



**Upper Tribunal**

**(Immigration and Asylum Chamber)**

Appeal Numbers: IA/42353/2013

IA/42380/2013

IA/42393/2013

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 3 November 2014**

**Determination Promulgated  
On 18 November 2014**

**Before**

**DEPUTY JUDGE OF THE UPPER TRIBUNAL CHANA**

**Between**

**MR GURINERJIT SINGH  
MS PARMINDER KAUR  
MR PARBHKIRAT SINGH  
(Anonymity directions not made)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation**

For the appellant: Mr H Rashid of Counsel

For the respondent: Mr Neville-Smart, Senior Presenting Officer

**DECISION AND REASONS**

1. The appellants are citizens of India born on 27 May 1967, 1 August 1970 and 4 January 1984 respectively. They are father, mother and son. They appealed to the First-tier Tribunal against the decision of the respondent to refuse to grant them leave to remain in the United Kingdom on the basis of their Article 8 rights. First Tier Tribunal Judge

Raikes dismissed the appellants' appeals in a determination dated 27 May 2014.

2. At the hearing I was informed that the third appellant in the appeal (IA/42390/2013) has not appealed the decision of the First-tier Tribunal as his appeal was allowed under the Immigration Rules on the basis that he has been in this country for more than half his life.
3. Permission to appeal was granted by First-tier Tribunal Judge RC Campbell on 12 June 2014 stating that it is arguable that the Judge materially erred in law in his determination for not giving insufficient reasons at paragraph 47 and 48 of the determination in support of her overall conclusion that the separation of the third appellant from the rest of the family, following their removal to India, would only be of modest impact.

### **First-tier Tribunal's findings**

4. The Judge made the following findings in his determination which in summary are the following.
  - I. The first and his eldest son who was aged 9 entered the United Kingdom on 7 August 2004 after having been granted leave to enter as visitors their leave being valid until 4 February 2005. The second and third appellants entered the United Kingdom on 15 April 2008 having been granted leave to enter as visitors such leave being valid until 20 September 2008.
  - II. The appellant's claim is as follows. The first appellant had arranged for an agent to assist him in his eldest son in getting to the United Kingdom and his sister-in-law paid for them to do so. While in the United Kingdom the first appellant commenced employment and made a life for himself. The second appellant entered the United Kingdom in May 2004 and returned to India as her father was suffering from cancer. She stayed in India with her younger son at her sister's property for about two years. She returned to the United Kingdom in 2007 following her sister's decision to sell the property she was living in.
  - III. There are aspects of the appellant's accounts in their evidence at the hearing which are either inconsistent or implausible when taken as a whole. This includes their reason for first coming to the United Kingdom is not credible which was due to a family rift between the first appellant and his family. The second appellant however in both her statement and in her evidence stated that there were no such problems with her family in India. The evidence is that the evidence is that the second appellant has been travelling back and forth between the United Kingdom and India on a fairly regular basis. After her

father died she lived in India for a period of two years and travelled to the United Kingdom and back to India in 2007.

- IV. The evidence of the appellants that they have severed all ties with India is not credible. The evidence is that they have people living in the village who they call aunt and uncle even though they claim that the rest of their family has left India. The appellant also applied for assisted voluntary return to India in 2012 and took substantial steps in the process before abandoning this option.
- V. The first appellant in his witness statement stated that relocating to India would have severe hardship to the family but in his oral evidence he said that he was prepared to return to work hard to pay his son's college fees.
- VI. While it is accepted that the appellants all enjoy good relationships and have all lived together as a unit since 2007, it is noted that they have spent several periods of time in the past living apart in order, it appears, to suit them in to ensure that they could achieve their aim of all remaining in the United Kingdom. Whilst they have emphasised their evidence at the hearing that they are very close this is not the case particularly given the lack of communication that clearly existed at the time of the assisted voluntary return application between the parents and the children of the family particularly the eldest son.
- VII. The appellant's circumstances under private and family life have been considered within the Immigration Rules. None of the appellants can meet the requirements of appendix FM. The first and second appellant are not in a subsisting relationship with a British citizen or a person settled in the United Kingdom, nor are they the parent of a British citizen child or a child with continuous residence in the United Kingdom. In respect of the third appellant he does not meet the requirements of leave to remain as a child in view of the Immigration Rules and his mother's position. In any event it has been accepted in the application that they are unable to meet the requirements of the Immigration Rules under either the partner or parent route.
- VIII. In respect of paragraph 276 ADE the appeals of the first second and third appellants must be considered separately from that of the eldest child in the original appeal. In respect of the first second and third appellant while they have been in the United Kingdom since August 2004 and April 2008, they arrived as visitors from India and have not lived continuously in the United Kingdom for a period of 20 years and further in respect of the first and second appellants are now aged 46 and 43

respectively and were adults at the time of their applications. In respect of the third appellant whilst he is under the age of 18, has not lived continuously in the United Kingdom for a period of at least seven years. The appellants have not therefore met the Immigration Rules.

- IX. However given the circumstances and in view of the recent case law, the Judge considered the position of the first, second and third appellants outside the Immigration Rules. It has to be decided whether the appellants' application raises any exceptional circumstances which might warrant consideration outside the Immigration Rules and under article 8 and accordance with the five stage test in **Razgar v SSHD [2004] UK HL 27.**
- X. It is noted that the eldest son in the previous proceedings has leave to remain in the United Kingdom in view of his age and circumstances. It has been taken into account that the first second and third appellant have lived with the eldest son as son and brother respectively for many years and a familial relationship is an existence, albeit not necessarily of such a degree as they do everything together as claimed.
- XI. The appellants are all Indian nationals but have lived in the United Kingdom with someone who has a right to remain in this country for a number of years. The first appellant has sporadically been in employment and the second has brought up children in the third appellant has attended school. The eldest son has commenced higher education in this country. It is stated in **MM (tier 1 PSW; Article 8 private life) Zimbabwe [2009]** that respect for private life does not include a right to work or study in itself however the social ties and relationships formed during such periods are capable of constituting "private life". Therefore the answer to the first question in **Razgar** is in the affirmative, that the appellants have established private and family life which would be breached by the respondent's decision.
- XII. The second, third and fourth question in **Razgar** are also answered in the affirmative in that the interference would have such gravity as potentially to engage the operation of Article 8.
- XIII. The fifth question is one of proportionality and whether the interference would be proportionate to the legitimate public interest to maintain immigration control.
- XIV. In assessing proportionality the findings of facts set out above are relied upon. The first second and third appellants did not meet the requirements of the Immigration Rules as set out. It

has been found that the appellants have not severed all ties with India. The first and second appellants have lived their entire lives in India prior to coming to the United Kingdom in 2004 in 2008 and by the application for AVR in 2012 demonstrated their intention to continue to live in India.

- XV. The appellants made no attempts to regularise their status until recently and by virtue of the length of residence in this country the eldest son now meets the requirements of the Immigration Rules. Other than the brief period in 2004 and 2008 the appellants never had any status in the United Kingdom and they have been living here when they did not have permission to do so. They cannot and should not have had any expectation of settlement when the family, or at least the parents of the family, knew that they were in the United Kingdom lawfully. The fact that they took steps by applying to voluntarily return to India over two years ago indicates a clear knowledge of this. The appellants managed to get birth certificates for the AVR application from friends in India which demonstrates that they have friends and ties to India.
- XVI. The best interests of the child has been considered which must be a primary consideration in making the decision. The appellants are Indian nationals who have no right to remain in the United Kingdom and their removal from the United Kingdom is proportionate. Whilst there will be an impact and an effect of their removal in view of the eldest son who has status in the United Kingdom, the third appellant like his parents is an Indian national and not a British citizen. He lives with his parents and would be able to return to India with them as a family unit. The Judge is satisfied that in the circumstances that the decision to remove the appellants is consistent with the statutory duty to protect the interests of the child.

### **Grounds of appeal**

5. The appellant in her grounds of appeal states the following which I summarise. The Judge in her determination has made a material error of law and made unlawful findings on matters that were material to the outcome, has misunderstood the evidence and has misdirected herself on the nature of the evidence and considered irrelevant matters. The Judge's finding that there is likely to be a minimal disruption to family life should the family be split, is fundamentally flawed. It is incumbent upon public bodies, where possible to promote family life.
- 6.

7. The Judge has failed to consider the fact that the eldest son of the family who is in full-time education in this country is still very much dependent on his parents and certainly is not leaving an independent life. He has just turned 19 years of age and lives with both his parents and the third appellant. If the parents were to be returned to India this would leave him without support. The Judge has failed to consider the impact on the eldest son of removal of his parents. The Judge has also failed to consider that her decision impacts on the third appellant as the decision amounts to the splitting of the family and it cannot be in the best interests of the third appellant who is still very much a minor. It is clear from the evidence that the family have a close bond and the two brothers enjoy a very good relationship.
8. The Judge's decision this country to the case law in **ZB (Pakistan) v SS HD [2009] EWCA Civ 834** and **Muse v ECO [2012] EWCA Civ 10** which states that "there is a positive duty on the respondent to promote family life". The decision of the Judge does not promote family life in this case and therefore the decision is unlawful.

### **The Rule 24 response**

9. The Rule 24 response stated the following which I summarise. The Judge of the First-tier Tribunal directed herself appropriately. The Judge has given reasons for her findings regarding family life and has asked herself the correct questions and conducted the proportionality exercise appropriately and therefore the determination does not contain any material error of law.
10. With respect to the proportionality challenges, it will be submitted that the Judge has considered paragraph 276 ADE of the Immigration Rules.
11. The Supreme Court has recently commented on this aspect in **Patel and ors UK SC 72 [2013]** at page 55 to 56, noting the limited utility of temporary leave in considering Article 8 issues.

### **The hearing**

12. I heard submissions from both parties at the hearing the full notes of which are in my Record of Proceedings.

### **Decision on error of law**

13. It was argued on behalf of the third appellant by Mr Rashid that the Judge found that the eldest child has an independent life while the evidence was that they have been residing together as a family unit. Mr Rashid argued that it is not right that the eldest son should live in

this country alone and independently and his parents and brother be sent back to India as this will result in the splitting up of the family.

14. The first-tier Tribunal Judge in a careful and detailed determination considered all the evidence in the appeal in respect of all the appellants individually. The Judge found that the first and second appellants did not meet the requirements of the Immigration Rules and there were no exceptional circumstances as to why they should be allowed to remain pursuant to article 8. This was a finding open to the Judge considering that the appellants came to this country on visitor's visas and after their expiration lived here unlawfully. The Judge was entitled to find that there were no exceptional circumstances in the first and second appellants' appeals that they should succeed pursuant to Article 8 when they cannot satisfy the requirements of the Immigration Rules.
15. It has been argued that as the eldest son who is 19 years old and in full-time education in this country, has been granted leave to remain pursuant to the Immigration Rules, it follows that the first second and third appellant's should also be allowed to remain as they are all a close family unit.
16. The Judge in his determination stated that eldest child can continue his education in this country because that is what he wants to do. The Judge was entitled to find that the eldest son is an adult and can live independently and pursue his education in this country even if this means separation from his family who will return to India. There is nothing perverse in this conclusion based on the evidence that the first and second appellants have no right to remain in this country. The Judge gave sustainable reasons for his finding that the eldest son who is in full-time education in this country can live on his own as he is an adult and found that the family have lived apart in the past. Implicit in the determination is that it is the eldest son's choice whether he wishes to stay in this country to pursue his education or accompany his family to India.
17. The quarrel with the Judge is that she did not take into account that the third appellant who is a minor should be allowed to stay in this country with his eldest brother and that this violates the older son and the third appellant's rights pursuant to Article 8.
18. The Judge noted that this family have lived apart in the past despite their close ties. The Judge was entitled to find on the evidence that all the appellants have done different things at different times in their lives. He took into account the evidence that the appellant's mother and the third appellant lived in India apart from the first and third appellant for almost 2 years. In the circumstances the Judge was entitled to find that the family is capable of living independently when the need arises. The Judge was aware that exclusion of the

appellants would also involve the separation of the two siblings and found that it was proportionate in the circumstances of this case.

19. In respect of the third appellant the Judge found that he is under the age of 18, has not lived continuously in the United Kingdom for a period of at least seven years. The Judge placed emphasis of the fact that the third appellant is not a British citizen which he is entitled to do. The Judge found that the third appellant will be removed with his parents as a family unit and that would be in the best interests of the third appellant. The Judge stated in her determination that the best interests of the third appellant must inform her decision. There is no perversity in her finding that the third appellant who is a minor can accompany his parents who have no right to remain in this country.
20. The Judge took into account all the relevant factors in his proportionality exercise and gave cogent reasons for her decision. The Judge took into account the Article 8 rights of all family members individually. The Judge also took into account the case of **Beoku Betts [2008] UKHL 39** which states that family life of the unit as a whole must be considered. She also considered the case of **Kugathas v SSHD [2003] EWCA Civ 31** and was aware that when considering family life there must be additional ties of dependency beyond normal emotional ties between related adults. The Judge was entitled to find on the evidence that although the family have lived together in this country, there has been no evidence of additional ties of dependency beyond normal emotional ties between related adults. The appellants appeal is no more than a quarrel with the Judge's findings which she was entitled to make on the evidence.
21. The upshot is that the determination of the Judge is not affected by a material error and I find that the Judge did conduct a proper assessment of all the appellants' rights individually pursuant to Article 8. The Judge also took into account the best interests of the third appellant and came to a sustainable conclusion.
22. I find that there is no material error of law in the determination of First-tier Tribunal and I uphold her decision.

### **Conclusions**

23. I therefore find that the appellants appeal must fail pursuant to Article 8 of the European Convention on Human Rights.

### **DECISION**

Appeal dismissed



Signed by

A Deputy Judge of the Upper Tribunal  
Mrs S Chana  
November 2014

Dated 12<sup>th</sup> day of