



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/21871/2014
IA/21873/2014
& IA/21876/2014

THE IMMIGRATION ACTS

Heard at Field House
On 8 December 2015

Decision Promulgated
On 14 January 2016

Before:

UPPER TRIBUNAL JUDGE GILL

Between

HKP
HHP
DP
(ANONYMITY ORDER MADE)

First appellant
Second appellant
Third Appellant

And

The Secretary of State for the Home Department

Respondent

Representation:

For the appellants: Mr C Yeo, of Counsel, instructed by Compass Immigration Law
For the respondent: Ms A Fijiwala, Senior Home Office Presenting Officer

Anonymity

The First-tier Tribunal made an order pursuant to rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014.

Given that these proceedings involve a child, I continue that order (pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008) and consequently, this determination identifies the minor appellant, and the adults associated with him, by initials only in order to preserve the anonymity of the minor appellant.

DECISION AND REASONS

Introduction and background facts:

1. The appellants have been granted permission to appeal the decision of Judge of the First-tier Tribunal I Howard promulgated on 8 May 2015 dismissing their appeals against separate decisions of the respondent, each dated 6 May 2014, to remove them under s.10 of the Immigration and Asylum Appeals Act 1999. The decisions were made in response to their representations of 14 December 2013 and 3 February 2014 for leave to remain on the basis of Article 8 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). The respondent's reasons for the decisions were given in a letter of the same date (hereafter the "reasons for refusal" letter or "RFRL").
2. The appellants are nationals of India. The first appellant is the husband of the second appellant. They were born, respectively, on 27 July 1976 and 7 July 1978. The third appellant is their son, born on 30 October 2003.
3. The appellants arrived in the UK in August 2006 as visitors. At the time, they were aged, respectively, 30 years, 28 years and 2 years 10 months. They overstayed. On 20 July 2012, they submitted a human rights application which was refused on 27 February 2013. They were each served with enforcement notices (forms IS.151A) on 2 December 2013 informing them of their liability to removal as persons who have remained unlawfully in the UK. A pre-action protocol letter was sent to the respondent on 19 March 2013. The original decision was maintained on 22 November 2013.
4. By their letters dated 14 December 2013 and 3 February 2014, the family made further representations for leave to remain. These representations were the subject of the decisions that were appealed to the judge under s.82 of the Nationality, Immigration and Asylum Act 2002 (the "2002 Act").
5. By August 2013, the third appellant had lived in the UK for a period of 7 years. The family's representations for leave on the basis of Article 8 were made shortly thereafter, in December 2013.

The relevant legal provisions

6. It was not argued before Judge Howard that the first and second appellants satisfied the requirements of para 276ADE or that their Article 8 claims could succeed outside Statement of Changes in the Immigration Rules HC 395 (as amended) (the "Rules") irrespective of the success or otherwise of the third appellant's case under para 276ADE and his Article 8 claim outside the Rules.
7. It was submitted before the judge that the third appellant satisfied the requirements of para 276ADE(1)(iv) of the Rules. Also relevant is s.117B of the 2002 Act. These provide as follows:

276ADE (1). The requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that at the date of application, the applicant:

- (i) ...; and
- (ii) ...; and
- (iii) ...; or
- (iv) is under the age of 18 years and has lived continuously in the UK for at least 7 years (discounting any period of imprisonment) and it would not be reasonable to expect the applicant to leave the UK; or
- (v) ...; or
- (vi)

117B 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) 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.

The evidence before Judge Howard

8. By the date of the hearing before Judge Howard on 4 March 2015, the appellants had lived in the UK for a period of 8 years 7 months and were aged, respectively, 38 ½ years, 36 ½ years and 11 years 5 months.
9. The evidence before the judge included a report dated 25 January 2014 (the date of 25 January 2013 stated on A50 must be a typographical error) from a Ms Christine Brown, an independent social worker. The report was prepared following her meeting with the appellants at their family home on 19 December 2013 which lasted approximately 2 hours.
10. In her report, Ms Brown said, inter alia, that the third appellant had developed his private life in the UK in the belief that he was a British citizen. He had come to regard himself as being British. He was thriving in the UK and he could not understand why he may now have to leave his school friends behind and his friends within the community with whom he has become attached including those who attend their temple. The third appellant has little concept of India as a place outside of what he may have viewed on the television. He is very westernised in his outlook. His removal has the potential to create a rift with his parents for causing him, in his view, to lose all that matters to him and without, in his view, good cause. His removal would leave his parents faced with having to manage a very distressed and an angry child. The third appellant could neither read nor write in Gujarati although he could understand his parents.
11. At section 5 of her report, entitled: “*Conclusion and recommendations*”, Ms Brown said that the third appellant has a strong and, it appeared, an enduring network of peer relationships to which he is very attached. Removal from the UK would, in her opinion, be a negative and retrospective measure and an unnecessary and disruptive one. Ms Brown had no doubt that the third appellant was significantly bonded with his extended relationships and that the impact on him of removal would be devastating for him. At paragraph 5.5, she said:

“... It is [the third appellant] who will, in essence, be ‘punished’ for his parents’ lack of status, with enormous and enduring implications for him; a situation over which he has no control and one that he did not at any point determine or knowingly introduce into his life ...”
12. In Ms Brown’s opinion, the welfare of the third appellant would be irrevocably compromised by his removal to India. Although there was an education system in place in India, there will be an expectation on a still young and traumatised child to make the adjustment from all that is familiar and safe to him to that which is alien and, Ms Brown suggested, frightening and disorientating which, she said, will impact adversely on his future development as he struggles to come to terms with what has occurred and what he will view, as a child, with fear and anxiety because there is no easy transition from one country to another when this is against the child's wishes.

The findings of Judge Howard

13. Judge Howard found that the third appellant did not meet satisfy para 276ADE(1)(iv) of the Rules. He did not accept that it was unreasonable for the third appellant to

return to India with his parents. Having concluded that para 276ADE(1) was not satisfied, he considered the Article 8 claim of the appellants outside the Rules. He found that the removal of the third appellant would be proportionate. He therefore found that the removal of all three appellants would be proportionate.

14. Judge Howard gave his reasons at paras 13-28, which I now quote:

- “13. I have considered all the material the appellant has submitted in support of their appeal.
14. It is submit *[sic]* that the third appellant’s case falls within paragraph 276ADE(1)(iv). At the time of the application [the third appellant] had not spent seven years in the UK. By August 2013 he had spent seven years in the UK. Given that it was only in August 2013 that this “route” was available to [the third appellant] I must consider the appeal in light of the rules extant at that time and not earlier. In August 2013 the qualification “and it would not be reasonable to expect the applicant to leave the UK” was in force.
15. It is appropriate to consider section 55 of the Borders, Citizenship and Immigration Act 2009. It is not the case of either the appellants or the respondent that it is otherwise than in the best interests of [the third appellant] that he remain with both his parents. Thus the question with which I am concerned at this state is whether there are reasons other than that he should remain with his parents that dictate it would not be reasonable to expect him to leave the UK, as he would remain with his parents in the UK or India.
16. The matters relied upon by the third appellant to argue that it would not be reasonable to expect him to leave the UK centre around the private life he has established as a consequence of his having undertaken all of his primary education in the UK. That he has thrived in the environment of his primary school is undeniable and is spoken of by the school in his school reports and reflected in the work he has done examples of which are included in the appellants’ bundle.
17. In addition to this material the appellants commissioned an independent social worker, Christine Brown, to consider this and other material and to express an opinion as to what is in the third appellant’s best interest. At section 5 of her report she sets out her conclusions. Not unsurprisingly she finds a boy who has a strong and enduring network of peer relationships to which he is very attached [5.2], that his welfare needs are being met by his parents as well as by his peer networks [5.4] and that he is significantly and closely bonded with his extended relationships [5.5]. It is in this paragraph that she goes on to opine that impact of his removal will be devastating for him, adding it is [the third appellant] who will, in essence, be ‘punished’ for his parents lack of status with enormous and enduring implications for him. She asserts that [the third appellant]’s welfare will be irrevocably compromised by his removal to India.
18. Her reasons for so concluding are based upon the fact his extended relationships will come to an end and that the educational opportunities in India, while present, are significantly inferior, certainly in the maintained sector, to those offered by the same sector in the UK.
19. The opinion expressed by the social worker with which I do not agree is the notion that [the third appellant] would be ‘punished’ for his parents’ lack of status. This is emotive and does not represent the reality of the situation. For a family to be required to return to its country of origin in circumstances where the members of the family present in the UK are only the appellants and where the entirety of

the extended family is still in the country of origin cannot be characterised as a punishment.

20. He will be returning with his parents to the place where he was born. He will be reunited with his extended family. The first and second appellants also argue that their circumstances in India would be much reduced due to the first appellant's lack of education and the lack of opportunities in that country. The appellants are of the Brahman caste. A high caste. As already stated the whole of the extended family is to be found there and it to them they will return. I am quite satisfied this family, like the vast majority of families in India, operate joint family system and as such they will be assimilated back into the first appellant's family and home.
21. In the event of his returning to India he will continue to be educated, perhaps not at the level he currently enjoys, but educated nonetheless. He will be exposed to a new cohort of peers of similar age and ethnicity. He does not speak Gujarati. This will be hurdle he must overcome, but given the whole of his immediate and extended family speak it as their first language there is no reason to suppose that he will not, in a relatively short space of time become proficient in that language too. His English language skills will be a positive advantage to him in India.
22. [the third appellant] was two and three quarter years old when he came to the UK. He is now eleven. The years he has spent in the UK are formative, but not determinative. I simply cannot accept the proposition that a child in the position of [the third appellant], even on the balance of probabilities, cannot reasonable be expected to return to India with his parents, particularly where the entirety of his remaining family is to be found their and culturally his parents remain closer to India than the UK, as both gave evidence before me through an interpreter.
23. Having found that the appellants do not meet the requirements of any of the Immigration Rules I must now consider whether there is any Article 8 claim. My approach is that now set out in detail by Aikens LJ in the Court of Appeal decision **MM and others [2014] EWCA Civ 985** and in particular the analysis at paragraphs 130 to 154. Paragraph 130 summarises the position as follows:

“Sales J's decision therefore follows the logic of Laws LJ's statements in [38]-[39] of ***AM (Ethiopia)***, analysed above. However, there is a difference in that in ***Nagre*** the new rules were themselves attempting to cover, generally, circumstances where an individual should be allowed to remain in the UK on **Article 8** grounds; whereas in ***AM (Ethiopia)*** and in the present appeals the rule challenged stipulates a particular requirement that has to be fulfilled before the applicant will be allowed to enter or remain. The argument in each case is that it is that specific requirement that offends **Article 8**. ***Nagre*** does not add anything to the debate, save for the statement that if a particular person is outside the rule then he has to demonstrate, as a preliminary to a consideration outside the rule, that he has an arguable case that there may be good grounds for granting leave to remain outside the rules. I cannot see much utility in imposing this further, intermediary, test. If the applicant cannot satisfy the rule, then there either is or there is not a further **Article 8** claim. That will have to be determined by the relevant decision-maker.”
24. Thus I ask myself whether, on the evidence before me, that they have an arguable case that there may be good grounds for granting leave to remain outside the Rules.
25. The evidence set out above upon which I consider the Article 8 claim. In so doing I have considered the cases of **R. v. The Secretary of State for the Home Department (Appellant) ex parte Razgar (FC) (Respondent) [2004] UKHL 27**

and **Huang v Secretary of State for the Home Department; Kashmiri v Secretary of State for the Home Department** [2007] UKHL 11.

26. In assessing that claim I must consider the five questions posed by their Lordships in **Razgar**.

“(1) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?”

In addition to the matters germane to the third appellant's case and set out above in the context of his Immigration Rules claim I also heard evidence about the private lives established by the first and second appellants in the UK. I have a large number of letters and other documents which speak of the friendships they have forged while living in the UK. The schooling and friendships both represent aspects of the three appellants separate private lives. Each will in turn be interfered with by their removal from the UK.

“(2) If so, will such interference have consequences of such gravity as potentially to engage the operation of article 8?”

The private lives spoken of by the first and second appellants are unremarkable. Given they have been in the UK since 2006 it would be remarkable if they had not forged friendships and where permitted found work. However, to interfere with such aspects of the private life of an adult cannot be said to be of such gravity to warrant international protection, particularly when considered in the context their unlawful presence for the vast majority of their time in the UK.

[the third appellant]'s schooling is established. It is at least arguable that to interfere with it at this stage would have consequences of such gravity as to potentially engage Article 8.

“(3) If so, is such interference in accordance with the law?”

Given my findings in relation to paragraph 276ADE of the Immigration Rules it follows the interference is in accordance with the law.

“(4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?”

Part 5A of the 2002 Act at paragraph 117B sets out the statutory criteria to be considered when carrying out this assessment. ...

What is apparent from the statute is that in the instant case the fact very nearly all the private life [the third appellant] has established in the UK was established at a time his presence was unlawful. As a consequence as a matter of law it is something to which I should attach little weight.

“(5) If so, is such interference proportionate to the legitimate public end sought to be achieved?”

I do not propose to set out again all my findings as to the reasonableness of requiring the third appellant to be removed from the UK. However, when considering those matters in the context of Article 8 the third appellant is disadvantaged as the weight I can attach to those matters is reduced. When assessing those matters in the context of the Article 8 claim, and giving them what weight I can the conclusion to which I am driven is that the decision to remove the third appellant is proportionate.

27. In reaching my conclusion on the Article 8 claim I have again considered the best interests of the child as a matter of priority and in accordance with section 55 of the Borders, Citizenship and Immigration Act 2009.
28. It for these reasons I driven to the conclusion the removals would be proportionate.”

The grounds

15. The grounds are organised under four headings, entitled grounds A to D. These may be summarised as follows:
16. Ground A is that the judge failed to give adequate reasons for discounting the evidence of the appellants as to the loss of ties with family and friends in India. He also failed to engage with the evidence. In summary, the following points are made:
 - (i) The judge erred in taking into account that the third appellant has extended family in India. He ignored the evidence of the second appellant that she has not been in contact with close family or friends in India for the past 4 to 5 years and that the first appellant’s father is deceased. He ignored the first appellant’s evidence that the third appellant’s limited command of the Gujarati language would make it near impossible for him to communicate with Gujarati speaking family overseas. The judge therefore also erred in finding that this family, in common with the vast majority of families in India, would be assimilated back into the first appellant’s home and family,
 - (ii) The judge’s finding that the third appellant will become proficient in Gujarati in a relatively short space of time was not based on evidence. He further failed to consider the reasonableness of being forced to learn a new language or the detriment that this would cause the third appellant.
 - (iii) The judge had said at para 20 that the appellants are of the high Brahman caste and will therefore not suffer from a significant lack of opportunity on return to India. In doing so, he had ignored the fact that the first appellant and his father were labourers.
 - (iv) The judge's finding at para 22 that the first and second appellants remained culturally close to India as both had given evidence through an interpreter oversimplified the diverse nature of culture.
17. Ground B is that the judge failed to consider the report of Ms Brown in the round, together with ZH (Tanzania) v SSHD [2011] UKSC 4. In particular, the grounds argue that the judge erred in finding that Ms Brown's opinion, that the third appellant would effectively be punished for his parents’ lack of status, was emotive as Ms Brown’s opinion was drawn from her observations.
18. Ground C is that the judge misapplied s.117B in his assessment of the Article 8 claims outside the Rules. The following points are made:
 - (i) The judge erroneously applied s.117B to the fourth step, rather than the fifth-step in applying the five-step approach explained in Razqar.
 - (ii) The judge failed to consider the third appellant's strong peer network in the UK.

- (iii) The judge had misapplied s.117B because s.117B did not statutorily require the judge to place little weight on the third appellant's private life. As the judge had "*mandatorily*" attached little weight to the private life of the third appellant, he had effectively not carried out the balancing exercise in relation to proportionality outside the Rules.
 - (iv) The judge failed to consider other factors such as s.117B(2), that the public interest favours English speakers.
 - (v) The judge failed to apply Azimi-Moayed and others [2013] UKUT 00197 (IAC) where the Upper Tribunal said that "*seven years from age 4 is likely to be more significant to a child than the first seven years of life*".
19. Ground D is that Judge Howard failed to properly consider the best interests of the third appellant. The following further points are made:
- (i) In stating that the third appellant will be exposed to a new cohort of peers of similar age and ethnicity, the judge failed to take into account the loss of the third appellant's current peers, including his best friend. The grounds argue that the fact that new friendships can be formed does not mitigate the loss of existing relationships.
 - (ii) The judge failed to consider the fact that the third appellant is at a sensitive stage of his education due to the transition to secondary education in the coming months and therefore failed to following the guidance of the Court of Appeal in EV (Philippines) & others v SSHD [2014] EWCA Civ 874, that a decision as to what is in the best interests of children will depend on a number of factors, including the stage at which their education has reached.
20. Judge of the First-tier Tribunal Simpson granted permission without restriction, stating that it was arguable that, when considering the third appellant's case, the judge failed to due weight to the fact that, having lived in the UK in excess of 8 years, he is a qualified child under para 276ADE. Judge Simpson considered that it was arguable that, in assessing the reasonableness of his removal, it was incumbent upon the judge to take note of the findings in Azimi-Moayed that "*the Tribunal notes that seven years from age 4 is likely to be more significant to a child than the first seven years of life*". Judge Simpson referred to the third appellant being now in secondary school, that any removal to India was likely to have serious implications in respect of his educational prospects, particularly as he is English-speaking and cannot speak, read or write Gujarati. She referred to s.117B(6) of the 2002 Act which states that the public interest does not require removal of a person with a genuine and subsisting relationship with a qualified child where it would be unreasonable to expect the child to leave the UK.

Submissions

21. Mr Yeo reminded me of para 7.6 of the Explanatory Memorandum and the "*Compatibility Statement*" dated 13 June 2012 which preceded the coming into force of HC 194 which brought into effect the amendments to the Rules with effect from 9 July 2012. The requirement of reasonableness in para 276ADE(1)(iv) was only introduced in December 2012. The test of reasonableness was not a hard test to meet. There were no countervailing factors in the third appellant's case. He had not

committed any criminal offences. The judge failed to refer to Azimi-Moayed and EV (Philippines). The third appellant had had his entire education to date in the UK. The hearing before Judge Howard took place in March 2015 but his decision was only promulgated in May 2015. The delay was significant because the third appellant completed his primary education in July 2015. He commenced secondary school in September 2015.

22. Mr Yeo submitted that Judge Howard omitted to take into account the third appellant's own wishes and feelings. Judge Howard considered that the appellants would be assimilated into their own extended families in India. However, the evidence was that the family home did not exist. Judge Howard found that the third appellant would be able to become proficient in the Gujarati language in a short space of time whereas the evidence was that the third appellant was very resistant to going to India. Mr Yeo submitted that this would be an obstacle to his learning Gujarati.
23. Mr Yeo took me through the report of Ms Brown in considerable detail, submitting that the judge had not engaged properly with this expert's report. When Ms Brown said that the third appellant's removal would be regarded as "*punishment*", she was considering the position from the third appellant's point of view.
24. If the word "reasonable" is interpreted as having a high threshold for the purposes of para 276ADE(1)(iv), Mr Yeo submitted that the third appellant could succeed outside the Rules on the basis of Article 8 jurisprudence which continued to apply.
25. Ms Fijiwala submitted, in essence, that the judge had not materially erred in law.

Assessment

26. I have intentionally set out the grounds at some length. It will be apparent that the grounds amount in large part to no more than a disagreement with the reasoning and findings of Judge Howard. This notwithstanding the terms in which permission was granted. I also make the following specific points.
27. In relation to ground A, the first appellant had stated in his witness statement that his father had died. He also said that he has three sisters. Although he said that his family have "*spread apart*" since his departure from India and that he has lost contact with most of his family and friends, this does not mean contact cannot be resumed. The second appellant has a sister, a brother, her parents and her grandparents in India. Whilst she too says that she has not been in contact with close family and friends in India for the last 4-5 years, this does not mean that contact cannot be resumed. It is plain from the reasoning of Judge Howard that, in finding that the appellants would be assimilated into their extended families, he was not prepared to accept their unsupported evidence that they have lost contact with their immediate families and cannot look to them for assistance in re-settling themselves in India.
28. The judge did not speculate in finding that the third appellant will become proficient in the Gujarati language in a short space of time. Ms Brown said in her report that the third appellant understands his parents. He attends the Hindu temple. It is therefore

inevitable that he will regularly have been exposed to people who speak Gujarati. This will plainly make it easier for him to learn to read and write in Gujarati.

29. Whilst it is true that Judge Howard did not specifically indicate that he was aware that the first appellant and his father were labourers, there is no obligation on judges to refer to every piece of the evidence before them.
30. The remainder of ground A amounts to no more than a disagreement with the judge's reasoning and findings and an attempt to re-argue the case.
31. Ground B is likewise hopeless. Judge Howard gave adequate consideration to the report of Ms Brown. Mr Yeo attempted to suggest that Ms Brown's statement, that the third appellant would effectively be punished for his parents' lack of status, was a statement made from the third appellant's point of view. In other words, she was merely stating how the third appellant would view matters. However, that is not how the relevant sentence in para 5.5 of her report, which I have quoted at my para 11, reads. It is plain that she was expressing her own opinion, that the removal of the third appellant would effectively punish him for his parents' lack of status. The judge did not err in rejecting her opinion in this respect for the reasons he gave.
32. Since ground C concerns the proportionality exercise outside the Rules, I shall consider ground D before I turn to ground C.
33. There is no substance at all in ground D. It is plain that Judge Howard was fully aware, and took into account, that the third appellant "*has a strong and enduring network of peer relationships to which he is very attached*" in the UK (see para 17 of his decision). It was obvious that the third appellant would lose the ability to continue those relationships in the same way if removed from the UK. The judge did not need to specifically say so. There is therefore no merit in the contention that he failed to take the loss of such relationships into account.
34. Ms Fijiwala accepted that the judge had not taken into account the stage at which the third appellant had reached in his education. However, given that the third appellant was due to commence secondary school in the UK in September 2012 and that removal to India would likewise result in the third appellant having to attend a new school, any error in failing to consider that the third appellant was due to commence secondary school shortly was not material, in my judgement, bearing in mind that he did take into account (as I have said above) the loss to the third appellant of his ability to continue his relationships with his existing peers.
35. Accordingly, ground D does not establish any material error of law in the decision of Judge Howard.
36. Overall, the judge gave adequate reasons for his finding that the third appellant did not satisfy para 276ADE(1)(iv). He engaged adequately with the evidence that was before him. His finding was fully open to him. It cannot be said that his finding was not reasonably open to him or that it was an irrational or perverse finding.
37. For all of these reasons, Judge Howard did not materially err in law in reaching his finding that it is reasonable to expect the third appellant to leave the UK. It follows that he did not materially err in law in finding that the third appellant did not meet the

requirements of para 276ADE(1)(iv). It further follows that he did not materially err in law in dismissing the third appellant's appeal under the Rules and therefore the appeals of the first and second appellants under the Rules.

38. Before turning to ground C, I will deal with Mr Yeo's submission that, if the threshold for reasonableness in relation to para 276ADE(1)(iv) is higher than is the case when Article 8 jurisprudence is applied outside the Rules, it is possible for the third appellant to establish in relation to his Article 8 claim outside the Rules, that it is not reasonable to expect him to leave the UK, even if he fails to satisfy the requirement of reasonableness under para 276ADE(1)(iv). In relation to this submission, I make the following points:

- (i) There is no authority for the proposition that the threshold for reasonableness under para 276ADE(1)(iv) is different from the threshold of reasonableness when applying Article 8 jurisprudence outside the Rules. I have decided grounds A, B and D on that basis.
- (ii) The submission ignores the Court of Appeal's judgment in SSHD v SS (Congo) and others [2015] EWCA Civ 387. In my judgment, applying SS (Congo), the position is that, if a minor applicant is unable to show that removal would not be reasonable under para 276ADE(1)(iv) of the Rules, he/she can only succeed in his or her Article 8 claim outside the Rules if it can be shown that there are compelling circumstances for the grant of leave to remain outside the Rules (para 33 of SS (Congo)). Although this is a formulation which the Court of Appeal said in SS (Congo) is not as strict as the test of exceptionality or a requirement of "*very compelling reasons*" applicable in deportation cases, it gives appropriate weight to the focused consideration of public interest factors as finds expression in the Secretary of State's formulation of the new Rules in Appendix FM. There is no reason to apply a different approach in relation to the right to private life and the requirements of para 276ADE(1).
- (iii) The judgment in SS (Congo) was delivered on 23 April 2015, in the period between 4 March 2015 (the date of the hearing before Judge Howard) and 8 May 2015 (the date his decision was promulgated). The judge did not refer to SS (Congo) and he did not apply it. Instead, he considered the third appellant's Article 8 claim outside the Rules in a freestanding way, pursuant to the guidance in Razgar. This was a generous approach. If he had applied SS (Congo), he would only have needed to say that nothing was advanced in support of the third appellant's Article 8 claim outside the Rules that was not relied upon in relation to his case under para 276ADE(1)(iv) and that therefore there were no compelling reasons for the grant of leave to remain on the basis of Article 8 outside the Rules. He did not need to carry out the detailed assessment he carried out outside the Rules, at paras 23-28 of his decision. There is quite simply nothing about the circumstances of the third appellant which provide a compelling case for the grant to leave on the basis of Article 8 outside the Rules.
- (iv) For these reasons, and even if I am wrong in anything I say at paras 39-41 below, any error in relation to ground C is not material.

39. There is nothing of any substance in ground C. There is no material error of law in applying s.117B to the fourth step as opposed to the fifth step of the five-step

approach explained in Razgar. Contrary to the grounds, the judge did take into account the third appellant's strong peer network in the UK (see, in particular, para 17 where he noted the opinion of Ms Brown in this respect). S.117B(4) did require little weight to be placed on an individual's private life established whilst his or her immigration status was unlawful. Section 117B(4) draws no distinctions between adults and children.

40. Section 117B(2), which states that it is in the public interest that persons who seek to enter or remain in the UK are able to speak English, does not create a freestanding right to enter or remain based on an individual's ability to speak English. In any event, the judge was plainly aware that the third appellant speaks English and he quoted section 117B in full. There is therefore no reason to think that he did not take into account the fact that the third appellant is able to speak English fluently.
41. The Upper Tribunal did not say in Azimi-Moayed that, whenever a child has lived in the UK for seven years or more from the age of four years, it would be unreasonable to expect the child to leave the UK. This will be a question of fact in every case. All relevant factors will need to be considered and the best interests of the child considered. This is precisely the approach the judge followed.
42. For all of the above reasons, Judge Howard did not materially err in law. The appeals of the appellants to the Upper Tribunal are dismissed.

Decision

The decision of the First-tier Tribunal did not involve the making of any material error of law. The appellants' appeals to the Upper Tribunal are dismissed.

Signed
Upper Tribunal Judge Gill

Date: 2 January 2016