Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/41053/2013
IA/41066/2013
IA/41073/2013
IA/41091/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 24 April 2014	**On 15 May 2014**
Prepared 30 April 2014	.....

Before

UPPER TRIBUNAL JUDGE MCGEACHY

Between

MR JAYKUMAR ASHWINLAL SUKHADIA
MRS VIVEKA JAYMUMAR SUKHADIA
MISS NISHTHA SUKHADIA
MISS NISHI SUKHADIA

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Miss D Ofei-Kwatia, of Counsel instructed by Messrs Aschfords Law
For the Respondent: Miss A Holmes, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The first two appellants are the parents of the third and fourth appellants. They appeal, with permission, against a decision of Judge of the First-tier Tribunal Burns who in a determination promulgated on 4 March 2014 dismissed the appellant's appeals against a decision of the Secretary of State to refuse leave to remain on human rights grounds.

2. The appellants are citizens of India. The first appellant was born on 15 June 1976 and entered Britain with the second appellant on 15 June 2001. They had visitor visas valid from 31 May 2001 until 30 November 2001. After November 2001 they overstayed and have remained in Britain without leave since that date.

3. On 7 March 2004 their first child died at birth. On 26 April 2005 the third appellant Nishtha was born. On 16 February 2009 an application for leave to remain outside the Rules was received and refused on 3 August 2009.

4. An application for judicial review was then made. That was refused. On 13 April 2010 the fourth appellant was born. On 16 September 2010 representations were made requesting removal documents to be served in order for the first appellant to receive a right of appeal. Further representations were made in August 2012 and in July 2013, by request, further submissions were submitted.

5. On 24 September 2013 the decision was made to refuse the appellants' leave to remain.

6. The application in 2009 was made on the basis that the first two appellants had lived in Britain for seven years and six months and the third appellant was already attending school on a full-time basis. It was claimed that the children were integrated into the UK education system. When the further representations were made it is argued that the principal appellants had lived in Britain for over twelve years and it was stated that the children, who had been born here, had no experience of any other way of life and considered that they belonged in the United Kingdom. Their culture was here and they considered Britain to be their home, had no ties to India and nothing to return to there.

7. It was argued that as the third appellant had been born in Britain the provisions of paragraph 276ADE of the Rules were satisfied and the appellants did not fall under any of the grounds for refusal under Section S-LTR. Numerous letters of support and documentation to show the integration of the appellants into Britain had been submitted.

8. The refusal letter of 24 September 2013 referred to the terms of Appendix FM. It was pointed out that the appellants were not British and the principal appellant would not be considered eligible as a partner or parent

for the purposes of Article 8 of the ECHR. Section EX1 of Appendix FM was considered. While it was accepted that the principal appellant had a genuine parental relationship with a child who had lived in Britain continuously for seven years it was considered that it was not unreasonable for the child to leave Britain. It was not accepted that with support from family members she would not be able to integrate into a society that would not be dissimilar to her own. It was not considered that the third appellant was at a stage of education which was crucial. It was pointed out that she had already changed schools in Britain. It was considered that there were no insurmountable obstacles preventing family life continuing in India.

9. It was not considered that the principal appellants had established private life in Britain under the provisions of paragraph 276ADE.

10. At the hearing Judge Burns heard evidence noting that the reason given by the principal appellants for why they had not returned to India was because they liked Britain. Judge Burns noted that the representations made had not indicated how the appellants had managed to support themselves in Britain. The first appellant denied that he had worked in Britain and said he was supported by family and then said that they were supported by a Mr Shah. It was pointed out to him that in 2009 when the application for leave to remain had been refused the third appellant was only 4 and he was asked why they had not returned to India then. He said that that they had not returned because of the heat. In India he had helped in his parents' business. He had married in 1998. He was asked why he had said in his witness statement that he had not wanted to return to India because family members did not accept his marriage because he and his wife were of different castes and it was put to him that it was unlikely that his parents were opposed to the marriage if he had worked with them for three years after he was married. He replied that his parents would make adverse comments about his wife.

11. He said that he could not return to live with his parents or his wife's family because a man could not go to stay with his in-laws. However, he maintained contact and had good relations with his family and he had a brother in India. He indicated that he might have some savings.

12. The second appellant gave some evidence regarding their life in Britain. They had a two bedroom flat for which they paid rent but the rent had been provided by very generous friends. She had worked in a shop for three or four years but had stopped in July 2013. Her husband had also helped out with friends who had shops. She gave further details of the family's expenditure.

13. In paragraphs 22 onwards of the determination Judge Burns set out his findings of fact. He found that he could not accept either of the witnesses as credible and did not accept their reasons for overstaying in Britain. He stated that he believed they had arrived here with no intention of ever

returning to India and there was a strong suggestion that their reasons were economic but it might well be that they merely liked it here. He did not accept that they were not accepted in India as they had worked and lived with the first appellant's parents for some time. He stated that it was obvious that they had been working in Britain earning some significant income.

14. He noted the submissions regarding the third appellant and concluded that it would not be disproportionate for the family to leave. He referred to the judgment in the Supreme Court in **Zoumbas [2013] UKSC 74** and stated that the best interests of the children lay in remaining in the family unit and the family would return to India together. He said that he had no doubt that the children would quickly readjust -the eldest child had done so when she had changed school.

15. He referred to the determination in **Gulshan [2013] UKUT 00640** and to the judgment in **Nagre [2013] EWHC 720 (Admin)**. He stated that he did not accept the argument that the family satisfied the requirements of paragraph 276ADE(vi) "since they failed for the reasons given in the refusal letter". He concluded that it would not be unreasonable to expect the third appellant to leave Britain in the company of her parents and sibling.

16. The grounds of appeal claimed that the judge had not engaged with the facts that the appellants would have no ties with India and that all their ties were now in Britain and that he had not taken into account the length of time that the first two appellants had lived here. It was also argued that the judge had failed to give adequate or any reasons for finding the appellants did not satisfy the requirements of paragraph 276ADE(iv) and that it was insufficient to state that the third appellant would be returning "in the company of her parents and her siblings". It was emphasised that the third appellant had now lived in Britain for more than seven years and had been born here. Reference was made to the determination of the Tribunal in **EM (returnees) Zimbabwe CG [2011] UKUT 98 (IAC)**.

17. Further reference was made to the Immigration Directorate's Instructions on the guidance on the application of EX.1 considering a child's best interests. This stated that the facts in each case should be considered taking into account a number of factors including the child's health, whether or not the child would be leaving with its parents and the wider family ties in Britain. Further relevant facts were whether or not the child will be likely to be able to reintegrate readily into life in another country and whether the parents or child would be able to enjoy the full rights of being citizens in that country. It was claimed that the judge had failed to engage with the contents of an independent social worker's report before him and that he had not given proper reasons for his decision. It was argued that the decision was disproportionate.

18. Judge of the First-tier Tribunal Andrew granted permission to appeal stating that it was arguable that the judge had given inadequate reasons or had not addressed matters referred to in the skeleton argument including, inter alia, the reasons for his finding that the appellants could not meet the requirements of paragraph 276ADE She also considered that it was arguable that he had not properly addressed the rights of the appellants under Article 8 or the best interests of the children or engaged with the social work report which was before him. Moreover he had not considered the delay by the respondent in making the decision.

19. At the hearing of the appeal before me Miss Ofei-Kwatia relied on the grounds of appeal. She stated there was an error of law in that the judge had not dealt with a number of issues before him. She emphasised that the third appellant was a child who had lived in Britain for seven years and stated that the provisions of paragraph 276ADE were freestanding provisions. She claimed that the judge had placed undue weight on the fact the family would be returning as a family unit.

20. Miss Ofei-Kwatia argued that the judge had not distinguished the relevant factors set out in the determination in **EA (Nigeria)**. In particular, he had not taken into account that the third appellant had developed private life here which was outside that of the nuclear family. The judge had not considered the school report to show progress here and indeed had not considered the letters from the third appellant's teachers. Moreover, he had not properly considered the social work report and indeed the issue of the language spoken by the children.

21. She went on to argue that the decision of the judge was inconsistent and that he had not taken into account the best interests of the child. She referred to the decision and the Administrative Court in **Tinizaray [2011] EWHC 1850 (Admin).** Weight should have been placed on the social worker's report. She stated that the decision was unlawful by virtue of the length of residence and lack of time in the home country- the principal appellants had come here when they were young adults and were now established in this country. In any event she stated that even if the appellants did not come within the Rules then their freestanding Article 8 rights would have to be considered under the relevant structured approach. She emphasised that the principal appellant's first child was buried in Britain.

23. In reply Ms Holmes referred to paragraph 20 of the determination in which the judge had referred to the social worker report at pages 13 to 36 of the bundle. The judge had gone on in paragraph 20 to note that the social worker had felt that if the third appellant were removed to India she would not be able to access similar education or provisions although a private schools would offer education of a reasonable standard but "now charge a fortune which her parents would not be able to afford". The social worker had criticised the Indian education system for allowing corporal punishment. The social worker had gone on to say that Asians of Hindu

religion were not allowed to be vegan or expected to be vegetarians and the children spoke English as their first English. The social worker considered that removing the children to India was inconsistent with a duty to safeguard the welfare of the children. Ms Holmes stated that there was no evidence for the assertions made by the social worker, that therefore the judge was entitled to deal with them as he had. She then referred in some detail to the report. She stated that only psychological impact of the removal on the children would be a matter with which the parents would be able to deal. It is up to them to ensure the family life continued and the children had stability. She referred to the letter from the headmistress and said hat the headmistress had been wrong to say that it was not in the best interests for them to be removed as she did not have the full details of what life the children would live in India. Moreover, with regard to paragraph 276ADE of the Rules the letter from the Secretary of State dealt properly with that issue pointing out that the appellants could not qualify under the Rules. Paragraph 276 did not give a freestanding right merely because a child had lived in Britain for seven years.

24. She stated the judge had properly dealt with the issue of family ties with India in the determination. Having emphasised that the appellants never had leave to remain she asked me to find that the removal of the appellants would be entirely proportionate.

25. In reply Miss Ofei-Kwatia again referred to the third appellant's school, emphasised the family had not accepted public benefits here and stated that the children should not be made to bear the brunt of the bad decisions made by their parents.

26. I find that there is no material error of law in the determination of the Judge in the First-tier Tribunal.

Discussion.

27. Miss Ofei-Kwatia referrd to the judgment in **Tinizaray.** I note that in her judgment in **AA (Iran) [2013] EWCA Civ 1523** Lady Justice Sharp stated at paragraph 16:

> "There is another aspect of the case to which I should make brief reference. The original grounds of appeal and skeleton argument on behalf of the appellant (to which Mr Drabble was not party) would have required us to consider whether consideration of the appellants' Article 8 case by the FTT – in particular the consideration of Section 55 and the best interests of a child as a primary consideration – was flawed because of the failure of the FTT to consider his best interests by express reference to the checklist set out in Section 1 of the Children Act. The basis for such a submission was said to reside in **R (Tinizaray) v SSHD [2011] EWHC 1850** and the approach there taken to **ZH (Tanzania) v SSHD [2011] 2 AC 166 SC**. In the event, Mr Drabble did not press that grounds of appeal. He is right not to do so. In **SS (Nigeria) v SSHD**

> **[2013] EWCA Civ 550**, Laws LJ said (at paragraph 55) that **Tinizaray** should not be regarded as "establishing anything in the nature of a general principle (about Section 1 of the Children Act)". I respectively agree. Mr Sheldon tells us that notwithstanding what Laws LJ said, some Tribunals continue to adopt the **Tinizaray** approach. In my view they should not do so. **Tinizaray** should receive its quietus".

I therefore reject any argument put forward that the approach in **Tinizaray** is the appropriate way in which to deal with the issue of the rights of children and that the Judge made any error in not doing so. Moreover, the judge did consider oral evidence before him including the correspondence from the school and the social worker report. He did not accept as credible the appellants' claim that they would have nothing to return to in India and that they were somehow "outcastes". He pointed to the fact that the first appellant had worked, when married, in the family business in India and he considered that he would be able to return to the family business there – that was a conclusion which was fully open to him on the evidence.

28. Moreover he was correct to place little weight on the social worker's report. The assertions of the social worker do not bear scrutiny.

29. The report has many assertions none of which are reasoned. For example the social worker asserts that the removal of the appellants to India would make it difficult for the children to adjust to the Indian system of education "which is so different from the UK education system. Their educational needs may not met, consequently may leave school without qualifications and lead them poor employment chances" *(sic).*

30. The social worker gives no reasons for finding that the children, who appear to be intelligent and diligent in their studies would leave school in India without qualification. Moreover although he says that private schools may offer a similar standard of education he goes on to say that the third appellant's parents would not be able to afford private education. Again he gives no reasons for that assertion – the first appellant was working in his father's business before he left India, both parents have been able to work in Britain and there appears nothing to indicate that they would not be able to work in India and afford private education. The assertion of the social worker that "Nishtha's vision of becoming a doctor will not be realised if she is removed to India" is simply baseless.

31. He goes on to state that the Indian education system allows corporal punishment and that this would be detrimental for the children. There is no reason given as to why the third and fourth appellants should suffer corporal punishment. The assertion that they are "likely to be exposed to a risk of significant harm due to the application of corporal punishment at schools" is again without foundation.

32. Having noted that the family have a close relationship together the social worker goes on to state that the family now eat English food. However, both of the first appellant's parents followed the Hindu religion and he and his wife were vegetarians on arrival. There is no indication that any harm would be done to the children should they follow a vegetarian diet in India.

33. It is claimed the children could not read or write Gujarati and yet the reality is that the first language of the first and second appellants is Gujarati and there is no basis on which the social worker had reached the conclusion that the children could not learn to speak Gujarati fluently when they are exposed to that language in India.

34. It is of note that the social worker stated that their children's parents take them regularly to the local temple where they pray together as a family and then visit relatives. Clearly the children are being bought up in the Hindu culture as well as that of Britain. The assertion of the social worker that the world in which the children have developed would be taken away if they all moved to India is simply wrong. They would be removed as a family and the social environment for children is largely that of the family.

35. The comments at the end of the report refer to the importance for relations with parents. That is clearly correct and that is why the removal of the children with their parents would not be a breach of their rights here.

36. The social worker goes on to state that removing the family would be viewed as a breakdown in a relationship between the family and their wider family however he does not appear to consider the fact that that the family have relations in India: that was clearly a finding made by the judge.

37. Again in his conclusions the social worker states that the family would be destitute in India. Again there is nothing on which he could base that decision.

38. Finally he refers to the removal of the children as being inconsistent with the need to safeguard and promote the welfare of children. The reality is that the children's welfare is the responsibility of their parents and there is nothing to show that their parents would not provide stability and safety for them in India.

39. I have considered the letters from the schools. They make it clear that the children are well adjusted and diligent in their studies. There seems no reason why they would not be able to return to India and again study diligently there.

40. The judge did properly consider the life that the family would lead in India and took into account the length of time that the principal appellants had lived here and that after the expiry of their leave to remain as visitors

they had lived here without authority. He considered the rights of the children and the social worker's report. He was correct to place weight on the fact that the appellants would be returning as a family unit. He was correct to find that the appellants did not meet the requirements of the Rules and furthermore that their removal would be proportionate. He gave sufficient reasons for his conclusions. He dealt properly with the claim that the fact that the third appellant had lived in Britain for seven years meant that the family and that appellant were entitled to remain under the rules. It was certainly nor unreasonable to state that the appellants should return to India as a family unit – the rule does not state that merely because a child has lived in Britain for 7 years the family should be entitled to remain. The range of factors which are set out in the IDIs were considered be the Judge. His decision was fully open to him and he was correct to find that the decision was a proportionate internee with the rights of the appellants under Article 8 of the ECHR.

41. I therefore find that there is no material error of law in the determination and conclude that the decision of the Judge that these appeals are dismissed shall stand.

Signed Date

Upper Tribunal Judge McGeachy