



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

**Appeal Numbers: IA/14614/2014  
IA/14615/2014  
IA/14616/2014  
IA/14617/2014**

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 30 January 2015**

**Decision Promulgated  
On 30 January 2015**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE FROMM**

**Between**

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

Appellant

**and**

**VIOLA VILA (1)  
GEZIM KARAJ (2)  
BRIAN KARAJ (3)  
ARMELA KARAJ (4)  
(NO ANONYMITY DIRECTION MADE)**

Respondents

**Representation:**

For the Appellant: Mr S Walker, Home Office Presenting Officer  
For the Respondent: None

**DECISION AND REASONS**

1. The respondents to this appeal are citizens of Albania, born on 20 August 1982, 26 February 1976, 21 June 2005 and 30 December 2007 respectively. The appellant is the Secretary of State for the Home Department, who has appealed with the permission of the First-tier Tribunal against a decision of Judge of the First-tier Tribunal Pears,

allowing the respondents' appeals against decisions of the Secretary of State, dated 11 March 2014, to remove them to Albania, having refused their applications for leave on human rights grounds. The Secretary of State found the appellants could not succeed under Appendix FM or paragraph 276ADE of the Immigration Rules, HC395, and there were no exceptional circumstances for the purposes of article 8 of the Human Rights Convention.

2. It is more convenient to refer to the parties as they were before the First-tier Tribunal. I shall therefore refer to Mrs Vila and her family from now on as "the appellants" and the Secretary of State as "the respondent".
3. I was not asked and saw no reason to make an anonymity direction.
4. The first and second appellants claim to have entered the UK clandestinely in 2002 and to have remained here without leave ever since. The third and fourth appellants, who are now aged 9 and 7, were born in the UK. The appellants brought themselves to the attention of the authorities by submitting their applications for leave for a purpose not covered by the rules in July 2013.
5. At the appeal hearing before Judge Pears, the first and second appellants acknowledged that they did not meet the requirements of the Immigration Rules. However, the appeals of the third and fourth appellants were pursued on the grounds that the decisions made by the respondent were not in accordance with the law. Further, the Tribunal was asked to rule on whether the rules were met or, alternatively, removing the third and fourth appellants would breach article 8 of the Human Rights Convention.
6. Judge Pears found the decision in respect of the third appellant in particular was not in accordance with the law. In paragraph 13 of his decision he noted the explanatory memorandum to changes in the rules that brought in Appendix FM in paragraph 276ADE. He noted a passage at paragraph 7.5 and 7.6 in that document which stated that the key test for non-British children remaining on a permanent basis was the length of their residence in the UK, which the rules set at seven years, subject to countervailing factors. The Judge noted that the refusal letter did not identify any countervailing factors and therefore it was difficult to identify which factors were taken into account which prevailed over the third appellant's residence for more than seven years.
7. In paragraphs 14 and 15 Judge Pears considered whether the decision letters showed the respondent had complied with her duty under section 55 of the Borders, Citizenship and Immigration Act 2009 to safeguard and promote the welfare of children and he concluded she had not. This was a further reason the decisions were not in accordance with the law.

8. Next, in paragraphs 16 to 20, Judge Pears analysed the respondent's application of paragraph 276ADE and he concluded that wrong version of the rules had been applied to him.
9. I pause to note here that Judge Pears could have allowed the third appellant's appeal under the correct version of the rules on the basis of the undisputed facts.
10. Judge Pears noted that he could have allowed the appeals to the extent that the decisions were not in accordance with the law. However, he was urged by counsel for the appellants, to go further and to consider the claims on their merits. In paragraph 21 he recorded that this was not opposed by the respondent's counsel. He noted the respondent had served a one-stop notice, the application had been made over two years ago and the appellants, particularly the children, needed a resolution of the case on its merits rather than wait for the outcome of a remittal.
11. Having directed himself extensively by reference to domestic case law and, in particular, *ZH (Tanzania)* [2011] UKSC 4, he concluded the removal of the appellants would be a disproportionate step.
12. The grounds seeking permission to appeal argue one point only. They argue the First-tier Tribunal misdirected itself in law by going on to make a ruling on the substantive merits of the article 8 claim and it should have allowed the appeal to the limited extent of finding the decision was not in accordance with the law. The Judge had failed to have proper regard to the position of the respondent. Reliance was placed on paragraph 46 of Sedley LJ's judgment in *Mirza & Ors v SSHD* [2011] EWCA Civ 159. I note the grounds do not engage with the actual decision on the merits.
13. Permission to appeal was granted by Judge of the First-tier Tribunal Andrew.
14. The appellants did not attend the hearing. The reason for that might well be that the respondent has decided to grant them leave for a period of 30 months. Mr Walker helpfully showed me a copy of the respondent's letter to that effect, dated 25 November 2014. Of course, this is the respondent's appeal so there is no statutory abandonment. The respondent may be deemed to have given notice of the withdrawal of her case for the purposes of rule 17(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008 but I do not give consent to withdrawal and I have decided to determine the appeal.
15. As I indicated to Mr Walker, I do not think the citation of *Mirza* assists the respondent's case. *Mirza* dealt with the question of whether it was lawful for the respondent, in refusing an application for leave to remain, to delay making a removal decision which would enable the person to bring an appeal, without having to overstay. Having dealt with that issue,

Sedley LJ remarked at the end of his judgment that it was not appropriate to go on to consider a breach of article 8 having found illegality in the decision-making process. He said,

“... But there is no need to travel into article 8 once unlawfulness is established, and there are obvious difficulties about presuming a removal which, if the law is observed, may never happen. ...”

16. That is quite different from the present case in which the appellants are appealing against decisions to remove them. Removal decisions are not being anticipated: they have happened.
17. Furthermore, as noted by the Judge, the respondent's counsel did not oppose Judge Pears's decision to proceed to determine the article 8 claim on its merits, even though he did not need to do so.
18. There was no error of law in the way the Judge proceeded. His analysis of the changes to the rule in paragraph 18 of his decision is correct. The third appellant's appeal should have been allowed under the rules.
19. The First-tier Tribunal's decision does not disclose any material error of law and shall stand. The respondent's appeal is dismissed.

### **NOTICE OF DECISION**

The First-tier Tribunal did not make a material error on a point of law and its decision allowing the appeals on article 8 grounds shall stand.

No anonymity direction has been made.

**Signed  
2015**

**Date 30 January**

**Judge Froom, sitting as a Deputy Judge of  
the Upper Tribunal**