IAC-HW-AM-V1

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

Appeal Numbers: IA/43935/2014
IA/43947/2014
IA/43946/2014
IA/43941/2014

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
|---|---|
| **On 3 November 2015** | **On 9 November 2015** |

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE SHAERF**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**NURUL ISLAM**
**REBEKA SULTANA**
**MAHFUJA ISLAM**
**THOHIDUL ISLAM**
**(ANONYMITY DIRECTION NOT MADE)**

Respondents

**Representation:**
For the Appellant: Ms N Willocks-Briscoe of the Specialist Appeals Team
For the Respondents: Mr A Reza of JKR Solicitors

**DECISION AND REASONS**

**The Respondents**

1. The Respondents to whom I shall refer as "the Applicants" are husband and wife and their two children born in 1999 and 2001. They are all citizens of Bangladesh.

2. On 11 April the Applicants entered with leave until 20 September 2005 as family visitors. They overstayed and on 16 December 2009 applied for indefinite leave. The Appellant (the SSHD) refused those applications. The Applicants took no further action until 26 March 2013 when they made further applications for limited leave to remain. On 13 October 2014 the SSHD refused the applications by way of reference to paragraph 276ADE and Appendix FM, Section EX.1 of the Immigration Rules. The SSHD took into account the obligation to consider the best interests of the child Applicants imposed by Section 55 of the Borders, Citizenship and Immigration Act 2009. Additionally reference was made to paragraph 353B of the Immigration Rules. The SSHD stated there were no circumstances which warranted a separate consideration of the applications by way of reference to Article 8 of the European Convention outside the Immigration Rules.

3. On 28 October 2014 each of the Applicants lodged notice of appeal under Section 82 of the Nationality, Immigration and Asylum Act 2002 as amended (the 2002 Act). The grounds refer to the subsisting relationship between the parents and their children and the fact they have lived in the United Kingdom continuously for almost ten years and assert it would be unreasonable to expect them to return to Bangladesh, particularly the children. The other grounds are generic.

**The First-tier Tribunal Proceedings**

4. Following a hearing at which the parents gave oral testimony as well as the wife's brother and sister, Judge of the First-tier Tribunal Wellesley-Cole allowed the appeals in a decision promulgated on 12th May 2015.

5. The Respondent sought permission to appeal which on 31 July 2015 Judge of the First-tier Tribunal Pirotta granted because it was arguable the Judge had erred in considering the child Applicants in isolation before considering the appeals of their parents and had not taken a holistic approach or applied the jurisprudence in *EV (Philippines) v SSHD [2014] EWCA Civ. 874*. Additionally, her treatment of Appendix FM of the Immigration Rules and the claim under Article 8 was questionable. Further, the Judge had failed to take into account the Applicants' immigration history which included the use of false documents to obtain education for the child Applicants. The Judge's consideration was "short on facts, evidence, analysis or findings". It was also arguable the Judge "had not properly conducted the evaluation of the evidence, arguments or law, applied case law or carried out the proper exercise of Appendix FM (and paragraph) 276ADE".

**The Upper Tribunal Proceedings**

6. For the Applicants, Mr Reza stated he had seen neither the application for nor the grant of permission to appeal. Copies were made available and time given for him to consider them.

**Submissions for the SSHD**

7. Ms Willocks-Briscoe relied in the grounds in the permission application. She referred to paragraph 18 of the decision allowing the appeals of the child Applicants by way of reference to Section EX.1 of Appendix FM. She submitted that Section EX.1 was not applicable to either the adult Applicants or their children for the reasons given at pages 2 and 3 of the SSHD's decision. The adult Applicants did not satisfy the requirements of paragraph E-LTRP.1.2 because they were not British citizens or present and settled in the United Kingdom or in the United Kingdom with refugee leave or as persons with humanitarian protection. Section EX.1 was not applicable to the child Applicants because neither parent satisfied the requirement of paragraph E-LRTC.1.6 of having leave to enter or remain. She also relied on the determination in *Sabir (Appendix FM-EX.1 not freestanding) [2014] UKUT 00063 (IAC)* that Section EX.1 is not a freestanding element but a component part of any relevant leave granting Rule.

8. The Judge had failed to view the evidence holistically and to address the requirements of the Immigration Rules and Appendix FM. Further, her treatment of the claim under Article 8 of the European Convention outside the Rules was deficient because it had proceeded on the artificial basis that the child Applicants remained in the United Kingdom following their parents' departure.

**Submissions for the Applicants**

9. Mr Reza whose firm had been instructed as recently as 21 October 2015, submitted that there was no material error of law in the Judge's decision. She had adopted a structured approach and referred to relevant case law. He continued that the child Applicants had been in the United Kingdom for a long time and the Judge's treatment of the claim outside the Immigration Rules in the latter part of paragraph 18 of her decision was proper and gave sustainable reasons for her conclusion.

10. The child Applicants met the requirements of paragraph 276ADE of the Immigration Rules. He referred generally to the case law dealing with child appellants to which the Judge had referred at paragraphs 16 and 17 of her decision. Both child Applicants had lived in the United Kingdom for more than seven years and he referred generically to the determination in *Azimi-Moayed and others (Decisions affecting children; onward appeals) Iran [2013] UKUT 197 (IAC)*.

11. He then submitted that if the child Applicants qualified under paragraph 276ADE then their parents should succeed under Article 8 of the European Convention

outside the Immigration Rules. No further authority or argument was submitted to support this proposition.

12. Mr Reza turned to the use of false passports by the adult Applicants to obtain State education for the child Applicants. They had admitted this in their applications for further leave. It had not been referred to by the SSHD in the decision and therefore there had been no need for the Judge to have considered this aspect.

13. There were compelling reasons to grant leave outside the Immigration Rules.

14. The Judge had found the child Applicants qualified under paragraph 276ADE and had then gone on to consider the claims of the adult Applicants and allowed them outside the Immigration Rules. They had admitted at an early stage their use of false documentation which should not thereafter be held against them. The decision contained no material error of law and should stand.

**Further Submissions for the SSHD**

15. Ms Willocks-Briscoe submitted that the provisions of paragraph 276ADE of the Immigration Rules were not available for the free-standing grant of leave to children. The Judge had failed to take a holistic approach and to have considered all the relevant factors. The adult Applicants failed under paragraph 276ADE. The Judge had not followed the jurisprudence in *EV (Philippines) v SSHD [2014] EWCA Civ. 874* although she had cited it at paragraph 11. She had dealt with the child Applicants in a vacuum and then gone on to consider the adult Applicants.

16. Paragraph 16 of her decision did not take into account the countervailing factors referred to in the SSHD's decision or the use of false passports referred to in paragraph 5 of the Judge's decision. These matters were relevant as were the benefits which the Applicants had improperly obtained. Further, the Judge's treatment of the factors referred to in Section 117B of the 2002 Act was inadequate.

**Additional Submissions for the Applicants**

17. Mr Reza submitted that the fact the adult Applicants could not meet the requirements of paragraph 276ADE was not reason to prevent the child Applicants succeeding. He referred to paragraph 35 of the judgment in *EV (Philippines)* which sets out factors upon which the best interests of children will depend and offered a citation of *Zoumbas v SSHD [...] UKSC ...* as authority for the proposition that a child's best interests can outweigh the public interest. I noted the submission was that a child's best interests can outweigh but not must or in this case did outweigh the public interest. Mr Reza identified paragraph 11 of the Judge's decision as being the balancing exercise conducted by the Judge but I pointed out that this simply recorded the submissions made to her for each of the parties.

18. Finally, Mr Reza relied on paragraph 18 of the Judge's decision and in particular the first and last sentences stating:-

> "In relation to the parents having already referred to them being a family unit which cannot be split up because they are the primary carers *Gulshan* did provide the correct approach to human rights cases and it referred to if there are compelling reasons, which I find would be the situation here if the family should be split up. ... I have taken into account the authority of *Zoumbas* and return to the interplay between Article 8 and the best interests and the cumulative effect on the family the family which is relevant here, noting that Section 55 was not dealt with in the refusal letter."

In fact the SSHD had in the decision considered her duties under Section 55 of the 2009 Act at pages 4 and 5.

19. Ms Willocks-Briscoe responded that paragraph 18 of the Judge's decision contained a material error of law as she had previously submitted in that the Judge had considered the child Applicants before the adult Applicants.

**Findings and Consideration**

20. In *EV (Philippines)* the Court of Appeal conducted an extensive review of the numerous authorities about the meaning and assessment of the best interests of a child. It went on to conclude:-

> "55. Underlying these statements of principle is the real world fact that the parent has no right to remain in the UK. So no counter-factual assumption is being made, and the interests of the other family members are to be considered in the light of the real world facts. This is not an approach which is confined to domestic law. In *Üner v The Netherlands [2007] 45 EHRR 14*, as Lady Hale pointed out, the Grand Chamber said that one of the factors to be considered was:
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> > "*the best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled.*"
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> 56. This, too, takes as the starting point the real world fact that the applicant has no right to be in the host country. Likewise in *Rodrigues da Silva, Hoogkamer v Netherlands [2007] 44 EHRR 34* the court said that:
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> > "*Factors to be taken into account in this context are the extent to which family life is effectively ruptured, the extent of the ties in the contracting state,* ***whether there are insurmountable obstacles in the way of the family living in the country of origin of one or more of them****, whether there are factors of immigration control (eg a history of breaches of immigration law) or considerations of public order weighing in favour of exclusion.*" (Emphasis added)
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> 57. Finally, at [29] Lady Hale returned to the test. She said that:
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> > "*Specifically, as Lord Bingham indicated in EB (Kosovo), it will involve asking whether it is reasonable to expect the child to live in another country.*"

> 58. In my judgment, therefore, the assessment of the best interests of the children must be made on the basis that the facts are as they are in the real world. If one parent has no right to remain, but the other parent does, that is the background against which the assessment is conducted. If neither parent has the right to remain, then that is the background against which the assessment is conducted. Thus the ultimate question will be: is it reasonable to expect the child to follow the parent with no right to remain to the country of origin?
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> 59. On the facts of *ZH* it was not reasonable to expect the children to follow their mother to Tanzania, not least because the family would be separated and the children would be deprived of the right to grow up in the country of which they were citizens.
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> 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.

The Judge failed to make findings first about the adult Applicants and then what constituted the best interests of the child Applicants and then to conduct any balancing exercise to assess the proportionality of the decisions under appeal.

21. The Judge erred in not taking account of the jurisprudence in *Dube (Sections 117A-117D) [2015] UKUT 00090 (IAC)* and the several other decisions of the Upper Tribunal explaining the ambit and application of Sections 117A-117D of the 2002 Act. The Judge's treatment of Section 117B in paragraph 19 of her decision is inadequate.

22. The consideration of the Applicants' claim under Article 8 of the European Convention outside the Immigration Rules did not adopt the structure recommended in *R (Razgar) v SSHD [2004] UKHL 27*. As the Judge granting permission to appeal put it at paragraph 3 of her grant "the Judge's consideration was short on facts, evidence, analysis or findings, she had taken a wrong approach and not applied the law".

23. For all these reasons I find that the First-tier Tribunal's decision contains material errors of law and must be set aside.

24. I note that Mr Reza's firm had only recently been instructed. He had informed me that the Applicants' had chosen to stay outside for the hearing but that if the matter were to proceed they would require and interpreter and none had been requested.

25. Consequently, in in the light of Section 12(2)(B) of the Tribunals, Courts and Enforcement Act 2007 and paragraph 7.2 of the Upper Tribunal's Practice Statement of 10 February 2010 as amended, the appeal is remitted to the First-tier Tribunal for a hearing afresh. None of the findings are preserved.

**Anonymity**

26. There was no request for an anonymity order and having heard the application and considered the papers in the Tribunal file I find that none is warranted.

**NOTICE OF DECISION**

**The decision of the First-tier Tribunal contained material errors of law and is set aside in its entirety. The appeal is remitted to the First-tier Tribunal for hearing afresh before any Judge other than Judge Wellesley-Cole.**

**Anonymity direction not made.**

Signed/Official Crest Date 09. xi. 2015

Designated Judge Shaerf
A Deputy Judge of the Upper Tribunal