Upper Tribunal
(Immigration and Asylum Chamber)

Appeal numbers: IA/49619/2013
IA/49629/2013
IA/49640/2013
IA/49659/2013
IA/49665/2013

THE IMMIGRATION ACTS

Heard at Field House
On 12 February 2015

Determination Promulgated
On 16 February 2015

Before

UPPER TRIBUNAL JUDGE MOULDEN

Between

MISS J C R
MISS M F C R
MR J C R
MR E C A
MRS C R T
(Anonymity Direction Made)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr P Thoree a solicitor from Thoree & Co
For the Respondent: Mr L Tarlow a Senior Home Office Presenting Officer

DETERMINATION AND REASONS

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1. The appellants are citizens of Columbia. Their dates of birth are respectively, J 27 May 1997, M 2 November 1995, Master J 12 March 2008, E 15 April 1974 and C December 1974. E and C are husband and wife and the parents of the other appellants. I will refer to them as the husband and the wife and to their two daughters as J and M and their son as Master J.

2. The husband claimed to have entered the UK on 26 November 2000 as a visitor. When his visitor visa expired he overstayed. The wife claimed to have entered the UK on 26 May 2002 with J and M. Master J was born in the UK on 12 March 2008. Except for any initial period of leave as a visitor all of the appellants have remained in this country illegally.

3. The appellants made an application to remain in the UK on 25 November 2008 which was refused on 4 December 2009. That decision was maintained after reconsideration on 22 June 2010. On 24 May 2012 the husband submitted an application for leave to remain with the other members of the family as his dependants. This was refused on 15 January 2013 with no right of appeal. The appellants sought judicial review quashing the decision and granting them an in country right of appeal. The application for judicial review was resolved by a consent order dated 13 August 2013 by which the respondent agreed to reconsider the decision and make a fresh decision on the application for leave to remain on Article 8 grounds within three months of the order. This was followed by the decisions of 22 November 2013 against which the appellants appealed to the First-Tier Tribunal.

4. On 20 March 2014 First-Tier Tribunal Judge Davidson (“Judge Davidson”) heard the appellants’ appeals. By a determination promulgated on 19 June 2014 all the appeals were allowed on Article 8 human rights grounds. The respondent applied for and was granted permission to appeal to the Upper Tribunal arguing that Judge Davidson had erred in law. That appeal came before Deputy Upper Tribunal Judge J G Macdonald (“Judge Macdonald”) on 3 September 2014. He found that Judge Davidson had erred in law and set aside the decision directing that there should be a further hearing.

5. The appeals came before me on 11 December 2014 when I gave directions for the submission of documents and skeleton arguments. I also directed that the findings of credibility and fact contained in the determination of Judge Davidson should be preserved.

6. It is in these circumstances that the appeals come before me. Although there was a direction that one should be produced there is no skeleton argument from the respondent. I have a skeleton argument from Mr Thoree who has also submitted a supplementary bundle of evidence for the appellants (bundle D). I now have four bundles from the appellants (A, B, C, and D) the first three of which were submitted for earlier hearings.

7. Mr Thoree's skeleton is largely based on the premise that the Immigration Rules which should be applied are those in force before the amended Immigration Rules which came into effect on 9 July 2012. The grounds also seek to argue that there is no error of law in the determination of Judge Davidson and that this decision should be upheld. I indicated to the representatives that it seemed to me that on this rehearing I should apply the provisions of the Immigration Rules which came into effect on 28 July 2014 and the provisions of s 117 of the Immigration Act 2014 ("the 2014 Act") which came into effect on the same date. I provided them with copies of YM (Uganda) v Secretary of State for the Home Department [2014] EWCA Civ 1292 as authority for this proposition.

8. I heard evidence from J and M who adopted their witness statements contained in Bundle D. They gave evidence in chief, were cross-examined, and I asked some questions for clarification. Their evidence is set out in my record of proceedings.

9. Mr Tarlow relied on the reasons for refusal letter of 6 November 2013. It was undeniable that J and M had done well in their education. They had aspirations and expectations of a life here. They had a good private life and a family life with their sibling and parents. However, if they were removed to Columbia they would be removed together and would stay together as a family. No member of the family was able to meet the requirements of Appendix FM of the current Immigration Rules. In the circumstances the appeals stood or fell on the Article 8 Strasbourg jurisprudence with reference to s 117 and in particular 117B of the 2014 Act.

10. Mr Tarlow submitted that sections 117B 4 and 5 applied. I should give little weight to the fact that M and J had done well. None of the children were British citizens or qualifying children. M was now over 18. Applying the Razgar tests the appeal turned on the final question, proportionality, in the light of the provisions of the 2014 Act.

11. Mr Tarlow submitted that M and J were bright and capable and would have the ability to adapt to life in Columbia. Their chosen professions, accountancy and cabin crew, were to a large extent internationally transferable. It was accepted that they would need to re-educate to some extent. Currently, they were in limbo because their studies had been brought to an end because of their lack of immigration status.

12. Mr Thoree submitted that there was no indication that the respondent had looked at the bundle of documents submitted with the application and had failed to consider the best interests of the children under s 55 of the Borders Citizenship and Immigration Act 2009 ("s 55"). He relied on JO and Others (section 55 duty) Nigeria [2014] UKUT 517 (IAC) (1 December 2014). The documents submitted to the respondent were listed in his

firm's letter of 25 April 2012. I asked Mr Thoree whether there was sufficient consideration of the s 55 issues in the section entitled "section 55 consideration" at page 4 of the reasons for refusal letter dated 6 November 2013 and if not what factors had not been considered. He submitted that more consideration should have been given to the childrens' wishes and feelings, although he was unable to point me to any evidence about this which was before the respondent. He added that there was insufficient consideration of the question of the childrens' education. In relation to this aspect he asked me to remit the appeals to the respondent as not in accordance with the law and for further consideration.

13. Mr Thoree submitted that the M and J could succeed under Appendix FM. J met the requirements of paragraph 276ADE(4). M met the requirements of paragraph 276ADE(5). He accepted that none of these provisions could benefit the husband or the wife.

14. In relation to section 117 of the 2014 Act, Mr Thoree submitted that all the family spoke English. He accepted that the husband had never paid tax or National Insurance and that the children had had free education. They had also benefited from some NHS treatment. Under 117B(5) the husband had come here in 2008. He submitted that 117B(6) could benefit J and Master J. It would be unreasonable to expect the family to relocate to Columbia. The children would have to start their education all over again and this would not be in their best interests even taking into account the interests of immigration control. The overriding objective under the new legislation was to deter foreign criminals. None of the appellants came within this category. I was asked to allow all their appeals.

15. Mr Tarlow did not reply. I reserved my determination.

16. I can find no merit in Mr Thoree's submission that the respondent's decision was not in accordance with the law because there was no proper consideration of the s 55 best interests of the children. He was not able to point to any particular aspect of the evidence before the respondent which had not been considered when this was addressed on page 4 of the reasons for refusal letter dated 6 November 2013 I find that the respondent did give proper consideration to the s 55 requirements.

17. In the light of <u>YM (Uganda) v Secretary of State for the Home Department</u> [2014] EWCA Civ 1292 in particular paragraphs 38 and 39 I find that, notwithstanding the provisions which were in force at the dates of the application, the decision and the hearing before Judge Davidson, I must apply the Immigration Rules which came into effect on 28 July 2014 and the 2014 Act.

18. Judge Davidson's findings of fact, which are preserved, are largely set out in paragraphs 19 and 20 of the determination. Paragraph 19 contains

nothing material in addition to what I have already recorded save for the conclusion that the appellants have been here since 2002. In paragraph 20 he said;

> "20. Although the parents have a lamentable immigration record, having come to the UK 12 years ago and seemingly just overstayed and worked illegally in clear contravention of the UK's Immigration Rules, I accept that they are broadly honest, hard-working people, who came from a blighted country to the UK because (the husband's) brothers were already living here. They claim not to have claimed or used public funds, but that is not entirely true because they have had a child on the NHS while here, and their two oldest children have been educated in the UK at public expense. Strictly speaking they were not entitled to any of these benefits. There is no evidence of either of the parents paying tax or National Insurance at any time…"

19. I find that the evidence which I heard from M and J confirmed Judge Davidson's view of them. Both are intelligent, perceptive and well able to express themselves clearly in English with a wide vocabulary. J is now 17 and M 19. The situation has changed to the extent that both of them have now had their studies curtailed. They believe and I accept that this is probably because their lack of immigration status has been discovered and it has been decided that they are not entitled to further education.

20. J was on a two-year BTEC course which, had had she not been excluded in December 2014, would have finished in June 2015. She hopes for a career as airline cabin crew. She believes that if she went to Columbia and tried to pursue her career she would have to redo much of her education and then go to university. This would have to be paid for and her parents could not afford it. Her Spanish was not fluent but, I deduce from her answers, is competent and would need brushing up. She passed eight or nine GCSEs and subsequently a BTEC business course which she passed with "double grade merit merit". The repetition of "merit" is not a typographical error.

21. M finished her BTEC course before she was excluded from further education. She passed with distinctions, merits and some passes. Without immodesty she agreed that she had done "pretty well". Following the completion of her BTEC course she wanted to go to university or some other suitable accountancy training and had applied to several universities before discovering that, because of her lack of status, she would not be offered a place. She would not be able to go to university or continue state funded education in the UK unless she achieved legal status here. Her assessment of her ability to speak Spanish was similar to J's. She wanted to become a financial accountant and believed that if she went back to Columbia she would have to redo much of her studies. The accountancy training system was different to that in the UK. Like J she thought that she

would need to go to university in Columbia but her parents would not be able to afford this.

22. At the hearing before Judge Macdonald Mr Thoree accepted that at the date of the hearing before Judge Davidson the requirements in paragraph 276ADE of the Immigration Rules included a provision that M and F would need to establish that it would not be reasonable to expect them to leave the UK. At that stage Mr Thoree accepted that they could not succeed under the Article 8 provisions in the Immigration Rules and could only succeed outside the Rules. Before me Mr Thoree repeated the argument that M and F could succeed under paragraph 276ADE. I find that the provisions of paragraph 276ADE no longer apply and that the appellants can only succeed on Article 8 human rights grounds outside the Immigration Rules.

23. The provisions of the Immigration Act 2014 set out where the public interest lies in paragraphs 117A, 117B, 117C and 117D as follows;

117A Application of this Part

(1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts —

(a) breaches a person’s right to respect for private and family life under Article 8, and

(b) as a result would be unlawful under section 6 of the Human Rights Act 1998.

(2) In considering the public interest question, the court or tribunal must (in particular) have regard—

(a) in all cases, to the considerations listed in section 117B, and

(b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.

(3) In subsection (2), “the public interest question” means the question of whether an interference with a person’s right to respect for private and family life is justified under Article 8(2).

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.

117C Article 8: additional considerations in cases involving foreign criminals

(1) The deportation of foreign criminals is in the public interest.

(2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.

(3) In the case of a foreign criminal ("C") who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.

(4) Exception 1 applies where—

(a) C has been lawfully resident in the United Kingdom for most of C's life,

(b) C is socially and culturally integrated in the United Kingdom, and

(c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.

(5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.

(6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.

(7) The considerations in subsections (1) to (6) are to be taken into account where a court or tribunal is considering a decision to deport a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted.

117D Interpretation of this Part

(1) In this Part—

"Article 8" means Article 8 of the European Convention on Human Rights;

"qualifying child" means a person who is under the age of 18 and who—

(a) is a British citizen, or

(b) has lived in the United Kingdom for a continuous period of seven years or more;

"qualifying partner" means a partner who—

(a) is a British citizen, or

(b) who is settled in the United Kingdom (within the meaning of the Immigration Act 1971 — see section 33(2A) of that Act).

(2) In this Part, "foreign criminal" means a person—

(a) who is not a British citizen,

(b) who has been convicted in the United Kingdom of an offence, and

(c) who—

(i) has been sentenced to a period of imprisonment of at least 12 months,

(ii) has been convicted of an offence that has caused serious harm, or

(iii) is a persistent offender.

(3) For the purposes of subsection (2)(b), a person subject to an order under—

(a) section 5 of the Criminal Procedure (Insanity) Act 1964 (insanity etc),

(b) section 57 of the Criminal Procedure (Scotland) Act 1995 (insanity etc), or

(c) Article 50A of the Mental Health (Northern Ireland) Order 1986 (insanity etc),

has not been convicted of an offence.

(4) In this Part, references to a person who has been sentenced to a period of imprisonment of a certain length of time—

(a) do not include a person who has received a suspended sentence (unless a court subsequently orders that the sentence or any part of it (of whatever length) is to take effect);

(b) do not include a person who has been sentenced to a period of imprisonment of that length of time only by virtue of being sentenced to consecutive sentences amounting in aggregate to that length of time;

(c) include a person who is sentenced to detention, or ordered or directed to be detained, in an institution other than a prison (including, in particular, a hospital or an institution for young offenders) for that length of time; and

(d) include a person who is sentenced to imprisonment or detention, or ordered or directed to be detained, for an indeterminate period, provided that it may last for at least that length of time.

(5) If any question arises for the purposes of this Part as to whether a person is a British citizen, it is for the person asserting that fact to prove it."

24. I must apply sections 117A and 117B in the light of the interpretation section 117D. I find that the children speak excellent English and the husband and wife probably speak competent English. I give little weight to the private lives of the appellants. Except for minimal periods after arrival they have at all times been in the UK unlawfully and their immigration status has been precarious. Because the provisions of 117B(6)(a) and (b) are cumulative they can only benefit the husband and the wife, being the persons who have a genuine and subsisting parental relationship with the

children and only then if it would be reasonable to expect any of the children to leave the UK. This provision applies only to a “qualifying child”. None of the children are British citizens. Only one of them, J, is a qualifying child. She is under 18 and has lived in the UK for a continuous period of more than seven years. M is over 18 and Master J has not been here long enough because he is not yet seven.

25. I find that the appellants have a family life together. There would be no breach of their Article 8 family life human rights if, as is proposed, they are removed to Columbia together. Whilst it is said that they have relatives in the UK it has not been argued that the appellants have family lives with them.

26. It is not necessary to strictly apply a two stage test as advocated in Gulshan (Article 8 – new Rules – correct approach) Pakistan [2013] UKUT 640 (IAT). I can conflate these and consider whether there are compelling circumstances not sufficiently recognised under the Immigration Rules for granting leave to remain outside the Immigration Rules. In considering whether there are compelling circumstances I must take into account all the relevant evidence whilst giving effect to the provisions of section 117 of the 2014 Act.

27. I apply the tests in the opinion of Lord Bingham in Razgar, R (on the application of) v. Secretary of State for the Home Department [2004] UKHL 27. In relation to the appellants’ private lives the first four questions are answered in the affirmative leaving the question of whether the proposed interference is proportionate to the legitimate public end sought to be achieved?

28. I find that the husband and the wife must have established private lives in this country although they have provided little evidence of this. Except for a very short period when they first arrived they have always been here illegally and well aware of this. Their position has always been precarious. The husband and wife admitted that they remained here knowing that they were not entitled to because they wanted to obtain a better future and a better education for their children. Whilst this is a laudable ambition for parents to have for their children it shows a flagrant disregard for the immigration system and the public interest. The husband was well aware that he was not entitled to work as is reflected by the fact that he worked illegally for cash in hand. Neither the husband nor the wife have paid any tax or National Insurance. They have obtained the benefit of education for their children to which they were not entitled. They have obtained the benefit of some NHS treatment to which they were also not entitled. If I was considering the position of the husband and wife on their own without their children I would have no hesitation in concluding that it would be a proportionate interference with their Article 8 private life rights to remove them to Columbia.

29. Master J is now nearly 7 and attending primary school. I have little evidence about his private life but I accept that he does have a private life in the UK. He cannot be blamed for what his parents have done. I find that the main focus in his life is probably his family. One of his sisters said that Spanish was spoken at home. His first language may well be English but I find that if he went to Columbia he would soon be able to communicate in Spanish, attend school and make new friends.

30. M and J have established a private life here. There are letters of support from close friends. However, I find that the main focus is on the life of the family. They are a close-knit family. It is clear that they have made the most of and derived considerable benefit from their education in the UK. They are, as I have said, intelligent, perceptive and well able to express themselves clearly in English. Their command of Spanish may be rusty but would soon become fluent in Columbia. Both have completed their secondary education here. What they would prefer and hope to do is to go on and complete their tertiary education in this country. J would like to complete her BTEC and go on to university before getting a job as aircraft cabin crew whilst M would like to achieve an accountancy qualification either at University or by another suitable route. I accept that return to Columbia will delay the achievement of their ambitions and that some retraining will be required but with their abilities and the qualifications obtained in this country I find that they will progress and make the most of their talents, even if the family cannot afford to pay for them to go to university. Clearly they do not want to go back to Columbia and would be upset if they had to go there. The consequences of having to return would be mitigated if, as is proposed, they return as a united family.

31. Whilst I accept that the best interests of the children would be to remain in this country and that these interests are a paramount consideration the consequences of their having to return to Columbia are not so bad and the difference not so great that the public interest in returning them is overcome.

32. Judge Davidson said that the appellants came from a “blighted country”. There is no evidence to show and I do not accept that they would be at risk in any way on return to Columbia. Whilst they might not be well off it has not been argued that they would be destitute.

33. Balancing the public interest in the maintenance of effective immigration control particularly in the light of the provisions of s 117 of the 2014 Act against all the factors which militate in favour of the appellants I find that it would be a proportionate interference with their Article 8 human rights to remove them to Columbia. Had the provisions of paragraph 276ADE applied it would have been in reasonable to expect all of them, including the children, to leave the UK.

34. Whilst I have not been asked to make an anonymity direction and I note that Judge Davidson did not do so I consider that an anonymity direction is necessary in order to protect the interests of the children. I make an order under rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 prohibiting the disclosure or publication of any matter likely to lead members of the public to identify any of the appellants.

35. The decision of Judge Davidson has been set aside. I remake the decision and dismiss the appellants' appeals under the Immigration Rules and on Article 8 human rights grounds.

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Signed Date 13 February 2015

Upper Tribunal Judge Moulden