Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/18002/2014
IA/18006/2014
IA/18009/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 9 December 2014	**On 12 January 2015**

Before

UPPER TRIBUNAL JUDGE MOULDEN

Between

MR MD WARIS UDDIN
MRS SHIRIN AHMED
MASTER AHNAF WARIS FARABI
(No Anonymity Direction Made)

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr C Yeo of counsel instructed by Zahra & Co Solicitors
For the Respondent: Mr M Shilliday a Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant's are citizens of Bangladesh and respectively husband-and-wife and the parents of the third appellant (I will refer to them as the father, the mother and the son). Both they and the respondent have been given permission to appeal the determination of First-Tier Tribunal Judge Russell

("the FTTJ") who allowed the appeal of the son against the respondent's decision of 9 April 2014 to refuse the appellants' applications for further leave to remain in the UK on the basis of private and family life and the decision to remove them from the UK. The FTTJ neither allowed nor dismissed the appeals of the father or the mother against the same decisions.

2. The respondent has appealed against the decision to allow the son's appeal and the father and mother have appealed against the FTTJ's failure to make decisions in their appeals. In the circumstances where there are cross appeals I will continue to refer to the appellants either as such or as I have described above and the Secretary of State as the respondent.

3. The father arrived in the UK or 4 April 2005 and was granted leave to enter as a student. The mother and son entered the UK 8 May 2006. The father applied for further leave to remain as a post study migrant but this was refused in April 2009. There was no appeal against this decision and the appellants have remained unlawfully in the UK since then.

4. 12 December 2012 the father applied for leave to remain on compassionate grounds but the respondent rejected this application on 4 September 2013. On 16 October 2013 the father made a further application for leave to remain on the basis of private and family life. This was rejected on 20 November 2013. On 28 March 2014 the father made further representations to remain on the basis of private and family life. This led to the refusal of 9 April 2014 by reference to Appendix FM and Paragraph 276 ADE of the Immigration Rules. The respondent was not persuaded that the appellants met the requirements of the Rules nor was it unreasonable to expect the son to leave the UK taking into account section 55 of the Borders, Citizenship and Immigration Act 2009. There was also a decision to remove them as illegal entrants under section 10 of the Immigration and Asylum Act 1999. The appellants appealed under the provisions of section 82(1) of the Nationality, Immigration and Asylum Act 2002 on the grounds that the respondent's decision was not in accordance with the law, interfered with their human rights and did not respect the best interests of the son.

5. The FTTJ heard the appeal 8 October 2014. Both parties were represented, the appellants by Mr Yeo who appeared before me. Oral evidence was given by the father and the son. After hearing submissions the FTTJ reserved his determination. He concluded that the appellants could not meet the requirements of Appendix FM. The father and mother did not meet the requirements of paragraph 276 ADE of the Rules. The FTTJ went on to consider whether the son could meet the requirements of paragraph 276 ADE (1) (iv). In relation to his private life in the UK he would need to show that he was under 18, had lived continuously in the UK for at least seven years (discounting any period of imprisonment) and that it would not be reasonable to expect him to leave the UK. As the other requirements were clearly met the question turned on whether it would be reasonable to expect him to leave the UK.

6. After reviewing the evidence relating to the family and in particular the son the FTTJ found that it would be in the best interests of the son to remain in the UK. He considered the countervailing factors which might outweigh this before concluding that it would not be reasonable to remove the son to Bangladesh in the light of the provisions of paragraph 276 ADE (1) (iv) of the Rules.

7. The FTTJ allowed the son's appeal and then said; "Having found that the third appellant meets the requirements of the immigration rules I do not need to go on to consider whether his removal engages the operation of Article 8 ECHR. The Home Secretary may now wish to consider the position of the first and second appellants in light of my findings in relation to their son." Whilst the final conclusion was "The appeals are allowed (sic)" it is common ground and I find that the FTTJ allowed the appeal of the son but did not decide the appeals of the father and the mother.

8. It is also common ground that the FTTJ should have decided the appeals of the father and the mother and that the failure to do so was an error of law. What needs to be done as a result is a question to which I will return.

9. The respondent submits one composite ground of appeal in which it is alleged that the FTTJ erred in law by making a material misdirection in his approach to when it was reasonable for a child to be removed having spent over seven years in the UK. The FTTJ failed to apply the principles set out in EV (Philippines) & Ors v Secretary of State for the home Department [2014] EWCA Civ 874. There was no obligation on the UK to provide education for the world and the appellants would be a burden on public resources. Bearing in mind paragraph 117B of the Immigration Act 2014 there was no evidence that the appellants were financially independent and would not be a burden on taxpayers. There was nothing exceptional about the circumstances of the son's case.

10. Mr Shilliday relied on the grounds of appeal and took me through the authorities relied on by the FTTJ in the determination. He accepted that these were relevant authorities but submitted that the FTTJ misapplied them. There was a significant similarity between the facts of this case and those in EV Philippines where the children concerned were within six months of the same age. The FTTJ had failed to make a "real world" assessment. His parents had no independent claim or right to remain in the UK. Although they had been mentioned the FTTJ had failed properly to take into account the factors which militated against the father and mother and affected the son.

11. Mr Yeo submitted that there was only one ground of appeal which amounted to no more than a disagreement with conclusions properly reached on the evidence and did not disclose any error of law. Paragraph 117 of the Immigration Act 2014 was not relevant because the son succeeded under the main Immigration Rules. The FTTJ properly assessed the factors both for and

against the appellant and in particular the son in great detail. No material factor had been left out of account.

12. Mr Yeo argued not only that the son's appeal should succeed but that in the light of this the appeals of the mother and father should also succeed on Article 8 human rights grounds outside the Rules even after taking into account the provisions of the Immigration Act 2014.

13. I was asked to uphold the decision allowing the son's appeal on the basis that there was no error of law and to remake the decisions in relation to the father and mother for which purpose no further evidence or submissions were required.

14. I asked Mr Shilliday what action he submitted I should take if I found that there was no error of law and upheld the decision to allow the son's appeal. On behalf the respondent he conceded that in these circumstances the appeals of the father and mother should be allowed on Article 8 human rights grounds outside the Immigration Rules.

15. I reserved my determination.

16. The respondent's grounds of appeal slightly misquote from the judgement of Jackson LJ in EV Philippines. The correct extract states;

> "60. That is a long way from the facts of our case. In our case none of the family is a British citizen. None has the right to remain in this country. If the mother is removed, the father has no independent right to remain. If the parents are removed, then it is entirely reasonable to expect the children to go with them. As the immigration judge found it is obviously in their best interests to remain with their parents. Although it is, of course a question of fact for the tribunal, I cannot see that the desirability of being educated at public expense in the UK can outweigh the benefit to the children of remaining with their parents. Just as we cannot provide medical treatment for the world, so we cannot educate the world.
>
> 61. In fact the immigration judge weighed the best interests of the children as a primary consideration, and set against it the economic well-being of the country. As Maurice Kay LJ pointed out in AE (Algeria) v Secretary of State for the Home Department [2014] EWCA Civ 653 at [9] in conducting that exercise it would have been appropriate to consider the cost to the public purse in providing education to these children. In fact that was not something that the immigration judge explicitly considered. If anything, therefore, the immigration judge adopted an approach too favourable to the appellant."

17. I also take into account what was said by Christopher Clarke LJ in paragraphs 33 to 37;

"33. More important for present purposes is to know how the tribunal should approach the proportionality exercise if it has determined that the best interests of the child or children are that they should continue with their education in England. Whether or not it is in the interests of a child to continue his or her education in England may depend on what assumptions one makes as to what happens to the parents. There can be cases where it is in the child's best interests to remain in education in the UK, even though one or both parents did not remain here. In the present case, however, I take the FTT's finding to be that it was in the best interests of the children to continue their education in England with both parents living here. That assumes that both parents are here. But the best interests of the child are to be determined by reference to the child alone without reference to the immigration history or status of either parent.

34. In determining whether or not, in a case such as the present, the need for immigration control outweighs the best interests of the children, it is necessary to determine the relative strength of the factors which make it in their best interests to remain here; and also to take account of any factors that point the other way.

35. A decision as to what is in the best interests of children will depend on a number of factors such as (a) their age; (b) the length of time that they have been here; (c) how long they have been in education; (c) what stage their education has reached; (d) to what extent they have become distanced from the country to which it is proposed that they return; (e) how renewable their connection with it may be; (f) to what extent they will have linguistic, medical or other difficulties in adapting to life in that country; and (g) the extent to which the course proposed will interfere with their family life or their rights (if they have any) as British citizens.

36. In a sense the tribunal is concerned with how emphatic an answer falls to be given to the question: is it in the best interests of the child to remain? The longer the child has been here, the more advanced (or critical) the stage of his education, the looser his ties with the country in question, and the more deleterious the consequences of his return, the greater the weight that falls into one side of the scales. If it is overwhelmingly in the child's best interests that he should not return, the need to maintain immigration control may well not tip the balance. By contrast if it is in the child's best interests to remain, but only on balance (with some factors pointing the other way), the result may be the opposite.

37. In the balance on the other side there falls to be taken into account the strong weight to be given to the need to maintain immigration control in pursuit of the economic well-being of the country and the fact that, *ex hypothesi*, the applicants have no entitlement to remain. The immigration history of the parents may also be relevant e.g. if they are overstayers, or have acted deceitfully."

33. Whilst the FTTJ was not referred to EV Philippines and made no reference to it I find that he did properly reflect these principles. Whilst the grounds of appeal set out a number of factors which it is argued the FTT should have taken into account or to which he should have given greater emphasis I can find no material factor which was left out of account or given inappropriate weight. The factors which militate against the appellants are assessed with equal indeed arguably greater care than those which work in their favour. After a careful examination of the grounds and the determination I find that the grounds of are no more than disagreements with conclusions properly reached by the FTTJ on all the evidence.

34. I find that the FTTJ not err in law in relation to allowing the son's appeal.

35. I find that the FTTJ did err in law by failing to determine the appeals of the father and the mother. As there is no decision there is no decision to set aside. I must make the decisions in their appeals. However, through Mr Shilliday the respondent has conceded that the appeals of the father and the mother should be allowed on Article 8 private and family life grounds outside the Immigration Rules.

36. I have not been asked to make an anonymity direction and can see no good reason to do so.

37. I dismiss the respondent's appeal against the decision to allow the son's appeal.

38. I allow the appeals of the father and the mother on Article 8 human rights grounds.

……

Signed Date 10 December 2014

Upper Tribunal Judge Moulden