Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/04698/2013

THE IMMIGRATION ACTS

Heard at Glasgow
on 19th September 2013

Determination sent
on 24th September 2013

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

PALVINDER KAUR

Respondent

For the Appellant: Mr S Winter, Advocate, instructed by Maguire, Solicitors
For the Respondent: Mrs M O'Brien, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. This determination refers to parties as they were in the First-tier Tribunal.

2. The SSHD appeals against a determination by First-tier Tribunal Judge Mrs J C Grant-Hutchinson, dated 24th June 2013, dismissing the Appellant's appeal on asylum and humanitarian protection grounds but allowing it under Article 8 of the ECHR.

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3. At the end of her determination, paragraph 52, the judge said that there was a "good arguable case" not covered by the Immigration Rules and going to the crux of the appeal in that the Appellant's two young daughters are illegitimate and do not have their father named on their birth certificates. She found it reasonably likely that this would give rise not only discrimination but to social stigma and to concerns about the future social welfare of the children, such that their Article 8 rights outweighed the public interest.

4. The SSHD now criticises that conclusion as unreasoned, or inadequately reasoned. The grounds recite evidence of schools and medical facilities to which the Appellant and her children would have access in India, and argue that there is no evidence that the children's rights would be breached due to being born out of wedlock and having no father listed on their birth certificates.

5. On 12th July 2013 permission to appeal was granted on the view that it was not clear on what the judge's conclusion was based, the background evidence cited being general and not related to illegitimate children.

6. Mr Winter accepted that the determination errs in law. There was no evidence before the judge to justify the conclusion reached at paragraph 52.

7. Mrs O'Brien said that it followed that the determination should be remade by dismissing the appeal also under Article 8. Even to look outside the Rules, there had to be a "good arguable case". As the Article 8 outcome outside the Rules had no evidential basis, it followed that the Rules applied, and there could be only one outcome.

8. Mr Winter submitted that the Upper Tribunal in remaking the decision could admit such new evidence and make such further findings of fact as it thought appropriate. He said that even on the evidence before the First-tier Tribunal, there was a good arguable case for the appeal to be allowed not on the disadvantages of illegitimate children in India, but on the best interests of the children. They are now aged 6 and 4½. Their mother suffers from medical problems, including depression. She is of a poor village background and limited education, likely to find only low-paid work in India. Her parents are elderly. The case involved some delay on the side of the Home Office. The Appellant came to the UK as a spouse but remained after the breakdown of her marriage. She came to light apparently after an enforcement visit (perhaps based on a tip-off) in 2006. Since then she has complied with Home Office reporting requirements, and has not failed to cooperate. The children are doing well. Both are now at school, and the younger has just started her first primary year. The situation for children in India is brought out in the Respondent's Country of Information Report (COIR) at 24.04 onwards. Given the Appellant's mental health and general situation, her children are likely to be among the more disadvantaged in India. It would be a reasonable inference that they might end up at a young age in the child labour force. Section 25 of the COIR sets out the potential disadvantages for children and particularly for females – high mortality rate, illiteracy, sexual and physical abuse, child labour and so on. These are prospects which the children

would not face in the UK. Mr Winter accepted that the availability of a resettlement package from the Respondent is relevant, but he said that could not cover the long-term, and in a case involving young children it was crucial to look further into the future. No enforcement steps were taken against the Appellant since it was identified that she was here illegally, and both children were born since then. The Home Office policy document "Every Child Matters", November 2009, opens with the words, "Improving the way key people and bodies safeguard and promote the welfare of children as crucial to improving outcomes for children". It could not possibly be in the better interests of these children to be sent back to India rather than to live in the UK. In summary, on return they would be among the more disadvantaged section of the Indian population; they have lived here all their lives up to the present, respectively reaching the ages of 6 and 4; there is no public interest of substance; and the appeal should be allowed, although along another line of evidence and reasoning.

9. Mrs O'Brien next submitted that it is essentially now argued that the prospects for the Appellant's children are not generally as good in India as in the UK. That is not enough. Although the Respondent took no steps to remove the Appellant, she was under a responsibility to leave the UK. She was awaiting a decision, but had no remaining status. The crux of the case was that the Appellant wanted her children to take advantage of the educational and welfare state provision available in the UK. She had her problems, but there could be no doubt that she would do her best to maintain herself and her family in India if she had to. Some of the family's disadvantages would apply in the UK as they did in India. The Secretary of State's duty to promote the welfare of children was not to be equated to a duty to enable foreign children to have access to free education and welfare in the UK. The reintegration package offered by the Respondent is not simply a sum of money. Packages are tailored to the individual circumstances of a returnee, and are intended to help them get back on their feet, not only to last for a short period and then leave them with nothing. The Appellant's children are bilingual and of a cultural background and age such that they should have no real difficulty into integrating into Indian society, even though have not yet been there. It was not disproportionate to expect the Appellant to return to India and that her children should go with her.

10. Mr Winter finally submitted that any immigration faults of the Appellant should not be visited on her children. The situation the children would face on return could not sit with the terms of Home Office policy on promoting children's welfare. The interests of the children should customarily dictate the result of the case. The Appellant herself has an unfortunate history and is a vulnerable person. It is not a case of seeking a free education and guaranteed future for her children. There are adverse factors in India which differentiate the case from that.

11. I reserved my determination.

12. The First-tier Tribunal Judge's conclusion on the children's Article 8 rights has been agreed to have no evidential basis. In a case involving the best interests of children, I am reluctant to hold that it follows that the determination is simply reversed. I

therefore consider whether the best interests of the children require the appeal to be allowed.

13. Although Mr Winter said that further evidence could be looked at, he put the case about the children essentially on evidence before the First-tier Tribunal and in the public domain.

14. The case involves only whether it is in the best interests of the child to live with and be brought up by their mother in India or in the UK. There is no question of separation of children and parent. The other parent plays no meaningful part in their lives, and the little known about him suggests that he has no right to be in the UK.

15. The children have been in the UK throughout their lives, but they are still in their earlier years, so as to be primarily focused on their mother, and not to have formed such ties outside the family that their disruption will impact significantly on their wellbeing. They have been brought up to be bilingual and there should not be great difficulty for them in adjusting to life in India.

16. It does not appear that the children will be among the more advantaged parts of the Indian population, but (as the First-tier Tribunal Judge found at paragraph 49) the Appellant, despite any health problems, will do the best she can for them. She has an unfortunate background and history, but she is not helpless.

17. The assistance with return offered by the Respondent is an important factor. As narrated at paragraph 28 of the First-tier Tribunal's determination, a package is offered including support in finding employment, housing and childcare. As the Presenting Officer said in the Upper Tribunal, this is not just a lump sum, leaving the family to get on with it, but an individually tailored scheme.

18. The case attracts some sympathy for the Appellant' personal history, and for the children, but the argument on their interests does resolve essentially into the free education and other welfare advantages available in the UK. On return to India, it does not appear that they would be brought up as part of the rising middle class, but with a caring mother and a resettlement programme, nor would they be amongst the worst off. The submissions for the Appellant emphasise the most dreadful features of the lives of many children in India. The background excerpts in the Respondent's grounds of appeal draw on the same sources to emphasise more positive features of life in India even for many less advantaged children. There is no guarantee of a glorious future for the children in the UK, and no reason to think that they must be dragged into degradation and despair if they return. The submission that they might end up as child labour goes too far. The extent to which they might be better off by remaining here cannot be measured with any exactitude, but I do not find the evidence persuasive that they would be badly disadvantaged by return to India.

19. The Appellant came here lawfully. She stayed on after she knew she was not entitled to be here. This is not a case of a very bad immigration history, but nor is it one where the Respondent delayed a decision on an application. Her children have lived here from birth, but are not UK citizens.

20. The public duty to respect the best interests of children is not a duty to extend state provision to relatively poor families from relatively poor countries. The Appellant asks for a finding that the best interests of the children outweigh the public interest so far as to entitle them to remain here with their mother rather than returning with her, and with public assistance, to India. That would impose a high duty on the state to advance the interests of the children, notwithstanding the state's declared policy in terms of the Immigration Rules, and the assisted return.

21. I conclude, in the round, that the children's best interests in this case are not likely to be adversely affected to such an extent as to outweigh the public interest in the application of the Immigration Rules (as explained in Huang v SSHD [2007] UKHL at paragraph 16).

22. The determination of the First-tier Tribunal is **set aside**. The following decision is substituted: the appeal, as originally brought to the First-tier Tribunal, now stands as **dismissed on all available grounds**.

23 September 2013
Upper Tribunal Judge Macleman