



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

Appeal Numbers: IA/50728/2013
IA/50729/2013
IA/50730/2013
IA/50731/2013
IA/50732/2013
IA/50733/2013

THE IMMIGRATION ACTS

**Heard at Field House
On 5 June 2014**

**Determination
Promulgated
On 23 June 2014**

Before

UPPER TRIBUNAL JUDGE ESHUN

Between

**WILGE VELASCO VELASCO VILLAVICENCIO (FIRST APPELLANT)
ESTHER JANETT BARROSO DE VELASCO (SECOND APPELLANT)
BARBARA VELASCO BARROSO (THIRD APPELLANT)
EVONNE WILMA VELASCO BARROSO (FOURTH APPELLANT)
WILGE VELASCO BARROSO (FIFTH APPELLANT)
STEPHANIE VELASCO BARROSO (SIXTH APPELLANT)**

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr P Thoree, Solicitor
For the Respondent: Mr T Wilding, HOPO

DETERMINATION AND REASONS

1. The Secretary of State has been granted permission to appeal the decision of First-tier Tribunal Judge Pedro allowing the appeals of the appellants under Article 8 of the ECHR.

2. The appellants are citizens of Bolivia. The second appellant is the spouse of the first appellant. The third, fourth, fifth and sixth appellants are the children of the first and second appellants.
3. The first appellant entered the UK on 1 February 2003. He was last granted entry clearance as a student valid until 7 July 2004. The second, third and fourth appellants entered the UK as dependants of the first appellant on 20 March 2004. They were granted an extension of leave to remain on 26 August 2004 until 31 December 2005. The fifth and sixth appellants were born in the UK on 23 December 2004 and 3 September 2010 respectively.
4. On 6 March 2012 all the appellants applied for leave to remain under Article 8. Their applications were refused on 16 April 2013. On 26 April 2013 the respondent received a pre-action protocol letter followed by a judicial review claim form dated 30 May 2013. The consent order was sealed on 8 October 2013 with the respondent agreeing to reconsider the decision and set removal directions if the decision was to be maintained, and to do this by 8 January 2014. The final decision to refuse their applications was made on 19 November 2013, by which time the new family and private life provisions of the Immigration Rules had come into force on 9 July 2012. The judge said that both representatives were in agreement at the commencement of the hearing that given that their applications were made on 6 March 2012 before the coming into force of the new family and private life provisions into the Immigration Rules on 9 July 2012, that the new provisions were not applicable to the appellants' applications and that the decisions under appeal fell to be considered under the Immigration Act Rules as they stood prior to 9 July 2012. Therefore, the family life provisions of Appendix FM and the private life provisions of paragraph 276ADE of the current Immigration Rules were not applicable in these appeals.
5. The appellants' solicitor, Mr Thoree, confirmed to the judge that the appellants were relying on one ground of appeal only; being that the removal of the appellants in consequence of the respondent's decisions would be unlawful under Section 6 of the Human Rights Act 1998 as being incompatible with the appellants' Convention rights under Article 8.
6. The judge therefore considered the appellants' Article 8 appeals in line with **Razgar** and adopted the five step approach.
7. He said it was not in issue that all six appellants form a family unit. He was not satisfied that the respondent's decision and/or the appellants' removal to Bolivia as one family unit would be an interference with their established family life sufficient to engage Article 8.
8. The judge was also satisfied that the six appellants have established private life in the UK. The first appellant has now been in the UK for

eleven years. The second, third and fourth appellants have now been here for ten years. The fifth and sixth appellants were born here and have lived here all their lives, be now aged 9 and 3 respectively. He was satisfied on the evidence produced to him that the first and second appellants are in employment and that they have been in employment since their arrival in the UK, albeit that such employment has been unlawful since at least their leave to remain expired in December 2005. He also accepted that the minor appellants are all at school and that all six appellants have made friends and acquaintances, as well as establishing their lives in the UK. In the circumstances he was satisfied that they have established private lives in the UK and that the respondent's decisions to remove them amount to an interference with their private lives to a degree of severity required to engage Article 8.

9. The judge then turned to proportionality. He considered the immigration history of the first and second appellants and found that they had an appalling history of blatant disregard for UK laws and immigration control. The first appellant arrived on a student visa in February 2003 and arranged for the second appellant and their two children to join him as dependants on his student visa in March 2004. When their leave to remain expired on 31 December 2005, the first and second appellants simply decided to remain in the UK without making any attempt to regularise their stay until their current applications were made in March 2012, more than six years after their leave to remain had expired.
10. The judge also found that the first and second appellants have worked unlawfully in the UK, again in blatant disregard for UK laws and immigration control. He accepted that although they worked unlawfully, they have worked hard to support themselves and their children in the UK and there was no evidence before him to indicate that they have at any time taken advantage of public funds, although he has taken into account that they have received the benefit of public expenditure in relation to all of their children receiving the benefit of state education as well as the whole family availing themselves of NHS treatment as and when required. The judge found that the manner in which the appellants have conducted themselves in breach of UK laws and immigration control is to be condemned and in no way condoned.
11. The judge then considered the best interests of the children which, he said in light of the guidance of the Supreme Court in **ZH**, must be a primary consideration. This means that they must be considered first. He said the innocence of the child appellants in this appeal must be given due regard. At the hearing the third appellant, now aged 16, gave oral evidence before him. She indicated that it was only a few months ago in December 2013 that the first appellant discussed with her the possibility of them having to return to Bolivia, and that she was completely shocked by this. The judge accepted that none of the child appellants were aware that their lives may

not be able to continue in the UK and that they may be forced to return to Bolivia until fairly recently. The third and fourth appellants arrived in the UK at the ages of 6 and 5 respectively and have now been in the UK for a period of ten years. The fifth and sixth appellants were born in the UK and are now aged 9 and 3, having lived all their lives in the UK. While he accepted that the youngest child (the sixth appellant) would be going to Bolivia with his parents and would be readily able to adapt to life in Bolivia with his parents' support, the judge did not consider that the same could be said of the third, fourth and fifth appellants.

12. The judge said it was of interest to know that whilst, for reasons he has already given in this determination the provisions of paragraph 276ADE of the current Immigration Rules are not directly applicable, nonetheless it is specifically prescribed in paragraph 276ADE that an applicant should be considered for leave to remain on the grounds of private life under the age of 8 and has lived continuously in the UK for at least seven years. He relied on the Upper Tribunal's decision in **Azimi-Moayad and Others (decisions affecting children; onward appeals) [2013] UKUT 00197 (IAC)** which held that seven years from the age of 4 is likely to be more significant to a child than the first seven years of life. This factor is even more significant in the case of the second and third appellants who have now been in the UK for ten years since the ages of 6 and 5 and are now 16 and 15, having established social and cultural ties as well as being at an important stage of their education. The fifth appellant was born in the UK and is now 9 years old. He has now been here for a period considerably in excess of seven years and has lived here all his life, albeit that his period of stay in the UK commenced from birth and not from the age of 4.
13. The judge considered that all four child appellants are Bolivian citizens. The judge did not accept Mr Thoree's argument that in the case of the fifth appellant he will be eligible to apply for registration as a British citizen in December 2004 at the age of 10, having lived in the UK continuously since birth. This was because he had to consider the position at the date of the hearing and therefore citizenship was not a factor weighing in their favour. He considered however that the need and desirability for stability and continuity of social and educational provision, as well as what would almost certainly amount to a severe disruption to the social, cultural and educational ties of the child appellants, and particularly the third and fourth appellants, have developed in the UK, are factors which in his view give considerable weight to the best interests of these child appellants remaining in the UK, despite the appalling immigration history of their parents. After careful consideration of the facts he found that the balance just tipped in favour of the appellants because of the best interests of the children.
14. The judge found that when the appellants came to the attention of the Home Office by making an application for leave to remain in the UK under

Article 8 of the ECHR, it would appear that the respondent was content simply to refuse to grant leave to remain but to take no action to remove them from the UK. The appellants, through their legal representative, were forced to issue judicial review proceedings to trigger any removal decision being made. The judge found that all of this history did not demonstrate a concern or anxiety on the part of the respondent to remove the appellants from the UK, but instead appears to be an indictment of a systemic failure over the years to pursue the public interest in maintaining effective immigration control. Through a combination of this systemic failure and the appellants' abuse of immigration control, there has been accumulated the very lengthy period of time that the child appellants, and in particular the third and fourth appellants, have now resided in the UK and developed considerable social, cultural and educational ties here, which in all the circumstances of this case, he considered it would be inappropriate to disrupt in light of the guidance in the case law to which he had referred and the particular circumstances of this case in which the child appellants are innocent victims. He therefore found that the respondent's decisions in relation to all six appellants were disproportionate.

15. The respondent was granted permission to argue grounds that arguable that the judge erred in failing to consider the guidance **Gulshan (Article 8 - new Rules - correct approach) [2013] UKUT 640 (IAC)**, namely, if there are arguably good grounds for granting leave to remain outside the Immigration Rules, is it necessary for Article 8 purposes go on to consider whether are compelling circumstances not sufficiently recognised under the Rules. The judge it was argued made no findings in this regard and proceeded to undertake a free standing Article 8 assessment.
16. Mr Wilding relied on the respondent's grounds of appeal. He said that although the determination on its face was dense and detailed, there was little engagement with the process which **Gulshan** set for judicial makers looking at Article 8 outside the Immigration Rules. Mr Wilding submitted that the judge erred in putting to one side that the appellants do not meet the Article 8 Immigration Rules and then embarked on a freewheeling Article 8 analysis. He sidetracked the immigration history of the first and second appellants and the negative aspects simply because of the children. **MK India** states that Article 8 is a two stage assessment. Section 55 is not determinative. It is to be treated as a primary consideration.
17. I find in this case, as recorded at paragraph 8 of the determination, that both the HOPO below and Mr. Thoree, the appellants' legal representative were in agreement at the commencement of the hearing that because the appellants made their applications on 6 March 2012 before the coming into force of the Article 8 provisions of the Immigration Rules on 9 July 2012, the family life provisions of Appendix FM and the private life

provisions of paragraph 276ADE of the current Immigration Rules did not apply to these appeals. The judge agreed because he noted at paragraph 20 that the provisions of paragraph 276ADE of the current Immigration Rules were not directly applicable. It is therefore not right to argue that the judge put to one side that the appellants do not meet the Article 8 provisions of the Immigration Rules and embarked on a freewheeling Article 8 analysis.

18. The respondent relied on **Gulshan** but I find that Gulshan does not apply to these appeals. **Gulshan** made her application on 5 September 2012 after the coming into force of the new Immigration Rules. Her application could not succeed under the new/current Immigration Rules. This led the Upper Tribunal to hold that the judge should have addressed the Article 8 family aspects of an appellant through the Immigration Rules and the private life aspects through paragraph 276ADE. It is only if there were arguably good grounds for granting leave to remain outside the Rules was it necessary for the judge for Article 8 purposes to go on to consider whether there were compelling circumstances not sufficiently recognised under the Rules. The appellants in this case, however, made their applications in March 2012 before the coming into force of the new Article 8 Immigration Rules.
19. I find that these appeals are more in line with **Edgehill & Another [2014] EWCA Civ 402**. The principal issue in **Edgehill** was whether the Upper Tribunal correctly applied the transitional provisions set out in the Statement of Changes in Immigration Rules promulgated on 13 June 2012. Those changes in Immigration Rules came into effect on 9 July 2012. Edgehill made her application on 22 August 2011 with a right of abode in the UK on the grounds of ancestry, or alternatively for indefinite leave to remain under Article 8 ECHR. The respondent refused her application on 7 March 2012. Her appeal was dismissed by the First-tier Tribunal on both limbs. Her essential argument before the Court of Appeal was that the Upper Tribunal erred in placing reliance on Rule 276ADE of the new Rules, since those Rules are expressly disapplied in respect of applications for leave to remain made before 9 July 2012. The Court of Appeal held at **[32]** “...To adopt the language of Lord Browne in **Mahad**, “*the natural and ordinary meaning of the words, recognising that they are statements of the Secretary of State’s administrative policy*”, is that the Secretary of State would not place reliance on the new Rules when dealing with applications made before 9 July 2012.” The Court of Appeal held at **[41]** “Major changes to the Immigration Rules came into force on 9 July 2012. The transitional provisions stated that the new rules would not apply to applications for leave to remain before that date.”
20. In light of the Court of Appeal’s decision in **Edgehill**, I find that the judge did not err in law in his failure to apply **Gulshan**.

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21. The judge's decision allowing the appeals of the appellants shall stand.

Signed

Date

Upper Tribunal Judge Eshun