Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/47662/2014
IA/47651/2014
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THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 31 July 2017	**On 23 August 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE HILL QC

Between

ROWENA [D]
ANDREI [D]
[A R D]
[A N D]
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr R Solomon, Counsel instructed by Hodders Law
For the Respondent: Mr N Bramble, Home Office Presenting Officer

REMAKE DECISION AND REASONS

1. This is the remaking of a decision of First-tier Tribunal Judge Miles which was promulgated on 9 August 2016. That decision was set aside by me on 26 May 2017 and, for convenience, I annex to this determination my Decision and Reasons.
2. In brief summary, the first appellant came to the United Kingdom in January 2011 under a Tier 4 (General) Student Migrant visa. This expired on 29 June 2012, but was extended until 30 August 2013. Her husband and their two children (the second to fourth appellants) arrived on 4 April 2011, when [ARD] was 5 years of age and the younger child, [AND], was 2. They are now 11 and 9 respectively.

3. [ARD] has now embarked upon his secondary education at Wembley High Technology College and has just completed his first year. He is making good progress notwithstanding a diagnosis of ADHD. He is fully absorbed into the education system in the United Kingdom, has made friends and undertakes extra curricular activities, including football. English is his first language, although he had spoken Tagalog while in the Philippines. It is said, and I have no reason to doubt, that he identifies himself as English.

4. It is the younger child, [AND], however, who has been the primary focus of these proceedings as, by common consent, the outcome of her appeal will also be determinative of those of the other three.

The issue for determination

5. It was confirmed at the outset of the hearing that the findings of fact of Judge Miles are preserved, and this was an appropriate matter for the consideration of Article 8 outside the Immigration Rules. There was no challenge to Judge Miles' conclusion (under section 55 of the Borders Citizenship and Immigration Act 2009) that best interests of the children lay in them remaining in the United Kingdom.

6. The single issue for me, therefore, is the balancing exercise in deciding whether the statutory factors regarding maintenance of immigration control were such as to outweigh those best interests, as expressly identified in a passage of the judgment of Clarke LJ in **EV (Philippines) & Ors v Secretary of State for the Home Department [2014] EWCA Civ 874**. Paragraph 36 reads as follows:

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

7. No evidence was called by either party, although some additional material was introduced by Mr Solomon of counsel for the appellants. I therefore heard submissions on the appropriate balance to be struck between the best interests of the children and the maintenance of immigration control.

The appellants' case

8. Mr Solomon made reference to the first appellant's mother, Glory, with whom the family resides and who provides financial support, together with the appellant's sister Juliet, who lives separately but is in regular contact with the family, and as long ago as 2015 was making a contribution in the order of £100 per week towards their day-to-day expenditure. Glory and Juliet are both employed by the National Health Service. Glory receives an income in the order of £19,000 per annum gross and that of Juliet is broadly similar.

8. [AND] has been diagnosed with autism spectrum disorder. She has learning difficulties and limited speech. She has no awareness of danger and she cannot walk for prolonged periods. She needs 24 hour care. She has possible nephrocalcinosis which is a condition of the kidney and sensory modulation difficulties. She has sleep difficulties, hyperacusis and bicuspid aortic valve. These latter heart-related conditions appear to have received investigation and referred without treatment for review in four to five years.

9. Correspondence from the [AND]'s general practitioner in the form of a letter dated 8 June 2017 makes reference to these matters being serious and life-threatening conditions.

10. Mr Solomon submitted that [AND] is no ordinary child: she suffers from autism and as a result is particularly resistant to changes of circumstances, which would be de-stabilising. She is the subject of ongoing health concerns with clinical intervention on a multi-disciplinary basis.

11. [AND] was seen in March of 2011 at a clinic in the University of the Philippines, General Hospital, where Williams syndrome was considered. This provisional diagnosis was made in the Philippines before the family arrived in the United Kingdom. It is not disputed that a conclusive diagnosis would have required a visit to Australia.

12. In relation to the adequacy and availability of medical treatment in the Philippines, Mr Solomon compiled a clip of documentation drawn from various resources. These included a report on the Philippines from the Foreign & Commonwealth Office Travel Department; the United States Department of State Country Report on Human Rights dealing with the Philippines, and particularly with persons with disabilities; and an extract from Business World Online entitled "Philippine health care system, from bad to worse" (28 March 2016).

14. There is also a letter from Sister Juliet Rose, the Executive Principle at Pield Heath House School which [AND] currently attends which says as follows:

> "As a member of a religious order I have been to visit the Philippines where our sisters and staff work with children and young people who have similar disabilities to [AND] and I do not feel that the provision that would be available would be as beneficial to that which she is already receiving here at Pield Health. Unfortunately the services are not as well co-ordinated particularly in the education of youngsters with severe learning difficulties and a therapeutic provision that [AND] desperately needs".

15. In terms of affordability the evidence in the first appellant's witness statement (paragraph 34) indicates that the minimum daily wage in the Philippines is in the order of £8.85 and the cost on [AND]'s medical therapy session and school fees would be in the order of £1,680.47 monthly. Documentary evidence confirms this. The second appellant's income is currently £25,000 per year gross for the year ending April 2017, slightly down on £26,000 gross for the previous year. It would fall dramatically were he to return to the Philippines. His evidence is that the family business in which he was previously engaged no longer operates. The first appellant would be unable to work in the Philippines as she would have to care for the [AND] in the absence of the family support which she currently enjoys in the United Kingdom.

16. Mr Solomon argues that that the maintenance of immigration of immigration control should not prevail in the particular circumstances of this case. Referring to section 117B (reproduced below) he submits that all the appellants speak English and are well integrated and not a burden on society; that their continued presence in the United Kingdom has not been unlawful (as Mr Bramble concedes) but merely precarious. The second appellant is employed, drawing a respectable salary and contributing by way of tax and national insurances to public services. The use of educational and health services for [AND]'s benefit has not been exploitative but on a contributory basis. This will continue.

17. Mr Solomon contends that it overwhelmingly in the [AND]'s best interests that she should remain in the United Kingdom. She has a debilitating and complex medical condition for which there is no affordable treatment in the Philippines. It would be deleterious to her health and well-being were she to leave the United Kingdom. Therefore the need to maintain immigration control should not therefore tip the balance in the Article 8 assessment. He invites me to allow the appeal.

The respondent's case

18. Mr Bramble, on behalf of the Secretary of State, does not seek to step aside from accepting the finding that the best interests of both children are served by them

remaining in the United Kingdom. However, he submits these are outweighed by the need tom maintain immigration control.

19. He made particular reference in the general practitioner's letter to the low-level of [AND]'s medication and the apparent absence of any particular treatment. He also points to the absence of anything other than general comments about the absence of medical facilities in the Philippines, and its cost putting it beyond the reach of most of the population. There is a paucity of evidence directly referable to [AND], her needs, and her family's likely future circumstances. He suggests that the salaries of the first appellant's mother and sister would still be available to help defray a portion of the costs.

20. Mr Bramble referred me to the decision of the Upper Tribunal in **Akhalu (health claim: ECHR Article 8) [2013] UKUT 400 (IAC)**, in particular paragraph 45:

> "The correct approach is for the judge to have regard to every aspect of the claimant's private life here, as well as the consequences for her health of removal, but to have in mind when striking the balance of proportionality that a comparison of levels of medical treatment available is something that will not in itself have any real impact on the outcome of the exercise. The judge must recognise […] that it will be a rare case that succeeds where this is an important aspect of the claimant's case."

He readily conceded, however, that this case concerned an adult claimant and that the position with a child might be different.

21. Mr Bramble urged me to dismiss the appeal and to affirm the decision of the Secretary of State.

The law

22. There were no contentious issues regarding the law to be applied. Both representatives agreed on the relevance of the passage from Clarke LJ in **EV (Philippines)** quoted above, and cited more extensively in my Error Law decision (annexed hereto). It is helpful to set out in full the content of section 117B of the Nationality, Immigration and Asylum Act 2002:

> "**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."

Assessment

23. Notwithstanding the complex procedural history and voluminous evidence, the matter can be disposed of relatively briefly. The combined effect of the medical evidence regarding [AND]'s health, and that concerning the availability and affordability of any suitable healthcare (let alone something of a commensurate standard to that which she is currently receiving) is such that it is overwhelmingly in her best interests to remain in the United Kingdom. I have particular regard to Sister Juliet Rose's evidence concerning the experience of her own religious order in the Philippines. [AND]'s schooling would effectively cease as would any specialist treatment for her spectrum of conditions. The modest financial assistance from [AND]'s wider family in the United Kingdom, even if it were to continue at the same level as present, would be wholly insufficient to bring the cost of medical treatment and specialist schooling within reach. [AND]'s is a very unusual case.

24. It follows that the public interest in the maintenance of immigration control may not necessarily tip the balance. In the particular and exceptional circumstances of this appeal, I consider that such balance can only be struck in favour of [AND] remaining in the United Kingdom. Her best interests outweigh the maintenance of immigration control. I bear in mind also, although these factors are not determinative, that her family is well integrated into the United Kingdom, speak fluent English, and that [AND]'s father has been, and remains, in full time employment contributing to the economy.

25. This case has proceeded on the basis that the appeals of the other appellants are parasitic upon the outcome of [AND]'s. Accordingly, since her appeal is to be allowed so will those of first, second and third appellants.

Notice of Decision

The decision of the First-tier Tribunal having been set aside, it is now remade, allowing the appeal of all four appellants on human rights grounds.

No anonymity direction is made.

Signed *Mark Hill* Date 7 August 2017

Deputy Upper Tribunal Judge Hill QC

APPENDIX

ERROR OF LAW DECISION AND REASONS

1. This is an appeal from the decision of First-tier Tribunal Judge Miles, promulgated on 9 August 2016. The appeal relates to a family unit who are all citizens of the Philippines and the particular focus of the appeal has been the welfare of one of two children of the family, namely [AND], the fourth appellant.

2. The brief history of this matter is that the first appellant was born on 14 September 1979 and in 2013 applied for leave to remain in the United Kingdom. She identified her husband and their two children (the second, third and fourth appellants) as dependants. That application was rejected by the Secretary of State under paragraph 276ADE of the Immigration Rules, on the basis that it had not been established on a balance of probabilities that the parents would face very significant obstacles to their reintegration in the Philippines. Mr Eaton, who acts for all of the appellants, does not challenge that finding.

3. In relation to the two children there was no available claim under the Immigration Rules because neither had been resident in the United Kingdom for the qualifying period of seven years.

4. At paragraph 29 of the decision, the judge considered whether, notwithstanding the failure of the claim under the Immigration Rules, there were compelling circumstances to support a claim for the grant of leave outside the Rules. Being satisfied that there were, he proceeded to consider an appeal under Article 8 ECHR, but concluded that it failed for reasons fully set out.

5. This appeal has focused on the judge's application of the staged proportionality assessment prescribed in **R (on the application of Razgar) v Secretary of State for the Home Department [2004] UKHL 27**. There is no criticism of the basic approach of the judge in dealing first with the best interests of the children before proceeding to consider the effect of the statutory public interest factors as set out in Section 117B of the Nationality, Immigration and Asylum Act 2002.

6. At the core of the appeal is Mr Eaton's submission that the judge misstated relevant parts of the evidence and, in consequence, the proportionality exercise as further described in **EV (Philippines) & Others v Secretary of State for the Home Department [2014] EWCA Civ 874** was flawed. Mr Eaton referred me to paragraph 36 of the judge's decision which reads:

> "In my judgment this is not a case where there is no provision to assist with [AND]'s needs in the Philippines although it may well be the case that that provision would not be as developed and sophisticated as she currently enjoys in the United Kingdom. Furthermore, and for the reasons which I have previously given, I am not satisfied that this family would have no source of financial support in the Philippines the reasons for

which I have endeavoured to explain in the paragraphs above. While one cannot fail to have sympathy for the appellant and her husband in trying to deal with their daughter's condition the public purse in the United Kingdom, in the guise of the National Health Service, cannot, in my judgment, be expected to fund every seriously ill child on an indefinite basis for the future, which seems to me would be the case in this appeal, when the parents of the child have always known that they had no legitimate expectation to be permitted to remain beyond the time limits of the period of leave which was initially granted and which they recognised as such. Furthermore, the fact that they have continued to reside in this country for almost three years beyond the end of that period of leave makes no significant difference to that assessment. In my judgment the same argument must apply to educating the children for the future."

7. Mr Eaton submits that the judge has not properly recall or record the evidence which was before him. He drew my particular attention to the fact that schooling in the Philippines would have a cost of £20,000 per year, putting it beyond the reach of the family. This information was before the judge at page HH1 of the bundle. It would seem that the costs of the special school requirements in the Philippines would be unaffordable, even taking into account the financial assistance which the judge assumed would continue to come from family members in the United Kingdom. The cost of the schooling would be in addition to the cost of any medical which, Mr Eaton submitted, was not in fact realistically available.

8. At page L4 in the bundle was an extract from the witness statement of the first appellant. Mr Eaton took me to paragraphs 30 and 31 in which it was stated:

> "30. It would be very difficult for us to return to the Philippines especially that [AND] needs a lot of care and attention for her health. [AND]'s underlying diagnosis and health condition is complicated although the Philippines health system is similar and comparative with the UK [AND]'s condition may not likely to be met due to lack of facilities for her specific diagnosis.
>
> 31. As such her diagnosis cannot be even tested in the Philippines. [AND] was diagnosed in the Philippines but her definitive diagnosis was not confirmed as the laboratory test needed to diagnose her condition is available locally. They even referred us to go to Australia for further testing."

9. Mr Eaton submitted that this evidence was not dealt with by the judge in his proportionality assessment at paragraph 36. I do not consider there to be any merit in this criticism, as these paragraphs were quoted verbatim by the judge in paragraph 17 of the decision in his summary of the first appellant's evidence. The judge clearly had those matters in mind.

10. Mr Eaton also submitted (i) that the judge was wrongly highlighted not the best interests of [AND] but those of the National Health Service; and (ii) that he did not give sufficient regard to the fact that the appellants were not over-stayers, having made the application prior to the expiration to their existing leave.. I do not consider either of these criticism to be justified. The judge's remark on the exposure of the

NHS was a proper comment, and not dispositive of the appeal; and his observation in paragraph 34 that the appellant's immigration status was precarious was self-evidently correct.

11. Whilst at paragraph 37 the judge quoted extensively Lewison J in the Court of Appeal's decision in **EV (Philippines)**, two pertinent paragraphs of the principal judgment of Christopher Clarke LJ (with which Lewison LJ concurred) are not referred to. They read:

> "35. A decision as to what is in the best interests of children will depend on a number of factors such as (a) their age; (b) the length of time that they have been here; (c) how long they have been in education; (c) what stage their education has reached; (d) to what extent they have become distanced from the country to which it is proposed that they return; (e) how renewable their connection with it may be; (f) to what extent they will have linguistic, medical or other difficulties in adapting to life in that country; and (g) the extent to which the course proposed will interfere with their family life or their rights (if they have any) as British citizens.
>
> 36. In a sense the tribunal is concerned with how emphatic an answer falls to be given to the question: is it in the best interests of the child to remain? The longer the child has been here, the more advanced (or critical) the stage of his education, the looser his ties with the country in question, and the more deleterious the consequences of his return, the greater the weight that falls into one side of the scales. If it is overwhelmingly in the child's best interests that he should not return, the need to maintain immigration control may well not tip the balance. By contrast if it is in the child's best interests to remain, but only on balance (with some factors pointing the other way), the result may be the opposite.
>
> 37. In the balance on the other side there falls to be taken into account the strong weight to be given to the need to maintain immigration control in pursuit of the economic well-being of the country and the fact that, *ex hypothesi*, the applicants have no entitlement to remain. The immigration history of the parents may also be relevant e.g. if they are overstayers, or have acted deceitfully." (emphasis added)

12. The appellant's case, as advanced by Mr Eaton in this appeal, is that the judge made an error of law in his application of **EV (Philippines).** It is said that he should have concluded, on a proper reading of the evidence, that in this instance it was overwhelmingly in [AND]'s best interests not to return and in those circumstances far less weight should have been accorded to maintaining immigration control. The judge's alleged misapprehension concerning the evidence of the affordability of special schooling and medical care (discussed above) is folded into this substantive ground of appeal.

13. The judge's decision is a lengthy and detailed one. He has dealt very fully in the discussion of the appeal under the Immigration Rules with whether there would be very significant obstacles to the reintegration of the family unit in the Philippines. It

was not necessary for him to repeat in a later part of his decision those factors which were identified at an earlier stage.

14. The judge clearly had a full understanding of the facts of this case and there was no requirement to mention each and every matter of evidence. The judge was entitled to make the assessment which he did as to the relative provision of education and healthcare as between the United Kingdom and the Philippines. The judge came to the conclusion at the end of paragraph 31 that the best interests of the children would be to remain in the care of their parents and residing in the United Kingdom, but resolved the proportionality exercise at paragraph 38 in giving greater weight to the public interest in removing the family. This conclusion was open to him.

15. However, and not without some hesitation, I am narrowly persuaded that the judge may not have given anxious scrutiny to the matter. I cannot rule out the possibility that he misunderstood the evidence as to the affordability of special schooling and medical care which might be available to [AND] in the Philippines. That being so, I cannot be confident that the judge correctly applied the nuanced balancing exercise prescribed by Christopher Clarke LJ in the passage from **EV (Philippines)** quoted above.

16. In the circumstances the proper course is to allow the appeal and set aside the First-tier Tribunal's determination under Article 8. All other findings will be preserved. The decision on human rights ground will be remade and the matter will be retained in the Upper Tribunal, ideally to be listed before me if I am available. Out of an abundance of caution I will list the matter for a full day and make directions for the service of evidence. But the parents should not assume that the outcome will necessarily be different when the decision on Article 8 is remade: a decision will be made in the merits having regard to all available evidence.

Notice of Decision

i. Having found a material error of law, the appeal is allowed and the decision of the First-tier Tribunal is set aside in relation to Article 8 of the European Convention on Human Rights. All other findings of the First-tier Tribunal are preserved.

ii. The matter is retained in the Upper Tribunal and adjourned for the decision on Article 8 to be remade.

iii. The matter to be relisted on the first open day after 6 weeks with a time estimate of 1 day, before Deputy Upper Tribunal Judge Hill QC if available.

iv. Any additional evidence from either party, to include expert reports if so advised, to be filed and served in a single paginated bundle by no later than **4 pm on Friday 23 June 2017**.

v. The appellants and the respondent are to file and serve skeleton arguments, including copies of all authorities to be relied on, by no later than **3 clear days prior to the resumed hearing**.

No anonymity direction is made.

Signed *Mark Hill* Date 26 May 2017

Deputy Upper Tribunal Judge Hill QC