explained, in agreement with Lord Reed in *Hesham Ali*, para 42, and *Agyarko*, para 42, the ultimate issue is whether a fair balance has been struck between individual and public interests, taking account the various factors identified.”

36. It follows, in my judgment, that it is not in itself a misdirection for a judge to fail explicitly to refer to the “unjustifiably harsh consequences” test in assessing proportionality. The judge must apply the correct approach, set out in the Strasbourg jurisprudence, striking a fair balance between the public interest (which may be strong) and determining whether in a precarious family life case (such as the present) there is a strong or compelling claim to outweigh the public interest. In striking that fair balance, and doing so in a proper and lawful manner, the best interests of any child who may be adversely affected by the decision are a “primary consideration”.

37. In this case, I accept Mr Lotay’s submission that the judge did approach the balancing exercise in para 38 of her determination appropriately and lawfully. She specifically considered whether the “severity” of the impact upon the appellant’s family outweighed the public interest which she said was a “strong ... consideration”. Mr Lotay may well be correct that as a matter of dictionary definition the term “severe” means, in any event, “rigorous or harsh treatment”. Of course, whether it is “unjustifiable” is, in large measure, a reflection of striking a fair balance between the consequences (that are harsh) and the public interest on the other side of the scales. Consequently, I reject what is said in ground 1 that the judge misdirected herself as to the proper approach to assessing proportionality under Art 8.

38. I also reject ground 4, namely that the judge failed to give due consideration to the public interest. Whilst the judge at para 31 referred to the appellant being able to speak English and not a burden on public funds, she nevertheless recognised that there was a “strong” public interest in the maintenance of immigration control derived from the “legitimate aim of maintaining the economic well-being” of the UK. That is a correct self-direction of the engaged public interest. I see no basis on which it can be properly argued that the judge failed to give proper consideration to the public interest in her decision. Consequently, I reject ground 4.

39. That then leaves both in ground 1 and ground 3, the judge’s approach to K and P’s “best interests”. These were, as the Supreme Court’s jurisprudence plainly states, “a primary consideration”.

40. Ground 3 contends that in reaching an assessment that the best interests of K and P were to remain in the UK, the judge failed properly to apply what was said in EV (Philippines) at [58]-[60]. There, Lewison LJ said this:

“58. In my judgment, therefore, the assessment of the best interests of the children must be made on the basis that the facts are as they are in the real world. If one parent has no right to remain, but the other parent 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. Thus the ultimate question will be: is it reasonable to expect the child to follow the parent with no right to remain to the country of origin?”

59. On the facts of ZH it was not reasonable to expect the children to follow their mother to Tanzania, not least because the family would be separated and the children would be deprived of the right to grow up in the country of which they were citizens.

60. 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.

41. However, I see nothing in the judge’s decision which runs counter to the approach set out by Lewison LJ in EV (Philippines). In that case, it was recognised that generally speaking when parents and children lack any basis to remain in the UK, the best interests of any children lies in accompanying their parents to their home country. However, that need not necessarily be the case. There may well be circumstances, as Lewison LJ said at [58] where it would not be reasonable to expect the child to follow the parent with no right to remain in the UK. The best interests of a child remain a “primary consideration” following ZH (Tanzania) and Zoumbas and an assessment of those best interests is necessarily fact-sensitive. A child’s best interests may point to remaining in the UK. That, of course, was the judge’s finding in this appeal based upon the impact upon K and P (in particular K) of the disruption caused by leaving the UK and his schooling here to return to the Philippines and start school there.
42. Consequently, I reject ground 3.
43. That then leaves the final point raised in ground 1 that the judge, having no background material to determine whether K and P’s educational needs could be met in the Philippines, was wrong to rely upon the evidence of Ms Paul and to conclude that K and P’s best interests were to remain in the UK.
44. In my judgment, that contention is not made out. Ms Paul did state that:

“If [K] was to move to a new school without support [K] would become very upset and may lash out at others. He would be unable to sit at a desk for more than a few minutes and would disrupt the learning of others”.

45. However, the remainder of Ms Paul’s evidence concerning the disruption caused to K and P of being dislocated from the UK to a school in the Philippines was, as Mr Lotay submitted, based on the premise as the judge accepted that there was no evidence concerning what support they would receive in terms of SEN in the Philippines. At para 33 of her decision, the judge took into account the evidence of Ms Paul concerning the impact upon K arising from his ASD and ADHD of relocating to a school in the Philippines even with support. Likewise, in para 35 the judge, albeit to a lesser extent, took into account disruption in change of school, teachers and to a country where they would have to speak a different language (presumably also in order to receive education) as relevant issues in assessing their best interests and the impact upon them.
46. Further, at para 34 the judge took into account the support from their grandmother that they would lose if they relocated to the Philippines.
47. In MM(Lebanon), Lady Hale and Lord Carnwath in their joint judgment (at [107]) reminded appellate bodies of its role when assessing whether an error of law was established:

“107. It is no doubt desirable that there should be a consistent approach to issues of this kind at tribunal level, but as we have explained there are means to achieve this within the tribunal system. As was said in *Mukarkar v Secretary of State for the Home Department* [2006] EWCA Civ 1045, para 40 (per Carnwath LJ):

“... It is of the nature of such judgments that different tribunals, without illegality or irrationality, may reach different conclusions on the same case ... The mere fact that one tribunal has reached what may seem an unusually generous view of the facts of a particular case does not mean that it has made an error of law ... Nor does it create any precedent, so as to limit the Secretary of State’s right to argue for a more restrictive approach on a similar case in the future. However, on the facts of the particular case, the decision of the specialist tribunal should be respected.”

48. The judge was entitled, in my view, having taken all of this evidence into account, to find that the best interests of both K and P were to remain in the UK in the educational setting in which they had settled, the judge reached a reasonable and rational finding, in the sense that it was not a decision that no reasonable judge could reach on this evidence. In addition, the judge was reasonably and rationally entitled to find that the “severity” of the impact outweighed the public interest carrying out the balancing exercise as set out in para 38 of her decision.

Ground 2

49. That then leaves ground 2 and the contention that the judge was wrong to apply by analogy CI (Nigeria) to the appellant. In CI (Nigeria) the Court of Appeal held that it was relevant in assessing what weight to give to an individual’s private and family

life that, had the individual's parents applied earlier in time, the appellant would have been granted indefinite leave to remain earlier (see [49]-[53]). At [52]-[53] Leggatt LJ (as he then was) said this:

"52. This does not mean that it is always irrelevant to ask whether, if CI's application for leave to remain had been made or determined sooner than it was, the application would or should have succeeded. As Lord Reed explained in *R (Agyarko) v Secretary of State for the Home Department* [2017] UKSC 11; [2017] 1 WLR 823, paras 51-52:

"51. Whether the applicant is in the UK unlawfully, or is entitled to remain in the UK only temporarily, however, the significance of this consideration depends on what the outcome of immigration control might otherwise be. For example, if an applicant would otherwise be automatically deported as a foreign criminal, then the weight of the public interest in his or her removal will generally be very considerable. If, on the other hand, an applicant - even if residing in the UK unlawfully - was otherwise certain to be granted leave to enter, at least if an application were made from outside the UK, then there might be no public interest in his or her removal. ...

52. It is also necessary to bear in mind that the cogency of the public interest in the removal of a person living in the UK unlawfully is liable to diminish - or, looking at the matter from the opposite perspective, the weight to be given to precarious family life is liable to increase - if there is a protracted delay in the enforcement of immigration control. ...

53. The stage at which such considerations are relevant, however, in a case involving deportation of a "foreign criminal" is in assessing whether there are "very compelling circumstances" over and above those described in the Exceptions which outweigh the public interest in deportation. That is indeed implicit in Lord Reed's discussion, which starts from the premise that the applicant is residing in the UK unlawfully."

50. This point, of course, in the context of this appeal related to the appellant's reliance upon his private life and the issue of proportionality under Art 8. That is made clear in para 24 of the judge's determination where it is recorded that Mr Lotay (who also represented the appellant before Judge Jones) relied upon CI (Nigeria) in support of the submission that the fact that the appellant had been eligible for British citizenship, but his parent failed to apply on his behalf, was relevant to the weight to be attached to his private life in the UK in assessing proportionality under Art 8.

51. In para 25, the judge concluded that the appellant would have been granted British citizenship and in para 32 took that into account:

"A matter to be put into the balance when weighing the public interest considerations and conducting the proportionality assessment under Article 8".

52. To the limited extent this played in the judge's reasoning, it was consistent with CI (Nigeria) and the passage from Lord Reed's judgment in Agyarko. In fact, of course, this appeal was largely determined on the basis of the impact upon P and K and their lives in the UK rather than that of the appellant directly. The relevance of CI

(Nigeria) to their claim was, perhaps, somewhat tangential. Indeed, apart from the reference in para 32, the judge made no further and explicit reference to this factor when carrying out the balancing exercise in para 38 of her determination. Nevertheless, to the extent that it was relevant, I accept Mr Lotay's submission, which was accepted by the judge, that the appellant's history, and that he would in all probability have become a British citizen, was not irrelevant to his claim under Art 8 of the ECHR. Although, as I have said, I do not consider that it factored in in any significant way in the judge's reasoning when she concluded that the "strong" public interest was outweighed by the severity of the impact, largely by reference to K and P's lives in the UK.

53. Consequently, I also reject ground 2.

Decision

54. For the above reasons, the decision of the First-tier Tribunal to allow the appellant's appeal under Art 8 of the ECHR did not involve the making of an error of law. That decision, therefore, stands.

55. Accordingly, the Secretary of State's appeal to the Upper Tribunal is dismissed.

Signed

Andrew Grubb

Judge of the Upper Tribunal
19 July 2021

TO THE RESPONDENT **FEE AWARD**

Having allowed the appeal, Judge Jones did not make a fee award on the basis that the appeal took account of evidence which was not available to the original decision maker. That decision has not been challenged and therefore Judge Jones' decision not to make a fee award stands.

Signed

Andrew Grubb

Judge of the Upper Tribunal
19 July 2021