Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA 13293 2013
IA 13296 2013
IA 13299 2013
IA 13308 2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 6 December 2013	**On 28 January 2014**

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

KAVITA DABEEDIN
BHARDOOAZ DABEEDIN
ROVINDRA SEN DABEEDIN
KARISHNEE KAVITA DABEEDIN

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr H Kannangara, Counsel, instructed by Jade Law Solicitors
For the Respondent: Mr S Walker, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellants are all citizens of Mauritius and are members of the same family. The first two appellants are married to each other and the third and fourth appellants are their minor children. The third appellant, a boy, was born on 23 March 1997 and so is now 16 years old. The fourth appellant, a girl, was born on 1 January 1999 and so is now 15 years old. They appeal a decision of the First-tier Tribunal dismissing their appeals against a decision of the respondent refusing to vary their leave to remain in the United Kingdom and to remove them. It is their case that removing them would interfere disproportionately with their private and family lives and should be allowed under Article 8 of the European Convention on Human Rights.

2. Each case must be decided separately and the children in particular are, or may be, in a different position from their parents.

3. The second appellant was the first of the appellants to arrive in the United Kingdom. He entered on 8 September 2004. The other three appellants (being the mother and two children) entered the United Kingdom in December 2004. The first and third appellants returned to Mauritius for almost all of 2005 and returned to the United Kingdom in December 2005. The second and fourth appellants have remained in the United Kingdom since they arrived. It follows that they had all had at least seven years' continuous residence in the United Kingdom before their applications were decided in April 2013.

4. The First-tier Tribunal decided that none of the appellants complied with the requirements of the relevant Rules because they had not lived continuously in the United Kingdom for at least twenty years. As is explained in the grounds, this is clearly a misdirection of law. Paragraph 276ADE(iv) of HC 395 gives an alternative way of establishing entitlement to remain on human rights grounds as reflected in the rules. An applicant who has not lived in the United Kingdom for at least twenty years but "is under the age of 18 years and has lived continuously in the UK for at least seven years" has established a right to remain. Plainly the minor appellants come within the scope of this Rule. The Rule has subsequently been amended so that there is a further requirement that "it would not be reasonable to expect the applicant to leave the UK". However, and somewhat unusually for Immigration Rules, there are transitional provisions and this additional requirement does not apply to the third or fourth appellants.

5. It follows that their appeal should have been allowed under the Rules. It follows that in the case of the third and fourth appellants I identify an error of law and substitute a decision allowing the appeal under the Rules. This is a case where the alterations to the Rules may very well have been more generous than the Human Rights Act required and the Rule was quite soon amended, but these appellants had the advantage of making an application at a time when they could take advantage of the wording of the Rules, and their appeals should be allowed.

6. There is an abundance of evidence before me that they are doing well at school, taking advantage of the opportunities provided for them by the United Kingdom education system and I have no doubt that their best interests lie in their remaining in the United Kingdom within the education system there in the care of their parents, who appear to have managed their upbringing satisfactorily.

7. This does not mean that the parents will be allowed to remain. The best interests of the children are not determinative. They are a primary consideration to which I must have regard.

8. There is nothing in the papers that indicates that any thought has been given to the best way to consider the rights of the parents in the event of the appeals of the children being allowed. This is somewhat surprising, but I saw no need to adjourn to invite the parties to serve further evidence. The conduct of the case is a matter for them and not for me. My task is to decide the appeal on the evidence already before me if I can do that properly.

9. The two adult appellants, if I can so describe them, have had permission to be in the United Kingdom throughout their stay and appear to have organised their lives very industriously and done nothing to their discredit. I am aware that the First-tier Tribunal found that they had abused the immigration system because they said in cross-examination that they intended to remain in the United Kingdom when they were first given leave to enter. I am not satisfied that this point is well founded. It is trite immigration law that a person might *want* to remain in the United Kingdom but *intend* to follow the Rules, and at every stage the appellants have had permission to be in the United Kingdom and have been open in their dealings with the authorities. The fact they were persuaded to say in cross-examination that they intended all along to remain suggests to me more that they are people anxious to act to the betterment of their family that it does that they ever intended to act without proper regard to the law. The finding that they were people intent on abusing the system should not have been made.

10. Nevertheless, they are not entitled to remain under the Rules and I have to ask myself if there is any misdirection or error in concluding that their removal is not an unlawful interference with their private and family lives.

11. I have had regard to the various stages in **Razgar** but I see no need to make detailed and express findings. This case is all about proportionality and I have to ask myself if it is proportionate to remove people whose lawful stay in the United Kingdom has come to an end but whose children have established a right to remain.

12. I direct myself that the minor appellants' right to remain is an entitlement that comes from satisfying the requirements of the Rules. I think it must be distinguished from an EEA national exercising a treaty right where the policy considerations are different. I do not find it helpful to consider the jurisprudence that deals with the obligations on a state to accommodate the parents of an EEA national child who is exercising treaty rights. The right to stay under the Rules is not analogous to the exercise of a fundamental EU treaty right.

13. Nevertheless I have had regard to the decision of this Tribunal in **Sanade and others (British children - Zambrano – Dereci) [2012] UKUT 00048 (IAC)**. It is relevant because it determines the context in which I must conduct the article 8 balancing exercise. The minor appellant's do not have as strong right to remain in the United Kingdom such as they would have if they were British or EEA citizens. Nevertheless they have, independently of their parents, established an unqualified right to remain in the United Kingdom. My consideration of the parents' case must start from the premise that they have children who are entitled to remain in the United Kingdom. This is not a case where, subject to questions of reasonableness the family could be removed as a whole.

14. The parents may well have had a long held desire to remain in the United Kingdom but there is no reason to find that they ever intended to behave contrary to the rules. Their conduct in the United Kingdom has been industrious and they have been of good behaviour. It is generally thought important to uphold immigration control by insisting that those no longer entitled to remain do leave but the parents' cases are free from aggravating features.

15. I do not find it helpful to consider the position that would appear to apply if the children were from a broken family unit and an "overseas parent" who wanted admission to the United Kingdom for the purposes of exercising contact. These children are not from a broken family. Their parents live together as a family unit and, it has been established, can provide a home for the children in Mauritius. No doubt if they would make a good home for their children in Mauritius if that is what they had to do.

16. However, absent special circumstances, it is clearly undesirable to separate children from their parents and the children's right to be in the United Kingdom under the rules is established. I should not ask myself it if would be reasonable to expect the children to remove with the parents because that would be deciding the case as if the amended rule had been in force at the material time.

17. For the sake of the children I allow the appeal of the parents.

18. It follows that I set aside the decision of the First-tier Tribunal and substitute a decision allowing these appeals.

Decision

The First-tier Tribunal erred in law. I set aside the First-tier Tribunal's decision in each case and substitute a decision allowing the appeals.

Signed
Jonathan Perkins
Judge of the Upper Tribunal

Dated 24 January 2014