



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

Appeal Numbers: IA/13400/2014
IA/13401/2014
IA/13402/2014
IA/13403/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 10 February 2015**

**Decision Promulgated
On 26 March 2015**

Before

UPPER TRIBUNAL JUDGE MOULDEN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

**SAMIR MERCHANT
SAMSHA MERCHANT
ALISHAN MERCHANT
INSHAR MERCHANT
(No Anonymity Direction Made)**

Respondents

Representation:

For the Appellant: Mr T Melvin a Senior Home Office Presenting Officer
For the Respondent: Mr A Otchie of counsel instructed by Malik Law Chambers

DECISION AND DIRECTIONS

1. The appellant is the Secretary of State for the Home Department (“the Secretary of State”). The respondents are citizens of India. The first and second respondents are respectively husband-and-wife and the third and fourth dependents are their children aged 16 and 7 ½. Collectively I will refer to them as the claimants and individually as the husband, the wife, the son and the daughter.

2. The Secretary of State has been given permission to appeal the determination of First-Tier Tribunal Judge Wilsher (“the FTTJ”) who allowed the claimants’ appeals against the Secretary of State’s decisions of 13 June 2013 to refuse the claimants leave to remain in the UK on Article 8 human rights grounds. The FTTJ allowed the appeal of the son on Immigration grounds and allowed the appeals of the husband wife and daughter on the basis that the Secretary of State’s decisions were not in accordance with the law and should be reconsidered by her.
3. The husband wife and son entered the UK on 18 May 2005 on six-month visitor’s visas. After these expired on 11 October 2005 they remained without leave. The daughter was born in the UK on 19 February 2007. Their applications were made on 28 February 2012. They were refused leave to remain, which did not attract a right of appeal. Subsequently, 10 March 2014 the Secretary of State gave removal directions to each of the claimants.
4. The FTTJ heard the appeals on 9 October 2014. All parties were represented. The husband and wife gave evidence. In paragraph 7 of the determination the FTTJ said; “This case therefore turns heavily on the question of whether a child who has been living in the UK for seven years, without any other complicating factors falls within the Rules and/or Article 8 of the ECHR and whether that generates an associated right to remain for their parents who have no lawful status under the Rules and/or Article 8 ECHR.”
5. The FTTJ concluded that in the case of the son he had been in the UK since 2005, a period of nine years and that the Secretary of State made an incorrect decision in his case when applying the Rules. Given the long period of his integration into British life, the educational stage he had breached and his advanced age and autonomy the FTTJ found that it would not be reasonable to expect him to leave the UK. He satisfied the provisions of Rule 276ADE of the Immigration Rules. The position of the daughter was in some respects similar. She had lived in the UK for seven years but on the facts of her case did not succeed in the same way as the son.
6. The Secretary of State applied for and was granted permission to appeal. Her grounds submit that the FTTJ erred in law by failing to adopt the structured approach to the best interests of the son in the light of the judgement of the Court of Appeal in AE (Algeria) v SSHD [2014] EWCA Civ 653 and EV (Philippines) v SSHD [2014] EWCA Civ 874. No consideration had been given to the factors which went against the conclusion as to the best interests of the son, in particular the situation of the family as a whole who had sought to flout immigration controls and could have no legitimate expectation of been given permission to remain in the UK. No proper weight had been given to the weighty interests of effective immigration control. It would be reasonable for the son to return to India with the rest of the family.

7. The husband and wife attended the hearing before me. Mr Otchie submitted a skeleton argument and the case of R on the application of Osawemwenze v SSHD [2014] EWHC 1564 (Admin).
8. Mr Melvin submitted that none of the claimant had ever had leave to be in the UK except for six-month visitor visas for the husband, wife and son granted as long ago as May 2005. The husband admitted that his intention was to stay in the UK in order to secure better economic prospects. The FTTJ had erred in law by failing properly to consider in relation to an overall assessment as well as paragraph 276ADE that the son was the minor dependent of his parents and should be expected to return to India with them and his sister. They would return together as a family. AE (Algeria) showed, at paragraph 9, that what was required was a structured approach looking at all the relevant factors relating to the family as a whole. The FTTJ had considered only the factors in favour of the son as an individual. If the son was deprived of a continuing education at public expense it was something he had never been entitled to in the first place. His father and mother had no right to be here, no right to work, no ability to support the children and no right to an education for them.
9. Mr Melvin relied on paragraphs 59 to 61 of EV Philippines. The FTTJ had failed to take an overall view of the family as a whole. The reasonableness test he applied was too narrowly compartmentalised. I was asked to find that the FTTJ had made an error of law and to set aside the decision which, he submitted, I could re-determine on submissions only without the need for an adjournment or further evidence.
10. Mr Otchie relied on his skeleton argument. He submitted that it was a clear and careful determination. There was no doubt that the son met the requirements of paragraph 276ADE(iv) to which the FTTJ added the point as to his autonomy as a person in the light of his age. The FTTJ reached a conclusion open to him in the light of the checklist in paragraphs 59 to 61 of EV Philippines. The FTTJ set out the appropriate test in paragraph 7 of his determination and then followed the appropriate Razgar step-by-step approach.
11. Mr Otchie argued that the conclusion that the son met the requirements of the Immigration Rules meant that the Secretary of State's decision, which did not address this, was not in accordance with the law. I was referred to paragraph 30 of Osawemwenze. The children should not be blamed for the sins of their parents. They were fully integrated into UK society. There had been delay by the Secretary of State in issuing removal directions.
12. Mr Otchie submitted that there was no material error of law. In reply to my question as to what action he would ask me to take if I found that there was a material error, he argued that the appeal should go back to the First-Tier Tribunal. The claimants would wish to call oral evidence from the son and the daughter and further evidence from the father and mother as to what their position would be if they returned to India. Further submissions would also be required.

13. In his reply, Mr Melvin submitted that the seven-year concession in DP596 had ceased to exist. The son's appeal was interdependent with that of his father and mother. The FTTJ had made no findings as to the Secretary of State's case. The FTTJ had cherry picked only parts of the evidence which benefited the son without any adequate consideration of the public interest.

14. I reserved my determination.

15. In paragraph 9 of the AE Algeria Maurice Kay LJ said;

"9. What was required was a structured approach with the best interests of Maya and her siblings as a primary consideration but with careful consideration also of factors pointing the other way. Such factors include but are not limited to the overstaying of the children and their mother and the illegal entry and bogus asylum claim of the appellant father. The latter is no doubt what the UT had in mind when referring to "the need to maintain immigration control". Moreover, I do not consider that it would be inappropriate for the future cost and duration of Maya's treatment and care in this country to play a part in the balancing exercise as matters relating to the economic wellbeing of this country, given the strains on the public finances....."

16. In paragraphs 58 to 61 of EV Philippines Lewison LJ said;

"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.

61. 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.

17. Mr Otchie relied on paragraph 30 of Osawemwenze in which Andrew Thomas QC sitting as a High Court judge said;

“30. Baroness Hale held (at para 18) that the starting point is the right of all states to control the entry and residence of aliens. Thereafter, the factors to be taken into account include: the length of the applicant's stay in the country from which he is to be expelled; the nationalities of the various persons concerned; the applicant's family situation, such as the length of the marriage; whether family life was established knowing of the precariousness of the immigration situation; the ages of any children concerned; and the seriousness of the difficulties which the family is likely to encounter in the country to which the Appellant is to be expelled. The Court should take into account the fact that the situation is not one of the child's own making. Their interests are a primary consideration, but they are not paramount (see para 25).”

18. I find that the FTTJ erred in law by failing to adopt a structured approach which considered the position and best interests of the son not just in isolation but also in the context of the family as a whole. In substance what the FTTJ did was to consider the best interests of the son and whether he satisfied the provisions of paragraph 276ADE of the Immigration Rules in isolation from the circumstances of the rest of the family. Paragraph 276ADE includes a test as to whether “it would not be reasonable to expect the applicant to leave the UK”. The FTTJ addressed that reasonableness test in the context of the son on his own and not in the context of the position of the rest of the family. The best case for any member of the family was that of the son, followed by the daughter with the strongest factors pointing towards the removal of the husband and the wife. AE Algeria and EV Philippines provide clear indications of the need for this structured and holistic approach. I can find nothing in Osawemwenze to indicate that any different approach should be taken.

19. In paragraph 11 the FTTJ said; “I therefore think that the claims are very much interlinked and that my finding in relation to the third appellant may impact upon the overall assessment of the other appeals”. I find this to be a clear indication that the FTTJ made an assessment of the son’s position and reached a conclusion before making an assessment of the position of all the members of the family. I find this to be a material error of law.

20. Mr Otchie submitted that if I found there to be a material error of law and set aside the decision then the appeal should be re-determined in the First-Tier Tribunal so that the claimants could produce further and updated evidence and make further submissions. Whilst I have reservations as to the need for further evidence I am prepared to give the claimant's the benefit of the doubt.
21. Whilst I have not been asked to make an anonymity direction I note that the FTTJ did so. I consider that an anonymity direction is necessary in order to protect the interests of the children. I make an order under rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 prohibiting the disclosure or publication of any matter likely to lead members of the public to identify any of the claimants.
22. Having found that there is a material error of law I set aside the decision of the FTTJ and direct that the decision be remade in the First-Tier Tribunal.

Signed:
Upper Tribunal Judge Moulden

Date: 13 February 2015