



**Upper Tribunal  
(Immigration and Asylum Chamber)**  
Numbers: IA/26462/2014

Appeal

IA/26463/2014

**THE IMMIGRATION ACTS**

**Heard at: Manchester**

**Decision and Reasons  
Promulgated**

**On: 12<sup>th</sup> March 2015**

**On: 20<sup>th</sup> July 2015**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE BRUCE**

**Between**

**Secretary of State for the Home Department**

Appellant

**and**

**Ms Julie Wayilumba Phambala  
Master Wathu Phambala  
(no anonymity direction made)**

Respondents

**Representation:**

For the Appellant: Mr Harrison, Senior Home Office Presenting Officer  
For the Respondent: Mr Singh, Greater Manchester Immigration Aid Unit

**DECISION AND REASONS**

1. The Respondents are both nationals of Malawi. They are respectively a mother and her dependent son, aged 10. On the 22<sup>nd</sup> October 2014 the First-tier Tribunal (Judge Ransley) allowed their linked appeals against decisions to remove them from the United Kingdom under s10 of the Immigration and Asylum Act 1999. The Secretary of State now has permission<sup>1</sup> to appeal against that decision.

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<sup>1</sup> Permission granted by First-tier Tribunal Judge Fisher on the 20<sup>th</sup> November 2014

2. On the 6<sup>th</sup> July 2012 the Respondents had made applications for leave to remain in the UK on Article 8 grounds 'outside of the Rules'. At that point Master Wayilumba was weeks away from his eighth birthday and had been in the UK for a continuous period of over seven years.
3. The Secretary of State refused the applications but made no decision which would give rise to a right of appeal. The Respondents applied for permission to judicially review the failure to make an appealable decision and the matter was settled by consent on the 14<sup>th</sup> March 2014. The Secretary of State thereafter served the Respondents with s10 notices<sup>2</sup> and an appeal was lodged with the First-tier Tribunal. A fresh refusal letter, dated 11<sup>th</sup> June 2014, explained why the Secretary of State did not consider that the applicants met the requirements of any of the provisions set out in Appendix FM or paragraph 276ADE(1)(iv), and why the Secretary of State did not find there to be any exceptional circumstances.
4. When the matter came before Judge Ransley she noted the date of the original applications and in accordance with the decision in Edgehill<sup>3</sup>, found that the amendments made to the Immigration Rules on the 9<sup>th</sup> July 2012 had no application to these appeals. She proceeded to deal with the matter before her solely on human rights grounds. In doing so she had regard to a policy document entitled "Immigration Rules on Family and Private Life (HC 194): Grounds of Compatibility with Article 8 of the ECHR". This is a statement made by the Home Office on the 13<sup>th</sup> June 2012 prior to introduction of the 'new' rules on the 9<sup>th</sup> July 2012. It includes the following remark:

"we consider that a period of seven continuous years spent in the UK as a child will generally establish a sufficient level of integration for family and private life to exist such that removal would normally not be in the best interest of the child".
5. Judge Ransley accepted that the second appellant before her had been in the UK for a continuous period of over seven years. She found there to be no countervailing factors such that his removal would be necessary. She found that in his nine years in the UK he had integrated, particularly into the school system. She found that he could enjoy the benefit of the policy that Mr Singh had referred her to, since it was in force at the date that he had made his application. She allowed the appeals.
6. The Secretary of State now appeals on the following grounds (the grounds are listed (a)-(i) but are here summarised):
  - i) The Judge was wrong to have applied Edgehill because the applications had been made 'outside of the Rules' and so the transitional provisions examined in that case did not apply;
  - ii) It was not open to the Tribunal to rely on a policy statement made

<sup>2</sup> Decisions to remove pursuant to s10 of the Immigration and Asylum Act 1999 dated 16<sup>th</sup> June 2014

<sup>3</sup> Edgehill and Anor v SSHD [2014] EWCA Civ 402

in relation to the new rules if she was not applying those Rules;

- iii) The Tribunal should have considered 276ADE(1)(iv) and in particular the only matter in issue between the parties, whether it was “reasonable” to expect him to return to Malawi with his mother;
- iv) The seven years long residence should not have been treated as determinative;
- v) There were weighty public interest factors in removing both mother and child since she they had entered in 2005 and overstayed.

### My Findings

7. There is an error of law in this determination in that we now know from the judgement in Singh and Khalid<sup>4</sup> that a decision taken in June 2014, as these were, should be considered under the ‘new’ Rules. The Rule in place at the date of decision was the amended version of 276ADE(1)(iv) which required Master Phambala to show that he:

(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; or

[emphasis added]

8. The Secretary of State is therefore quite correct in making points (i), (iii) and (iv), as they are set out above.
9. That does not however mean that this decision must be set aside. The policy mentioned at (ii) was, it must now be agreed in light of Singh and Khalid, plainly relevant. That is one of a number of clear policy statements by the Secretary of State in respect of this provision. I find the effect of those policy statements to be such that Judge Ransley could only have allowed this appeal.
10. The origins of 276ADE(1)(iv) was the concession known as DP5/96. That policy, and those which followed, created a general, but rebuttable, presumption that enforcement action would “not normally” proceed in cases where a child was born here and had lived continuously to the age of 7 or over, or where, having come to the United Kingdom at an early age, 7 years or more of continuous residence had been accumulated<sup>5</sup>. That has consistently been the Secretary of State’s position, and as the policy cited to Judge Ransley indicates, underpinned the introduction of

<sup>4</sup> Khalid v SSHD; Singh v SSHD [2015] EWCA Civ 74

<sup>5</sup> For a detailed history of the rule and its development see Dyson LH in Munir v SSHD [2012] UKSC 32 paras 9-13

276ADE(1)(iv) itself. In December 2012 the rule was amended to include the term “reasonable”. The grounds of appeal suggest that this should be read to mean “proportionate” (at (f)). That this is not so is illustrated by the current guidance which accompanies the current version of the Rules. Immigration Directorate Instruction ‘Family Migration: Appendix FM Section 1.0b *Family Life (as a Partner or Parent) and Private Life: 10-Year Routes*’ (“the IDI”) gives the following guidance:

11.2.4. Would it be unreasonable to expect a non-British Citizen child to leave the UK?

The requirement that a non-British Citizen child has lived in the UK for a continuous period of at least the 7 years immediately preceding the date of application, recognises that over time children start to put down roots and integrate into life in the UK, to the extent that being required to leave the UK may be unreasonable. The longer the child has resided in the UK, the more the balance will begin to swing in terms of it being unreasonable to expect the child to leave the UK, and *strong reasons will be required in order to refuse a case with continuous UK residence of more than 7 years.*

The decision maker must consider whether, in the specific circumstances of the case, it would be reasonable to expect the child to live in another country.

The decision maker must consider the facts relating to each child in the UK in the family individually, and also consider all the facts relating to the family as a whole. The decision maker should also engage with any specific issues explicitly raised by the family, by each child or on behalf of each child.

11. As can be seen from this, the insertion of the term “reasonable” was not meant to indicate that the Secretary of State had changed her mind about where the best interests of the child lay. It remains the position that where a child has accumulated seven years “strong reasons” will be required in order to refuse leave to remain. That is because after a period of seven years that child’s private life will be entrenched to the point that it would – usually- be unreasonable to interfere with it. As it was put by Lord Wallace of Tankerness in the debate in the House of Lords on the introduction of section 117B (6) NIAA 2002 (as amended by the Immigration Act 2014):

“we have acknowledged that if a child has reached the age of seven, he or she will have moved beyond simply having his or her needs met by the parents. The child will be part of the education system and may be developing social networks and connections beyond the parents and home. However, a child who has not spent seven years in the United Kingdom either will be relatively young and able to adapt, or if they are older, will be likely to have spent their earlier years in their country of origin or another country. When considering the best interests of the child, the fact of citizenship is important but so is the fact that the child has spent a large part of his or her childhood in the United Kingdom”<sup>6</sup>.

12. All of this guidance recognises that after a period of seven years residence a child will have forged strong links with the UK to the extent that he or she will have an established private life outside of the

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<sup>6</sup> At column 1383, Hansard 5<sup>th</sup> March 2014

immediate embrace of his parents and siblings. It is that private life which is the starting point of consideration under this Rule. The relationships and understanding of life that a child develops as he grows older are matters which in themselves attract weight. The fact that the child might be able to adapt to life elsewhere is a relevant factor but it cannot be determinative, since exclusive focus on that question would obscure the fact that for such a child, his “private life” in the UK is everything he knows. That is the starting point, and the task of the Tribunal is to then look to other factors to decide whether, on the particular facts of this case, these displace or outweigh the presumption that interference with that private life will normally be contrary to the child’s best interests. Those factors are wide-ranging and varied. The IDI gives several examples including, for instance, the child’s health, whether his parents have leave, the extent of family connections to the country of proposed return. The assessment of what is “reasonable” will call for the Tribunal to weigh all of these matters into the balance and to see whether they constitute “strong reasons” - the language of the current IDI - to proceed with removal notwithstanding the established Article 8 rights of the child in the UK. In this case Judge Ransley had regard to the fact that the child’s mother was an overstayer, but did not regard that as a countervailing factor of sufficient weight to render his removal reasonable. In the absence of, for instance, any criminality there were no strong reasons to remove this child after such a lengthy period of residence.

## **Decisions**

13. The determination of the First-tier Tribunal does not contain an error of law and it is upheld.

Deputy Upper Tribunal Judge Bruce  
12<sup>th</sup> March 2015