Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: AA/04185/2013

THE IMMIGRATION ACTS

Heard at Manchester	**Date Sent**
On 23 August 2013	**On 11 November 2013**
	…………………………………

Before

UPPER TRIBUNAL JUDGE DAWSON
UPPER TRIBUNAL JUDGE O'CONNOR

Between

MMA

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss J Mason, Legal Representative, South Manchester Law Centre
For the Respondent: Mr I Jarvis, Senior Presenting Officer

DETERMINATION AND REASONS

INTRODUCTION

1. This appeal arises out of a challenge to the determination of First-tier Tribunal Judge Gladstone who dismissed the appeal of MMA, his wife (Ms E) and three children on asylum, humanitarian protection and human rights grounds against the decisions of

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18 March 2013 to remove them as illegal entrants. They are nationals of Libya where the appellant was born on 20 December 1962. After hearing submissions on whether the First-tier Tribunal had erred in law, we reserved our decision. Thereafter we invited written submissions from the parties on an issue relating to the construction of an immigration rule that had not been dealt at the hearing. None had been received by the deadline set.

KEY DATES

2. The family unit comprises the appellant's wife (Ms E) and three children. The eldest (D1) was born in 1999 in Libya. Another daughter (D2) was born in the UK in December 2000. A son (S) was also born in this country in December 2006. Sadly the appellant's first wife died during S's birth.

3. The key chronology is as follows:

28 August 1999	Appellant comes to the United Kingdom on a government scholarship with a student visa with his first wife and E1.
20 December 2000	D2 is born
January 2003	D1 attends primary school.
August-Sept. 2006	The family travel to Libya for a holiday.
19 December 2006	S is born and the appellant's first wife dies. The family travels to Libya for her burial where they remain until April 2007. During that time the appellant marries, Mrs E his late wife's sister.
April 2007	The family unit returns to the United Kingdom.
September 2008	The family returns to Libya for the appellant to undertake research.
28 March 2009	The appellant returns alone to the United Kingdom as his UK visa was to expire on 31 March 2009. He had planned to return to Libya to resume his unfinished research.
2 July 2009	The appellant's application is refused.
14 September 2009	The appellant applies for indefinite leave based on long residence.
30 July 2010	That application is refused and reconsideration is sought. The appellant remains without leave. He makes two further applications for leave to remain which were refused, the last being 30 July 2010.

4 October 2012	Ms E and the three children arrive in the United Kingdom on a visit visa.
27 February 2013	The appellant makes application for asylum with his family as dependants.

PROCEEDINGS BEFORE THE FIRST-TIER TRIBUNAL

4. The First-tier Tribunal Judge had before her copies of the applications made by Ms E and the children on 23 August 2012 for the visit visas. These reveal that the stated purpose of the visit by Ms E was to see her sister for two to three weeks. According to the Entry Clearance Officer's notes, her husband was to remain in Libya. He was employed and a letter (to this effect) had been seen as was a letter from him consenting to the visit. At the hearing, evidence was given that the application had been made through an agency.

5. The appellant was interviewed about his asylum claim and the respondent set out her reasons for rejecting it in a letter dated 13 March 2013. The key reasons for rejecting the application were as follows:

   (i) His claim that the whole family were wanted in Libya due to their connections to Gaddafi was not considered to be supported by the appellant's own evidence.

   (ii) Whilst it was acknowledged that there is evidence of people being attacked in Bin Waleed (where the appellant had been born) the account that Ms E and the children were able to remain there unharmed was inconsistent with what had been reported regarding the treatment of suspected Gaddafi supporters.

   (iii) The fact that Ms E and the children were able to leave Libya with ease did not support the claim that the family were identifiable as pro-Gaddafi.

   (iv) It was not in dispute that the appellant had always claimed to have lived in Bin Waleed and country information stated that this is home to the Warfalla tribe. The claim that the appellant would be targeted due to that ethnicity was not consistent with the rest of the claim with reference to the absence of problems experienced by Ms E and the children other than the one attack on the family home which took place at the height of the uprising in August 2012.

   (v) There are people of Warfalla ethnicity involved in anti-Gaddafi activities demonstrating that not all Warfalla are considered to be [pro] Gaddafi. It was not accepted the appellant would be targeted on return to Libya due to his ethnicity.

   (vi) In the alternative there is a part of Libya where the family could return to and live safely with reference to the ability of Ms E and the children to live in

Benghazi during the uprising from the end of 2011. Accordingly, internal relocation remained a viable option and was not unduly harsh.

(vii) The delay in the claim to asylum undermined the claimed fear and the appellant's credibility was damaged by the failure by the appellant to make any further attempt to regularise his stay after the last request made for the Secretary of State to reconsider her decision in May 2011.

(viii) It was acknowledged there continued to be outbursts of internal armed conflict in parts of Libya but the nature and scope of the conflict did not indicate that there were substantial grounds for believing the appellant would, solely on account of his presence, face a real risk of being subject to indiscriminate violence (Article 15(c) of Council Directive 2004/E3/EC of 29 April 2004) (the Qualification Directive).

(ix) It was not considered that removal to Libya would be a breach of either Articles 2 or 3 of the Human Rights Convention.

(x) Consideration had been given to the claim under Article 8 and the application had been determined in accordance with Appendix FM of the Immigration Rules. With reference to EX1(a) the children had been in the United Kingdom since 4 October 2012 and had not spent seven years in the United Kingdom nor had they demonstrated any exceptional circumstances why they could not return with the appellant to their country of origin.

(xi) The appellant also failed to fulfil the requirements of s.D-LTRPT 1.2 of Appendix FM and it was considered it would be in the children's best interests to return with the appellant and the application was therefore refused under s.D-LTRPT.1.3.

(xii) With regard to the appellant's relationship to Ms E regard had been had to EX1(b), however the appellant failed to qualify under R-LTRP.1.1(d).

(xiii) The application to remain had been determined under paragraph 276ADE by virtue of 326B. The appellant had failed to demonstrate he had twenty years' previous residence in the United Kingdom and failed to fulfil the requirements of 276BE.

6. The First-tier Tribunal Judge reached these conclusions:

(i) Neither the appellant nor Mrs E was credible.

(ii) He could not be satisfied that the family (house in Bin Waleed) was attacked by militia seeking the appellant as claimed, either in 2011 or 2012.

(iii) There was no evidence that the militia showed any interest in the appellant's brothers who had not (at the relevant time) fled to Tunisia at the end of 2011 with one living next door to the appellant's house. There was no interest until

the house was apparently raised to the ground in either August or September 2012. If such an event happened it did not indicate interest in the appellant and was merely a random attack.

(iv) Ms E and the children lived in Benghazi with her family after the appellant returned to the UK in March 2009.

(v) If Ms E had genuine fears because of the claimed incidents it was not understood why she did not travel to Egypt with her mother and brother if not to Tunisia with the appellant's brothers and families.

(vi) The account had been fabricated to establish an asylum claim and it was not accepted that the appellant had been, is now, or would on return be of any interest for political reasons. That claim related in part to the appellant's ethnicity and that he is from Bin Waleed but in the light of the findings otherwise reached, it was not considered he would be of adverse interest for any other reason on return.

(vii) The conclusion in the refusal letter regarding Article 15(c) was endorsed by the judge and she considered that no claim was made out for humanitarian protection or under the Human Rights Convention under Article 3.

(viii) As to Article 8, paragraph 276ADE must be read in conjunction with Appendix FMEX1 and it is implicit in the wording of 276ADE(iv) that the applicant had to have lived continuously in the United Kingdom for at least seven years immediately preceding the raising of the issue. D1 had left the UK in December 2006, aged 7, she returned again between 7 April 2007 and September 2008 then aged 9. Thereafter she was enrolled in a school in Libya and did not return here until October 2012, some four years later. D1 therefore did not meet the requirements under the "new Rules".

(ix) Proceeding with a discrete analysis of the of the appellant's case under Article 8 the judge considered that the appellant, Mrs E and the children could reasonably be expected to return to Libya and that the interference with their right to respect for private life would not have consequences of such gravity as potentially to engage the operation of Article 8.

PERMISSION TO APPEAL

7. Three grounds are advanced in the application for permission to appeal:

(i) The judge had failed to consider the best interests of the three children, in particular failed to take into account any of the evidence relating to the conditions and risks the children would face on return to Libya, failed to make clear findings on where the family will be returned to or where they will live and failed to take account of the views expressed by D1 in her witness statement as to her concerns.

(ii) The judge failed to give adequate reasons for findings on a material issue. In particular the respondent had accepted the appellant's ethnicity and place of origin which the respondent had sought unsuccessfully to withdraw at the hearing. Notwithstanding findings regarding the credibility of the appellant's account, the judge had failed to make findings on whether the appellant and his family would be at risk on return to Bin Waleed based on his undisputed profile.

(iii) The judge had misdirected herself on law on a material matter on the basis that D1 met the requirements of paragraph 276ADE(iv) and it failed to give any reason why paragraph 276ADE should be read in conjunction with Appendix FMEX.1 There was no reference to the extensive Home Office guidance on long residence having to directly precede consideration of the issue.

8. These grounds were considered arguable by Designated First-tier Tribunal Judge Taylor.

SUBMISSIONS

9. We heard extensive submissions from the parties at the hearing on 23 August.

10. As to the first ground, in summary, Miss Mason accepted that the best interests of D1 (and the other children) were for them to be within the family unit but the judge had failed to take account of the country information which indicated deterioration in the situation in Libya. There was no challenge to the findings by the judge (as to the basis on which the claim had been made for protection) but Miss Mason argued that the judge had failed to specifically address the country information indicating the deterioration between October 2012 when the family left and the hearing in May 2013. We were taken through the documents on which she relied.

11. Mr Jarvis argued that the judge had made reference to the relevant evidence and relied on the findings reached in support of the judge's conclusion that the appellant would not be at risk. By way of response Miss Mason accepted that the Article 15(c) threshold had not been reached but nevertheless the evidence indicated risks for the children.

12. As to the third ground relating to paragraph 276ADE, Mr Jarvis accepted, based on a policy in force at the time when the decision under appeal was made, that no specific application needed to have been made by D1 under this provision. He referred to a subsequent change in the Rule reflecting this; paragraph 276A0 and to *EM (Zimbabwe)* and the Administrative Court decision in *SSHD v Rahman* [2011] EWCA Civ 814 over the historical policy of DP5/96. He maintained that the correct approach was the calculation of seven years immediately preceding consideration of the application.

13. Turning to the second ground Mr Jarvis reminded us of the adverse credibility findings that had been made and argued that the country information did not mention that the Warfalla were being targeted as a tribe as such.

14. At the conclusion of those submissions we announced our decision that we were not persuaded the First-tier Tribunal Judge had made an error on a point of law on the first and second grounds of application but needed to give further consideration to the arguments on the third relating to paragraph 276ADE and in particular its application to D1. Miss Mason and Mr Jarvis agreed that in the event we decided the judge erred such that the decision required to be set aside (insofar as her treatment of 276ADE), we would not need to hear further evidence or further submissions in the light of the detailed argument we had heard.

OUR CONCLUSIONS

15. The thread running through grounds 1 and 2 is an alleged failure by the judge to have regard to country information when assessing the best interests of the children and the risk faced by the appellant and his family by implication as a consequence of his ethnicity and place of origin alone.

16. The judge set out at [8] of her decision the documentation before her including a country evidence bundle. In [90] she explained that she had carefully considered all the documents in evidence in the matter. We need no persuasion that this was indeed the judge's approach reflected in a particularly detailed thorough determination. It is correct that the judge made no specific reference to any of the individual documents contained in the country information bundle in the course of her conclusions but it is evident from the way those conclusions are framed it is against the evidence of the conflict and ensuing unsettled conditions in Libya.

17. In essence, the judge concluded that Ms E and the children did not suffer the difficulties as claimed.

18. In the course our discussion, we encouraged Miss Mason to point us to the evidence that she relied on to support her contention that the judge should have come to a different conclusion on the best interests of the children and the risks faced by the appellant.

19. As to that evidence, we accept that the FCO advice was against all but essential travel to certain locations and against all travel to other parts of Libya including Benghazi. The advice identifies a high threat from terrorism including kidnapping. That advice is however for British citizens.

20. The other material Miss Mason directed us to indicates continuing instability in Libya. However, we consider that in regard to the judge's conclusions on the absences of specific harm encountered by Ms E and the children whilst living in Benghazi and her rejection of the account of troubles in Bin Waleed, it was open to the judge to find that the appellant and his family would not be at risk. As to the complaint that the judge had failed to take into account the views expressed by D1, those views were considered at [100] of the determination and the judge gave reasons open to her why she considered that evidence did not alter her view on the other evidence she had seen and heard. In respect of risk faced by virtue of the

appellant's ethnicity and place of origin we consider that again in the light of the findings reached on what Ms E and the children had experienced, it was open to the judge to conclude in the particular circumstances this aspect of the appellant's claim did not warrant international protection.

21. It is correct that the judge did not dwell at any length on the best interests of the children but, having regard to the findings reached on the circumstances the family might face if returned to Libya, it is not arguable that more was required than her succinct analysis in [120] and [122] of the determination. This is particularly so in the light of Miss Mason's acceptance that the starting point for the consideration of those best interests were for the family unit to stay together.

22. Our conclusion therefore in respect of the challenges in grounds (1) and (2) of the application is that these are no more than a disagreement with factual findings rationally open to the judge on the evidence before her.

23. We now turn to the third ground of challenge specifically relating to D1 and whether or not she was entitled to leave to remain under the Immigration Rules by virtue of the seven years' continuous presence she previously had enjoyed in the United Kingdom.

24. Paragraph 276ADE (relevant to D1) is as follows:

> "*Private life*
>
> *Requirements to be met by an applicant on the grounds of private life:*
>
> *276ADE. The requirements to be met by an applicant for leave to remain on the grounds of private lives in the UK are that at the date of application, the applicant:*
>
> *(i) does not fall for refusal on any grounds in section S-LTR 1.2 to S-LTR [2.3 and S-LTR 3.1] in Appendix FM; and*
>
> …
>
> *(iv) is under the age of 18 years and has lived continuously in the UK for at least seven years (discounting any period of imprisonment); and it would not be reasonable to expect the applicant to leave the UK …*
>
> …".

25. Paragraph 276BE provides that limited leave to remain on the grounds of private life in the UK may be granted for a period not exceeding 30 months provided that the Secretary of State is satisfied that the requirements in paragraph 276ADE are met.

26. Paragraph 276DE sets out the requirements to be met for the grant of indefinite leave to remain including one that the applicant has been in the United Kingdom with continuous leave on the grounds of private life for a period of at least 120 months.

27. The issue we are required to determine is whether a minor applicant who had lived continuously here for at least seven years is able to rely on that previous continuous residence to support an application under paragraph 276ADE (iii) on return to the United Kingdom if still a minor after that period of absence.

28. Paragraph 276A defines, for the purposes of paragraphs relating to long residence in the United Kingdom and paragraph 276ADE, continuous residence as:

> *"(a) 'continuous residence' means residence in the United Kingdom for an unbroken period, and for these purposes a period shall not be considered to have been broken where an applicant is absent from the United Kingdom for a period of six months or less at any one time, provided that the applicant in question has existing limited leave to enter or remain upon the departure and return but shall be considered to have been broken if the applicant:*
>
> *(i) [been removed or deported];*
>
> *(ii) has left the United Kingdom and on doing so evidenced a clear intention not to return;*
>
> *(iii) left the United Kingdom in circumstances in which he could have had no reasonable expectation at the time of leaving that he would lawfully be able to return; or*
>
> *(iv)* [relates to convictions]*;*
>
> *(v) has spent a total of more than 18 months absent from the United Kingdom during the period in question.*
>
> *(b) 'lawful residence' means residence which is continuous residence pursuant to:*
>
> *(i) existing leave to enter or remain; or*
>
> *(ii) temporary admission within section 11 of the 1971 Act play leave to enter or remain subsequently granted; or*
>
> *(iii) [exemption from immigration control];*
>
> *(c) 'lived continuously' and 'living continuously' means' continuous residence', except that 276A (a) (iv) shall not apply."*

29. Sections S-LTR (relevant to paragraph 276ADE) provides for the refusal of limited leave to remain on the grounds of *suitability* if any of certain paragraphs apply. These range from situations where an applicant at the date of application is the subject of a deportation order, has convictions resulting in prison sentences of a particular length, where the applicant's presence is not conducive to the public good, has failed to co-operate with the Home Office, provided false documentation or misrepresented matters, or has outstanding charges to the NHS.

30. Miss Mason compared the provisions in 276ADE with the 'exception' provisions in s.EX of Appendix FM which sets out the basis on which exceptions to the general

provisions described in GEN 1.1 relating to those seeking to enter or remain in the United Kingdom on the basis of their family life with a person who is a British citizen, is settled in the United Kingdom or is in this country with limited leave as a refugee or someone granted humanitarian protection. Specifically EX.1. provides:

"This paragraph applies if:

"(a)(i) the applicant has a genuine and subsisting parental relationship with a child who-

(aa) is under the age of 18 years;

(bb) is in the UK;

(cc) is a British citizen or has lived in the UK continuously for at least seven years ***immediately preceding the date of application*** **[**emphasis added]*; and*

(ii) [etc.,]"

Her argument is that there is a reason why the draughtsman did not add the above clause which we have emphasised.

31. Mr Jarvis accepted that 276ADE applied even where no specific application had been made under that category. Subsequent amendments to the Rules clarify that this is the correct approach (276A0). The appellant's daughter is of course under 18 and there is no dispute that prior to leaving the United Kingdom in 2006 she had lived continuously here for at least seven years.

32. The judge considered that paragraph 276ADE must be read in conjunction with Appendix FMEX.1. There is nothing however in 276ADE which is concerned with family life. Appendix FM is concerned not with private life but family life and the exception EX provides certain rights for a parent applicant who has a child under 18 who has lived in this country continuously for at least seven years. In contrast paragraph 276ADE is a stand alone opportunity under the Rules for someone *inter alia,* under the age of 18 to obtain leave to remain on the basis of presence here alone irrespective of the circumstances of the parent or parents. The judge also expressed the view that it was implicit in the wording of paragraph 276ADE(iv) that the period of seven years should immediately precede the raising of the issue.

33. The Supreme Court in *Mahad (previously referred to as AM) (Ethiopia) v Entry Clearance Officer* [2009] UKSC 16, Lord Brown made the position clear regarding the proper approach to the construction of the Immigration Rules. At [10] of his judgment he stated:

"10. There is really no dispute about the proper approach to the construction of the Rules. As Lord Hoffmann said in *Odelola v Secretary of State for the Home Department* [2009] 1 WLR 1230, 1233 (paragraph 4):

"Like any other question of construction, this [whether a rule change applies to all undetermined applications or only to subsequent applications] depends upon the language of the rule, construed against the relevant background. That involves a consideration of the

immigration rules as a whole and the function which they serve in the administration of immigration policy."

That is entirely consistent with what Buxton LJ (collecting together a number of dicta from past cases concerning the status of the rules) had said in *Odelola* in the Court of Appeal ([2009] 1 WLR 126) and, indeed, with what Laws LJ said (before the House of Lords decision in *Odelola*) in the present case. Essentially it comes to this. The Rules are not to be construed with all the strictness applicable to the construction of a statute or a statutory instrument but, instead, sensibly according to the natural and ordinary meaning of the words used, recognising that they are statements of the Secretary of State's administrative policy. The respondent's counsel readily accepted that what she meant in her written case by the proposition "the question of interpretation is . . . what the Secretary of State intended his policy to be" was that the court's task is to discover from the words used in the Rules what the Secretary of State must be taken to have intended. After all, under section 3(2) of the Immigration Act 1971, the Secretary of State has to lay the Rules before Parliament which then has the opportunity to disapprove them. True, as I observed in *Odelola* (para 33): "the question is what the *Secretary of State* intended. The rules are her rules." But that intention is to be discerned objectively from the language used, not divined by reference to supposed policy considerations. Still less is the Secretary of State's intention to be discovered from the Immigration Directorates' Instructions (IDIs) issued intermittently to guide immigration officers in their application of the rules. IDIs are given pursuant to paragraph 1(3) of Schedule 2 to the 1971 Act which provides that:

"In the exercise of their functions under this Act immigration officers shall act in accordance with such instructions (*not inconsistent with the immigration rules)* as may be given them by the Secretary of State . . ." (emphasis added).

34. It is correct that the draughtsman of the rule has used a tense to describe something that has happened in the past however this needs to be read in conjunction with the introduction to 276ADE "The requirements to be met by an applicant for leave to remain ….. are that at the date of application". This frame of reference to a point in time extends to the present (i.e. the date of application) and indicates by use of the present perfect tense to something that occurred in the past (i.e. completion of a period of continuous presence as defined) which is continuing. If the intention of the draughtsman had been to enable a previously crystallised period of continuous residence to be relied on irrespective of any intervening event, the simple past would have been used (…the applicant lived) or more probably, (…had lived).

35. The additional phrase in EX.1 ("*…immediately preceding the date of application")* is readily explained by the absence of any frame of reference. Without this there would be a potential for confusion over the point in time that the qualifying period referred to.

36. It follows therefore that if someone who is under the age of 18 years and has previously spent seven years' continuous living in the United Kingdom such a person would be unable to meet the requirements of the rule if that residence had been broken for any of the reason apart from the exceptions in paragraph 276A . In the light of D1's length of absence she is unable to succeed.

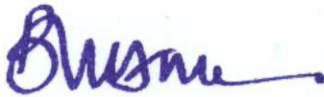
37. This is not the only hurdle D1 faces. There is a test of reasonableness to consider which was not in the version of the Rules which we were directed to by the parties. Neither party has offered any further submissions on this aspect although as

indicated above, they were invited to so after we reserved our determination. Our conclusion is that the test of reasonableness is one which requires an evaluation of all the relevant factors comparable to a human rights proportionality analysis, including a consideration of where the best interests of the child lay. The question to be answered is whether it is reasonable for D1 to leave the United Kingdom. This is a fact sensitive assessment.

38. The judge found at [123] of her determination that the appellant, witness and children can reasonably be expected to return to Libya and gave adequate reasons for doing so. We consider that the test which the judge applied under article 8 mirrors the exercise required by the rule; we do not find that D1 is able to make out a claim to remain based on 276ADE. The combined effect of the lack of risk found by the judge taken with the lengthy period of time D1 spent in Libya before her last return to the UK, provides the answer. It would not be unreasonable for D1 to accompany her family and as a result she does not meet the requirements of the rule.

39. We are therefore satisfied that the Tribunal did not make an error on a point of law that requires the decision to be set aside and re-made. We dismiss the appeal in the Upper Tribunal. The decision of the First-tier Tribunal stands.

Signed



Date 7 November 2013

Upper Tribunal Judge Dawson