Upper Tribunal
(Immigration and Asylum Chamber)

Appeal numbers: OA / 15699 / 2012
OA / 15706 / 2012
OA / 15710 / 2012
OA / 15716 / 2012
OA / 15719 / 2012

THE IMMIGRATION ACTS

Heard at:	Field House	Determination promulgated	
On	20 June 2013	On	**21 AUGUST 2013**

Lord Burns
Upper Tribunal Judge Gill

Between

Miss Thackshajini Sooriyacumar	First appellant
Miss Saranjajini Sooriyacumar	Second appellant
Master Premkumar Sooriyacumar	Third appellant
Master Arunkumar Sooriyacumar	Fourth appellant
Miss Vithyajini Sooriyacumar	Fifth appellant

And

Entry Clearance Officer, Chennai — Respondent

Representation:
For the appellants: Ms. S. Jegarajah, of Counsel, instructed by Wimbledon Solicitors
For the respondent: Mr. D. Hayes, Senior Home Office Presenting Officer.

DETERMINATION AND REASONS

1. The appellants are siblings, all nationals of Sri Lanka, born (respectively) on 19 August 1989, 18 December 1992, 6 April 1994, 9 July 1996 and 12 June 1991. On 29 March 2012, they applied for entry clearance in order to join their father, Mr. Kumarasamy Sooriyacumar (the sponsor), who is settled in the United Kingdom. The respondent refused their applications on 3 July 2012. The third and fourth appeals were below 18 years of age at the date of their applications. We will hereafter refer to them as the minor appellants and the remaining appellants as the adult appellants, whose ages as at the date of the refusals of entry clearance were 22 (first appellant), 19 (second appellant) and 20 (fifth appellant).

2. At the time of their applications and as at the date of the refusals, the appellants were all living in India with their mother. She did not apply for entry clearance with the appellants apparently because of an issue as to the English language requirement under the Immigration Rules. The grounds of appeal lodged with the appeals of the appellants state that, at the time of the appellants' applications for entry clearance in March 2012, their mother had been "*undergoing attempts*" to pass the English language test and that she had since passed that test. The grounds of appeal also stressed that it had been made clear at all times that it was the intention of the appellants and the mother that all would travel to the United Kingdom together.

The determination of the First-tier Tribunal

3. The appellants' appeals were dismissed by First-tier Tribunal Judge Prior under para 297 in relation to the minor appellants and para 317 in relation to the adult appellants of the Statement of Changes in the Immigration Rules HC 395 (as amended) (the Immigration Rules). The judge also dismissed their appeals under Article 8 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

4. Judge Prior found that there would be adequate accommodation for all of the five appellants and adequate maintenance for them and their mother, under paras 297 and 317. He found that the two minor appellants did not satisfy para 297(i) of the Immigration Rules for the following reasons:

   i. The appellants' mother made her application for entry clearance in August 2012. The explanation given to the judge for the delay in her application was that, until shortly before her application, she had not managed successfully to pass her English language test. The judge considered that, as at the date of the respondent's decision on 3 July 2012, there could be no assurance that the minor appellants "*would accompany their parent in India for the purpose of settlement in the United Kingdom".*

      It is evident that the judge was here considering the requirement in para 297(i)(c), that: "*one parent is present and settled in the United Kingdom and the other is being admitted on the same occasion for settlement".*

   ii. The minor appellants did not satisfy the requirement that the sponsor had had sole responsibility for their upbringing. It is evident that the judge was here considering the requirement in para 297(i)(e), that "*one parent is present and settled in the United Kingdom or being admitted on the same occasion and as had sole responsibility for the child's upbringing*"). The judge said that it was not contended that the sponsor had had sole responsibility for their upbringing and he noted that, indeed, it was the sponsor's evidence that the appellants' mother had primary responsibility for their care.

5. The appeals of the adult appellants were dismissed under the Immigration Rules for the following reasons:

   i. There was no evidence whatsoever that they were living alone in India. That is, they did not satisfy para 317(i)(f), that they were *"living alone outside the United Kingdom in the most exceptional compassionate circumstances"*.

ii. Moreover, there was evidence that they had an aunt in Sri Lanka. There was no evidence that their aunt was not a close relative in their country of origin and nationality to whom they could not look for financial support. That is, they did not satisfy para 317(v), that they had "*no other close relatives in their own country to whom they could turn for financial support".*

6. The appeals of all the appellants were dismissed under Article 8 for the reasons the judge gave at para 9 and paras 14 to 17. At para 9, he said that as at the date of the respondent's decision, there could no assurance that the appellants' mother would pass her English language test and thus likely to be leaving India and the five appellants without a mother. At paras 14 to 17, he said:

> "14. There was no documentary evidence before me as to the status of the Appellants together with their mother, in India. The evidence of the mother and the sponsor was that the Appellants did not have any legal status in India or Indian nationality. The sponsor testified that the Appellants were registered with the police and had notified the police of a change of residential address. The Appellants had been in India for almost thirteen years and there was no evidence that they could not continue to live there or, for that matter, to work there. One of the Appellants was qualified as a physiotherapist and another Appellant was not far short of qualifying as a dentist. There was no evidence relating to the ability of the sponsor to join the Appellants and his wife in India and to live and work in that country. There was evidence before me that certainly the sponsor's wife had, at least in the past, worked in India in the provision of private tuition. There was no evidence, and indeed no submissions, before me that even began to satisfy me that it would be unreasonable for the sponsor to join his family in India and thus pursue family life in that country.
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> 15. It was the sponsor's evidence that his claim for asylum had not only been refused by the Home Office but been dismissed on appeal. I was not satisfied, on the evidence before me (of which there was very little), that the Appellants and their parents could not pursue their family life in the country of which they are nationals, namely Sri Lanka. The sponsor does have a sister in that country and lived in that country for forty years before leaving for the United Kingdom. In Sri Lanka the sponsor worked as an art teacher, political cartoonist and journalist.
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> 16. I was not satisfied that Articled 8 was engaged.
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> 17. I have not overlooked the evidence that the sponsor had a stroke in March 2010 however I do not regard that fact as having any significance in the context of the issues that I have had to consider in this appeal. The effect of the stroke, according to a medical report of 29 January, 2013, was to cause no more than a residual altered sensation to the sponsor's right side. The report makes reference to the sponsor's diabetes and adds that it is "*fairly well controlled with medication*".

The grounds

7. The grounds of application for permission to appeal to the Upper Tribunal did not challenge the decision of Judge Prior to dismiss the appeals under the Immigration Rules. They only sought to challenge his decision to dismiss the appeals under Article 8, contending that he erred in law as follows:

(i) in stating, at para 16 of the determination, that: "*I was not satisfied that Article 8 was engaged"*, whereas the respondent had accepted that Article 8 was engaged;

(ii) in failing to apply "relevant law" in relation to Article 8. The grounds refer to various cases, including Razgar v. SSHD [2004] UKHL 27, Beoku-Betts v.

SSHD [2008] UKHL 39, VW (Uganda) and AB (Somalia) v. SSHD [2009] EWCA Civ 5. The *particular* points made in the grounds were that:

(a) the judge had failed to consider the best interests of the minor appellants; and

(b) in making his finding that it would be reasonable to expect the minor appellants to live in India, the judge had failed to have regard to the fact that neither of the appellants had any right to live lawfully in India. The grounds contend that the only country where the family can enjoy their family was in the United Kingdom.

It is also to be noted that para 36 of the grounds makes the point that the appellants' mother had had her visa application refused and was then appealing. At the hearing before us, Miss Jegarajah took issue with this, stating that her instructions were that the mother is awaiting a decision in her case.

8. First-tier Tribunal Judge Fisher granted permission to appeal to the Upper Tribunal on 16 April 2013. The only point in the grounds that impressed him was the point at our para 7 (i) above, although he did not refuse permission on the remaining grounds. He said, in general terms, that it was "*at least arguable that the Judge made an error of law in his extremely short analysis under Article 8*".

Submissions

9. Despite the fact that the grounds of application for permission did not seek to challenge the decision of Judge Prior to dismiss the appeals under the Immigration Rules, Miss Jegarajah challenged the decision to dismiss the appeals under the Immigration Rules, giving no notice to the respondent and having made no application for permission. We say more about this at para 15 below. We decided to hear her submissions *de bene esse*.

10. In relation to the Judge's decision to dismiss the appeals under the Immigration Rules, Miss Jegarajah submitted that the correct date for determining whether the requirements under the Immigration Rules were satisfied was not the date of the refusal by the Entry Clearance Officer (ECO) (3 July 2012) but the date on which the decision of the ECO in each case was reviewed by the Entry Clearance Manager (ECM) (22 November 2012). By the date of the ECM's review, the appellants' mother had applied for entry clearance (she applied on 24 August 2012) and she had passed her English language test. This, taken together with the finding of Judge Prior that the accommodation and maintenance requirements were satisfied means that it should be assumed that she would have succeeded in her application for entry clearance on 22 November 2012 and thus that the appellants satisfied the requirements of the Immigration Rules as at the date of the ECM's review. The ECM's decision should be seen as an extension of the ECO's decision, especially given that the ECM corrected the error of the Entry Clearance Officer, in that, the ECM acknowledged the error in the Refusal Notices and accepted that Article 8(1) was engaged.

11. Alternatively, if the appeals fell to be decided on the basis of the circumstances as at 3 July 2012, the date of the decisions of the ECO, the appellants satisfied the requirements of the Immigration Rules because:

(a) The document dated 29 March 2012 on page 226 of the appellants' bundle shows that the appellants' mother had in fact passed her English language test as at the date of the appellants' applications for entry clearance (29 March 2012).

Miss Jegarajah submitted that this document was admissible pursuant to E & R [2004] EWCA Civ 49.

We pointed out that it is stated on the document that the document "was *not a certificate*" but Miss Jegarajah submitted that it was nevertheless some evidence that the appellants' mother had passed her English language test. She asked us to find an error of law and re-open the whole case.

(b) The appellants' applications under the Immigration Rules had to be decided on the basis of the following two assumptions: First, that their mother had made an entry clearance application on the same occasion (29 March 2012). Second, that, if she had made an entry clearance application on the same occasion, she "*will have succeeded*".

It was necessary to make these assumptions for two reasons: First, because Judge Prior found that there was adequate accommodation and maintenance for all five appellants and their mother. Second, because of the need to read paras 297 and 317 so that they were consistent with the rights of the child pursuant to the United Nations Convention on the Rights of the Child (UNCRC). It was explicitly stated in the grounds of appeal that it was the intention that all of the appellants would travel together as one family unit. She submitted that this was a "*Robinson obvious*" point. Applying the "*Robinson obvious*" principle in this case meant that Judge Prior should have assumed that the appellants' mother had applied for entry clearance when they did and that, if she had done so, she would have succeeded.

(c) Accordingly, she submitted, the minor appellants satisfied the requirement in para 297(i)(c) and the adult appellants the requirement in para 317(ii), that they were accompanying a parent/person (as the case may be) (i.e. their mother) who is "*being admitted on the same occasion for settlement".* It was important that these assumptions were made because leave that is granted under the Immigration Rules is different from the leave that is granted until Article 8.

12. Miss Jegarajah submitted that the exercise of discretion should be informed by the best interests of the minor appellants, pursuant to the UNCRC. The best interests of the minor appellants include the need to create stability. The judge did not consider the individualised circumstances of each appellant. Miss Jegarajah did not explain whether the discretion that she was referring to was to be found in paras 297 and 317 of the Immigration Rules or in relation to Article 8 or whether she was referring to the general discretion outside the rules.

13. Miss Jegarajah submitted that the judge had erred in failing to address the best interests of the minor appellants. It is an error for the Tribunal not to deal with the best interests of a child, even if not raised in argument before it: para 17 of SS (Sri Lanka) [2012] EWCA Civ 945. The requirement to consider the best interests of a

child is not an optional extra. She also relied upon paras 44 to 48 of Mundeba (s.55 and para 297(i)(f) [2013] UKUT 00088 (IAC).

14. Mr. Hayes submitted that it was not clear why the appellants' mother applied in August 2012 on the basis of the document in March 2012 and why she had not made the application in March 2012 if she was going to rely upon this document. Judge Prior was told that she had not passed her test, which calls into question any suggestion that she had passed her test in March 2012. The document itself states that it is not a certificate. He submitted that there was no legal basis for much of Miss Jegarajah's submissions and the remainder were largely premised on speculation. There was no authority for the proposition that one should speculate on the success or otherwise of a future application, as this would necessitate an assumption that there would be no change in circumstances between the two date.

Discussion

15. Almost the entire hearing was taken up with Miss Jegarajah's submissions on grounds in respect of which no notice was given to the respondent and no application was made in writing. It was not until well into her submissions that she applied for permission. This is not an insignificant point in this case, given that the respondent is the ECO. Indeed, if an application had been made in writing to amend the grounds, we are in no doubt that permission would have been refused, as we satisfied that Miss Jegarajah's submissions were lacking in any substance and ought not properly to have been made. We give our reasons below. Miss Jegarajah relied upon paras 10 and 11 of the Practice Statement, neither of which, in our view, assist her. Para 10 refers to unrepresented appellants, whereas the appellants were represented when the grounds were submitted in support of the application for permission to appeal. Para 11 concerns the variation of grounds in the second or renewed application for permission, whereas the point we made was precisely that she had given no prior notice at all of the new grounds upon which she wished to rely.

16. In essence, Miss Jegarajah left us with no choice but to hear her submissions *de bene esse* in order to reach any decision on her application for permission, by which time she had effectively ventilated all the points she wished to make and achieved the same result whether or not we decided to grant permission in the event. Although we said we would reserve our position as to whether to grant permission to appeal, she in effect deprived Mr. Hayes of a proper opportunity of responding to her points.

17. We turn to deal with the arguments advanced in relation to the decision of Judge Prior to dismiss the appeals under the Immigration Rules.

18. Miss Jegarajah referred us to no authority for the proposition that the fact that the ECM reviewed the decision of the ECO and corrected an error within it meant that the relevant date for the purposes of s.85A(2) of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act) was the date of the review by the ECM. We reject this submission. The general rule is stated at s.85(4), that the Tribunal may consider evidence about any matter which it thinks relevant to the substance of the decision, including evidence about a matter arising after the date of the decision. However, s.85(4) is subject to the exceptions set out in s.85A. S.85A(2) sets out exception 1, in the following terms:

> "Exception 1 is that in relation to an appeal under section 82(1) against an immigration decision of a kind specified in section 82(2)(b) or (c) the Tribunal may only consider the circumstances appertaining as the time of the decision".

19. A decision to refuse entry clearance is a decision of a kind specified in s.82(2)(b). To succeed in her argument that the appeals should be determined by reference to the date of the ECM's review, Miss Jegarajah would need to persuade us that the "*decision*" referred to the phrase: "*the circumstances appertaining as the time of the decision"* in s.85A(2) should be interpreted to include the decision of the ECM. However, the difficulty is that the "*decision*" mentioned in this phrase is a reference to the "*immigration decision*" mentioned in the first part of s.85A(2) and "*immigration decision*" is defined in s.82(2) as including a "refusal *of entry clearance*". There is no mention of the definition including a review by the ECM, nor is it possible to construe "*refusal of entry clearance*" as including the review by the ECM. We are satisfied that the ECO's decision was the refusal of entry clearance. All the ECM did was to maintain the refusal decision. The ECM's decision was not a refusal of entry clearance, notwithstanding the fact that he corrected the error of the ECO in stating that Article 8(1) was not engaged.

20. This means that we do not need to deal with the remainder of the arguments described at our para 10 above. In any event, there is no authority for the proposition that the Tribunal should enter into speculation about the outcome of a hypothetical application. We reject the submission.

21. We turn to the arguments summarised at our para 11.

22. Reliance upon E & R is misconceived and ignores two points. Firstly, it is not only the case that this was not argued before Judge Prior, the evidence he was given was that the reason why the appellants' mother did not apply for entry clearance on the same occasion as the appellants was because she had not passed her English language test and that she only passed her test shortly before she made her own application for entry clearance in August 2012. Secondly, there are a few issues that arise in connection with the reliability of the document at paged 226 as evidence that she had passed the test, not least because the document specifically states it is not a certificate. In addition, there is some question as to whether her entry clearance application in August 2012 was refused or whether she is awaiting a decision. Miss Jegarajah took issue with the accuracy of para 36 of the grounds. However, the grounds were also settled by Counsel (Mr. Paul Turner of Tooks Chambers). Neither the submissions of Counsel nor the grounds of application for permission settled by another Counsel are evidence in the case. In any event, whether the appellants' mother is awaiting a decision or appealing a decision is not material to the issues before us in these appeals. Suffice it to say that there is a sufficient lack of clarity about the document at page 226 for it to be said that the document establishes an existing fact. Thus, a basic requirement for the application of E & R is absent.

23. This means that, strictly speaking, we do not need to deal with the arguments summarised at our para 11 (b) and (c). However, we will do so. These submissions only require a brief response, as it is self-evident in our view that the submissions lack any substance. In the first place, and as we have said above, the submission that the appellants' mother must be assumed to have made an entry clearance application on the same occasion as the appellant and she must be assumed to

have succeeded is based on pure speculation. It also ignores the fact that there was no certificate to show that she had passed her English language test.

24. Furthermore, there is no authority for the proposition that the obligations of the United Kingdom pursuant to the UNCRC require the Tribunal, in this particular case, to enter into such speculation.

25. Miss Jegarajah's reliance upon the "*Robinson obvious*" principle is also misconceived. As is well known, the term "*Robinson obvious*" is derived from the case in which the principle was first enunciated, *R v. SSHD, ex parte Robinson* [1998] QB 929, where, at page 946, Lord Woolf M.R. made clear in delivering the decision of the Court of Appeal that an obvious point is one which has a strong prospect of success if it is argued. We are very clear that the arguments advanced by Miss Jegarajah stand *no* prospect of success.

26. Finally, we agree with Mr. Hayes that the requirement *"being admitted on the same occasion for settlement"* should be construed according to its ordinary meaning and cannot possibly apply to someone who had not made an application for entry clearance and had not succeeded.

27. We turn to the argument (summarised at our para 12) that the discretion should have been exercised differently. There is no discretion in paras 297 and 317 of the Immigration Rules: either the requirements set out therein are satisfied or they are not. Similarly, there is no question of discretion in relation to Article 8. Either the decision amounts to a breach of Article 8 or it does not. The respondent's refusal to exercise the general discretion outwith the Immigration Rules and Article 8 was a matter for him. In any event, this point was not argued before Judge Prior and it was not explained to him or to us why any refusal to exercise the general discretion was not in accordance with the law even if the decision does not amount to a breach of Article 8.

28. We therefore refuse permission to amend the grounds.

29. We turn to the grounds upon which permission was granted (summarised at our paras 7 and 13.

30. It is to be noted that Miss Jegarajah did not address us at all on the alleged error at para 16 of the judge's determination, although we will deal with the point made in the grounds. Determinations should not be read in a strict or restrictive way. Whilst it is true that the language used by Judge Prior at para 16 reflects the language of the second of the five-step approach explained at para 17 of R (on the application of Razgar) v SSHD (2004) UKHL 27, it is plain that he considered proportionality and that he in fact meant that the decision was not disproportionate. We are satisfied that there is nothing at all in this point.

31. The exception described in s.85A(2) of the 2002 Act applies not only to any assessment as to whether the requirements of the Immigration Rules are satisfied but also the assessment of Article 8. This point was established in AS (Somalia) v. SSHD [2008] EWCA Civ 149 and AS (Somalia) v. SSHD [2009] UKHL 32 in relation to the versions of ss.85(4) and (5) of the 2002 Act that existed then. In relation to the issue we are considering here, there is no material difference in wording between the earlier versions and the current versions of ss.85(4) and 85(5) (and

85A) which came into force on 23 May 2011. We therefore reject Miss Jegarajah's submission that Article 8 claims in entry clearance cases are to be considered on the basis of the circumstances appertaining as at the date of the hearing.

32. As to the question whether Judge Prior had erred in law by failing to consider the best interests of the minor children, we acknowledge that paras 9 to 17 of the determination do not make any reference to the best interests of the children or to s.55 of the Borders, Citizenship & Immigration Act 2009. We accept that the Tribunal is regarded as an extension of the decision-making process and has a duty to consider the best interests of children even if not raised (SS (Sri Lanka)).

33. At para 38 of its determination in Mundeba, the Tribunal said:

> "As a starting point the best interests of a child are usually best served by being with both or at least one of their parents. Continuity of residence is another factor; change in the place of residence where a child has grown up for a number of years when socially aware is important: see also *SG (child of a polygamous marriage) Nepal* [2012] UKUT 265 (IAC); [2012] Imm AR 939."

34. At the date of the decision, the minor appellants were living with at least one parent, their mother. They had been living in India for thirteen years. That was a factor which pointed to their best interests being with their mother who Judge Prior correctly said could not be assured to pass her English language test. There was nothing in the circumstances of the minor appellants that gave rise to any real issue in relation to their welfare or needs in living in India with their mother. It was not said that their essential needs were not being provided for.

35. The duty of the Tribunal to consider the best interests of the minor appellants does not require the Tribunal to embark upon enquiries of its own in an attempt to establish their best interests, especially given that the evidence presented did not give any reason for such enquiries to be conducted and, furthermore, the appellants were physically outside of the jurisdiction and they were represented in the United Kingdom.

36. Accordingly, we are satisfied that the failure of Judge Prior to consider the best interests of the minor appellants cannot have affected the outcome of the appeals. Any error he made does not justify setting aside his decision to dismiss all of these appeals on immigration grounds and under Article 8.

Signed:

Upper Tribunal Judge Gill Date: 14 August 2013