



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: AA/00439/2016

THE IMMIGRATION ACTS

Heard at: Manchester
On: 13th September 2017

Decision and Reasons Promulgated
On: 19th September 2017

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

Secretary of State for the Home Department

Appellant

And

SA

(anonymity direction made)

Respondent

For the Appellant: Ms Pettersen, Senior Home Office Presenting Officer
For the Respondent: Ms Sachdev, Bury Law Centre

DETERMINATION AND REASONS

1. The Respondent is a national of Nigeria. She is an overstayer who has been living in the United Kingdom for at least 14 years. On the 22nd December 2016 the First-tier Tribunal (Judge Bircher) allowed her appeal on human rights grounds, principally because of the presence in the UK of the Respondent's children, aged 3 and 7 at the date of the hearing. The Secretary of State for the Home Department now has permission to appeal against that decision.

Anonymity Order

2. There is no reason why the identity of SA should be protected. I am however concerned that publicly identifying her could lead to the identification of her children. Having had regard to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 and the Presidential Guidance Note No 1 of 2013: Anonymity Orders I consider it appropriate to make an order in the following terms:

“Unless and until a tribunal or court directs otherwise, the Respondent is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of her family. This direction applies to, amongst others, both the Appellant and the Respondent. Failure to comply with this direction could lead to contempt of court proceedings”

The Decision of the First-tier Tribunal

3. The case before the First-tier Tribunal was that SA had been trafficked to the United Kingdom when she was aged just 16, entering the country at some point in 1996 and being held in a situation of forced domestic labour. She had eventually escaped, met the father of the children and established her own private and family life in the UK. She averred that she could not return to Nigeria because she was afraid of her traffickers, she no longer had any ties there and her children were settled in this country to the extent that it would not be reasonable to expect them to leave.
4. In a careful and reasoned decision the First-tier Tribunal rejected the account of trafficking. It did not accept that SA had been living in this country since 1996, although it was satisfied, having had regard to documentary evidence, that she has been here since at least 2004. The Tribunal did not accept that she had lost all ties to Nigeria or that there were significant obstacles to her integration there. SA could not therefore hope to qualify for leave to remain under the Immigration Rules. Turning to Article 8 ‘outside of the rules’ the Tribunal directed itself that the best interests of the children were, in accordance with the decision of the Supreme Court in ZH (Tanzania) UKSC 4, a ‘primary consideration’. It found that both children, but particularly the eldest, were settled in this country and that they had formed ties outside of the home. The eldest child is for instance described as “an asset” to his school. They both maintain contact with their father, who lives here (albeit with uncertain immigration status). It would be a struggle for them to adapt to life in Nigeria. The only life they have ever known is life in this country. Having made those findings the determination goes on to address the public interest factors set out in s117B of the Nationality, Immigration and Asylum Act 2002. It is noted that

the SA speaks “excellent” English and that she is financially independent. She did however enter the UK illegally and her immigration status has always been precarious. The determination concludes:

“On balance and in particular because of the lengthy period of time which her eldest child in particular has spent in the UK, I conclude that a refusal of the appellant’s appeal would be a disproportionate interference with Article 8 rights and therefore unlawful under section 6 of the Human Rights Act 1998”.

5. The appeal was thereby allowed.

The Challenge

6. The Secretary of State for the Home Department contends that the decision of the First-tier Tribunal is flawed for the following errors of law:
 - i) The eldest child had been only 4 at the date that the application had been made. He could not therefore qualify for leave under the relevant rule (276ADE) and the appeal could only be allowed on Article 8 grounds if there were “compelling circumstances” warranting leave outside of the rules;
 - ii) The fact that the child had been here for 7 years could not constitute “compelling circumstances”;
 - iii) Given that the child had only been here for 4 years at the date of application the Tribunal should have had regard to the *dicta* in EV (Philippines) [2014] EWCA Civ 874 regarding the public interest in removing persons who have no right to remain;
 - iv) The ultimate question is whether it is reasonable to expect the child to leave the UK, in accordance with section 117B(6) of the 2002 Act. The determination does not address that test;
 - v) In answering that question the Tribunal was obliged to have regard to the public interest: MA (Pakistan) [2016] EWCA Civ 705.

The Response

7. Ms Sachdev pointed out that the determination sets out in great detail, and at some length, the reasons it gave for rejecting SA’s trafficking claims. It plainly recognised that she had entered the country unlawfully and that she has no

right to remain in this country. The Tribunal expressly addresses the public interest factors in s117B and weighs them in the balance against the best interests of the children, and in particular the eldest, who met the definition of a “qualifying child” as per s117D of the 2002 Act. Given the terms of the Secretary of State for the Home Department’s own policy it was difficult to see how the decision would have been otherwise.

My Findings

8. The grounds of appeal reflect the somewhat tortuous route of Article 8 jurisprudence in the UK since the 1998 Act. The Secretary of State for the Home Department invokes the concepts of exceptionality and “compelling circumstances” to contend that there was nothing exceptional or compelling about a mother who is an overstayer having some children. Neither of these phrases has ever imported a legal test into the consideration of proportionality; where they have been used by the higher courts it has been simply to underline the expectation that most cases which fail under the Rules are unlikely to succeed on human rights grounds. It was ever thus. The phrases were only ever intended to emphasise the importance to be placed on the public interest in controlling immigration. Their significance has now rather fallen away, give the introduction of the codified public interest considerations that now appear in ss117A-D of the 2002 Act (as amended by the Immigration Act 2014), in particular in s117B. The First-tier Tribunal of this chamber is now required to have regard to the factors set out at s117B (1)-(6) in its assessment of proportionality. Having done that it does not need to go on to identify some “exceptional” or “compelling” feature of the case. If the case has engaged Article 8 (i.e. the first two *Razgar* questions have been answered in the affirmative) and the balancing exercise tips in the notional appellant’s favour, the case will be, by definition, exceptional. To that extent the first four paragraphs of the Secretary of State’s grounds are misconceived. Insofar as the grounds might be read to take issue with the decision of the Tribunal to consider Article 8 at all, it is of course the case that Nagre [2013] EWHC 720, the case specifically invoked in the grounds, was never intended to introduce a ‘two-stage’ test. It is plain on the facts, and indeed having regard to the Rules (276ADE(1)(iv)) and statute (s117B(6)) that interference with the private life of a qualifying child was plainly a matter that engaged Article 8. I can find no error in the Tribunal’s decision to consider the child’s human rights outwith the framework of the Immigration Rules.
9. Paragraph 5 contends that the decision of the First-tier Tribunal is contrary to that in EV (Philippines). In that case an adult overstayer sought to resist removal with reference to the presence in the UK of her four year old child and the fact that the child had started school here. The Court rightly held that in those circumstances any private life that the child had developed would be

nascent and that in all the circumstances her removal with her mother would be a proportionate response to the need to maintain immigration control. The present case was an in-country human rights appeal involving a child who was over 7 years old. This set it apart from EV (Philippines) for two important legal reasons. First, the terms of statute. Parliament has specifically legislated that a child who has spent seven continuous years in the UK is “qualifying”, a term intended to reflect the likelihood that the child will have a very well developed private life in this country; I note that the other way in which a child can be “qualified” is by being British. Second, the terms of the Secretary of State’s own policy. In the Immigration Directorates’ Instruction ‘Family Migration: Appendix FM Section 1.0b *Family Life (as a Partner or Parent) and Private Life: 10-Year Routes*’ Home Office caseowners are instructed as follows:

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.

(emphasis added)

10. That guidance has its origins in long-standing government policy to allow children who had accrued seven years’ long residence to stay, absent countervailing factors. Policies such as DP3/93 and DP5/96 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 had been accumulated¹. Although there have been shifts and amendments to this policy over the years, the government has consistently maintained that a residence of at least 7 years’ duration is a significant benchmark. As the policy statement² which accompanied the introduction of

¹ For a detailed history of the rule and its development see Dyson LJ in Munir v SSHD [2012] UKSC 32 paras 9-13

² *The Grounds of Compatibility with Article 8 of the ECHR*: Statement by the Home Office (13 June 2012) at 27.

paragraph 276ADE (1)(iv) puts it: “a period of 7 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 interests of the child” [my emphasis]. See for instance these remarks by Lord Wallace of Tankerness made in the debate on the introduction of the 2014 Act:

“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”³.

11. There was therefore no error in the Tribunal failing to follow the principles - or outcome - in EV (Phillipines).
12. As Ms Pettersen rightly acknowledged, the crux of this appeal is the Tribunal’s failure to direct itself to the test in s117B(6)(b). Although it made express findings about the first limb of the provision [at §80], and it does reach a clear proportionality conclusion [at §81-82] the Tribunal has nowhere employed the word “reasonable”. This, she submitted, demonstrates an error in approach such that the decision should be set aside.
13. Section 117B reads:

Article 8: public interest considerations applicable in all cases:

(1) The maintenance of effective immigration controls is in the public interest.

(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English –

- (a) are less of a burden on taxpayers, and
- (b) are better able to integrate into society.

³ At column 1383, Hansard 5th March 2014

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons –

- (a) are not a burden on taxpayers, and
- (b) are better able to integrate into society.

(4) Little weight should be given to –

- (a) a private life, or
- (b) a relationship formed with a qualifying partner,
that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where –

- (a) the person has a genuine and subsisting parental relationship with a qualifying child, and
- (b) it would not be reasonable to expect the child to leave the United Kingdom.

14. In Treebhowan [2015] UKUT 674 the President of this Tribunal Mr Justice McCloskey held that s117B(6) was of a different nature from the public interest factors set out in ss(1)-(5). It is expressed in mandatory terms so that if both limbs (a) and (b) are satisfied, the result is that it would be disproportionate to remove the appellant in question. The decision on whether it would be reasonable for the qualifying child to leave the country therefore assumed great significance in the deliberations. In MA (Pakistan) the Court of Appeal agreed that s117B(6) was capable of being determinative in the proportionality balancing exercise. It did not however agree with the way that McCloskey J had approached the question of reasonableness. In Treebhowan (and other decisions) the President had placed considerable emphasis on the welfare of the child. In MA Elias LJ accepted, albeit reluctantly, that the evaluation must include a balancing of the public interest against those 'best interest' factors.

These included, but are not limited to, the matters referred to at ss(1)-(5). The test of 'reasonableness' in effect becomes the proportionality balancing exercise. In those circumstances the failure of the First-tier Tribunal in this case to use the word 'reasonable', and instead to use the term 'proportionate' is hardly material. The Tribunal considers first the 'best interest' factors. It specifically has regard to the private life of the child with long residence - the qualifying child. It then has express regard to the public interest factors, and in particular the fact that SA has no leave to remain in the UK, and never has. I do not think it appropriate to interfere with that approach.

15. If I am wrong, and the decision is fatally flawed for the omission of the word 'reasonable', I would remake the decision with the same outcome. In MA the Court of Appeal endorsed the approach taken by the Respondent in her own published guidance on these issues (as this Tribunal did in PD and Others (Article 8 - conjoined family claims) [2016] UKUT 108). That guidance, cited above, 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 immediate embrace of his parents and siblings, (a point specifically recognised by the Tribunal in this case). It is *that private life* which should be 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. It will normally be contrary to the child's best interests to interfere with that private life. 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 in favour of granting leave. 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; whether criminality on the part of the parent could justify a refusal of leave. The assessment of what is "reasonable" calls for the Tribunal to weigh all of these matters into the balance and to see whether they constitute "strong reasons" - the language of the Secretary of State for the Home Department - to proceed with removal notwithstanding the established Article 8 rights of the child in the UK. This policy, and those which preceded it, must form the basis of any consideration of this Rule. As Elias LJ puts it at paragraph 46 of MA:

"Even on the approach of the Secretary of State, the fact that a child has been here for seven years must be given significant weight when carrying out the proportionality exercise. Indeed, the Secretary of State published guidance in August 2015 in the form of Immigration Directorate Instructions entitled "Family Life (as a partner or parent) and Private Life: 10 Year Routes" in which it is expressly stated that once the seven years' residence requirement is satisfied, there need to be "strong reasons" for refusing leave (para. 11.2.4). These instructions

were not in force when the cases now subject to appeal were determined, but in my view they merely confirm what is implicit in adopting a policy of this nature. After such a period of time the child will have put down roots and developed social, cultural and educational links in the UK such that it is likely to be highly disruptive if the child is required to leave the UK. That may be less so when the children are very young because the focus of their lives will be on their families, but the disruption becomes more serious as they get older. Moreover, in these cases there must be a very strong expectation that the child's best interests will be to remain in the UK with his parents as part of a family unit, and that must rank as a primary consideration in the proportionality assessment".

16. In this case the countervailing factor was the fact that the child's mother is an illegal entrant. As Ms Pettersen accepted, it is implicit in the operation of s117B(6) that the parent facing removal will not have leave to remain in this country; if she did there would be no consideration of the Rule. For that reason I am not satisfied that the lack of status *simpliciter* would be capable of constituting the "strong reasons" discussed in the policy. The findings of fact in this case are that the child in question has no connection to Nigeria apart from his mother, who has herself been out of that country for a long time. He would "struggle" to adjust to life there. By contrast he has strong links to this country: his friends, school, home and father are all here. Were I remaking this decision I would be unable to identify strong reasons why it would be reasonable to expect this child to now leave the UK and I too would allow the appeal.

Decision

17. The determination of the First-tier Tribunal does not contain an error of law such that it must be set aside.
18. There is an order for anonymity.

Upper Tribunal Judge Bruce
14th September 2017