



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

Appeal Numbers: IA/22522/2014
IA/22523/2014
IA/22524/2014
IA/22525/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 14 August 2015**

**Decision Promulgated
On 18 August 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE FROMM

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MARIA ESTER GONZALEZ (1)
OSCAR DANIEL AMARILLA ROJAS (2)
MIRANDA ANABEL AMARILLA GONZALEZ (3)
ANNE NICOLE AMARILLA GONZALEZ (4)**

(NO ANONYMITY DIRECTION MADE)

Respondents

Representation:

For the Appellant: Ms A Fijiwala, Home Office Presenting Officer

For the Respondent: Ms M Sirikanda, Solicitor

DECISION AND REASONS

1. The respondents to this appeal are citizens of Paraguay born on 13 February 1973, 10 January 1969, 27 July 1997 and 26 January 2007 respectively. They are a family and therefore their appeals have been linked and heard

together. 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 Monaghan, allowing the respondents' appeals against decisions of the Secretary of State, dated 8 May 2014, to remove them to Paraguay, having refused their applications for leave on human rights grounds. The Secretary of State refused the applications for leave, having found the respondents 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 the members of the Gonzalez 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 appellants' immigration history is not contested and is set out in Judge Monaghan's decision. In short, the first and second appellants arrived as visitors and in due course overstayed. The third appellant joined them on 23 December 2005, aged 8. The fourth appellant was born in the UK on 26 January 2007.
5. After a hearing on 15 January 2015 Judge Monaghan allowed the appeals. She directed herself that, with respect to the children, the determinative issue was whether it would be reasonable to expect them to leave the UK given that they were both under the age of 18 and had lived continuously in the UK for seven years (see paragraph 276ADE(1)(iv)). In the case of both children, she concluded it would not be reasonable for them to leave the UK. She then dealt briefly with the position of the parents. Applying section 117B(6) of the 2002 Act, she noted there was no public interest in removing them. She concluded that it would be disproportionate to remove them.
6. The Secretary of State applied for permission to appeal, arguing that the judge erred in her assessment of the position of the parents. In particular, the judge had failed to consider the other factors listed in section 117B. Permission to appeal was granted by the First-tier Tribunal.
7. I heard argument on the question of whether Judge Monaghan's decision is vitiated by material error of law.
8. Ms Fijiwala was unable to provide a clear copy of the grounds, which are poorly copied in the file. She focused attention on what she considered the inadequate proportionality balancing exercise conducted by the judge in relation to the parents. Section 117B(6) should not be considered as a stand lone provision. Additionally, she argued the judge had not given clear reasons for finding this was a case worthy of consideration outside

the rules given the parent route in Appendix FM was not met. In relation to the children, the judge had failed to engage adequately with the reasonableness test. Her main point was that the judge had not considered the parents' immigration history. However, she did not argue the judge's decision was irrational or perverse.

9. Ms Sirikanda helpfully provided a skeleton argument which she built on in her submissions. It is not necessary to set them out as I indicated at the end of the hearing that I would be dismissing the appeal because I did not find any material error of law in Judge Monaghan's decision. My reasons are as follows.
10. Whether or not it is reasonable to expect the children to leave the UK is a question of fact for the judge. Judge Monaghan was plainly aware of the relevant facts in reaching her decision. Whilst it might be anticipated that some judges might have reached a different conclusion on these facts, it cannot be said the judge erred in making her decision. In other words, it was a decision which it was open to the judge to make. She did not misdirect herself in law. She did not misunderstand the evidence or fail to take account of relevant matters. She gave adequate reasons for her decision in order to explain it.
11. In *EV (Philippines) & Ors v SSHD* [2014] EWCA Civ 874 Lewison LJ found on the facts of that case that, where the parents had no independent right to remain in the UK, it was "entirely reasonable" to expect the children to go with them. The desirability of the children being educated in the UK at public expense could not outweigh their best interests, which was to remain with their parents. The judge had not shown it was unreasonable for the children to return. The judge had not taken into account the need for the Secretary of State to control immigration. The case was commonplace. In short, the judge had not given adequate reasons for his decision.
12. However, reliance on that guidance is misplaced here. The Court of Appeal was concerned with the best interests question and the proportionality balancing exercise which went with it. In contrast, paragraph 276ADE(1)(iv) of the rules simply states as follows:

'(iv) is under the age of 18 years and has lived continuously in the UK for at least 7 years (discounting any period of imprisonment) and it would not be reasonable to expect the applicant to leave the UK;'
13. It would arguably have been an error of law for the judge to have conducted a balancing exercise and to have weighed the parents' immigration history against the children's interests in remaining in the UK. The rule is a pure test of what is reasonable and the judge's approach cannot be faulted.

14. Ms Sirikanda argued the respondent had not appealed against the decision in respect of the children and permission to appeal had not been granted to argue the points taken by Ms Fijiwala. She might well be right but, as said, my papers are not clear and it is helpful to let the parties know my views of this point in any case.
15. I pressed Ms Fijiwala to say whether the appeal could be maintained in the event there was no error by the judge in respect of the children's appeals. This was, in effect, a case of the parents 'piggy-backing' on their children's rights. Ms Fijiwala confirmed she thought there was a material error of law nonetheless.
16. I agree Judge Monaghan has erroneously treated section 117B(6) as decisive rather than as one element in the assessment of the public interest (see *Dube (ss.117A-117D)* [2015] UKUT 00090 (IAC)). However, it seems to me that any such error could not be material because it is difficult, if not impossible, to see how the judge could have arrived at any other conclusion on the proportionality issue in the light of her finding in respect of the children. If it is not reasonable to remove the children then the logic of that position is that they are to be treated as having been granted leave to remain. They were 17 and 8 years of age respectively at the date of hearing and both lived at home with their parents. Both attended school. Plainly they required their parents to look after them and section 117B(6) would be given preponderant weight. On the basis of the judge's findings it is inconceivable she could have found the provisions in sections 117B(1), (2), (3), (4) and (5) would have defeated the parents' claim to have a right to enjoy family life in the UK with their children after treating their best interests as a primary consideration. The evidence shows the parents are willing to work and would not be likely to become a burden on the state. They were not relying on the private life they had established.
17. The decision of the First-tier Tribunal does not contain a material error of law of the kind contended by the respondent. Accordingly it shall stand and 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

Date 17 August 2015

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