



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/43770/2014
IA/43777/2014
IA/43784/2014
IA/43789/2014

THE IMMIGRATION ACTS

Heard at Field House
On 20 October 20115

Decision and Reasons Promulgated
On 28 October 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

NUNES JODEILTO LIMA
FABIANA LOPES De OLIVEIRA
GABRIELA NUNES De OLIVEIRA
SAMUEL LUCAS NUNES De OLIVEIRA

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr S A Canter (counsel) instructed by Proficient immigration Services

For the Respondent: Ms A Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of these Appellants. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. These are appeals by four Appellants against the decision of First-tier Tribunal Judge Metzger promulgated on 02 June 2015, which dismissed each Appellants' appeal.

Background

3. The first and second Appellants are a couple in a relationship akin to marriage. The third and fourth appellants are their children. The first appellant was born on 5 April 1969. The second appellant was born on 6 July 1972. The third appellant was born on 9 December 1996. The fourth appellant was born on 7 January 2001. All four appellants are Brazilian nationals.

4. On 3rd April 2014 the Appellants applied for leave to remain in the UK on the basis of their private lives in the UK. On 21st May 2014 the Secretary of State refused the Appellants' applications. On 5 June 2014 the appellants submitted a pre-action protocol to challenge the decision of 21st May 2014. On 10 July 2014 the respondent served a one-stop warning statement of additional grounds in terms of section 120 of the 2002 Act on each of the appellants. On 1 September 2014 the respondent refused each of the appellant's applications for leave to remain in the UK and served decisions to remove the appellants on 3 September 2014.

The Judge's Decision

5. The Appellants appealed to the First-tier Tribunal. First-tier Tribunal Judge Metzger ("the Judge") dismissed the appeals against the Respondent's decision.

6. Grounds of appeal were lodged and on 26 August 2015 Judge Fisher gave permission to appeal stating *inter alia*

".... It is arguable that the judge erred in saying that "all" appellants had spent "many" years in Brazil when the fourth appellant was only five years old when he arrived in the UK. It is also arguable that, in commenting that the third appellant had developed a relationship as a result of her continued unlawful presence in the UK, he was erroneously importing considerations from section 117B of the 2002 Act into the test of reasonableness under paragraph 276 ADE(1)(iv)."

The Hearing

7. (a) Mr Cantor for the appellants argued that the Judge had made material errors of both fact and law. He focused on [15] to [18] and argued that although the Judge correctly identified the "reasonableness test" when considering paragraph 276 ADE (1)(iv) of the rules, he failed to apply it. He argued that at [15] the Judge had incorrectly found the third and fourth appellants shared responsibility with the first and second appellants for their poor immigration history. He argued that the Judge at [15] makes errors of fact when

considering the circumstances pertaining to the third and fourth appellants, and that the Judge had confused consideration of section 117B of the 2002 Act with the requirements of paragraph 276ADE of the rules.

(b) Mr Cantor argued that when the Judge moves on to consider article 8 ECHR out-with the rules his proportionality assessment was flawed and that an inadequate balancing exercise was carried out by the Judge. He argued that the Judge had not considered the distinct claims of each of the appellants; instead he treated all four appellants as one. Although the case of Azimi-Moayed and others (decisions affecting children; onward appeals)[2013] UKUT 197(IAC) is cited by the Judge, Mr Cantor argues that the guidance contained in that case was not applied by the Judge, and that the Judge failed to consider section 55 of the Borders Citizenship & Immigration Act 2009.

(c) Mr Cantor told me that the Judge had not engaged the submission that the decision was not in accordance with the law because paragraph 37 of the reasons for refusal letter sets out an exceptional circumstances test before considering article 8 ECHR.

8. For the respondent Ms Everett told me that although the decision is brief, it does not contain a material error of law. She conceded that the third and fourth appellants had been in the UK for more than seven years at the date of hearing and argued that there was only one of the factors for consideration in these four appeals. She relied on the case of AM (S 117B) Malawi [2015] UKUT 260 (IAC), and told me that the decision sets out all the relevant considerations and that, on the particular facts and circumstances pertaining to these appellants, the conclusion reached by the Judge was a conclusion open to him on the evidence presented. She asked me to dismiss the appeals & allow the decision to stand.

Analysis

9. The first ground of appeal is that the Judge made errors in applying the "reasonableness test". Counsel for the appellant argued that the errors are contained in [15] of the decision. He said that it is there that the Judge held the first and second appellants' poor immigration history against third and fourth appellants. He also argued that in the same paragraph the judge demonstrated a lack of understanding of the length of time the third and fourth appellants have been in the UK, & the short time they have each spent in Brazil.

10. The criticism of what is said at [15] is misplaced. When every word of that paragraph is read it can be seen that the Judge narrates "*the third appellant was 10 years old when she arrived in the United Kingdom and the fourth appellant was five years old when he arrived in the United Kingdom*".

11. It is argued that the Judge conflated consideration to section 117 of 2002 Act with consideration of paragraph 276 ADE of the Immigration Rules, particularly in relation to the third appellant, but the judge specifically refers to section 117B of the 2002 act at [20]. It is clear from an holistic reading of the decision that between [13] and [18] the Judge is considering the appellants' cases in terms of paragraph 276 ADE of the Immigration Rules.

12. The second and third grounds of appeal amounts to a challenge of the Judge's assessment of proportionality, and a suggested refusal to deal with the contention that the respondent's decision was not in accordance with the law. A full reading of the determination makes it quite clear that although the judge did not refer to the case of Razgar, he follow the guidance contained therein. The third question which the Judge answers implicitly in the affirmative (he must have done so to move on to consider proportionality) is a finding that the decisions are in accordance with the law.

13. The real thrust of this appeal drives at the assessment of proportionality. The Judge's assessment of proportionality is carried out in [19] [20] and [21]. It is there that I find a material error of law exists. The assessment is brief. The assessment should be set out with more structure and greater clarity. The parties to the appeal should be able to read the assessment and see what factors were weighed against one another, and why the judge reach his conclusion. Those basic features of the proportionality analysis are missing. I therefore set aside the decision. There is however no great dispute about the facts of these cases. I therefore proceed to decide each of these appeals of new.

Findings of Fact

14. The appellants are all members of the same family. The first two appellants are in a relationship akin to marriage. The third and fourth appellants are their children. The third appellant has now attained 18 years of age and so is (now) an adult.

15. The first appellant arrived in the UK 5 August 2004. The second appellant entered the UK with a visit visas on 27 April 2005. The third and fourth appellants entered the UK in possession of valid visit visas on 27 December 2006. The four appellants have lived together as one family since then.

16. On 26 March 2009 the appellants made an application for leave to remain in the UK, which the respondent refused on 29 March 2011. On 17 November 2011 the respondent issued notices to each of the appellants that they were liable to removal. On 29 November 2011 the appellants submitted applications for asylum. Those applications were refused by the respondent and certified as clearly unfounded on 26 January 2012.

17. On 14 February 2012 the appellants submitted applications for leave to remain claiming that their article 8 ECHR rights would be breached by removal. Those applications were refused on 3 April 2012. Their appeals against those refusals were dismissed on 8 April 2013.

18. On 3 April 2014 the appellants submitted a further application for leave to remain in the UK. Those applications were refused without a right of appeal on 21st May 2014. On 5th June 2014 the appellants submitted a pre-action protocol to challenge the decision of 21st May 2014. On 10 July 2014 the respondent served a one-stop warning & statement of additional grounds (in terms of section 120 of the 2002 Act) on each of the appellants. On 1 September 2014 the respondent refused each of the appellants' applications for leave to

remain in the UK and served decisions to remove the appellants on 3 September 2014. It is against those decisions that the appellants appeal.

19. After arriving in the UK the first appellant worked as a cleaner. The first and second appellants have both worked in the UK even though they do not have the right to do so. Neither of them have consistently paid either tax or national insurance.

20. The third appellant has completed his secondary education in the UK. She has been offered a place to study for a nursing degree at college. Because she does not have settled status in the UK she would have to meet the costs of tuition fees. She has deferred entry to college in the hope that she will be granted leave to remain in the UK so that she can then pursue the course of study and embark on a career as a nurse. The third appellant has a boyfriend. Their relationship started when the appellant was only 13 years old and has now endured for almost 6 years. The appellant's boyfriend is a British citizen.

21. The fourth appellant is at secondary school. He is a gifted football player. Both the third and fourth appellants have been in the UK for more than seven years. The third appellant is a qualifying child for the purposes of section 117D of the 2002 Act.

22. None of the appellants can meet the requirements of appendix FM because all four appellants are Brazilian nationals, & the first and second appellants do not have sole responsibility for either the third or the fourth appellant. None of the first second and third appellants can meet the requirements of paragraph 276 ADE of the rules because they have all lived in the UK for less than 20 years.

23. The third appellant is under the age of 18 and has lived continuously in the UK for at least seven years. Paragraph 276 ADE(1)(iv) requires consideration. The question that must be answered is whether or not it would be reasonable to expect the third appellant to leave the UK.

Paragraph 276ADE

24. The first second and third appellants are all adults who have lived in the UK for less than 20 years. They can only succeed under paragraph 276 ADE if they can establish that paragraph 276 ADE 1(vi) is engaged. To do so they would have to lead evidence that there are very significant obstacles to their re-integration into Brazil. It has never been their case that such obstacles exist. When the appellants were served with a one-stop warning on 10 July 2014 they did not take the opportunity to produce evidence that such obstacles exist. The first and second appellants speak Portuguese and have lived in Brazil for longer than they have lived in the UK. The third appellant's time in each country is more evenly divided, no reliable evidence of obstacles to reintegration are placed before me. The first, second and third appellants therefore do not discharge the burden of proving that they fulfil the requirements of paragraph 276 ADE(1)(vi)

25. It is the respondent's intention to return all four appellants to Brazil as one family unit. The fourth appellant has lived in the UK for eight years. He is now 14 years old. He's

at secondary school and will by now have started a course leading to GCSE. He enjoys education in the UK. The respondent's decision would bring that education to an end and would separate the fourth appellant from his school friends. Return to Brazil would force the fourth appellant to confront an educational system with which he is not familiar. Return to Brazil would force the fourth appellant to establish new friendships. It would clearly be a challenge to the fourth appellant, but there is no evidence before me to indicate that it is a challenge that he could not meet.

26. The question of reasonableness requires consideration of the best interests of the third appellant, a child. I am mindful of Section 55 of the Borders, Citizenship and Immigration Act 2009, and the case of ZH (Tanzania) v SSHD [2011] UKSC 4.

27. I remind myself of the cases of Azimi-Moayed and others (decisions affecting children; onward appeals), [2013] UKUT 00197. It is the intention of the SoS to ensure that the Appellants all stay together. It has long been established that it is in the interests of a child to remain with his parents. The Respondent's decision maintains the unity of this family and does not separate the fourth appellant from his parents (and his sister). The interests of the child are served because the integrity of the family unit is not challenged.

28. The appellants cannot fulfil the requirements of the Immigration Rules

Article 8 ECHR

29. In R (on the application of Esther Ebun Oludoyi & Ors) v Secretary of State for the Home Department (Article 8 - MM (Lebanon) and Nagre) IJR [2014] UKUT 00539 (IAC) it was held that there is nothing in R (Nagre) v SSHD [2013] EWHC 720 (Admin), Gulshan (Article 8 - new Rules - correct approach) Pakistan [2013] UKUT 640 (IAC) or Shahzad (Art 8: legitimate aim) [2014] UKUT 00085 (IAC) that suggests that a threshold test was being suggested as opposed to making it clear that there was a need to look at the evidence to see if there was anything which has not already been adequately considered in the context of the Immigration Rules and which could lead to a successful Article 8 claim. These authorities must not be read as seeking to qualify or fetter the assessment of Article 8. This is consistent with para 128 of R (MM & Others) v SSHD [2014] EWCA Civ 985, that there is no utility in imposing a further intermediate test as a preliminary to a consideration of an Article 8 claim beyond the relevant criterion-based Rule. As is held in R (Ganesabalan) v SSHD [2014] EWHC 2712 (Admin), there is no prior threshold which dictates whether the exercise of discretion should be considered; rather the nature of the assessment and the reasoning which are called for are informed by threshold considerations.

30. Section 117 is a factor to be taken into account in determining proportionality. I appreciate that as the public interest provisions are now contained in primary legislation they override existing case law, Section 117A(2) requires me to have regard to the considerations listed in Sections 117B and 117C. I am conscious of my statutory duty to take these factors into account when coming to my conclusions. I am also aware that

Section 117A(3) imposes upon me the duty of carrying out a balancing exercise. In so doing I remind myself of the guidance contained within Razgar.

31. Section 117B(1) provides that the maintenance of effective immigration control is in the public interest. I consider Section 117B(6) because the fourth appellant is a qualifying child, but I have already found that it would not be unreasonable to expect each of the appellants to leave the UK. I therefore have to find that the fourth appellant does not benefit from the operation of Section 117B(6).

32. By virtue of section 117D a “qualifying child” means a person who is under the age of 18 and who— (a) is a British citizen, or (b) has lived in the United Kingdom for a continuous period of seven years or more. If a child is a qualifying child for the purposes of section 117B of the 2002 Act as amended, the issue will generally be whether it is not reasonable for that child to return to the country of origin under scrutiny. Although R(on the application of Osanwemwenze) v SSHD 2014 EWHC 1563 was not specifically concerned with section 117B it has some relevance in terms of the reasonableness of a child leaving the UK. In that case, the Claimant's 14-year-old stepson from Nigeria had been in the United Kingdom for more than 7 years and had leave to remain in his own right. It was held that this was an important but not an overriding consideration and it was reasonable to expect the Claimant's family including the stepson to relocate to Nigeria. The parents had experienced life there into adulthood and would be able to provide for the children and help them to reintegrate.

33. The appellants all speak English and so the public interests set out in Section 117B(2) are met. None of the appellants have claimed state benefits, so they might be financially independent. The third and fourth appellants have benefitted from state education. It may be that Section 117B(3) is neutral. In any event In AM (S 117B) Malawi [2015] UKUT 260 (IAC) the Tribunal held that an appellant can obtain no positive right to a grant of leave to remain from either s117B (2) or (3), whatever the degree of his fluency in English, or the strength of his financial resources. In Forman (ss 117A-C considerations) [2015] UKUT 00412 (IAC) it was held that the public interest in firm immigration control is not diluted by the consideration that a person pursuing a claim under Article 8 ECHR has at no time been a financial burden on the state or is self-sufficient or is likely to remain so indefinitely. The significance of these factors is that where they are not present the public interest is fortified.

34. The appellants are all in the UK unlawfully. Section 117B(4) operates against them. Section 117B(5) weighs against all of the appellants.

35. There are therefore more factors in Section 117B weighing against each of the appellants than in their favour.

36. The effect of the respondent's decision would be that the private life that the appellants have established in the UK would come to an end. They would have to move from their home, they would be separated from their friends, the third appellant would be removed from the UK education system and would have to start afresh in Brazil.

However, that private life has been established almost by stealth whilst the appellants have been in the UK illegally. The first and second appellants have already demonstrated that they are resourceful. The third and fourth appellants are young, intelligent and able. They face a big change in their life but there is nothing before me to indicate that it is a change to which they cannot adapt.

37. In Zoumbas v SSHD 2013 UKSC 74 it was held that there was no "substance in the criticism that the assessment of the children's best interests was flawed because it assumed that their parents would be removed to the Republic of Congo.It was legitimate for the decision-maker to ask herself first whether it would have been proportionate to remove the parents if they had no children and then, in considering the best interests of the children in the proportionality exercise, ask whether their well-being altered that provisional balance. When one has regard to the age of the children, the nature and extent of their integration into United Kingdom society, the close family unit in which they lived and their Congolese citizenship, the matters on which Mr Lindsay relied did not create such a strong case for the children that their interest in remaining in the United Kingdom could have outweighed the considerations on which the decision-maker relied in striking the balance in the proportionality exercise (paras 17 and 18 above). The assessment of the children's best interests must be read in the context of the decision letter as a whole." that there was no "irrationality in the conclusion that it was in the children's best interests to go with their parents to the Republic of Congo. No doubt it would have been possible to have stated that, other things being equal, it was in the best interests of the children that they and their parents stayed in the United Kingdom so that they could obtain such benefits as health care and education which the decision-maker recognised might be of a higher standard than would be available in the Congo. But other things were not equal. They were not British citizens. They had no right to future education and health care in this country. They were part of a close-knit family with highly educated parents and were of an age when their emotional needs could only be fully met within the immediate family unit. Such integration as had occurred into United Kingdom society would have been predominantly in the context of that family unit. Most significantly, the decision-maker concluded that they could be removed to the Republic of Congo in the care of their parents without serious detriment to their well-being".

38. In the case of EV (Philippines) and Others v SSHD [2014] EWCA Civ 874 Lord Justice Lewison, stated that the best interests of the children must be made on the basis that the facts are as they are in the real world and if neither parent has the right to remain, then that is the background against which the assessment is conducted. Thus Lord Justice Lewison thought that the ultimate question was whether it was reasonable to expect the child to follow the parent who had no right to remain to the country of origin.

39. I therefore find that the respondent's decision is not a disproportionate breach of any of the appellants' article 8 ECHR rights.

Conclusion

40. I therefore have to find that the respondent's decision is not a disproportionate breach of any rights that the appellants might have in terms of Article 8 ECHR.

Decision

41 The decision promulgated on 24 November 2014 contains a material error of law. I therefore set it aside.

42 I remake the decision.

43 The appeals of all four appellants are dismissed under the Immigration Rules.

44 The appeals of all four appellants are dismissed on Article 8 ECHR grounds.

45 There is no need for an anonymity direction.

Signed

25 October 2015
Deputy Upper Tribunal Judge Doyle