



IAC-HW-AM-V1

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

Appeal Numbers IA/02980/2015
IA/02986/2015
IA/03000/2015
IA/02992/2015

THE IMMIGRATION ACTS

Heard at Field House
On 7th March 2016

Decision & Reasons Promulgated
On 4th April 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE I A M MURRAY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

A M (FIRST)

R M (SECOND)

E M (THIRD)

T M (FOURTH)

(ANONYMITY DIRECTION MADE)

Respondents

Representation:

For the Appellant: Mr Kandola, Home Office Presenting Officer

For the Respondents: Mr Rees, Counsel for Raj Law Solicitors, London

DECISION AND REASONS

1. The Appellant in these proceedings is the Secretary of State, however for convenience I shall now refer to the parties as they were before the First-tier Tribunal.
2. The Appellants are citizens of Mauritius born on [] 1981, [] 1972, [] 2001 and [] 2010 respectively. The First and Second Appellants are the parents of the Third and Fourth Appellants. The Second, Third and Fourth Appellants are dependants of the

First Appellant. They are appealing against the decisions of the Respondent made on 8th January 2015 refusing to grant them leave to remain in the United Kingdom and the decisions dated 12th January 2014 to remove them from the United Kingdom. The appeals were heard by Judge of the First-tier Tribunal Haria on 14th September 2015. The appeals were allowed on human rights grounds and under the Immigration Rules. The decision was promulgated on 2nd October 2015.

3. An application for permission to appeal was lodged and permission was granted by Judge of the First-tier Tribunal Parkes on 25th February 2016. The permission states that the judge allowed the appeals on the basis that it would not be reasonable for the Third Appellant to leave the United Kingdom, having lived here for over seven years. The Appellants did not succeed under the Immigration Rules and the grounds argue that the judge failed to consider the guidance cases of **EV (Philippines)** and **Zoumbas** and failed to give adequate weight to the public interest in the enforcement of immigration control. The adults have a poor immigration history with lengthy overstaying and the use of false French documents to access services to which they were not entitled. The permission states that there is nothing unusual about the situation of the child other than the time she has spent in the United Kingdom and if that were enough then the reasonableness element of the Rules would add nothing. The permission states that it is arguable that the judge failed to have regard to the overall circumstances and placed too much emphasis on the child compared to the other competing interests.

The Hearing

4. There were no preliminary issues.
5. The Presenting Officer made his submissions relying on the grounds of application. He submitted that binding case law was not applied and no good reason was given for not applying this. The Presenting Officer referred to the case of **EV (Philippines) [2014] EWCA Civ 874** and the case **Zoumbas [2013] UKSC 74**. He submitted that the judge was not entitled to ignore these cases as these are binding authorities from the Court of Appeal and the Supreme Court.
6. I was referred to paragraph 61 of the decision in which the First-tier Tribunal Judge states that the First Two Appellants' immigration history is poor. They have always been in the United Kingdom illegally, they used fraudulent documents, they accessed healthcare and education free in the United Kingdom at the expense of the taxpayer and they worked illegally. He submitted that when these matters are taken into account and are weighed against the public interest they must weigh heavily against the Appellants including the eldest child.
7. He submitted that children without British citizenship cannot expect to be educated free in the United Kingdom. He submitted that the judge raised a number of public interest issues and should have dismissed the appeals. He submitted that the judge made a material misdirection of law by failing to apply these binding cases.

8. The Presenting Officer submitted that the First, Second and Fourth Appellants cannot succeed under the Immigration Rules. He made reference to suitability and submitted that these three Appellants are tagging on to the eldest child's claim under the Rules which can succeed. He submitted that what the First-tier Tribunal Judge has done is find that it is unreasonable for her to return to Mauritius and because of this none of the family members should be returning to Mauritius. He submitted that what the judge should have done is look at the family as a whole and not considered the Third Appellant in isolation.
9. He submitted that in Mauritius there is free primary and secondary education on British lines and that the children can both continue in education in Mauritius.
10. I was asked to find that there is a material error of law in the First-tier Tribunal Judge's decision and that it should be set aside and the appeal should be dismissed under the Rules and on human rights grounds.
11. Counsel for the Appellant submitted that he is relying on the skeleton argument on file.
12. He then responded to the submissions made by the Presenting Officer.
13. He submitted that the judge's decision does not depart from binding case law. He submitted that the judge gave proper consideration to the material facts of this case. The Presenting Officer stated that the judge did not properly consider public interest but Counsel submitted that this statement is just a disagreement with the decision made by the judge. He submitted that there is no misdirection of law. The judge looked at the facts in the round and came to a decision which she was entitled to come to.
14. Counsel referred to the said case of **EV (Philippines)** and submitted that the judge refers to this at paragraphs 48 to 51 of the decision. He submitted that not only did the judge consider this case he also considered a number of other cases and he submitted that the judge was entitled to reach the decision he did. He submitted that the judge gave a proper explanation for reaching her decision and I was asked to find that there is no material error of law in the judge's decision.
15. I pointed out that although the judge refers to **EV (Philippines)** in these paragraphs, she refers to one child in these paragraphs and not the family as a whole. Counsel referred to paragraph 51 in which the First-tier Tribunal Judge states that the case of **EV (Philippines)** holds that 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 and then by determining whether or not the need for immigration control outweighs the best interests of the children. He submitted that that is what the case states and the judge has dealt with it in this way.
16. He referred to paragraph 53 of the decision and submitted that the First-tier Tribunal Judge uses the guidance offered in the country guidance cases and based on this

finds that it would not be reasonable for the Third Appellant to go back to Mauritius, therefore the Third Appellant's claim meets the terms of paragraph 276ADE(1).

17. I put to Counsel that the judge is basing the claim on this one Appellant and the best interests of the child are not the primary consideration in this type of case.
18. I referred him to paragraph 36 of the decision which states "The parents' case rests on the position of Eesha. If it is not reasonable for her to go back to Mauritius it is not reasonable for them to go and nor is it reasonable for Tiana to return to Mauritius." I put to him that the judge does not appear to have looked at the family holistically.
19. The Presenting Officer submitted that the judge should have looked at the facts as a coherent whole but what she has done is describe what has been put to her by the appellant's representative and has misdirected herself in law.

Decision and Reasons

20. Under the heading "Immigration Rules" at paragraph 34 of the decision, the judge states that the issue to be determined in this case is what is reasonable for Eesha, the Third Appellant and whether it would be reasonable for her to leave the United Kingdom. The judge states that the terms of paragraph 276ADE(1)(iv) can be met by the Third Appellant. At paragraph 36 the judge states the parents' case rests on the position of their daughter Eesha. If it is not reasonable for her to go back to Mauritius it is not reasonable for them to go back, nor is it reasonable for Tiana to return to Mauritius. The Third Appellant was 3½ when she came to the United Kingdom. The Respondent accepts that the First Two Appellants have a genuine marriage. At paragraph 39 the judge states that she finds the First Two Appellants to be honest, truthful and credible. When their immigration history is considered this is a strange observation to make. At paragraph 40 the judge notes that education is available in Mauritius, is based on the British model and that primary education is free. The judge notes that the Second Appellant's parents and sister live in Mauritius. The judge notes that the Second Appellant's aunt helps them financially. The judge finds there is no reason why she cannot continue to do this if they return to Mauritius. The judge then refers to the best interests of the children under Section 55 of the Borders, Citizenship and Immigration Act 2009 and refers to the following cases **ZH (Tanzania) [2011] UKSC 4**, **MK [2011] UKUT 00475 (IAC)**, and at paragraphs 48 to 51 refers to the said case of **EV (Philippines) and others**. She quotes this case relating to what factors have to be considered when the best interests of children are considered. In particular she deals with the length of time the child or children have been in the United Kingdom but then at paragraph 50 she refers to paragraph 60 of **EV (Philippines)**. This states:

"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 - 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 goes on to the case of **Azimi-Moayed and others [2013] UKUT 197 (IAC)**. At paragraph 52 she accepts that the best interests of the children is to remain with their parents. The judge then states, “On my assessment of the evidence it would not be reasonable for Eesha to go back to Mauritius, it is in her best interests to remain in the UK. She meets the requirements of paragraph 276ADE(1)(iv)”. In spite of quoting paragraph 60 above from the case of **EV (Philippines)** the judge goes on to ignore this. **EV (Philippines)** goes on to state at paragraph 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. It would have been appropriate to consider the cost to the public purse in providing education to these children. The Immigration Judge adopted an approach too favourable to the appellant.”

21. In our case the judge makes reference to the First Two Appellants’ chequered history having been in the United Kingdom illegally for the whole time they have been here, the fact that the whole family has had access to employment, free healthcare and free education and she refers to the First and Second Appellants working when they had no right to do so. At paragraph 61 she makes an issue of all these matters. She refers to huge damage to the economy of the United Kingdom. She refers to the adults using false documents. She then states that none of Eesha’s time in the United Kingdom without the relevant visa is through her fault and that is correct. At paragraph 63 she refers to the maintenance of immigration control being necessary to preserve and foster the economic wellbeing of the country and to protect the health and morals and for the protection of the rights and freedoms of others. In spite of making these findings the judge finds in favour of the Appellants.
22. The case of **Zoumbas** states that it is in the children’s best interests to go with their parents to the Republic of Congo. It is stated in that case that it was in the best interests of the children that they and their parents stayed in the United Kingdom so that they could obtain such benefits as healthcare and education which the decision-maker recognised might be of a higher standard than would be available in the Congo but other things were not equal, they were not British citizens, they had no right to future education and healthcare in the United Kingdom, they were part of a close-knit family with highly educated parents and were of an age when their emotional needs could only met within the immediate family unit. **Zoumbas** goes on to state that the decision-maker concluded that the children could be removed to the Republic of Congo in the care of their parents without serious detriment to their wellbeing.

23. At paragraph 58 of First-tier Tribunal Judge Haria's decision the judge states that she has taken into account the factors set out in Sections 117A and 117B of the Nationality, Immigration and Asylum Act 2002, Part 5A. Although she sets out the terms of these sections she does not apply them. Her whole decision is based on the claim of the Third Appellant. She has not considered this family as a whole. She has not considered the cost to the United Kingdom of them being here for over seven years illegally and accessing healthcare and education and working illegally. She has not carried out a satisfactory proportionality assessment.
24. With regard to human rights it is clear that the judge has made a material misdirection of law and has failed to give adequate weight to public interest and the requirement of effective immigration control in the United Kingdom. The case of EA (Nigeria) states that a right to education is too narrow a scope to be of assistance when assessing the best interests of the child. To conduct such an analysis entirely through the prism of education would be a material misdirection. This is exactly what the judge has done in this case.
25. The law states that the best interests of the child must be a primary consideration but in this case the judge has taken it as the primary consideration. Factors that need to be included in the balancing exercise are not limited to the overstaying of the children and their parents. What has to be considered is whether it would be inappropriate for the cost and duration of the Third and Fourth Appellants' education and care in this country, to be reasonable.
26. The best interests of the children have to be weighed against the immigration history of the family. The facts of the case are that the family has been in the United Kingdom illegally for more than seven years and has stayed here against public interest and against the necessity for effective immigration control. They have family in Mauritius who can assist them on return. There is a good education system in Mauritius that can be used by the children. The First and Second Appellants have work experience in the United Kingdom that will help them to get work when they return to Mauritius.
27. The judge has not used the reasonability test correctly. The hardships raised are largely analogous with the ordinary challenges a couple would face in relocating. The rights of the minor Appellants, relating to their education, have to be considered based on the case law quoted and it is clear that the judge has not properly applied the relevant case law. There are therefore material errors of law in the judge's decision.

Notice of Decision

28. There are material errors of law in the First-tier Tribunal Judge's decision. This decision must be set aside.
29. Had the judge correctly applied the relevant case law her decision would have been different.

30. The terms of the Immigration Rules can only be met by Appellant number 3 and her appeal can be allowed under the Immigration Rules but when this family is considered as a whole their appeals must be dismissed on human rights grounds and under the Immigration Rules.
31. Anonymity has been directed.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies both to the Appellants and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date

Deputy Upper Tribunal Judge I A M Murray