



IAC-AH-LEM-V1

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

Appeal Numbers: IA/39329/2013
IA/39332/2013
IA/39333/2013
IA/39336/2013
IA/39340/2013

THE IMMIGRATION ACTS

**Heard at Bradford
On 7 August 2014**

**Determination
Promulgated
On 21st Oct 2014**

Before

UPPER TRIBUNAL JUDGE CLIVE LANE

Between

**YSC (FIRST APPELLANT)
JC (SECOND APPELLANT)
CC (THIRD APPELLANT)
YC (FOURTH APPELLANT)
QPC (FIFTH APPELLANT)
(ANONYMITY ORDER MADE)**

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Ms Z Preston, Immigration Legal Advice Centre
For the Respondent: Ms R Pettersen, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellants are citizens of Malawi. The appellants made applications for leave to remain in the United Kingdom on “compassionate grounds” but their applications were refused by decisions of the respondent dated 25 October 2013. The respondent decided that the removal of the appellants from the United Kingdom would not place the United Kingdom in breach of its obligations under Article 8 ECHR. In addition, directions were given under Section 10 of the Immigration and Asylum Act 1999 for the appellants’ removal from the United Kingdom. The appellants appealed against the refusal to the First-tier Tribunal (Judge Turnock) which, in a determination promulgated on 26 March 2014, dismissed the appeal. The appellants now appeal, with permission, to the Upper Tribunal.
2. The appellant submits that the judge erred in law by considering the appeals under the provisions of the “new” Article 8 Rules which came into effect in July 2012; the appellants’ applications for leave to remain were made in June 2012. It appears that both representatives at the First-tier Tribunal hearing considered that the “new” Rules should be applied.
3. To be fair to the appellant, the written grounds of appeal do not refer to this point; it was raised by the judge who granted permission in the First-tier Tribunal. However, it is devoid of merit. Whether or not the judge should or should not have applied the “new” Rules, he proceeded, in any event, to carry out “freestanding” analysis of Article 8 ECHR outside the Immigration Rules. The determination of the appeal on Article 8 grounds has been conducted by the judge without reference to the Immigration Rules. Given that the judge has carried out this separate Article 8 assessment, it is difficult to see how the appellants have suffered any prejudice by the approach which he adopted.
4. Where the parties are in agreement (as confirmed at the Upper Tribunal hearing by Ms Pettersen and Ms Preston) is that the minor appellants were required to satisfy the amended paragraph 276ADE (amended as from December 2012) which, in addition to requiring an applicant to be under the age of 18 years and to have lived continuously in the United Kingdom for at least seven years added the requirement that “it would not be reasonable to expect the applicant to leave the United Kingdom.”
5. The addition of the provision as to the “reasonableness” of return to the country of nationality is relevant in this appeal. Had the old Rule applied, then it is certainly arguable (in the light of the length of time the children have resided in the United Kingdom) that they satisfied the provision and should have been granted a period of leave. The grounds complain that the judge failed to have regard to the best interests of the children (Section 55 of the Borders, Citizenship and Immigration Act 2009). Had he done so, he would not have concluded that it was in the best interests of the children for them to accompany their parents on return to Malawi. The

requirement which the parents acknowledge they had to meet as to “reasonableness” brings the provision in the Immigration Rules in line with Section 55 (as part of the determination of the appeal on Article 8 grounds outside the Rules). Leaving aside the question as to whether “best interests” imposes a higher level of test than “reasonableness”, I do not accept the appellants’ submission that the judge has failed to have regard to the children’s best interests. In a careful and detailed determination, the judge wrote this at [54]:

[the children] would have the benefit of completing their education in the United Kingdom and access to support facilities provided by NHS [if they were to continue remaining living here]. However they are not British citizens and have no entitlement to the benefit of the education and NHS systems from which they have benefited to date. Their parents have a poor immigration history and have at least not cooperated with immigration services given the removal of the pages in the second appellant’s passport. Ultimately the best interests of the children must be to remain together with their parents as a family. The evidence is that conditions in Malawi are not such that removal of the family there would not be disproportionate. The removal of the children would cause some inevitable disruption to their education but there is no reason why they cannot successfully continue their education in Malawi and enjoy family life with their parents.

6. Given the particular facts in this case, I consider that analysis to be wholly adequate. The assessment of the “best interests” of the children began and ended with the finding that those best interests would be met by their remaining as part of a family with their parents. Quite properly, the judge referred to the fact that the children are not British citizens. That was a relevant factor as held by the Court of Appeal in *EV (Philippines)* [2014] EWCA Civ 874;
 1. 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?
 1. 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.
 1. 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.

1. In fact the immigration judge weighed the best interests of the children as a primary consideration, and set against it the economic well-being of the country. As Maurice Kay LJ pointed out in *AE (Algeria) v Secretary of State for the Home Department* [\[2014\] EWCA Civ 653](#) at [9] in conducting that exercise it would have been appropriate to consider the cost to the public purse in providing education to these children. In fact that was not something that the immigration judge explicitly considered. If anything, therefore, the immigration judge adopted an approach too favourable to the appellant.

7. The judge in the instant appeal has carried out a “real world” assessment which is entirely in line with the principles announced in *EV*. Whether one applies Article 8 ECHR or the Immigration Rule (including the “reasonableness” provision) the result will be the same; the children may be removed to Malawi with their parents. I find that the First-tier Tribunal Judge did not err in law as asserted in the grounds of appeal or the oral submissions of Ms Preston or at all. These appeals are dismissed.

DECISION

These appeals are dismissed.

Signed

Date 20 October 2014

Upper Tribunal Judge Clive Lane