



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

Appeal Numbers: IA/24600/2014  
IA/24603/2014  
IA/24608/2014  
IA/24610/2014

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 22<sup>nd</sup> July 2015**

**Decision & Reasons Promulgated  
On 12<sup>th</sup> August 2015**

**Before**

**MR JUSTICE KNOWLES  
UPPER TRIBUNAL JUDGE FRANCES**

**Between**

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

**Appellant**

**and**

**MR JATINKUMAR NATVARLAL PATEL (FIRST APPELLANT)  
MRS JEEGNASHABEN ARVINDBHAI AMIN (SECOND APPELLANT)  
MASTER DEV JATINKUMAR PATEL (THIRD APPELLANT)  
MASTER DEEP JATINKUMAR PATEL (FOURTH APPELLANT)  
(ANONYMITY DIRECTION NOT MADE)**

**Respondents**

**Representation:**

For the Appellant: Ms Fijiwala, Home Office Presenting Officer  
For the Respondents: Mr Turner, instructed by Farani Javid Taylor Solicitors

**DECISION AND REASONS**

1. This is an appeal by Secretary of State. We shall refer to the parties as in the First-tier Tribunal. The Appellants were born on 5<sup>th</sup> September 1972, 30<sup>th</sup> December 1978, 1<sup>st</sup> June 2005 and 3<sup>rd</sup> October 2009. They are a husband, his wife and their two children and they are Indian nationals.

2. Their appeals were allowed by First-tier Tribunal Judge Scott on 18<sup>th</sup> March 2014 under the Immigration Rules in respect of the third Appellant, and on Article 8 grounds in respect of the first, second and fourth Appellants. The judge found that the third Appellant satisfied paragraph 276ADE(1)(iv) of the Immigration Rules and therefore the removal of the remaining Appellants would be disproportionate under Article 8.
3. The Respondent appealed on the grounds that the judge had failed to apply binding case law or had failed to distinguish the cases of EV (Philippines) [2014] EWCA Civ 874 and Zoumbas [2013] UKSC 74, and he had failed to give reasons why he had departed from those cases. Secondly, the judge had materially misdirected himself in law in failing to give adequate weight to the public interest and the factors highlighted in section 117B of the Nationality, Immigration and Asylum Act 2002 [NIA], in particular the fact that none of the Appellants had been legally resident in the UK since the parent's visas expired in 2003 and 2004 and as such any private or family life developed during that time should be given little weight. It was submitted by the Respondent that the judge's findings relating to whether it was reasonable for the third Appellant to leave the UK were speculative.
4. Permission to appeal was granted by First-tier Tribunal Judge Lever on 27<sup>th</sup> May 2015 on the grounds that the adult Appellants came to the UK as visitors and overstayed. Their children were born in the UK whilst they were here unlawfully. The judge noted the concession that the case of the adult Appellants would be hopeless but for the presence of the children. Although the judge referred to the cases of EV (Philippines) and Zoumbas, he appeared not to follow the reasoning in those cases. It was arguable that he provided no reason why this case should be so distinguished from those cases and why he did not follow the superior court's decisions when considering, in particular, the position of the third Appellant, from which then flowed a favourable decision in respect of all four Appellants.

### The Judge's findings

5. In coming to his decision the judge made the following findings at [29] to [32].

"29. In assessing the third Appellant's best interests I note that he was born in the United Kingdom on 1<sup>st</sup> June 2009 and he is now 9 years and 9 months old. He has lived all his life in the United Kingdom with his family and has never been to India. It was pointed out on his behalf that in just three months' time he would be able to apply for British citizenship. There is a wealth of evidence to demonstrate the extent of his private life and integration into the United Kingdom. Although he has never had leave to remain and his private life has been established while he has been present in the country unlawfully, that is not his fault. He was born here and had no choice in the matter. He is not to be punished for the sins of his parents.

30. If removed to India the third Appellant's parents would have no employment and no qualifications to offer on the job market. I accept that his father's age would be likely to count against him in securing work. I also accept that there is extended family in India who would not be in a position to assist him so that the third Appellant and his family might well find themselves destitute and homeless on removal there.
  31. The third Appellant is also well established at school in the United Kingdom and it would clearly be in his best interests to remain in the education system here. There is of course an education system in India but the third Appellant's first language is English and, on the evidence before me, the medium of instruction in most schools in India is Gujarati or Hindi. Although the third Appellant is able to speak both those languages to some extent because they are spoken at home, he is unable to write in them. In any event, it is doubtful if the third Appellant's family would ever be able to afford to pay school fees in India and schools in which English is the medium of instruction are even more expensive. It is likely therefore that the third Appellant's removal to India would deprive him of further education of whatever quality.
  32. Overall I conclude that removal to India would be likely to be seriously detrimental to the third Appellant's wellbeing. There is now evidence to show that his parents would be unable to maintain him and his brother in India and be unable to provide for their safety and welfare. I find, therefore, that it would not be reasonable to expect him to leave the United Kingdom. The result is that he satisfies the terms of paragraph 276ADE(1)(iv) of the Immigration Rules."
6. In relation to Article 8 the judge directed himself in accordance with Razgar and concluded:
- "34. I find that the first four questions fall to be answered in the affirmative. The remaining question concerning proportionality, which involves the same balancing exercise as that carried out above as between the public interest and private rights. Again I take account of Section 117B(6) of the 2002 Act (as amended) which provides that the public interest does not require a person's removal where he or she has a genuine and subsisting parental relationship with a 'qualifying child' (in this case the third Appellant) and it would not be reasonable to expect the child to leave the United Kingdom (as I have found).
  35. The result is that the proportionality balancing exercise falls in favour of the first and second Appellants as the third Appellant's parents.

36. As the fourth Appellant is only 5½ years old no question of separation from his parents and brother arises and it is clearly in his best interests to remain in the family unit with them.
37. I conclude therefore that the removal of the first, second and fourth Appellants would involve a disproportionate interference with their Article 8 rights”.

### Submissions

7. Miss Fijiwala relied on the grounds of appeal and submitted that the judge failed to identify why he had distinguished this case from the cases of EV (Philippines) and Zoumbas. It was clear from paragraph 31 of the decision that the main reason why it was unreasonable for the third Appellant to leave the UK was that he was educated in the UK and the cost of education in India was greater. This analysis was flawed because the judge only considered factors in favour of the third Appellant, not those against.
8. Miss Fijiwala relied on paragraphs 59 to 61 of EV (Philippines) and submitted that the judge had failed to consider that none of the Appellants were citizens of the UK. The children were reliant on the education system in the UK at public expense and this was a factor which weighed against the Appellants in balancing the public interest. The judge had failed to consider that both parents were overstayers in considering whether it would be reasonable for the third Appellant to leave the UK.
9. Miss Fijiwala accepted that the judge acknowledged that the parents’ case was hopeless but in any event he had failed to take into account their unlawful residence. The starting point in the case should have been that the parents must be removed and it was for the children to follow them. The judge had failed to adopt that approach.
10. In relation to ground 2, Miss Fijiwala submitted that the judge had failed to give weight to the public interest in assessing the proportionality balance. She relied on AM (Malawi) [2015] UKUT 260 (IAC) at paragraph 13 where the court held “the mere presence of the children in the UK and their academic success was not a trump card which their parents could deploy to demand immigration status for the whole family”. She submitted that was exactly what the judge had done in this case and that was evident from his findings at paragraphs 17 and 31.
11. There was no objective evidence of the expensive schools in India or of the fact that the Appellants’ parents would not be able to obtain employment. She accepted that this matter was not raised in the grounds of appeal. However, she went on to deal with the findings at paragraph 31 and stated that the third Appellant was in a position where he could have access to education because he was capable of learning to write in Gujarati or Hindi since he was able to speak the language.

12. Ms Fujiwala went on to rely on paragraph 39 of SS (Congo) [2015] EWCA Civ 387 at paragraph 39(4) which stated:

“The fact that the interests of a child are in issue does not simply provide a trump card so that a child applicant for positive action to be taken by the state in the field of Article 8(1) must always have their application acceded to.”

The judge’s focus was in relation to the third Appellant and therefore he had used the third Appellant as a trump card in this case. Although the third Appellant was now eligible for British citizenship, it was still a matter of whether it was reasonable for him to leave the UK and the judge did not properly conduct the assessment of this.

13. In relation to the assessment of the public interest, the judge had failed to take into account the factors referred to in Section 117B of the NIA Act 2002, namely that the parents could not speak English and had been working in the UK unlawfully. Therefore, they had failed to show that they were financially independent as well.

#### Discussion and conclusions

14. We did not need to hear from Mr Turner before arriving at the following conclusions. In relation to ground 1, the judge applied the cases of EV (Philippines) and Zoumbas at paragraphs 26 and 27 of his determination and quoted from both of those decisions. He then concluded at paragraph 28:

“For the third Appellant it was submitted that the assessment is entirely fact-sensitive, which I accept, and that the facts in those cases were clearly distinguishable from the facts in the present case.”

15. Therefore, the judge had properly directed himself in accordance with EV (Philippines) and Zoumbas and he had given a reason for why he had not come to the same conclusion in those cases in that he found that the assessment was a fact-sensitive one and he had assessed the particular facts of this case.

16. We find that this is clear from the judge’s reference at paragraph 26 to paragraph 44 of EV (Philippines). In that case the court held:

“In carrying out this assessment [the judge] took into account the fact (a) that the parents would be employable in the Philippines; (b) that the family would not be homeless; (c) that there was an extended family to which they would have access; (d) that the family had only been in the UK for a limited time – 3 years 9 months at the date of the First-tier Tribunal decision at which time the children were 11, 10 and 8; (e) that the children would not be without education in the Philippines. The fact that it would not be as good and that secondary

education was not free was not determinative. In addition there was no question of any interference with the appellants' family life...."

17. It is clear from that paragraph that the facts in the case of EV (Philippines) were entirely different to the facts in this case. The judge went on to consider those factors mentioned at paragraph 44 of EV (Philippines) in assessing whether it was reasonable to expect the third Appellant to leave the UK. He took into account the ability of the parents to obtain employment, their ability to obtain housing, the presence of extended family members, their length of residence in the UK and whether the third Appellant could access education. The Judge made the findings at paragraphs 29 to 32 of the decision, which are quoted above.
18. The case of Zoumbas was also distinguished on its facts. In that case the parents were highly educated and the children were of an age where their emotional needs could only be fully met within the immediate family unit. The judge in that case concluded that the children could be removed in the care of their parents without serious detriment to their well being.
19. Therefore, we find that the judge applied the principles set out in the case law to the facts of the Appellants' case and his findings at paragraphs 29 to 32 were open to him on the evidence. The Appellants' situation was such that if returned to India it would cause severe detriment to the third Appellant and therefore it would not be reasonable to expect him to leave the UK.
20. In relation to ground 2, the weight to be attached to the public interest, we find that the judge has not used the third Appellant as a trump card. Although he fully appreciated the third Appellant's pivotal position in the appeal, he assessed the third Appellant's best interests accordingly and then he put that assessment into the proportionality balancing exercise.
21. The judge directed himself on the provisions of Section 117 of the NIA Act 2002 at paragraphs 22 and 23:
  - "22. The public interest in maintaining an effective system of immigration control is clear and is entitled to considerable weight. It is well established that the state has the right to control entry to its territory and that there is no right to choose where private and family life is to be established.
  23. ....one of the provisions of [Section 117B] is that little weight is to be given to a private life formed while the person concerned is in the United Kingdom unlawfully. Another is that the public interest does not require the removal of a person who has a genuine and subsisting parental relationship with a 'qualifying child' and it would not be reasonable to expect that child to leave the United Kingdom. Section 117D defines 'qualifying child' as including a person under the age of 18 who has lived

in the United Kingdom for a continuous period of seven years or more. The third Appellant is such child and again the question is whether it would be reasonable to expect him to leave the United Kingdom."

22. Accordingly, the judge was well aware of the weight to be attached to the public interest as a result of the first and second Appellants' substantial period of unlawful residence in the UK. He properly directed himself under Section 117B(6) and his conclusion that the proportionality balancing exercise fell in favour of the first and second Appellants was open to him on the evidence.
23. The judge's finding that it would not be reasonable to expect the third Appellant to return to India was open to him on the evidence and was not speculative as alleged in the grounds. The Appellants were found to be credible witnesses and their evidence was unchallenged. The judge was entitled to rely on their evidence in coming to the conclusions he did at paragraphs 30 and 31. The judge gave cogent reasons for making those findings.
24. We find that the judge accepted that the public interest in maintaining immigration control required the removal of the adult Appellants and that the best interests of the third Appellant was not a trump card in assessing proportionality. The judge worked through the circumstances of the case and the particular circumstances of the third Appellant. We find that, on the particular facts of this case, the judge was entitled to allow the appeal on Article 8 grounds.
25. Accordingly we find that there was no material error of law in the decision of the First-tier Tribunal and the Respondents' appeal to the Upper Tribunal is dismissed. The decision of 18<sup>th</sup> March 2015 shall stand.

### **Notice of Decision**

The appeal is dismissed

No anonymity direction is made.

Signed

Date

Upper Tribunal Judge Frances