Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: DA/01083/2013
DA/01084/2013
IA/46935/2013
IA/46927/2013
IA/46940/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 19 January 2015	**On 23 January 2015**

Before

UPPER TRIBUNAL JUDGE GILL

Between

Poornimah Rungoo	**First Appellant**
Manraj Munroo	**Second Appellant**
Keshav Rungoo	**Third Appellant**

and

The Secretary of State for the Home Department	**Respondent**

AND

Between

Secretary of State for the Home Department	**(appellant)**

and

Greata Rungoo	**(respondent)**

Representation:
For the Appellants: **Mr J Martin, of Counsel, instructed by Raj Law Solicitors.**
For the Respondent: **Mr E. Tufan, Senior Home Office Presenting Officer**

DETERMINATION AND REASONS

Introduction

1. I shall refer to the parties as follows:

Poornimah Rungoo (born 2 August 1965) as the first appellant;
Manraj Munroo (born 15 August 1958) as the second appellant;
Keshav Rungoo (born 11 July 1991) as the third appellant;
Greata Rungoo (born 8 December 1994) as the fourth appellant; and
the Secretary of State as the respondent

2. The appellants are nationals of Mauritius. The first appellant (aged 49 years) is the wife of the second appellant (aged 56 years). The third and fourth appellants are their son and daughter, respectively, aged 23 years and 20 years respectively. The first appellant arrived in the United Kingdom on 22 September 2004 and the remaining appellants on 23 October 2004, aged, respectively, 39, 46, 13 and 9 years 10 months.

3. These appeals concern a determination of the First-tier Tribunal (FtT) (Judge of the First-tier Tribunal R Sullivan and Non-Legal Member Mrs. W Jordan) (hereafter the "panel").

4. The panel found that the fourth appellant satisfied the requirements of para 276ADE(iv) of the Statement of Changes in the Immigration Rules HC 395 (as amended) (the "IRs") and therefore allowed her appeal under the IRs as well as on human rights grounds, Article 8. It dismissed the appeals of the remaining appellants on all grounds.

5. There were five appeals before the panel as follows:

i. The first appellant had appealed (DA/01083/2013) against a deportation order dated 10 May 2013. Reasons were given in a letter of the same date as to why s.32(5) of the UK Borders Act 2007 (the 2007 Act") applies.

ii. The second appellant had appealed against two decisions as follows:

(a) an appeal (DA/01084/2013) against a deportation order of 11 May 2013 as a family member of the first appellant. Reasons were given in a letter of the same date as to why s.32(5) of the 2007 Act applies; and

(b) an appeal (IA/46935/2013) against a decision of 23 October 2013 to refuse to vary leave to enter or remain and to remove him by way of directions set under s.47 of the (Removal: person with statutorily extended leave) of the Immigration, Asylum and Nationality Act 2006 (the "2006 Act").

iii. The third appellant had appealed (IA/46927/2013) against a decision of 23 October 2013 to refuse to vary leave to enter or remain and to remove him by way of directions set under s.47 of the 2006 Act.

iv. The fourth appellant had appealed (IA/46940/2013) against a decision of 23 October 2013 to refuse to vary leave to enter or remain and to remove her by way of directions set under s.47 of the 2006 Act.

The third and fourth appellants had also had deportation orders made against them as family members of the first appellant but their appeals against those decisions (DA/01086/2013 and DA/01087/2013) were allowed in a determination of the Upper Tribunal dated 9 October 2013, on the ground that, as they were over 18 years of age, they could not be deported as family members of the first appellant. Accordingly, these appeals were not before the panel.

6. The decision to deport the first appellant was made following her conviction on 25 November 2011 at Isleworth Crown Court of one offence of possession/control of an identity document with improper intention contrary to s.4(1) and (2) of the Identity Documents Act 2010. She bought a passport she knew to be false, her motive being to use the passport to avoid the necessity of paying student fees in the United Kingdom by pretending to be a French national. On 14 December 2011, she was sentenced to 18 months' imprisonment.

7. Permission to appeal to the Upper Tribunal was granted to the respondent to challenge the decision allowing the appeal of the fourth appellant. Permission was also granted to the first, second and third appellants to challenge the decisions dismissing their appeals.

8. At the hearing before me, the parties agreed that, as the grounds in relation to the appeals of the first, second and third appellants rely upon the fact that the fourth appellant's appeal was allowed, I should first consider whether there is a material error of law in the panel's decision to allow her appeal such that that decision should be set aside. My decision on this point will have a bearing on the remaining appeals, for reasons which will become apparent (see [22] below).

9. The directions to the parties for the hearings before me made it clear that the hearings on 19 January 2015 would be limited to whether the decisions of the panel on the appeals should be set aside. However, Mr. Martin and Mr. Tufan confirmed they were able to proceed when I proposed hearing submissions and (on a provisional basis and subject to whether I decided that the relevant decisions fell to be set aside) oral evidence (to the extent that the appellants wished to give oral evidence) in any re-making of the decisions on their appeals (if their appeals were to be re-made).

10. On that basis and with the agreement of the parties, I heard submissions on all issues and oral evidence from the fourth appellant, followed by oral evidence from the third appellant. Mr. Martin did not wish to call the first or second appellants.

11. I shall not repeat the immigration history and other information explained by the panel with great care in its determination.

ASSESSMENT

The respondent's appeal:

12. The panel gave its reasons for allowing the fourth appellant's appeal at [74]-[79]. The panel found that the fourth appellant satisfied para 276ADE(iv), in that, she had lived in the United Kingdom continuously for more than 7 years. They found that it would not be reasonable to expect her to leave the United Kingdom. The panel's reasons for this finding may be summarised as follows:

    i. The fourth appellant had attended primary and secondary school in the United Kingdom. She had attained a number of GCSE and A levels and had been offered a place at the University of West London to take a foundation course leading to a law course. She had enquired about studying law in Mauritius and understood that, as she

does not speak French, she would have to undertake further studies to be eligible for a university place. The panel accepted that her removal would disrupt her education.

ii. She was a member of a church group and was well settled in the United Kingdom.

iii. She had lived in the United Kingdom from the age of 9 years to 18 years, years which were recognised as significant (Azimi-Moayed and others (decisions affecting children; onwards appeals) [2013] UKUT 197 (IAC)).

iv. The panel relied upon its earlier findings, made in relation to the first and second appellants, as to whether there would be accommodation and maintenance for the family in Mauritius. It found that the second appellant had sold his interest in a family property in Mauritius when he knew that there was a risk that he and his family members would be deported or required the leave the United Kingdom. It had not been shown that the first appellant would not be able to rent property in Mauritius or that she would be unable to work in Mauritius. It had not been shown that the second appellant would have to retire in Mauritius earlier than in the United Kingdom.

v. The panel rejected the evidence of the family that, as converts from Hinduism to Christianity, they would suffer societal problems in Mauritius.

13. The panel also said, at [77]-[78] as follows:

> "77. We accept the fourth appellant's evidence that hers is a very close family and she turns to her mother in particular for advice. The fourth appellant has not established an independent life. She was offered the opportunity to live on campus at the University of West London but did not apply for accommodation, preferring to live at home. We accept that she finds it difficult to imagine living in Mauritius and does not want to return there. We accept that it will be very upsetting for her to be separated from her parents and brother. We accept that it will not be as easy for her to turn to her mother for advice if her mother is overseas. However, the fourth appellant is now an adult. We asked to what extent she relied on her parents; they support her financially and her mother is always there for her. Financial support and advice could in our view continue even if the fourth appellant's parents are overseas albeit that the fourth appellant would not have regular face to face contact with them.
>
> 78. We find that it was not reasonable to expect the fourth appellant to leave the United Kingdom. She qualified for leave to remain on the basis of private life under para 276ADE(iv)."

14. Having concluded that the fourth appellant satisfied the requirements of para 276ADE(iv), the panel considered Article 8 outside the IRs as follows ([79]):

> "79. We accept that the fourth appellant has both family and private life in the United Kingdom. Returning the [fourth] appellant's parents and brother to Mauritius would mean separating the fourth appellant from them. There would be an interference with the family life. **We are not satisfied that the interference is so serious that the fourth appellant would be forced to abandon her plans to study in the United Kingdom.** It was clear to us that the fourth appellant is an intelligent young woman and we are satisfied that she is capable of living independently. In our view it cannot be said that a parent's or sibling's wish to support a university student is a compelling compassionate circumstance justifying for any of them a grant of leave outside the Rules."

(my emphasis)

15. The respondent challenged the decision allowing the appeal under the IRs, with reference to para 276ADE(iv) as well as Article 8. Her grounds may be summarised as follows:

As to para 276ADE(iv):

i. The panel had failed to engage with the public interest factors; in particular, the prevention of disorder and crime, in relation to the first appellant's offending and her reasons for her offending, which were linked to the financial support of the third and fourth appellants.

ii. The panel had not lawfully engaged with all of the evidence. The fourth appellant's private life did not disclose any aspect that could not be re-established, in its essential elements, in Mauritius. As the fourth appellant had grown up in a Mauritian household, she will be familiar with the cultural and social norms of her country of birth: she will be able to rely upon her parents/brother for support with reintegration.

iii. There is provision for education in Mauritius. It would not be unreasonable to expect her to apply herself, with her family's support, with a view to studying in Mauritius. If she wished to undertake studies in the United Kingdom, she could apply for entry clearance as a student from Mauritius.

As to Article 8:

iv. The panel's findings on Article 8 appear to relate directly to their findings under the IRs. There was no indication that they had considered whether there were any exceptional circumstances outside the IRs.

v. The fourth appellant and the members of her family had entered the United Kingdom in a temporary capacity and could have no legitimate expectation that they could continue their family, or private lives, in the United Kingdom if the IRs were not satisfied.

vi. Non-British nationals do not have a right to education in the United Kingdom (Zoumbas v SSHD [2013] UKSC 74 and EV (Philippines) v SSHD [2014] EWCA Civ 874).

16. Mr. Tufan relied upon the grounds. He submitted that Azimi-Moayed was decided before the IRs were amended by HC 194. He submitted that, essentially, the panel had allowed the fourth appellant's appeal in order to allow her to pursue her studies in the United Kingdom.

17. As to i., Mr. Martin submitted that the state's interests were not relevant in deciding whether it was reasonable for the fourth appellant to leave the United Kingdom. Accordingly, the fourth appellant's circumstances did not to need to be balanced against the state's interests in deciding whether it would be reasonable for her to leave the United Kingdom. Mr. Martin submitted that the remainder of the respondent's grounds amounted to no more than a disagreement with the pane's finding.

18. I have not had the benefit of any authorities on the question whether the public interest must be taken into account in deciding whether it is reasonable for an individual to leave the United Kingdom for the purposes of para 276ASDE(vi). The amendments of the IRs on 9 July 2012 did not herald a change in the principles applied in assessing Article 8 claims. Prior to 9 July 2012, any assessment of whether it was reasonable for an individual to return to their home country was considered on the basis of the circumstances of the individual and

others affected by the decision. The state's interests featured in the balancing exercise after findings as to reasonableness and other relevant findings had been made. I therefore agree with Mr. Martin that consideration of whether it is reasonable for the fourth appellant to return to Mauritius did not require the state's interests to be taken into account. I therefore reject the respondent's ground i.

19. As to the remaining grounds, both in relation to para 276ADE(iv) and Article 8, I have to say that, whilst I may not have reached the same finding myself, these grounds do amount to a disagreement with the panel's reasoning. I accept that it appears that the panel placed too much weight on the fourth appellant's desire to study in the United Kingdom and that, if she were required to leave the United Kingdom and live in Mauritius with her parents and brother, this would disrupt her studies. This much is evident from the panel's reasoning at [74]-[79] as a whole, but, in particular, the sentence in [79] that I have emboldened in the quote above.

20. However, the panel gave other reasons as well, including the fact that the fourth appellant had attended primary and secondary school in the United Kingdom and that the time she had spent in the United Kingdom, was significant, given the determination of the Upper Tribunal in Azimi-Moayed. Mr. Tufan asked me not to rely upon Azimi-Moayed on the basis that it was decided before HC 194 amended the IRs. I do not accept that HC 194 has made any material difference to the principles applied prior to 9 July 2012 in assessing whether it is reasonable for a child under 18 to leave the United Kingdom. Indeed, the very fact that the Secretary of State decided to include the requirements set out in para 276ADE(vi) is support for the view that para 276ADE(vi) reflected the then jurisprudence on the subject.

21. I therefore dismiss the respondent's appeal against the decision of the panel to allow the appeal of the fourth appellant under para 276ADE.

The first, second and third appellant's appeals

22. The grounds of the first, second and third appellants may be summarised as follows:

    i. The second appellant asserts that, given that the fourth appellant's appeal was allowed under para 276ADE, he satisfies the requirements of Appendix FM and the panel was wrong to find otherwise. It is contended that, if the second appellant satisfies Appendix FM, this will impact upon the Article 8 claims of the third appellant and the first appellant.

    ii. However, even if the second appellant does not satisfy Appendix FM, the panel erred in its consideration of the Article 8 claims outside the IRs of the first, second and third appellants, in that, it failed to consider, firstly, whether family life continued to be enjoyed between each of them and the fourth appellant, and, secondly, the impact upon each of them of being separated from the fourth appellant. It is accepted that the situation of the first appellant is different owing to the fact that she is a foreign criminal. However, if the Article 8 claims outside the IRs of the second and third appellants fall to be re-assessed, then her Article 8 claim should also be re-assessed. In essence, it is contended that the panel failed to apply Beoku-Betts v Secretary of State for the Home Department [2008] UKHL 39.

The second appellant: Appendix FM

23. I now consider the second appellant's challenge to the panel's determination on the basis that the fourth appellant satisfies para 276ADE(iv) of the IRs.

24. Mr Martin submitted that, if the fourth appellant satisfies para 276ADE(iv), then the second appellant qualifies Appendix FM and the panel was wrong to conclude otherwise. Although E-LTRPT.1.1. states that all of the requirements of paragraphs E-LTRPT.2.2. to 5.2 must be met, it is not necessary for me to go beyond E-LTRPT.2.4. for reasons which will become clear. The relevant paragraphs are:

> "Section E-LTRPT: Eligibility for limited leave to remain as a parent
>
> "E-LTRPT.1.1. To qualify for limited leave to remain as a parent all of the requirements of paragraphs E-LTRPT.2.2. to 5.2. must be met.
>
> Relationship requirements
>
> E-LTRPT.2.2. The child of the applicant must be-
>
> (a) under the age of 18 years at the date of application, or where the child has turned 18 years of age since the applicant was first granted entry clearance or leave to remain as a parent under this Appendix, must not have formed an independent family unit or be leading an independent life;
> (b) living in the UK; and
> (c) a British Citizen or settled in the UK; or
> (d) has lived in the UK continuously for at least the 7 years immediately preceding the date of application and paragraph EX.1. applies.
>
> E-LTRPT.2.3. Either-
>
> (a) the applicant must have sole parental responsibility for the child or the child normally lives with the applicant and not their other parent (who is a British Citizen or settled in the UK);or
> (b) the parent or carer with whom the child normally lives must be-
> (i) a British Citizen in the UK or settled in the UK;
> (ii) not the partner of the applicant (which here includes a person who has been in a relationship with the applicant for less than two years prior to the date of application); and
> (iii) the applicant must not be eligible to apply for leave to remain as a partner under this Appendix.
>
> E-LTRPT.2.4.
>
> (a) The applicant must provide evidence that they have either-
> (i) sole parental responsibility for the child, or that the child normally lives with them; or
> (ii) access rights to the child; and
> (b) The applicant must provide evidence that they are taking, and intend to continue to take, an active role in the child's upbringing."

25. At [65] of its determination, the panel said that the second appellant did not qualify under Appendix FM because the fourth appellant was not settled in the United Kingdom. I agree with Mr Martin the panel overlooked the fact that E-LTRPT.2.2(d) was an alternative to E-LTRPT.2.2(c). The fourth appellant had lived in the United Kingdom continuously for at least 7 years immediately preceding the date of the application. Given the panel's finding that it

would be unreasonable for the fourth appellant to leave the United Kingdom (which has not been vitiated by error of law) paragraph EX.1 applied.

26. However, the question is whether this error was material. In this respect, Mr Martin submitted that a parent can satisfy E-LTRPT.2.3 and 2.4 even if he/she is still living with the other parent and therefore there is no question of either parent having sole parental responsibility. He submitted that a narrow interpretation of these paragraphs would give parents who are separated an advantage over those who are still living together, which he submitted would be illogical. He submitted that the sole responsibility rule is irrational and in breach of Article 8. If it is unreasonable for the fourth appellant to leave the United Kingdom and paragraphs E-LTRPT.2.3 and 2.4 were not construed widely, she would lose daily contact with both of her parents.

27. I cannot accept Mr Martin's submissions. Any challenge to the lawfulness of E-LTRPT.2.3 and 2.4 must be raised elsewhere. This is not the forum to raise that issue.

28. It is plain that, in order to satisfy E-LTRPT.2.3 and 2.4, the second appellant must have sole responsibility. The interpretation that Mr Martin suggests is not merely a wide interpretation, it would mean effectively disapplying E-LTRPT.2.3 and 2.4. It is not open to the Upper Tribunal to do so. On that basis, it is plain that the second appellant cannot satisfy Appendix FM, notwithstanding the error made by the panel at [65].

29. Accordingly, I have concluded that the panel's error at [65] of its determination is not material.

The first, second and third appellants: Article 8 outside the IRs

30. At [66] of its determination the panel said, in relation to the second appellant's appeal, as follows:

> "66. As to Article 8 we accept that the second appellant has established family life and private life in the United Kingdom and that the [decision to deport him as a family member] and [his] immigration decision interfere with the right to respect for those rights. However we are bound by Nagre and Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 00640 (IAC). **In our view this is not a case in which there are compelling circumstances not sufficiently recognised by the Rules**. The [decision to deport the second appellant] and [his] immigration decision are lawful, justified and proportionate."
>
> (my emphasis)

31. Mr Martin submitted that, in stating that it was bound by R (Nagre) v Secretary of State for the Home Department [2013] 720 (Admin) and Gulshan, the panel had failed to consider the second appellant's Article 8 claim outside the Immigration Rules. He submitted that, in relation to the third appellant, the panel had considered whether his relationship with Ms Ramandeep Kaur amounted to family life but it did not mention at all whether he enjoyed family life with the fourth appellant.

32. I do not accept that the panel failed to consider whether family life was being enjoyed between the fourth appellant and each of the first, second and third appellants. It is clear from the first two sentences of [79] that the panel found that family life was being enjoyed.

33. Mr Martin accepts that the panel considered the impact on the fourth appellant of being separated from the other members of her family. This must be right because the contents of

[77] of the determination do not assist in understanding why the panel found that it would be unreasonable for the fourth appellant to leave the United Kingdom. Similarly, the contents of [79] do not assist in understanding why the fourth appellant's claim to remain in the United Kingdom on the basis of Article 8 outside the IRs succeeded.

34. It is plain that the panel considered that the relationship between the fourth appellant and her mother, the first appellant, was the closest in this family. Although it did not mention in terms at [77] and [79] the impact on the first appellant of being separated from the fourth appellant, it must plainly have had that in mind. Indeed, the final sentence of [79] suggests that the panel must have had in mind the impact of separation on the first, second and third appellants, as it specifically considered their wish to remain in the United Kingdom to support the fourth appellant through her studies. The sentence at [66] of the determination that I have emboldened above also suggests that the second appellant's claim outside the IRs was considered. When the determination is read as a whole, it is plain that the panel was acutely aware of the effect its decision would have on the family, in that, if the fourth appellant remained in the United Kingdom, she would be separated from the rest of her family. There is no reason to think that it did not consider the impact on the first, second and third appellants of being separated from the fourth appellant.

35. However, even if I am wrong, I am satisfied that any error is not material. The panel plainly found that the impact of separation on the fourth appellant was not such as to justify the remaining members of her family being allowed to remain. She is the youngest member of this family and would be left to cope on her own in the United Kingdom not having lived on her own previously, whereas the other appellants are not only older, they would have each other in Mauritius. In addition, in their cases, the balancing exercise required to be carried out outside the IRs in relation to proportionality meant that the public interest in their removal had to be taken into account, given that the second and third appellants did not qualify for leave under the IRs and the first appellant's criminal conviction. There was no compelling evidence before the panel that the impact on each of them would be greater than the impact on the fourth appellant such that, taking into account that they would have the support of each other and balancing their circumstances against the public interest in their removal, their removal would be disproportionate.

36. I am therefore satisfied that, if the panel had considered the issue (if, that is, they had not done so), it is inconceivable that they would have concluded that the impact on the first, second and third appellants of being separated from the fourth appellant was such as to render their removal disproportionate.

37. It is therefore not necessary for me to consider the oral evidence that the third appellant and the fourth appellant gave before me.

38. I dismiss the appeals of the first, second and third appellants to the Upper Tribunal.

Decision

The decisions of the First-tier Tribunal on the five appeals before it did not involve the making of an error on a point of law such that any of the decisions fell to be set aside.

Signed Date: 22 January 2015

Upper Tribunal Judge Gill