



IAC-AH-PC-V2

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

Appeal Numbers: IA/12644/2014
IA/12647/2014
IA/12649/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 19th June 2015**

**Decision & Reasons Promulgated
On 18th August 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

**MRS MARILOU CAPITO HERRERA
MR MANUEL LUIS VILLAREAL HERRERA
MASTER EMMANUEL CAPITO HERRERA (A MINOR)
(ANONYMITY DIRECTION NOT MADE)**

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr Jeshani, Counsel

For the Respondent: Ms Brocklesby-Weller, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellants are citizens of the Philippines. The first and second Appellants are born respectively on 30th September 1969 and 19th August 1962. The third Appellant is their son born on 13th December 1996. The Appellants' immigration history is set out in detail at paragraph 5 of a Notice of Refusal dated 21st February 2014. That Notice of Refusal was in

response to an application made by way of letters requesting the reconsideration of a decision dated 5th June 2013 and with reference to a letter dated 20th June 2013 whereby the Appellants asked that their cases be considered pursuant to Article 8 of the European Convention of Human Rights.

2. The Appellants appealed the Notice of Refusal and the appeal came before Judge of the First-tier Tribunal Blake sitting at Taylor House on 9th February 2015. In a decision promulgated on 6th March 2015 the Appellants' appeals were allowed so far as the third Appellant was concerned pursuant to the Immigration Rules and so far as all Appellants are concerned pursuant to Article 8 of the European Convention of Human Rights.
3. On 17th March 2015 the Secretary of State lodged Grounds of Appeal to the Upper Tribunal. Those grounds contended firstly that the judge had arguably failed to properly apply Rule 276ADE(1) and secondly that the judge had arguably failed to properly consider Article 8.
4. On 7th May 2015 First-tier Tribunal Judge Foudy granted permission to appeal. Judge Foudy noted that the grounds argued that the judge had erred in his approach to Article 8 and paragraph 276ADE and his assessment of whether it was unduly harsh to expect the Appellant to return to the Philippines. It was also noted that the grounds argued that the judge had failed to attach sufficient weight to public interest factors in reaching his decision. Judge Foudy noted that the judge had recognised the need to consider as a primary consideration the best interests of the minor Appellant, however it was not clear what factors weighed in the judge's mind when he decided that there were exceptional features of the Appellant's case that justified allowing the appeal. Neither did she consider that it was clear that due weight was given to the public interest factors set out in Section 117 of the 2002 Act and that this lack of reasoning was an arguable error of law.
5. No reply pursuant to Rule 24 appears to have been served by the Appellants' solicitors.
6. It is on that basis that the appeal comes before me to determine whether or not there is a material error of law in the decision of the First-tier Tribunal Judge. For the purpose of continuity throughout the proceedings the Herrera family are referred to as the Appellants and the Secretary of State as the Respondent. The Appellants appear by their instructed Counsel Mr Jeshani. Mr Jeshani has considerable knowledge and understanding of this case. He appeared before the First-tier Tribunal and he is the author of the Appellants' skeleton argument that was before that Tribunal. The Secretary of State appears by her Home Office Presenting Officer Ms Brocklesby-Weller.

Submissions/Arguments

7. As a preliminary issue Mr Jeshani points out that at the date of decision the third Appellant was aged under 18 and submits that he met the requirements of paragraph 276ADE(1)(iv). He points out that the judge went on to make findings in the alternative because at the date of the hearing the third Appellant was aged over 18 but under 25 and he had been in the UK for half of his life.
8. Ms Brocklesby-Weller submits that the Appellant could not succeed under paragraph 276ADE(v) as the relevant date for consideration of the issue is the date of application. Further she submits that if you took the date of decision it is the Secretary of State's contention that the third Appellant had spent more of his time in the Philippines in that he would have spent nine years five months 26 days in the Philippines and since his arrival in the UK seven years eight months. However, it is conceded that the Appellant could not meet paragraph 276ADE(1)(v) and consequently Ms Brocklesby-Weller submits that the analysis comes down to a reasonableness assessment and that the best interests of a child are different from reasonableness. She submits that wider consideration is to consider the family unit as a whole and whether allowing the appeal is reasonableness. She acknowledges that the Appellant enjoyed private life in the UK but it is necessary when assessing the concept of reasonableness to consider the seven years that he spent in the Philippines. She concludes by submitting that the judge has failed to complete the balancing exercise in that he had not factored in other matters which he should have done and submits that there is an error of law and the decision of the First-tier Tribunal Judge should be set aside.
9. In response Mr Jeshani submits that paragraph 276A(0) does not apply when Article 8 is raised and that the relevant date is the date of hearing and that pursuant to *EV (Philippines)* the Rules could not be met thereunder. However, he points out that when looking at Rule 276ADE(iv) the test is one of reasonableness and the judge has carried out that exercise and come to a conclusion that he was entitled to. He refers to his skeleton argument that was before the First-tier Tribunal Judge and he again relies upon it. In particular he takes me to paragraphs 18 to 21 and sets out paragraph 276ADE(1)(iv) submitting the third Appellant satisfies that paragraph of the Immigration Rules and that the judge has, in his analysis, considered this and that the Appellant meets the Rule. He submits that the judge has looked at all avenues and reminds me that this is an in-country appeal and therefore the judge is entitled to look at all factors up to the date of hearing.
10. He submits that the decision is a valid decision. He agrees that it was appropriate for Section 117 of the 2002 Act to be looked at by the judge and that he has done so. He indicates there are effectively two approaches that he would urge me to consider both of which ultimately mean the third Appellant succeeds. He urges me that there is no material error of law but even if I were to find that there were then the Appellant would succeed under 276ADE(v) especially if he were to make a further application now.

11. In her final response Ms Brocklesby-Weller reminds me that it was not possible for the Appellant to succeed under 276ADE(iv) bearing in mind the time that he had spent in the Philippines and resubmits that this is a matter of reasonableness.

The Law

12. Areas of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial considerations, reaching irrational conclusions on fact or evaluation or to give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.
13. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue of argument. Disagreement with an Immigration Judge's factual conclusion, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence which was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because an Immigration Judge concludes that the story is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

Findings

14. Whilst appreciating the comments made by Ms Brocklesby-Weller on behalf of the Secretary of State the First-tier Tribunal Judge has analysed the evidence in some detail and at paragraphs 113 to 119 gave due consideration as to whether or not the Appellant satisfied the requirements of the Immigration Rules paragraphs 276ADE(iv) and (v). Thereafter when drawing together all the threads of his facts and findings concluded that the overall position of the family was such that their removal would engage Article 8. In addition due consideration was given to the skeleton of Mr Jeshani which makes substantial reference to case law and the First-tier Tribunal Judge has specifically indicated that he gave due and full consideration to that. The judge has analysed the factual evidence and concluded that the third Appellant satisfies paragraph 276ADE(1)(iv) of the Immigration Rules, namely that (a) at the date of decision he was a child under the age of 18 (b) at the date of decision he had lived continuously in the United Kingdom for at least seven years and this is accepted by the Respondent and (c) that at the date of decision it would not be reasonable to expect him to leave the United Kingdom given

that he was in his first year of A-levels and the disruption that that would cause him at such a critical time in his life, in his education, his integration into British society and the strong ties that he has developed with individuals both in and out of school/college which would otherwise be disrupted and severed.

15. Ms Brocklesby-Weller acknowledges that the issue comes down to a reasonableness assessment and this is something that the judge has carried out. In such circumstances the submissions of the Secretary of State both written and oral amount to little more than argument and disagreement with the decision of the First-tier Tribunal Judge. He has given due and proper consideration to the reasonableness test and has made finding thereon which are sustainable and do not disclose therefore a material error of law.
16. Based on that finding the judge was thereafter perfectly entitled to conclude that the first and second Appellant have a genuine and subsisting parental relationship with the third Appellant and it could not be deemed reasonable, and that it would be contrary to the best interests of the third Appellant, to return back to the Philippines and for the Appellants to all return back to the Philippines as a family unit. He therefore made a finding, albeit that he did not go into great detail with regard to case law, that the removal of the family would be such as to engage Article 8 of the European Convention of Human Rights. However he has referred to *Razgar* and I am satisfied that he has done enough to show that the criteria is met. In such circumstances I am satisfied that there is no material error of law in the decision of the First-tier Tribunal and the appeal of the Secretary of State is dismissed and the decision of the First-tier Tribunal is maintained.

Notice of Decision

The decision of the First-tier Tribunal discloses no material error of law and the appeal of the Secretary of State is dismissed and the decision of the First-tier Tribunal is maintained.

No anonymity direction is made.

Signed

Date 18/08/2015

Deputy Upper Tribunal Judge D N Harris

TO THE RESPONDENT **FEE AWARD**

I have dismissed the appeal and therefore there can be no fee award.

Signed

Date 18/08/2015

Deputy Upper Tribunal Judge D N Harris