Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/06451/2014
IA/06452/2014
IA/06453/2014
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THE IMMIGRATION ACTS

Heard at Bennett House, Stoke	**Decision & Reasons Promulgated**
On 16th July 2015	**On 4th September 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE GARRATT

Between

(E) First Appellant

(M) Second Appellant

(MZ) Third Appellant

(H) Fourth Appellant

(ANONYMITY DIRECTION MADE)

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Ms J Rothwell, Counsel instructed by Blavo & Co
For the Respondent: Mr A McVeety, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Before the Upper Tribunal the Secretary of State becomes the appellant. However, for the sake of consistency and to avoid confusion, I shall continue to refer to the parties as they were before the First-tier Tribunal.

Background and Error on a Point of Law

2. At the first hearing of this appeal in the Upper Tribunal on 19th May 2015 I made an anonymity direction under Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 which I repeat at the end of this decision. I also reached the conclusion that the decision of the First-tier Tribunal showed an error on a point of law for the reasons set out in a decision sent out on 21st May 2015 which I quote below (corrected to take account of typographical errors):

> "**Background**
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> 4. On 19th January 2015 Judge of the First-tier Tribunal M Davies gave permission to the respondent to appeal against the decision of Judge of the First-tier Tribunal Petherbridge in which he allowed the appeal on human rights grounds against the decision of the respondent to refuse leave to remain applying the provisions of paragraph 276ADE and Appendix FM of the Immigration Rules. The first appellant is the mother of the second, third and fourth appellants. They are all citizens of Egypt although the third appellant was born in the United Kingdom.
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> **Errors on a Point of Law**
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> 5. In the grounds of application the respondent contended that the decision showed an error because the judge had made speculative findings about the likelihood of the third appellant being unable to receive treatment for autism in Egypt and also about the cost of such treatment if available and the ability of the first appellant to meet the cost of it.
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> 6. The grounds also submitted that the judge did not fully consider the third appellant's medical condition in the light of *N (FC)* [2005] UKHL 31 particularly the principle that, although the standard of medical treatment available in Egypt might not be the equivalent to that in the United Kingdom, that did not give the appellants the right to remain here or that it would be unjustifiably harsh to expect them to return to their home country.
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> 7. Judge Davies gave permission on the basis that the judge was arguably in error by speculating about the above matters.
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> 8. At the hearing Ms Johnstone expanded on the grounds on the basis that it was "*Robinson*" obvious that, although the judge made reference to Section 117B of the Nationality, Immigration and Asylum Act 2002 by quoting it verbatim, he did not consider that, as the second and fourth appellants had been in the United Kingdom for over seven years, Section 117B and the requirements of paragraph EX.1 of Appendix FM might have applied for the benefit of all the appellants. There was nothing to indicate that the judge had applied the test set out in Section 117B(6)(b) of whether or not it would be reasonable to expect the child in question to leave the United Kingdom. That test mirrors the provisions of paragraph EX.1 relating to the requirements for limited leave to remain as a parent of such a child.

9. Ms Rothwell drew my attention to the Rule 24 response which she had drafted and the accompanying copy of the Upper Tribunal decision in *GS and EO (Article 3 – health cases) India* [2012] UKUT 00397 (IAC) suggesting that there may be a lower threshold in Article 3 health cases involving children. However, she conceded that, at the hearing before the First-tier Tribunal, she had agreed that the appeal could not succeed on Article 3 health grounds.

10. After some consideration Ms Rothwell also agreed that, in reaching conclusions about the proportionality of the respondent's decision, the judge had made reference (paragraph 48) to a report of the World Autism Awareness Day of 3rd April 2013 which had not been put before him either at the hearing or in support of the appeal. Nevertheless, she suggested that the favourable Article 8 decision could stand because the best interests of the children had been fully considered and the judge was entitled to conclude that it would be disproportionate for the family to have to return to Egypt.

11. After considering the submissions for a few moments I indicated that I had reached the conclusion that the decision showed errors on points of law such that it should be re-made and now set out my reasons for that conclusion.

12. Not only is it evident that the judge speculated about the medical treatment which might be available in Egypt, particularly for the third appellant who suffers from autism, but, in doing so, made reference to a report on autism in Egypt (paragraph 48 of the decision) that was information which was not produced by either party to the proceedings and therefore available to the analysis and comment of both representatives. In any event it is not obvious that the report referred to entitled the judge to conclude (paragraph 53) that the third appellant would be unable to receive such treatment in Egypt or, if it were, that the first appellant could not afford the cost. More reasoning on those issues was required.

13. Additionally, in conducting the Article 8 balancing exercise, the judge made reference to Section 117B of the 2002 Act but without any apparent consideration of the provisions of sub-paragraph (6)(b) which specifies that the public interest does not require a person's removal where that person has a parental relationship with a qualifying child and it would not be reasonable to expect the child to leave the United Kingdom. In this context the judge was also wrong to reject the application of paragraph EX.1 of the Immigration Rules without the consideration of the same test. The judge's reasoning in paragraph 57 on these points is clearly inadequate when there is no reference to the specific test.

14. The decision therefore shows errors on points of law such that it should be re-made. I suggested to representatives that the matter should proceed in the Upper Tribunal by submissions only. However, Ms Rothwell indicated that, as the grounds had been expanded and because there had not been proper consideration of the relevant test, the appellant should be given the opportunity to prepare fresh submissions. In this respect I suggested that

the matter could still proceed by way of submissions only and neither representative disagreed. I was unable to specify a date for the resumed hearing of the matter before me in the Upper Tribunal at Stoke because of the administrative difficulties but I am now able to do so in the directions which I give."

3. At the resumed hearing in the Upper Tribunal representatives informed me that they had not received a copy of my decision quoted above. I therefore gave them copies. After representatives had considered the decision the matter then proceeded by way of submissions covering the application of the Immigration Rules and human rights issues outside them.

Submissions

4. Ms Rothwell relied upon her comprehensive skeleton argument which she had prepared in anticipation of my error of law decision. In it she notes the background to the application by the first appellant and her three children of whom M and H have been in the United Kingdom for just over seven years following their entry with the first appellant on 12th October 2006 and the third appellant, MZ, was born here on 17th October 2009. It was accepted by the First-tier Tribunal Judge that the father of the children has returned to Egypt and rejected his family.

5. The children all have medical conditions. M suffers from sleep apnoea, nocturnal vomiting, abdominal pain and rectal bleeding. H suffers from a urinary condition and MZ has autism. Medical reports in respect of each of these children are to be found in the original appellant bundle. My attention was also drawn to the additional information about the children which is contained in the latest appellants' bundle received by the Tribunal on 10th July 2015. This concerned attendance of the children at school, further medical appointments for MZ and school reports. In particular there is a Medical Report by Dr Mohammed El-Rifai, a locum consultant community paediatrician in Nottingham, who was educated in and has strong connections with Egypt. His letter describes the limited facilities available for autistic children in Egypt.

6. In her submissions Ms Rothwell also argues that the first appellant does fall within the parent route under Appendix FM as she is the parent of a child under 18 who has lived continuously in UK for at least seven years preceding the application. She is also a single parent with sole responsibility for all three children. She has always had leave to remain in the United Kingdom along with her children, speaks fluent English, has the prospect of a teaching position and is able to earn an income. Under the parent route the first appellant also falls to be considered under paragraph EX.1(a)(i) and (ii) requiring that it would not be reasonable to expect the second and fourth appellants to leave the United Kingdom. It is also argued that the children can benefit from the provisions of paragraph 276ADE(iv) on the basis of their private life where the test of reasonableness is the same.

7. As to the test of whether or not it would be reasonable to expect the first, second and fourth appellants to leave the United Kingdom, Ms Rothwell draws attention to the respondent's own IDI on family migration at paragraph 11.2.4 which points out that strong reasons would be required in order to refuse a case with continuous UK residence of more than seven years. The facts relating to each child must be

considered individually. The skeleton then details the problems which all children have faced because of the third appellant's autism and the fact that each child has medical difficulties. None of the children have been educated in Egypt and, as Ms Rothwell pointed out in oral submissions, the children have only some understanding of Arabic. English is spoken at home with the children's mother. It is also pointed out that, in relation to the treatment of autism, the family home in Egypt is four hours' drive from Cairo or Alexandria which are the only centres where treatment for autism might be available.

8. The skeleton also draws my attention to the decision of the Court of Appeal in *EV (Philippines)* [2014] EWCA Civ 874 as to the desired approach to the issue of the best interests of the children when considering whether or not the need for immigration control outweighs those interests. The factors to be considered include not only the time the children have been in the United Kingdom and the stage of their education but the extent to which they have become distanced from the country to which they are required to return and the extent to which they have linguistic, medical or other difficulties which might effect them adapting to life in that country.

9. Mr McVeety agreed that the first appellant and her children were English language speakers and that the children's understanding of Arabic was limited. In this respect my attention was drawn to paragraph 4 of the first appellant's statement in the original bundle concerning the use of English at home and the ability of the children to understand Arabic.

10. Mr McVeety also agreed that the main issue was whether or not it was reasonable to expect the child appellants to leave the United Kingdom. He argued that the children were not entitled to the same treatment as British citizens. The family's stay in the United Kingdom was only temporary and he thought that there was no evidence to show that the rights of the two older children would be significantly damaged if they were removed to Egypt. He drew attention to the public expense of keeping the children in the United Kingdom. The first appellant can obtain employment in Egypt. The medical condition for the third appellant should not be a bar to his removal because reports on autism in Egypt were contradictory and he questioned the value of the report by Dr El-Rifai whose information he thought was out of date. Whilst Mr McVeety agreed that the system for treatment of autism in Egypt might not be as good as in the United Kingdom that did not mean that the respondent's decision was disproportionate. He also argued that the circumstances for the youngest child were not exceptional.

11. In conclusion Ms Rothwell argued that the Rules themselves had given a special status to children who were here for more than seven years and the respondent's own IDIs pointed out that there had to be strong reasons before removal could take place. She also contended that the first appellant might not be able to work in Egypt if she had to care for the third appellant for whom treatment for his autism would be limited. In this respect she drew my attention to the report from the National Autistic Society in the original bundle which reported on the temporary nature of treatment available in Cairo and the requirement for autistic males to undergo national service.

Conclusions

12. There are no credibility issues relating to the circumstances of the appellants in the United Kingdom with the main issue being whether or not it is reasonable to expect the two child appellants who have been in the United Kingdom for seven years to leave this country. The best interests of all the children are, in relation to human rights issues, a primary consideration.

13. The respondent's own IDIs on family migration provide help in the interpretation of the phrase "reasonable to expect" which is found in EX.1. (a) (ii) of Appendix FM and paragraph 276ADE (iv). It is stated that strong reasons will be required in order to refuse a case involving children with continuous UK residence of more than seven years. The facts relating to each child have to be considered individually along with facts relating to the family as a whole. I identify, below, the factors which suggest that it would not be reasonable to expect the second and third appellants to leave the United Kingdom before identifying the factors which favour removal in the public interest.

14. It is relevant to note that all appellants have been in the United Kingdom with limited leave throughout. It is the abandonment of the family by the first appellant's husband and father of the children that led to the application to remain by the first appellant as a parent. Thus, the family cannot expect to return to Egypt to live as a family with a male head. All the children are well-established in the United Kingdom although it is only the second and fourth appellants have been here for over seven years. They are all undergoing education and the second and fourth appellants are doing well at school. English is their first language although they do speak some Arabic. The first appellant has ambitions for employment whilst in the United Kingdom although at present is reliant upon state support. The most significant obstacle to removal is the treatment and assistance which MZ receives in relation to his autism. The second and fourth appellants also suffer from medical conditions which have been summarised in Ms Rothwell's skeleton argument and relate to sleep and eating disorders although the difficulties suffered by the fourth appellant are relatively minor and relate more to his brother's autism.

15. The report by Dr El-Rifai confirms, and I accept, that special needs treatment for autism is not of the standard available in the United Kingdom and there are no centres of excellence generally, although care for autism might be better available in cities such as Cairo and Alexandria.

16. The above factors have to be balanced against those which may make it reasonable to expect the second and fourth appellants to be removed and which are in the best interests of all children. Despite the seven year provisions for the second and fourth appellants the fact is that the immigration status of all the appellants has been precarious because, certainly, the first appellant has always known that there was the risk that, even if her husband had remained with the family, their stay in the United Kingdom was limited to the duration of her husband's studies here. The family will be removed together which, as the Upper Tribunal suggested in *Azimi-Moayed and Others (Decisions affecting children; onward appeals)* [2013] UKUT 197 (IAC), will be in the best interests of the children. The two youngest children are not at a significant stage in their education or development to be materially affected by a move and the ability of the children to communicate in Arabic even if to a limited extent will assist

their re-settlement. There is also the prospect of the children continuing the relationship with their father even if he is separated from their mother.

17. The medical condition of the third appellant is not such that Article 3 protection can be invoked. None of the information before me about the treatment of autism and associated conditions in Egypt leads me to conclude that treatment is not available even if it is not at the standard of excellence enjoyed in the United Kingdom at public expense. Additionally the minor medical conditions suffered by the other children do not show that their health will be significantly impaired by living in Egypt. The report of Dr Drew for the second appellant does not point to illness or a condition which has been shown to be untreatable in Egypt and the report by Dr Kirkham suggests improvement. The social and emotional difficulties suffered by the fourth appellant have likewise not been shown to be untreatable in Egypt or otherwise debilitating.

18. The fact that there are two children of the family who have been in the United Kingdom for seven years and who are now undergoing education here does not automatically mean that it would not be reasonable to expect them to return to Egypt particularly where there are strong factors of the kind I have identified against them remaining. As to private life, it has not been shown that the two oldest child appellants can come within paragraph 276 ADE of the Rules applying the same test and nether the youngest child or the first appellant can come within the rule.

19. I now turn to consider the appeal on human rights grounds outside the rules taking into consideration sections 117 A-D of the 2002 Act in relation to the public interest in immigration control.

20. In *Azimi-Moayed and Others (Decisions affecting children; onward appeals)* [2013] UKUT 197 (IAC) the Upper Tribunal made it clear that the start point is that the best interests of children are to be with their parents although lengthy residence (identified as above seven years) can lead to development of cultural and educational ties that it would be inappropriate to disrupt. However, as far as the latter point is concerned, no significant circumstances relating to social, cultural and educational ties have been put forward in this case save those which can be expected as the norm for children educated in the United Kingdom but of foreign origin. I am not satisfied that any of the children or their mother have been shown to have lost their cultural and family ties to Egypt. The children are being taught to speak Arabic and there is no evidence that wider family ties to Egypt are not present. As the Supreme Court made clear in *Zoumbas* [2013] UKSC 74, the best interests of children must be a primary consideration although not always the only primary consideration and do not have the status of a paramount consideration.

21. My consideration of human rights issues outside the Rules takes into consideration the factors I have already identified in examining the appellants' position under them. This includes my consideration of family educational and medical issues. Whilst it will undoubtedly be difficult for the first appellant and her children to settle into life in Egypt it would not be unreasonable to expect them to do so. The children may have to improve their skills in the Arabic language and their mother will have to seek employment there. But these are only difficulties to be expected for a family whose immigration status in the United Kingdom has always been precarious because of the limited leave available to them. In *Forman (Sections 117A-C considerations)* [2015] UKUT 00412 (IAC) the Upper Tribunal made it clear that the public interest in firm

immigration control is not diluted by the consideration that a person pursuing a claim under Article 8 has at no time been a financial burden on the state or is self-sufficient or is likely to remain so indefinitely. The significance of these factors is that where they are not present the public interest is fortified. The appellants are not financially independent in the United Kingdom and are, currently, a burden on taxpayers particularly in relation to the medical and social services which they receive. As already indicated any private life established by them was when their immigration status was precarious. Further, as already concluded, I am not satisfied that it would be unreasonable to expect the child appellants to leave the United Kingdom. Thus, in relation to the proportionality issue which is relevant in this case bearing in mind that the parties have, I accept, a private and family life in the United Kingdom, I am unable to conclude that the respondent's decision is disproportionate.

Decision

The decision of the First-tier Tribunal involved the making of an error on a point of law. I re-make the decision by dismissing the appeals on immigration and human rights grounds.

Anonymity

As this appeal involves the interests of young children I make the following direction:

DIRECTION REGARDING ANONYMITY – RULE 14 OF THE TRIBUNAL PROCEDURE (UPPER TRIBUNAL) RULES 2008

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original appellant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.

Signed Date

Deputy Upper Tribunal Judge Garratt

TO THE RESPONDENT
FEE AWARD

As these appeals were fees exempt and because I have dismissed the appeals I make no fees award.

Signed Date
Deputy Upper Tribunal Judge Garratt