Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/30377/2013

THE IMMIGRATION ACTS

Heard at Field House
On 14th April and 23rd May 2014

Determination Promulgated
On 03rd June 2014

Before

UPPER TRIBUNAL JUDGE COKER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

KAYODE ABIDEMI OLORODE

Respondent

Representation:

For the Appellant: Mr P Nath (on 14th April 2014) and Ms C Everett (on 23rd May 2014), Senior Home Office Presenting Officers
For the Respondent: Mr R Arkhurst, counsel, instructed by ROCK solicitors

DETERMINATION AND REASONS

1. The appellant (hereafter the SSHD) sought and was granted permission to appeal a decision of First-tier Tribunal Judge Petherbridge promulgated on 21st February 2014 allowing the respondent's (hereafter the claimant) appeal against a decision to remove him from the UK pursuant to s10 Immigration and Asylum Act 1999. Permission to appeal was granted on the basis that the First-tier Tribunal judge had failed to identify compelling circumstances; that the appellant had no expectation of being permitted to remain in the UK and the time spent in

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the UK did not, in the circumstances, lead to the finding that the claimant should succeed.

Background

2. The claimant's wife arrived in the UK in May 2003 as a visitor. According to the application made on 19th February 2010 she has not left the UK since. The claimant travelled to the UK as a visitor during 2003 and in 2004 entered the UK as a student on a visa which was subsequently varied to expire on 28th February 2007. Their eldest child, Michael, who was born on 15th May 1997 arrived in November 2004 aged 7. The middle child Rachael date of birth 8th August 1999 arrived in the UK in July/August 2004 aged 5 and the youngest child Esther was born in the UK on 24th September 2004. An application for further leave to remain as a student/student dependants was refused and an appeal dismissed on 16th January 2008.

3. No attempt to further regularise their stay was made until, by letter dated 19th February 2010 the claimant and his wife and children applied for leave to remain by way of the exercise of discretion by the SSHD. Reference in the letter was made to their personal circumstances, length of residence, the anticipated implementation of s55 Borders Citizen and Immigration Act 2009 and the establishment by the family of private and family life ties as "defined" under Article 8 ECHR. That application was refused by Notices of Decision dated 15th January 2011 for each of them (with no right of appeal) under paragraph 322(1) of HC395 (as amended) on the basis that leave to remain was being sought for a purpose not covered by the Immigration Rules. A letter accompanying the Decisions refers to the applications having been considered on the basis of Article 8 and that the decisions were considered by the SSHD to be proportionate. Further reference is also made to the applications having been considered on an exceptional basis outside the Immigration Rules.

4. By letter dated 24th January 2011 the claimant sought a reconsideration of the decisions made, again requesting the exercise of discretion to grant indefinite leave to remain. Following a change in solicitors a further request for reconsideration was made by letter dated 1st July 2011 raising the same matters. The request for reconsideration was acknowledged by the SSHD by letter dated 18th July 2011. A chasing letter was sent on 17th April 2012.

5. By letter dated 30 July 2012 the claimant's solicitors drew attention to the lack of progress of the review request and also to the Rule changes on 9th July 2012. This letter submitted further representations in the light of those Rule changes although an application form in the required form was not submitted and nor was a fee paid. The letter submits that the claimant and his family meet the requirements of paragraph 276ADE and should thus be given leave to remain in line with their application. It is also submitted that the family have established private and family life ties and that removal would be disproportionate.

6. On 14th February 2013 a "Pre-Action letter before claim" was sent to the UKBA Judicial Review Unit requiring a decision and referring to a "human rights application" having been made and that the submissions made in July 2012

"…after the new paragraph 276ADE of the Immigration Rules came into existence….clearly fall within the remits of this new paragraph…".

7. An application for judicial review was then filed on 18th March 2013, such application being settled by way of a consent order on 15th May 2013 that the SSHD would reconsider her decision.

8. On 9th August 2013 the SSHD took and served decisions to remove the claimant and his family in accordance with s10 Immigration and Asylum Act 1999. The reasons for the decision were set out in an accompanying letter dated 7th August 2013. The SSHD waived the requirement for an application form and fee, stating "Your application has not been considered by the Secretary of State personally, but by an official acting on her behalf". The letter went on to set out a summary of the family immigration history and considered the facts before her under the partner route of Appendix FM, the parent route of Appendix FM, the child route of Appendix FM, under EX.1., under private life as it "falls under paragraph 276ADE" and states "Careful consideration has been given to all these circumstances individually and together, but for the reasons given above it is not accepted that there are exceptional circumstances in your case considered sufficiently compelling to justify allowing you to remain in the UK".

9. The claimant was the only one of the four who appealed, the wife and three children were cited by him as his dependants.

10. All of the children are involved in school activities and extra curricular activities. There is no challenge to the evidence put forward that the children are bright and an asset to the school and their parents.

11. It was agreed that Michael – the oldest child- is due to sit his AS levels this coming May/June 2014 and thereafter hopes to complete his A level course and enter university. Rachael is due to commence her GCSE course in September 2014 but is not sitting any public exams in the near future. Esther remains at primary school and it is not anticipated that she will enter secondary school for a couple of years.

12. The SSHD considered the application in accordance with the Immigration Rules in force at the date of decision and for reasons set out in a letter dated 7th August 2013 concluded that the claimant did not meet the requirements of Appendix FM, paragraph 276ADE. She also concluded that removal was not disproportionate and a breach of the ECHR.

13. After the conclusion of the hearing before me the case of Edgehill & Bhoyroo v SSHD [2014] EWCA Civ 402 came to my attention. I issued a direction in the following terms:

> "In the light of Edgehill the parties are directed to file and serve written submissions on or before 4pm 25th April 2014 as to the relevant Rules under which the decision in the appeal is to be remade. "

14. Having received written submissions from the claimant's representatives, the judgment in Haleemuddin v SSHD [2014] EWCA Civ 558 was handed down. In the circumstances I recalled the parties and heard submissions from both representatives on 23rd May 2014.

Error of law - First-tier Tribunal determination

15. The claimant submitted to the First-tier Tribunal that the relevant Rules under which the appeal was to be determined were the Rules in force prior to 9th July 2012 because the application for leave to remain had been submitted prior to that date. By reference to Odelola [2009] UKHL 25 Judge Petherbridge disagreed. Whilst in most cases where there has been a Rule change it is indeed the case that the appeal is determined according to the Rules in force at the date of decision, that is not so where there are specific transitional provisions. In so far as Appendix FM and paragraph 276ADE (the "new Rules") the transitional provisions state

> However, if an application for entry clearance, leave to remain or indefinite leave to remain has been made before 9 July 2012 and the application has not been decided, it will be decided in accordance with the rules in force on 8 July 2012.
>
> Appendix FM applies to applications made on or after 9 July 2012 as set out in paragraph 91 of this Statement of Changes.

16. The present appeal is slightly complex. The initiating application by the claimant was made in January 2010 and refused on 15th January 2011. The claimant applied in July 2011 for the decision to be reconsidered; an application was made for consideration under the Rules in force as from 9th July 2012, the SSHD agreed to reconsider and the appealable s10 removal decision was taken.

17. Edgehill & Bhoyroo v SSHD [2014] EWCA Civ 402 considered the requirements to be met by a person who had applied for leave to remain prior 9th July 2012 Both appellants (who were both appealing s10 removal decisions taken after a period in the UK of less than 14 years) in that case had argued that the new Rules did not apply to them because their applications had been submitted before 9th July 2012. Jackson LJ, in reaching his judgment referred to the legal principles governing the interpretation and application of the Immigration Rules. He cites Odelola and Mahad v Entry Clearance Officer [2009] UKSC 16 and concludes that

> It is not lawful to reject an Article 8 application made before 9th July 2012 in reliance upon the applicant's failure to achieve 20 years residence as specified in the new rules [paraphrasing 33] and goes on to say
> "A mere passing reference to the 20 years requirement in the new rules will not have the effect of invalidating the Secretary of State's decision. The decision only becomes unlawful if the decision maker relies upon rule 276ADE (iii) as a consideration materially affecting the decision."

18. In Haleemuddin Beatson LJ states

> [40] I, however, consider that the First-tier Tribunal Judge did err in his approach to Article 8. This is because he did not consider Mr

> Haleemudeen's case for remaining in the United Kingdom on the basis of his private and family life against the Secretary of State's policy as contained in Appendix FM and Rule 276ADE of the Immigration Rules. These new provisions in the Immigration Rules are a central part of the legislative and policy context in which the interests of immigration control are balanced against the interest and rights of people who have come to this country and wish to settle in it. Overall the Secretary of State's policy as to when an interference with an Article 8 right will be regarded as disproportionate is more particularised in the new Rules than it had previously been. The new Rules require stronger bonds with the United Kingdom before leave will be given under them. The features of the policy contained in the Rules include the requirements of 20 years residence, that the applicant's partner be a British Citizen in the United Kingdom, settled here or with leave as a refugee or humanitarian protection, and that where the basis of the application rests on the applicant's children that they have been residents for seven years.
> ….
> [42] The authorities make it clear that the focus of any assessment of whether an interference with private life pursuant to the requirements of immigration control is proportionate should be whether the Secretary of State's decision is in accordance with those provisions…..
> [43] In Nagre's case ([2013] EWHC 720 (Admin)) Sales J stated …..that it is necessary to find "particular factors in individual cases….of especially compelling force in favour of a grant of leave to remain" even though those factors are not fully reflected in and dealt with in the new Rules and "to consider whether there are compelling circumstances not sufficiently recognised under the new rules to require the grant of such leave"….

19. There appears to be a dichotomy of opinion in the Court of Appeal between these two cases. At the hearing on 14th April I indicated that on the basis of the information before me then, First-tier Tribunal Judge Petherbridge was incorrect in his finding that the new rules applied to the decision in question. After Edgehill that would appear in fact to have been the position but after Haleemuddin (the more recent Court of Appeal decision) it appears he may have been correct.

20. However, irrespective of those two views as to which Rules should be applied, of significance in [69] of the determination Judge Petherbridge states that the[SSHD]

> "…has very obviously failed to follow its own instruction that was issued following the formal withdrawal of its policy DP5/96 on the 09 December 2008. That Instruction said that when considering enforcement action against parents who had children who had lengthy residence in the United Kingdom, the general presumption was that enforced removal would not be proceeded with where a child had been born in the United Kingdom – that is the position with Esther born on 24 September 2004 – or against a child coming to the United Kingdom at an early age who had accumulated 7 years or more continuous residence and that applies to both Michael and Rachael who have been in this country since 2004."

21. A copy of the instruction referred to by Judge Petherbridge is not in the papers, none was produced to me and I have been unable to find such an instruction that was in force either at the date of application for reconsideration or in force as at 8th July 2012 (the day before the new Rules came into force).

22. The policy as regards administrative removal is set out in Chapter 13, section 2 of the Immigration Directorates' Instruction policy. The decision the subject of the appeal was founded upon a decision by the SSHD under which consideration was given under Appendix FM and rule 276ADE ie the new Rules. The SSHD did consider whether there were exceptional circumstances allowing the claimant to remain and had regard to character, compliance with conditions, length of time in the UK, representations submitted but concluded

> "…Careful consideration has been given to all these circumstances individually and together, but for the reasons given above [*referring back to the Rules*] it is not accepted that there are exceptional circumstances in your case considered sufficiently compelling to justify allowing you to remain in the UK. Regard has been given to all the representations you have submitted, however for the reasons given above it is considered that your removal from the UK is appropriate."

23. The judge has considered the appeal through the prism of the Rules in force at the date of decision but also appears to have applied a policy which was not in existence at the date of the decision or prior to 9th July 2012 or on the date of the hearing.

24. The grounds seeking permission to appeal refer to the judge's finding that it would be in the best interests of the children to remain in the UK. Although reference is made to the best interest of the children being a primary concern that needs to be considered in the context of the particular family circumstances "as well as the need to maintain immigration control". Passing reference is made by the judge to the claimant's disregard of immigration rules but his conclusion at [84] places the best interest of the children as being in effect, of paramount concern, rather than a matter to be given primacy. There is no reference in the conclusions to the weight to be given to the public interest.

25. I am therefore satisfied that although according to Haleemuddin the judge applied the correct Rules, there are significant errors of law in his assessment of the proportionality of the decision such that I set aside the decision.

Remaking the decision

26. The decision the subject of the appeal is a decision to remove the claimant (and his wife and children although they are not the subject of separate appeals and are treated as his dependants) pursuant to s10 Immigration and Asylum Act 1999, such decision being taken subsequent to an application made whilst the claimant was an overstayer for leave to remain on Article 8 grounds. The grounds of appeal against the s10 removal decision are, in essence, that it would be a breach of Article 8 ECHR to remove him and his family.

27. Rock solicitors submitted, relying upon Edgehill that

> "…the rule that should be applied to the case under consideration is Article 8 and paragraph 276ADE of the Immigration Rules. This is because the [claimant's] application was made well before the rule change in July 2012. In reaching a decision under Article 8, consideration should also be given to Section 55 of the UK Borders Act and established case law on these points."

On 23rd May they submitted that the reality was that it did not matter which of Edgehill or Haleemuddin was correct once it was accepted that there should be consideration of Article 8 outside the prism of the Rules, whether those in force prior to 9th July 2012 or after, and that there was a sufficiently serious factual matrix which mean that the proportionality of the decision should be assessed in accordance with established Razgar/Huang principles.

28. The SSHD submitted that there were no factors of a compelling nature in favour of a grant of leave to remain. Although acknowledging that Michael was due to sit his exams very shortly this was a matter that would and could be dealt with by way of a short delay in the enforcement of removal. He reiterated that the children and the parents would be removed as a family unit and they would have sufficient and adequate time to adjust to both life in Nigeria and the educational system.

29. Rock solicitor's rely upon the expert report filed in the First-tier Tribunal which sets out the asserted damage to the children on removal and they also quote from an undated and unidentified UK government statement that [paraphrased] the ties established by children who have been in the UK for 7 years or more will outweigh other considerations. This submission is of little assistance given the lack of source and date provided and I have placed no weight upon it. Reliance is also placed upon LD (Article 8 – best interest of child) Zimbabwe [2010] UKUT 278 (IAC) paragraphs 26 and 27:

> 26. Very weighty reasons are needed to justify separating a parent from a minor child or a child from a community in which he or she had grown up and lived for most of her life. Both principles are engaged in this case
> 27. The two younger children of the appellant have lived in the UK continuously for eleven years and for most of their lives. Previously Home Office policy tended to identify seven years of residence of a child as one that would presumptively require regularisation of immigration status of child and parents in the absence of compelling countervailing factors. That was really an administrative way of giving effect to the principle of the welfare of the child as a primary consideration in such cases and when it was considered that those interests normally required regularisation of the immigration position of the family as a whole. The policy may have been withdrawn but substantial residence as a child is a strong indication the judicial assessment of what the best interests of the child requires. The UN Convention on the Rights of the Child 1989 Art 3 makes such interests a primary consideration.

30. The headnote of LD reads as follows:

> 1. Consistent application of the Immigration Rules to promote the economic and social policy of the UK is a relevant factor in carrying out the balancing exercise under Article 8(2) but the weight attached to it depends on the context of the case, whether there was ever any claim under the rules for indefinite leave to remain, and why such claim was not accepted.
>
> 2. In the particular circumstances of this case the weight to be attached to enforcement of immigration control was small in the light of the misdirection as to Paragraph 320 (7A), and the fact that the paragraph applies to all cases whether there is family life deserving respect or not.
>
> 3. The interests of minor children and their welfare are a primary consideration. A failure to treat them as such will violate Article 8(2).

4. Weighty reasons would be required to justify separating a parent from a lawfully settled minor child or child from a community in which he or she had grown up and lived for most of his or her life. The general situation in the relevant home country is also relevant, especially if it is known that the conditions there are dire (as they are, for example, in Zimbabwe at present).

5. In this particular case, no useful purpose would have been served if the appellant is required to depart the UK in order to make an entry clearance from abroad. All the issues are to be determined in this appeal rather than in the course of an investigation abroad where there would in any event be an interference.

31. The claimant also relies upon Tinizaray [2011] EWHC 1850 (Admin) that "…Section 55….imposes a strong positive duty on UKBA caseworkers to procure such evidence as is necessary for them to assess a child's best interests." The submission did not claim that information was missing from the papers before me such as to enable me to reach a decision; nor was such a claim made at the hearing on 14th April 2014. For some unexplained reason the submissions fail to draw attention, in relation to the present case, to the judgment of the Court of Appeal in AN (Afghanistan) [2013] EWCA Civ 1189 which stated as follows:

22. In *SS (Nigeria)* [2013] EWCA Civ 550, Laws LJ warned against treating HHJ Thornton's observations in ***Tinizaray*** as enunciating anything in the nature of general principle (see para. 55); and Mann J with the concurrence of Black LJ, observed at para. 62 that the circumstances in which a tribunal should require further inquiries to be made, or evidence obtained, in order to satisfy itself as to the best interests of the child would be "extremely rare", saying
"In the vast majority of cases the Tribunal will expect the relevant interests of the child to be drawn to the attention of the decision-maker by the individual concerned." In *R (Toufighy) v Secretary of State for the Home Department* [2012] EWHC 3004 (Admin) Beatson J also emphasised that the approach in ***Tinizaray*** was peculiar to the facts of that case (see paras. 103-4).

I have placed no weight on their submission relying on Tinizary.

32. Although reference is made by the claimant to what are asserted to be clearly established principles laid down in Azimi-Moayed [2013] UKUT 00197 (IAC), showing that it would not be in the best interests of the children to be removed, the submissions do not set out the principles or explain how they apply to this appeal. Azimi-Moayed considered, *inter alia*, Article 8 and s55 UK Borders and Citizenship Act 2009. The headnote (and paragraph 13) of Azimi-Moayed, which was heard on 26th March 2013 and involved a decision to remove taken and served prior to July 2012 subsequent to an unsuccessful asylum claim, reads, in so far as is relevant to this appeal, as follows:

Decisions affecting children

(1) The case law of the Upper Tribunal has identified the following principles to assist in the determination of appeals where children are affected by the appealed decisions:

i) As a starting point it is in the best interests of children to be with both their parents and if both parents are being removed from the United Kingdom then the starting point suggests that so should

dependent children who form part of their household unless there are reasons to the contrary.

ii) It is generally in the interests of children to have both stability and continuity of social and educational provision and the benefit of growing up in the cultural norms of the society to which they belong.

iii) Lengthy residence in a country other than the state of origin can lead to development of social cultural and educational ties that it would be inappropriate to disrupt, in the absence of compelling reason to the contrary. What amounts to lengthy residence is not clear cut but past and present policies have identified seven years as a relevant period.

iv) Apart from the terms of published policies and rules, the Tribunal notes that seven years from age four is likely to be more significant to a child than the first seven years of life. Very young children are focused on their parents rather than their peers and are adaptable.

v) Short periods of residence, particularly ones without leave or the reasonable expectation of leave to enter or remain, while claims are promptly considered, are unlikely to give rise to private life deserving of respect in the absence of exceptional factors. In any event, protection of the economic well-being of society amply justifies removal in such cases.

33. The Upper Tribunal considered the approach to Article 8 in the context of the Immigration Rules in Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 640 (IAC), the headnote of which reads, in so far as is relevant, as follows:

On the current state of the authorities:

(a) …
(b) after applying the requirements of the Rules, only if there may be arguably good grounds for granting leave to remain outside them is it necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under them: R (on the application of) Nagre v Secretary of State for the Home Department [2013] EWHC 720 (Admin);
(c) the term "insurmountable obstacles" in provisions such as Section EX.1 are not obstacles which are impossible to surmount: MF (Article 8 – new rules) Nigeria [2012] UKUT 393 (IAC); Izuazu (Article 8 – new rules) [2013] UKUT 45 (IAC); they concern the practical possibilities of relocation. In the absence of such insurmountable obstacles, it is necessary to show other non-standard and particular features demonstrating that removal will be unjustifiably harsh: Nagre.

The Secretary of State addressed the Article 8 family aspects of the respondent's position through the Rules, in particular EX1, and the private life aspects through paragraph 276ADE. The judge should have done likewise, also paying attention to the Guidance. Thus the judge should have considered the Secretary of State's conclusion under EX.1 that there were no insurmountable obstacles preventing the continuation of the family life outside the UK. Only if there were arguably good grounds for granting leave to remain outside the rules was it necessary for him for Article 8 purposes to go on to consider whether there were compelling circumstances not sufficiently recognised under the Rules.

34. The changes to the Immigration Rules in July 2012 are described (in the accompanying memorandum) as establishing the framework within which a decision is to be taken and that they [19]

> "….. are intended to fill the policy vacuum by setting out the Secretary of State's position on proportionality and to meet the democratic deficit by seeking Parliament's agreement to her policy."

They do not purport to be the complete and only route by which decisions on proportionality under Article 8 are to be taken or that the matters set out in the Rules are the only matters that can be taken into account. They do however set out the SSHD's view as to where and how public interest should be weighed in the balance. Jurisprudence since July 2012 has developed the view that given the public interest as relayed in the Rules and the legitimate weight to be attached to such public interest there has to be something of a compelling nature to enable other considerations to be assessed. In reality this is probably little different to the previous position namely that weight is to be attached to the SSHD's view of public interest in reaching a decision on the proportionality of the decision but the articulation of that view and weight to be placed upon it is now set out with more clarity and enables more consistent decision making.

35. It was not argued before me that the claimant and his family could have met the criteria under the Rules prior to 9th July 2012: they had not accrued either 10 years lawful residence or 14 years unlawful residence. Nor could they meet the Rules post 9th July 2012

36. Thus the first issue to be determined is whether there are matters sufficiently compelling to enable consideration *outside* the Rules, if the Rules in force at the date of decision are those as amended by HC194. If the consideration of the appeal is under the Rules in force prior to HC194 then such an assessment does not have to be undertaken. In my view, the current educational status of the eldest child is a matter which is sufficiently compelling to justify consideration outside the Rules. Thus irrespective of whether consideration is under HC194 or not, specific consideration should be given to all of the circumstances taking account of the significant weight to be attached to the immigration history of the family and the public interest in their removal, as identified by the SSHD.

37. It is the intention of the SSHD that the family is to be removed as a unit; the family have not disputed this and thus there is no interference in their family life. The issue is the proportionality of the interference in their private life given their particular circumstances, balanced against the considerable and significant weight to be attached to the maintenance of immigration control.

38. The claimant's wife arrived in the UK as a visitor and has overstayed since then. The claimant arrived initially as a visitor, left and then returned as a student, remaining with leave (as a student and in accordance with s3C Immigration Act 1991) until 16th January 2008. The two oldest children arrived in the UK in 2004 and the youngest was born in the UK. No adequate explanation has been given for the failure of the family to leave the UK when the reason for them being here – the claimant's studies – ceased to exist. No attempt was made to regularise the family's stay for another two years; no explanation being provided for such delay. There were and are no identified health problems that could have caused a delay in departure. By the date of the first decision to refuse leave to remain on an

exceptional basis (15th January 2011) none of the children had resided in the UK for a period in excess of seven years. Despite receiving that decision, the claimant and his family again failed to leave the UK voluntarily and instead of submitting a further application and paying a fee, requested reconsideration. There is no requirement by the SSHD to reconsider such decisions but in accordance with her policy on the making of removal decisions she eventually (after the issue of judicial review proceedings) made and served s10 Immigration and Asylum Act 1999 removal decisions. By the time such decisions had been made and served, the claimant's children had all been in the UK in excess of 7 years although of course the relevant date for calculating time is the date of application, not the date of decision for applications covered by HC194. Prior to HC 194, time ceases to accrue after service of liability to removal or s10 removal decisions; it does not appear that such notices were served upon the claimant and his family but there is not, in the Rules prior to HC194, provision for the length of residence for the children to be taken into account under the Rules.

39. Azimi- Moayed of course refers to the relevance of 7 years and this is clearly a matter to be taken into account in this appeal although of course such a period has been accrued through the failure of this family to leave as required despite having come to the UK on short term temporary permits with no expectation of remaining permanently.

40. The psychologist makes reference to the difficulties the children would face on removal to Nigeria, the concerns of the parents at being unable to provide an adequate education for them, the loss of friendship groups but also makes reference to the very supportive parenting they give the children.

41. Although the children are in no way to blame for the failure of their parents to comply with immigration control, to remain without leave and to in effect extend their stay without merit because of a desire to remain in the UK, the difficulties that are likely to ensue for the children are at the making of the parents. Had they left when they were supposed to the children would not have put down such roots (the youngest would not even have started school). The high level of support the children are likely to get from their parents on return to their country of origin is a factor that impacts positively on their welfare. A particularly significant factor, which is recognised by the SSHD in her policy (Chapter 45.2.3 Enforcement Instructions and Guidance) is that

> "Where any of the children in the family are studying for GCSEs or A levels (or their equivalents), removal should not normally be planned to take place in the *three* months before they are due to sit and *final* exams."

42. Although the children have been in the UK for a period in excess of seven years, albeit without leave to remain, the critical stage that Michael has reached in his education would, I am satisfied, be disproportionate, particularly given the SSHD's policy. Although the SSHD in submissions said that removal would be delayed that is of course not the issue. At this date, which is the relevant date for me to determine the proportionality of removal, removal of Michael would be disproportionate. It is of course open to the SSHD to decide how long a period of time she wishes to give leave to remain for.

43. There remains then the issue of the parents and the other two children. To separate the family at this time would interfere with the right to family life. There can be no reasonable justification for such interference, particularly given the effect it would in all probability have on Michael and his exams.

44. I therefore find that to remove the claimant and the family from the UK at this time is not proportionate to the legitimate aim being pursed by the SSHD.

Conclusions:

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

I set aside the decision

I re-make the decision in the appeal by allowing it.

Date 2nd June 2014

Judge of the Upper Tribunal Coker