IAC-TH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/29166/2012
IA/29167/2012
IA/29168/2012
IA/29169/2012

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 19 June 2013	**On 27 June 2013**

Before

UPPER TRIBUNAL JUDGE O'CONNOR

Between

MR KHUSHTAR MOHAMED AKAY
MRS BIBI AFEEZAH AKAY
MISS ANISAH BIBI FAREENAH AKAY
MISS ALISAH BIBI FAHMIDA AKAY

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr S. Gokhoul, Solicitor
For the Respondent: Mr S. Ouseley, Senior Presenting Officer

DETERMINATION AND REASONS

1. The appellants are all citizens of Mauritius. The first and second appellants are husband and wife and the third and fourth appellants are

© CROWN COPYRIGHT 2013

the children of the first and second appellants. The third appellant was born in May 1999 and the fourth appellant was born in May 2005.

2. The first appellant entered the United Kingdom in June 2006 as a visitor and was subsequently given leave to remain as a student. The second appellant entered the United Kingdom in November 2006, with the third and fourth appellants, as visitors and they were subsequently granted leave to remain as the dependants of the first appellant. Leave to remain was last conferred, in relation to each of the appellants, so as to expire on 19 December 2011. On 15 December 2011 each of the appellants applied for leave to remain outside the Rules. These applications were refused by way of decisions made on 20 November 2012. Each of the appellants then appealed to the First-tier Tribunal.

3. The appellants' appeals were heard together on 8 March 2013 and dismissed on all grounds in a combined determination prepared on 25 March 2013. The appellants thereafter sought permission to appeal to the Upper Tribunal on the following grounds:

   (i) The First-tier Tribunal erred in law in applying an excessively high threshold to its consideration of whether Article 8 ECHR was engaged;

   (ii) The First-tier Tribunal erred in failing (a) to consider the best interests of the third and fourth appellants and (b) to treat those interests as a primary consideration;

   (iii) The First-tier Tribunal erred in concluding that the minor appellants would be able to adapt to a change in environment; failing to consider the independent report provided by the appellant's counsellor when coming to such finding.

4. By way of a decision dated 13 May 2013 Designated Judge Garratt granted the appellants permission to appeal in the following terms:

   "2. The appellants apply to appeal against the determination of Judge of the First-tier Tribunal B A Morris sent out 26 March 2013 in which she dismissed the appeals on immigration and human rights grounds against the decisions of the respondent to refuse leave to remain as a Tier 4 (General) Student Migrant for the first named appellant and for the remaining appellants as dependants of that person. The respondent also issued directions to remove the appellants under Section 47 of the Immigration, Asylum and Nationality Act 2006.

   3. The grounds take issue with the judge's Article 8 decision. Whilst it is not arguable that the judge wrongly applied the five stage test set out in Razgar [2004] UKHL 27, it is arguable that the judge failed to make the best interests of the minor appellants a primary consideration as required by ZH (Tanzania) v SSHD [2011] UKSC 4 and other recent case law relating to the interests of children. Further, although not referred to in the grounds, it is arguable that the judge should have considered whether or not the respondent's decision to issue

> simultaneous removal directions under Section 47 was in accordance with the law."

5. Thus the appeal came before me.

6. At the hearing Mr Gokhoul maintained the point first raised in the grant of permission, i.e. that the First-tier Tribunal erred in failing to consider whether the decision to remove the appellants pursuant to Section 47 of the Immigration, Asylum and Nationality Act 2006 was lawful. I observe that this was not a matter raised by the appellants in their grounds of appeal before the First-tier Tribunal and neither was it a matter raised in the application for permission to appeal brought against the decision of the First-tier Tribunal. There appears to be good reason for this. After careful consideration of the immigration decisions under appeal, it is clear to me that the Secretary of State did not make a decision to remove any of the appellants pursuant to Section 47 of the 2006 Act. Although the heading on the immigration decisions states as follows: **"refusal to vary leave to enter or remain and decision to remove / variation of leave and decision to remove",** the body of the immigration decisions do not thereafter refer to a decision to remove the appellants. Under the heading **"removal directions"** the following is stated:

> "If you choose not to appeal this decision, or you appeal and the appeal is unsuccessful, you must leave the United Kingdom as soon as possible when your leave to enter or remain in the United Kingdom expires. If you do not leave the United Kingdom voluntarily, you will be removed to Mauritius."

7. It is plain to me therefore that the First-tier Tribunal did not err in failing to consider whether the decisions made under Section 47 of the 2006 Act to remove the appellants were lawful, this being because there were no such decisions made by the Secretary of State. In any event, Mr Ouseley indicated that insofar as any Section 47 decisions had been made by the Secretary of State he formally withdrew them. Consequently, even if decisions to remove the appellants pursuant to Section 47 of the 2006 Act were made by the Secretary of State, any error of the First-tier Tribunal in failing to consider such matter would now be immaterial.

8. I now turn to the substance of this appeal, that being the challenge to the First-tier Tribunal's decision to dismiss the appellants' appeals against the decisions of the Secretary of State to refuse to vary their leave.

9. At paragraph 14 of its decision the tribunal record that Mr Gokhoul conceded that the appellants could not meet the requirements of the Immigration Rules.

10. The tribunal consider the application of Article 8 ECHR outside the Rules, concluding that each of the appellants has a private life in the United Kingdom, that removing them would be an interference with that private life of sufficient severity so as to engage Article 8, that the decisions are in accordance with the law and that requiring the appellants to return to Mauritius would be proportionate to the wider public interest of

maintaining an effective immigration policy. Consequently the First-tier Tribunal dismissed each of the appellants' appeals on this ground.

11. At the hearing Mr Gokhoul abandoned the grounds that were pleaded in the appellants notice of appeal save in one respect, it being maintained that the First-tier Tribunal had erred by failing to consider and/or place adequate weight on a letter from the South London and Maudsley NHS Foundation Trust, and its attached questionnaire, when considering the best interests of the third appellant.

12. Mr Gokhoul further sought to pursue an entirely new challenge to the First-tier Tribunal's determination; submitting that it had erred in its consideration of the issue of proportionality by attaching insufficient weight to the minor appellants' circumstances in the United Kingdom. In support of his submission, Mr Gokhoul directed the Tribunal's attention to paragraph 34 of the Supreme Court's decision in ZH (Tanzania). He further directed attention to the recent decision of the Presidential Tribunal in Azimi-Moayed [2013] UKUT 197 (IAC), in which the Tribunal set out a summary of the current learning on the issue of the best interests of the child.

13. In response Mr Ouseley indicated surprise at the appellants' change of position, noting that it had originally been asserted that the Tribunal had failed to consider the best interests of the children but that this ground had been conceded and in its place the weight attached to those interests by the First-tier Tribunal was under challenge.

14. He submitted that the First-tier Tribunal's determination was detailed and careful and that it had not ignored any of the evidence in relation to the best interests of the child. He further asserted that the First-tier Tribunal had come to conclusions that were open to it on the available evidence and that the grounds now raised essentially amounted to a perversity challenge, which could not be made out.

15. In reply Mr Gokhoul again made reference to the decision in Azimi-Moayed observing that the Tribunal noted therein that lengthy residence of a child in a country other than the state of origin could lead to the development of social, cultural and educational ties that it would be inappropriate to disrupt, in the absence of compelling reasons to the contrary. He observed that at paragraph 13(iii) of its decision in Azimi Moayed the Tribunal referred to seven years as being a relevant period to be seen as 'lengthy residence'; a seven year period from the age of 4 being seen to be more significant to a child than a period of seven years from birth. He recalled that the children in the instant case had been in the United Kingdom for six and a half years and submitted that consequently significant weight ought to be attached to their private lives here.

16. I initially turn to consider the grounds as they were originally pleaded in the appellants' notice of appeal. As to the first ground this plainly is not made out. The First-tier Tribunal found that Article 8 ECHR was engaged

on the facts of the instant appeal and, consequently, any error of the First-tier Tribunal in applying an excessively high threshold to its assessment of such engagement cannot possibly be material to its determination. In any event, it is plain that the tribunal did not apply an 'excessively high threshold', but properly directed itself to, and applied, the applicable legal principles.

17. As to the second of the pleaded grounds i.e. that the First-tier Tribunal failed to consider the best interests of the minor appellants, Mr Gokhoul now concedes that such interests were considered, and I agree that this is so. At paragraph 16 of its determination the Tribunal specifically refer to the interests of each of the children and thereafter carefully recount factors relevant to its consideration of those interests; including the length of time the minor appellants have been in the United Kingdom, their circumstances here and in Mauritius, their ages, the fact that the third appellant has undertaken counselling in the United Kingdom, their cultural background and the prospect of their education being disrupted if they were to be required to return to Mauritius.

18. Mr Gokhoul maintained reliance on the third of written grounds, i.e. that the First-tier Tribunal erred in failing to consider the independent report provided by the third appellant's counsellor. Despite maintaining reliance on this ground Mr Gokhoul properly drew the Tribunal's attention to a careful analysis of such document by the First-tier Tribunal at paragraph 16 of its determination. Indeed paragraph 16 contains virtually a verbatim recitation of the counsellor's evidence. This evidence is again referred to in paragraph 27 of the determination, at a point in the determination when the tribunal is giving specific consideration to the minor appellants' circumstances. The weight to be attached to this evidence was a matter for the First-tier Tribunal and its treatment of the evidence cannot be said to be perverse. It is plain from what I say above that I find there to be no merit in this ground.

19. Despite Mr Ouseley's expression of surprise at the appellants' sift of position at the hearing before the Upper Tribunal, he did not object to me considering the submission that the First-tier Tribunal had erred failing to attach sufficient weight to the circumstances of the minor appellants. I now turn to such consideration.

20. In my conclusion when its determination is looked at as a whole, it is plain that the First-tier Tribunal carefully considered the circumstances of the minor appellants prior to concluding that it was in their interests to continue to be cared for by their parents, with whom they would be returning to Mauritius. Having done so it was open to the tribunal to find that there was nothing in the minor appellants' circumstances to lead it to conclude that it would not be proportionate to remove the family unit as a whole.

21. The tribunal carefully went through the evidence it had before it in relation to the third appellant's need for counselling [16], and observed that during

cross-examination the second appellant had given evidence that this counselling had finished in May 2012, but that there had been an open invitation to telephone the counsellor should it be thought to be necessary. The tribunal were also well aware of the length of time that the appellants had remained in the United Kingdom, including the minor appellants, and also bore in mind the minor appellants' education, ages and their cultural background [16 & 27]. It was open to the tribunal to conclude that the minor appellants could adapt to a change of environment in Mauritius with the help and support of their parents [27], and it was also entitled to conclude that it was proportionate to require the family unit as a whole to return to Mauritius [28].

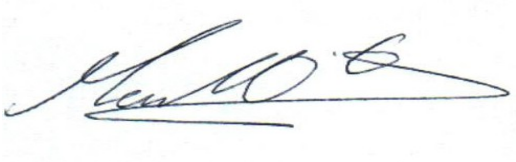
22. The decision of the tribunal in Azimi-Moayed does not establish a bright line to the effect that it will never be in the best interests of a child to be removed from the United Kingdom if he/she she has lived here for more than 7 years, neither does it support the contrary conclusion. The decision does no more than remind its reader that lengthy residence in the United Kingdom as a child is a relevant and significant consideration when determining where the best interests of a child lies. It is, however, important to treat each case on its own facts. In my conclusion, there is nothing irrational about the weight the First-tier Tribunal attached to the minor appellants' circumstances in the United Kingdom, despite the fact that they had lived here for just over six years as of the date of the First-tier Tribunal's determination.

23. For all the reasons I give above I conclude that the First-tier Tribunal's determination does not contain an error on a point of law such that it ought to be set aside, and its determination is to remain standing.

Decision

The First-tier Tribunal's determination does not contain an error on a point of law such that it ought to be set aside. The First-tier Tribunal's determination is to remain standing.

Signed:



Upper Tribunal Judge O'Connor
Date: 24 June 2013