



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/27856/2013

THE IMMIGRATION ACTS

Heard at Field House

**Determination
Promulgated**

On 3 June 2014

On 11 June 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE G A BLACK

Between

MASTER P A

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

ANONYMITY ORDER MADE

Representation:

For the Appellant: Ms M Ahammed (Legal Representative RMS Immigration Ltd)

For the Respondent: Mr J Parkinson

DETERMINATION AND REASONS

1. The appellant whose date of birth is 11 January 2007 is a national of India. This matter comes before me for consideration as to whether or not there is a material error of law in a determination before First-tier Tribunal Judge Devittie promulgated on 5 March 2014. In that determination the judge allowed the appeal on human rights grounds.

Background

2. In a decision dated 19 June 2013 the respondent refused the appellant's application for leave to remain under the provisions of Appendix FM relating to children. On 21 November 2012 he was granted limited leave to enter the UK until 14 May 2013 as a visitor. The appellant's parents had been granted leave outside of Appendix FM Rules and the application was refused because the appellant was not able to meet E-LTRC1.6 which states that one of the applicant's parents must be in the UK and have leave to enter or remain or indefinite leave to remain or is at the same time being granted leave to remain or indefinite leave to remain under this Appendix (except as an adult dependent relative).
3. Consideration was also given to private life under Article 8 with reference to paragraph 276ADE of the Rules. The Appellant entered the UK on 10 December 2012 and had not lived continuously in the UK for twenty years. He was age 6 at the time of the application and had not lived continuously in the UK for seven years. He spent five years of his life living in India and there was no evidence that he had lost ties in that country. The respondent did not consider that the appellant's application raised or contained any exceptional circumstances outside of the Rules warranting consideration under Article 8.
4. In his determination First-tier Tribunal Judge Devittie acknowledged that the appellant was unable to meet the requirements of the Immigration Rules and went on to consider the claim under Article 8 ECHR following the five stage process outlined in **Razgar**. He concluded that the appellant had established family life with his parents residing in the UK with limited leave and that all the other stages were met. He assessed proportionality having regard to the best interests of the minor child. He found that it would not be reasonable to expect the appellant's father to abandon his studies to return to live in India and that it would not be reasonable to expect his mother who was granted limited leave as a dependent to return to India with the appellant until such time as the studies of her husband were complete. There were no compelling considerations in the public interest justifying the interference with the family life of the appellant and his parents. The appellant's mother would be in an invidious position having to choose whether to remain with her husband in the UK or return to India to live with the appellant. At the time of the appellant's father's arrival in the UK in June 2011 the appellant did not have a passport and a decision was taken that he should remain in India pending obtaining a passport. During that time the Immigration Rules changed making it difficult for the appellant to succeed in an application as a Tier 4 Student dependant. The appellant was unable to return to India when his visa expired because his mother was pregnant at the time and he could not return alone.

Grounds of Appeal

5. In grounds of appeal the Secretary of State seeks permission to appeal on the grounds that the First-tier Tribunal Judge erred in his assessment of the interference with family life and proportionality. Reliance was placed on **Patel [2013] UKSC 72** in which Lord Carnwath held that the opportunity for a promising student to complete his course in the UK is not a right that is protected by Article 8. The judge was wrong to conclude that it would be unreasonable and a breach of Article 8 for the appellant to have to return to India with his mother.

Permission to Appeal

6. Permission to appeal was granted by First-tier Tribunal Judge J M Holmes on 10 April 2014. He found arguable grounds as follows:

“The appellant a child was brought to the UK on a visitor’s visa. His father by then was studying in the UK and his financial affairs meant the appellant could not have met the requirements for entry clearance as his dependent. The appellant’s mother appears to have travelled with him although her immigration status in the UK is not referred to in the determination. As the grounds point out, it is well arguable the judge’s approach to Article 8 appeal was flawed. The appellant’s father had chosen to travel to the UK to study and to leave his family in India whilst doing so. The appellant’s father had no right to insist upon his family being given LTR, despite their inability to meet the Immigration Rules, whilst he completed those studies. If there was some reason why the appellant could not return to India with his mother and there await his father’s return at the completion of those studies, then the determination does not disclose it. It is therefore well arguable that if the judge had properly applied **Patel** and **Nasim**, to which he makes no reference, he could not rationally have come to the conclusion that he did. All the grounds are therefore arguable.”

Error of Law Hearing

7. Mr Parkinson relied on the Secretary of State’s grounds of appeal and submitted that the judge failed to correctly apply current jurisprudence with regard to children and/or Article 8. The appellant entered as the visitor and presumably intended to return to India. The judge gave no adequate reasons for finding it unreasonable for the appellant to return to India with his mother or for all the family to return. The appellant had been parted from his parents for some eighteen months prior to his arrival in the UK as a visitor and it would therefore not be unreasonable for him to be looked after again by other family relatives in India. There were no compelling or compassionate circumstances existing other than the fact that the appellant was not able to meet the new Immigration Rule requirements. He entered as a visitor and now wishes to remain. He has established no arguable case as to why leave should be granted outside of the Rules and/or considered under Article 8 ECHR. Reliance was placed on **Patel, Nagre, Gulshan** and **MF (Nigeria)**.

8. Mrs Ahammed for the appellant submitted that the judge's decision under Article 8 ECHR was correct. He found at paragraph 7 that it was not reasonable to expect the appellant's mother to return to India as she has leave as a dependant until completion of studies by her husband. At the time the appellant's visa expired in June 2013 his mother was heavily pregnant and was not able to travel to India. It would not be reasonable to expect the appellant to live in India without his parents and young sister. He travelled to the UK with his grandparents who are living in India. The compelling reasons, following **Gulshan**, were the pregnancy of the mother and the appellant's relationship with his mother and sister. His father is in the middle of his studies which finish in September 2015 and he is not able to return to India without his family. Reliance was placed on a letter from Newham Hospital stating that the appellant's baby sister required treatment for an arachnoid cyst.
9. Mr Parkinson responded that the document from the hospital was nearly one year old since it was printed on 9 May 2013 and did not indicate that the appellant's sister was not capable of travel to India. The appellant had previously been left in the care of his grandparents who brought him to the UK and there is no reason why they could not collect him and take him back to India. The pregnancy was significant at the date of the visa expiry but not at the date of the determination as by that stage the appellant's mother could return to India together with the child. Effectively the appellant was seeking to circumvent the Immigration Rules by relying on Article 8 in circumstances where he had been granted limited leave as a visitor and an application for further leave was not permissible under the Rules on that basis.

Discussion and Decision

10. At the end of the hearing I found that there was a material error of law in the judge's determination. The claimant who is 6 years old came to the UK as a visitor. He did not travel to the UK with his parents as he had remained living in India with his grandparents pending the obtaining of a passport to enable him to travel to join them in the UK. When he was able to travel the Immigration Rules had changed and the appellant was unable to meet the requirements of the new Immigration Rules as a Tier 4 dependent. The appellant applied and was granted a visit visa. He then submitted an application to vary his leave which was refused and he appealed on human rights grounds.
11. The appeal was determined by First-tier Tribunal Judge Devittie who found that Article 8 ECHR was engaged and the decision was proportionate. I have carefully considered whether the determination amounts to a material error of law in particular having in mind that the appellant is a 6 year old boy. I am satisfied that the decision made followed from a flawed approach to Article 8. The judge's decision failed to apply **Patel, Nasim** and **MK (Nigeria)** having regard to the fact that the appellant's father was residing in the UK for a limited period of time as a student. The principles establish that for persons studying in the UK, this will not amount to a right protected by Article 8 ECHR. Further no consideration

was given by the Judge to the fact that the appellant entered the UK as a visitor at which time he intended to return to India and that there are no provisions in the Immigration Rules for extending leave in such circumstances. The judge did not consider the public interest in maintaining a fair and consistent immigration process and control by ensuring that steps are not taken to circumvent the Immigration Rules. Furthermore, whilst it is accepted that the appellant's mother was unable to travel to India as at the time of the expiry of the visit visa, she had by the time of the hearing given birth to the appellant's sister and there was no medical evidence then or now to show that it would not be possible or reasonable for her or the baby to return to India whilst her husband completes his course of study and/or for an application to be made by the appellant under the Immigration Rules as a dependant from out of country. I have considered section 55 Borders Citizenship & Immigration Act 2009 as to where the best interest of the appellant may lie. Clearly there is strong argument that his interests lie in remaining with both parents as a family unit. However, he was not able to meet the requirements of the rules and effectively sought to go outside those rules by coming to the UK as a visitor. I have regard to all the circumstances and taking into account that he lived with his grandparents prior to travelling to the UK, his status as a visitor and his establishing a limited private life in precarious circumstances, having spent the majority of his life in India, his parents temporary leave and the reasonableness of his mother returning to India with the appellant, the relatively short time until his father completes his studies. I conclude that the public interest in maintaining the fair application of immigration rules, outweighs the interests of the appellant remaining with his family as a unit for a temporary period and there are other alternative reasonable possibilities such as the appellant returning to India with his mother.

12. Accordingly the decision made by the First-tier Tribunal Judge is flawed as a result of a misdirection of the law.
13. I find a material error of law in the judge's determination. I set aside the determination. I allow the appeal by the Secretary of State for the Home Department and I remake the decision by substituting a decision that the appeal is dismissed on immigration grounds.
14. I was able to go on to remake the decision having asked the representatives at the end of the hearing if submissions were to be made in the event of my concluding that there was an error of law. Ms Ahammed confirmed that she had no submissions to make.

Decision

15. The appeal is allowed.

Signed

Date 10.6.2014

Deputy Upper Tribunal Judge G A Black