IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/09027/2014
IA/09029/2014
IA/09033/2014
IA/09034/2014
IA/09037/2014
IA/09041/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 7 January 2015	**On 14 January 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE MCWILLIAM

Between

MR AK (FIRST APPELLANT)
MRS BS (SECOND APPELLANT)
MISS AK (THIRD APPELLANT)
MISS SK (FOURTH APPELLANT)
MISS SDK (FIFTH APPELLANT)
MASTER UAK (SIXTH APPELLANT)
(ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr M Harris, Counsel instructed by Maliks and Khan Solicitors
For the Respondent: Mr L Tarlow, Home Office Presenting Officer

DECISION AND REASONS

1. The appellants are all citizens of India. The first appellant Mr AK's date of birth is 20 January 1974. He is married to the second appellant, Mrs BAS, whose date of birth is 11 February 1973. They have four children. Their eldest child is AK and her date of birth is 15 February 2001. She is the third appellant. The fourth appellant, their second child and daughter SK's date of birth is 2 August 2002. The fifth appellant and their third child and daughter is SDK and her date of birth is 2 January 2007. The sixth appellant, their youngest child and son UAK's date of birth is 28 June 2011.

2. The first four appellants came to the UK in 2005 as visitors. They were granted leave until 6 January 2006. They have overstayed since the expiry of their leave. The fifth appellant and the sixth appellant were born here. On 12 October 2010 the appellants made an application to remain here which was refused by the Secretary of State in a decision of 22 October 2010. They made a further application on 12 March 2013 which was refused by the Secretary of State in a decision of 1 May 2013. It appears that the Secretary of State agreed to reconsider the application and this generated a decision of 1 February 2014 whereby the Secretary of State dismissed the application under the Rules and outside the Rules concluding that there were no exceptional circumstances. It is this decision against which the appellants appealed.

3. Their appeals were dismissed by First-tier Tribunal Judge Khawar under the Immigration Rules and Article 8 in a decision that was promulgated on 2 October 2014 following a hearing on 10 September 2014 permission to appeal was granted by Judge Zucker on 12 November 2014. Thus the matter came before me.

The Decision of the FtT

4. The adult appellants' evidence is that their children would not be able to adapt to the education system there where children are badly treated and corporal punishment is commonplace. The first appellant would not be able to get a job in India. There is a functioning education system for the wealthy only and it would be difficult for all the children to adapt to the culture and mentality in India. There would be no family support. The first appellant, having left India in 1999, has lost social and cultural ties there and removal would be a devastating disruption to their lives. The children have laid down roots in the UK. Their eldest daughter is in year 9 and she is used to going to school in the UK where she has many friends and where she is doing well academically. Their second daughter also attends primary school. There is evidence from the eldest child, Miss AK, in the form of a witness statement. Her evidence is that she came here when she was aged 4 and attended primary school here. In 2013 she started

secondary school. She has not returned to India since 2005 and she is doing well at school here. The second daughter, SK, has also produced a witness statement and her evidence is that she does not remember India and she is scared of returning there to school. She is doing well here in the UK. There is a statement from the fifth appellant, Miss SDK, in the form of a witness statement and her evidence is that she is doing well at school. She was born here and she likes it here. The appellants relied on school reports which relate to the children, all of which are positive about their progress here. This evidence was before the FtT.

5. The Judge of the First-tier Tribunal made findings between [15] to [34]:

> "15. It is well settled law that the best interests of a child requires to be given primary consideration; ZH (Tanzania) [2011] UKSC4. Therefore in considering the best interests of the children in this case under Section 55 of the UK Borders Act 2009, I consider first the position of the Appellants four children; under Section 55 the Secretary of State is required to have regard to the 'need to safeguard and promote the welfare of the children who are in the United Kingdom).
>
> <u>Consideration of the Children's appeal under paragraph 276ADE of the immigration Rules.</u>
>
> 16. The legal position under the immigration Rules is that if the Third Fourth and Fifth Appellants succeed under paragraph 276ADE(iv) then the First Second and Sixth Appellants also succeed under the Immigration Rules (Appendix FM). The Third Fourth and Fifth Appellants have resided in the United Kingdom for a period in excess of seven years in each case. The only issue is the question of whether 'it would not be reasonable to expect the applicant to leave to the United Kingdom'.
>
> 17. It is asserted that it is not reasonable to expect them to return to India due to the fact that they do not speak or write Urdu, this being the principal language in India. It is further asserted that the children are totally adapted to the UK way of life and are very Anglicised. They are not familiar with Indian culture. They have no knowledge of the language and the way of life in India. In addition they are established in the United Kingdom education system and that each of the three eldest daughters have made lots of friends at school and are doing well academically. The eldest child, A, who is now 13 years of age, is in Year 9 at Secondary School. She was four years of age when she first came to the United Kingdom. The Fourth Appellant is now 12 years of age and at the same secondary school and is the year

below A. She came to the United Kingdom when she was merely one year old. The Fifth Appellant, was born in the United Kingdom on 2nd January 2007 and is now 7 years of age. She has always lived in the United Kingdom. She is at primary school.

18. The First Appellant's assertion that the children know nothing about Indian culture is highly unlikely to be true; photographs of the children submitted in the Appellants bundle show them to be wearing traditional Indian clothes consistent with Indian cultural norms. In addition the First Appellant's assertion that the children do not speak Urdu is also unlikely to be true because during oral evidence the Second Appellant said that she studied at Government schools in the medium of Urdu and not English. Furthermore that after coming to the United Kingdom and she had to learn to speak in English. She gave evidence through an interpreter during this appeal hearing. Consequently, given that she has been the principal day to day carer whilst the First Appellant has been out and about at work, it is more likely than not she would have communicated with the children in Urdu and/or Telegu.

19. Further and in any event, although no objective evidence has been served by either side, I take judicial notice of the fact that there are many schools, colleges and universities in India where the medium of tuition is the English language. Indeed a great many professionals such as computer experts, engineers and doctors emigrate on an annual basis, from India to Western countries – on the basis of their educational achievements in India.

20. I also note that the substance of the private life established by the eldest three children is entirely dependent upon their schooling. There is no evidence before me to suggest that they would not be able to settle into similar schools in India where the medium of teaching is in the English language. The fact that the First Appellant asserts he will not be in a position to be able to afford such education for his children is somewhat academic. Time and again the Higher Courts in this country have stated that impecuniosity is not a material consideration. Further and in any, the First Appellant has qualifications as an electronic engineer and worked in India in his profession for five years and thereafter for some six years in the United Kingdom – as an electronics engineers. There is no evidence before me to suggest that he would not be able to find suitable employment in his field upon return to India. The fact that he fell out with his elder brother/family is also somewhat academic as there is

nothing to prevent the Appellants in this case establishing a home well away from the First Appellant's family.

21. Neither party has submitted any objective evidence in relation to the educational systems in India except that, post hearing, the Appellant's representatives, forwarded to the Tribunal marked for my attention, a document on corporal punishment in schools in India. It is suggested I requested such document be forwarded to me. That is simply not the case. As the Respondent has not been given an opportunity to comment on this evidence, I disregard it. Further and in any event, I note the First and Second Appellants were themselves educated in India – in particular the First Appellant who (it emerged during oral evidence) is effectively a qualified electronics engineer having studied a Diploma in Electronic Engineering and worked in such capacity in India for a period of some six years – although none of this is referred to in their witness statements. Therefore the First and Second Appellants cannot possibly attempt to credibly maintain that they would not be able to adequately deal with any unwarranted 'harsh treatment' of their children in the Indian school setting, in the event of return.

22. The Appellant's Representative submitted that the type of education in India is different in that it relies more upon 'rote learning' through repetition whereas children in the United Kingdom are encouraged to investigate/express themselves and thereby learn. During his oral evidence the First Appellant also claimed that the first language used by Government Schools in the province where they come from is Telegu. The Second Appellant made no reference to this language but said that government schools conducted education in Urdu. Both were consistent in suggesting that there are private schools available where children are educated in English. However such schools tend to be expensive and the First Appellant maintains that he would not be in a position to be able to afford such expenditure. As noted above and as became apparent only during the Appellant's oral evidence, he is a qualified Electronic Engineer and will undoubtedly be able to find employment upon return. In addition he said that the Second Appellant is also educated and is a fashion designer. I conclude therefore that subject to child care, the Second Appellant would also be able to take up employment if she so desired.

23. The most significant consideration is that the children would be returning to India with their parents as a family unit. The First and Second Appellants would be able to support their children

whilst they become used to living in India and enjoying their full rights as Citizens of India. Furthermore the child Appellants in this case are still of such minor ages to be considered as being adaptable; Azimi-Moayed [2013]. Consequently in relation to the only issue under paragraph 276ADE(iv) I conclude that it would be reasonable to expect the Third Fourth and Fifth Appellants to leave the United Kingdom as their parents would be able to provide for their education, safety and welfare. Accordingly, the appeals of the Third Fourth and Fifth Appellants must fail under paragraph 276ADE. Similarly as the Sixth Appellant has not lived continuously in the United Kingdom for at least seven years, his appeal also fails thereunder.

24. All Six Appellants also seek to rely on Article 8 outside of the Immigration Rules. In my judgment, paragraph 276ADE and Appendix FM provide for a full consideration of all of the circumstances in this case and thus represent a complete code – Nagre [2012]/Gulshan [2013]. Furthermore, there are no 'arguably good grounds' (Gulshan) for a grant of leave outside of the Immigration Rules.

25. However out of an abundance of caution (in view of the Court of Appeal Judgment in MM [2014]) I have considered the right to respect for private and family life under Razgar v SSHD [2004], Huang and Kashmiri v SSHD [2007] UKHL 11, EB (Kosovo) v SSHD [2008] UKHL41, and Beoku-Betts v SSHD [2008].

26. In relation to family life Article 8 of the ECHR is clearly not engaged in the circumstances of the present case because all six members of the family would return together to India. Apart from their nuclear family the Appellants do not have any other family in the United Kingdom.

27. In relation to private life I have considered the five steps propounded by Lord Bingham in Razgar [2004] (which I do not reiterate as the Appellant is legally represented) I am satisfied the first two questions are to be answered affirmatively in favour of the Appellant; the Appellants have established private lives in the UK and their removal would constitute an interference with such rights.

28. The third and fourth questions under Razgar are to be answered affirmatively in favour of the Respondent; the Appellant's removal would be in accordance with the Immigration Rules and the law and necessary in a democratic society for the protection of the rights and freedoms of others/firm immigration control.

29. As to the final question, that of proportionality of removal, I resolve in favour of the Respondent. As established in the aforesaid House of Lords decisions, the test is whether family/private life can reasonably be established/enjoyed in the Appellant's country of origin. In carrying out a balancing exercise of factors in favour of the Appellant against those in favour of the Respondent, I take into account all the circumstances in this case.

30. As established in various Court of Appeal/House of Lords decisions, considerable weight is required to he attached to the public aim/public interest in the protection of the rights and freedoms of others/firm immigration control.

31. In carrying out a balancing exercise I note that the First and Second Appellants entered the United Kingdom with their eldest two children on the basis of visit visas valid for six months. There is no sensible explanation provided as to why they did not return. The First Appellant maintains that he was in dispute with his eldest brother and did not wish to return to India. On any view, India is a very substantial country and there was nothing to prevent the Appellants returning to India with a view to setting up their home elsewhere within India, well away from the First Appellant's family and any disputes that may have existed in the past. I also note that the First Appellant appears to have been employed in the UK, for at least six years as an electronics engineer and there is no evidence that he obtained a legitimate National Insurance number and/or paid his taxes as would have been required. He stated in oral evidence that currently he is only undertaking 'odd jobs' because the electronics firm he was working for could not continue to employ him due to potential legal risks. Therefore the First Appellant's private life, in terms of employment, is somewhat insignificant.

32. No doubt the First and Second Appellants have developed relationships with friends/colleagues within the community. In my judgment there would be no significant difficulty in the Appellants seeking to maintain such relationships by modern means of communication and/or through visits either to India or to the United Kingdom. Furthermore, as noted above, I am left in no doubt that the First Appellant would be able to find employment on return given his qualifications and work experience both in India and the United Kingdom.

33. I also note that by virtue of section 117B of the Immigration Act 2014, I am required to ascribe 'little weight' to the private and family life established by the Appellants during the family's precarious stay in the United Kingdom. – the Appellants having overstayed beyond their six months visit visa, by a substantial number of years.

34. I conclude on the totality of evidence before me that the Respondent has discharged the burden of proof upon her to establish that the removal of the Appellants is proportionate to the duty upon her to ensure firm immigration control/protect the rights and freedoms of others. Therefore this appeal also fails under Article 8 of the ECHR as developed under the Common Law."

The Grounds of Appeal and Oral Submissions

6. The grounds of appeal argue that the Judge failed to make a finding as to the best interests of the children and this is a material error.

7. At the hearing before me I heard submissions from both parties. Mr Tarlow relied on the Rule 24 response which argues that it is clear when reading the determination as a whole that the Judge assessed the best interests of the children. The thrust of the argument appears to focus on the children's education and the adult appellants showed a wholesale disregard for immigration control. The respondent in the Rule 24 response refers to **Zoumbas v SSHD [2013] UKSC 74**, **Azimi-Moayed and others (decisions affecting children; onward appeals) [2013] UKUT 197 (IAC)** and the more recent case of **EV (Philippines) & Ors v SSHD [2014] EWCA Civ 874**. It is argued that it is not unreasonable in the context of Section 117B of the Nationality, Immigration and Asylum Act 2002 to expect the elder of the minor appellants to leave the UK with their parents.

8. In oral submissions Mr Tarlow stated that although he relied on the Rule 24 response, he was unable to argue that the Judge had made an assessment of the best interests of the children. He would like to say that this error was not material, but he felt unable to do so.

9. Mr Harris relied on the grounds seeking permission. Both parties addressed me in the event that the decision was set aside and re-made. Mr Tarlow relied on the Reasons for Refusal Letter. Mr Harris submitted that the eldest child was now very much integrated into British society and that there were no countervailing factors against her. It was accepted that the family could not succeed outside the Rules if it were not for the children. Adaptability is not a determinative factor and it was accepted

that there would be education provision in India but the focus of the appeal was on the children's private lives.

Error of Law

10. Contrary to the evidence of the adult appellant's, the Judge found that the children were familiar with the culture and Urdu language and that in any event tuition in India would be in English. The Judge found that the substance of the children's private lives was dependent upon their education here and that there was no evidence that they would not be able to settle in school in India. The Judge found that it was not material that the appellants' father would not be in a position to afford to educate his children privately and in any event there was no evidence that he would not be able to find suitable employment in India having worked here as an electronic engineer and having previously worked as an engineer in India. The Judge noted that both the adult appellants were educated in India and that the second appellant was educated as a fashion designer and the family would be returning to India as a family unit. In the Judge's view in the light of the ages of the children they would be adaptable and would be able to enjoy their full rights as citizens of India. In his view it would be reasonable in the context of paragraph 276ADE of the Immigration Rules to expect the third, fourth and fifth appellants to leave the UK with their parents.

11. It is clear, having read the determination as a whole, that the Judge did not make an assessment of the best interests of the children and that he should have done so. In my view, as a result of this the Judge's findings in relation to reasonableness and proportionality are flawed. The best interests of the child is an integral part of the proportionality assessment which must be a primary consideration although not always the primary.

12. In the light of the nature of the error of law I set aside the decision of the First-tier Tribunal pursuant to Section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 and remake the decision pursuant to Section 12(2)(b)(ii). In my view there is no reason to go behind the primary findings that the Judge made as there was no challenge to these. However, it is necessary to assess the best interests of the children and reasonableness in the context of the Immigration Rules and Section 117B of the 2002 Act and proportionality pursuant to Article 8 of the 1950 Convention on Human Rights.

13. I have had regard to relevant jurisprudence on the issue. In **Azimi-Moayed and others** the Upper Tribunal in considering the case law in relation to decisions affecting children identified the following principles to assist in the determination of appeals where children are affected by the appealed decisions:

"(i) As a starting point it is in the best interests of children to be with both their parents and if both parents are being removed from the United Kingdom then the starting point suggests that so should dependent children who form part of their household unless there are reasons to the contrary.

(ii) It is generally in the interests of children to have both stability and continuity of social and educational provision and the benefit of growing up in the cultural norms of the society to which they belong.

(iii) Lengthy residence in a country other than the state of origin can lead to development of social cultural and educational ties that it would be inappropriate to disrupt, in the absence of compelling reason to the contrary. What amounts to lengthy residence is not clear-cut but past and present policies have identified seven years as a relevant period.

(iv) Apart from the terms of published policies and Rules, the Tribunal notes that seven years from age 4 is likely to be more significant to a child that the first seven years of life. Very young children are focused on their parents rather than their peers and are adaptable.

(v) Short periods of residence, particularly ones without leave or the reasonable expectation of leave to enter or remain, while claims are promptly considered, are unlikely to give rise to private life deserving of respect in the absence of exceptional factors. In any event, protection of the economic wellbeing of society amply justifies removal in such cases."

14. In **Zoumbas v SSHD** at paragraph 10 there is set out the legal principles which guide me in considering the best interests of a child which are deemed to be an integral part of the proportionality assessment under Article 8. Paragraph 10 states:

"In their written case Counsel for Mr Zoumbas set out legal principles which were relevant in this case and which they derived from three decisions of this court, namely **ZH (Tanzania)** (above), **H v Lord Advocate [2012] SC (UKSC) 308** and **H(H) v Deputy Prosecutor of the Italian Republic [2013] 1 AC 338**. Those principles are not in doubt and Ms Drummond on behalf of the Secretary of State did not challenge them. We paraphrase them as follows:

(1) The best interests of a child are an integral part of the proportionality assessment under Article 8 ECHR;

(2) in making that assessment, the best interests of a child must be a primary consideration, although not always the only primary consideration; and the child's best interests do not of themselves have the status of the paramount consideration;

(3) although the best interests of a child can be outweighed by the cumulative effect of other considerations, no other consideration can be treated as inherently more significant;

(4) while different Judges might approach the question of the best interests of a child in different ways, it is important to ask oneself the right questions in an orderly manner in order to avoid the risk that the best interests of a child might be undervalued when other important considerations were in play;

(5) it is important to have a clear idea of a child's circumstances and of what is in a child's best interests before one asks oneself whether those interests are outweighed by the force of other considerations;

(6) to that end there is no substitute for a careful examination of all relevant factors when the interests of a child are involved in an Article 8 assessment; and

(7) a child must not be blamed for matters for which he or she is not responsible, such as the conduct of a parent."

15. I have also had regard to the more recent case of **EV (Philippines) & Ors v SSHD [2014]** and have taken into account the decision including the following paragraphs:

"58. In my judgment, therefore, the assessment of the best interests of the children must be made on the basis that the facts are as they are in the real world. If one parent has no right to remain, but the other parent does, that is the background against which the assessment is conducted. If neither parent has the right to remain, then that is the background against which the assessment is conducted. Thus the ultimate question will be: is it reasonable to expect the child to follow the parent with no right to remain to the country of origin?

59. On the facts of **ZH** it was not reasonable to expect the children to follow their mother to Tanzania, not least because the family

would be separated and the children would be deprived of the right to grow up in the country of which they were citizens.

60. That is a long way from the facts of our case. In our case none of the family is a British citizen. None has the right to remain in this country. If the mother is removed, the father has no independent right to remain. If the parents are removed, then it is entirely reasonable to expect the children to go with them. As the Immigration Judge found it is obviously in their best interests to remain with their parents. Although it is, of course a question of fact for the Tribunal, I cannot see that the desirability of being educated at public expense in the UK can outweigh the benefit to the children of remaining with their parents. Just as we cannot provide medical treatment for the world, so we cannot educate the world."

16. The appellants' primary submission is that at least the eldest child satisfies the requirement under 276ADE(iv) which reads as follows:

> "is under the age of 18 years and has lived continuously in the UK for at least 7 years and it would not be reasonable to expect the child to leave the UK."

17. In addition Section 117B(6) of the 2002 Act is relied upon and this reads as follows:

> "In the case of a person who is not liable to deportation, the public interest does not require the person's removal where –
>
> (a) the person has a genuine and subsisting parental relationship with a qualifying child, and
>
> (b) it would not be reasonable to expect the child to leave the United Kingdom."

18. In my view the focus is very much upon the eldest child, Miss AK, who was aged 4 when she arrived here. She is now aged 13 and has been here for nine years since she was aged 4. The Immigration Rules and case law consider seven years to be of significance.

19. The starting point is that it is in all the children's best interests to be with both their parents, who in this case are being removed and who do not have a right to be here. The children in this case would be returning to a familiar culture. Both of their parents are Indian and the Judge made findings in relation to language and culture at [17]. I accept that lengthy residence can lead to the development of social, cultural and educational

ties here which are inappropriate to disrupt. The length of residence is a weighty factor in the appellants' favour. It is a fact here that there has been lengthy residence in excess of the seven years recognised by the Immigration Rules and now by Parliament in statute (Section 117B of the 2002 Act (at least the eldest child is a qualifying child)). Seven years alone is not sufficient to establish that it is in the child's best interests to remain here but that period of time can lead to the development of social and cultural ties that it would be inappropriate to disrupt in the absence of compelling reasons to the contrary.

20. I have taken on board the lawful and sustainable findings of the First-tier Tribunal and on the evidence I do not accept that the children would experience serious difficulties should they return to India. Mr Harris submitted that the focus was on the children's private lives but outside education and their home there was very little evidence of the extent of this. There is no cogent evidence in this case that the children have a significant private life outside the family home and their education. I accept that they must have friends and that they are integrated into the education system here but they are all relatively young. There is no persuasive evidence that the eldest child, who has spent in excess of seven years here from the age of 4 (which I recognise to be of significance), has social, cultural and educational ties that it would be inappropriate to disrupt.

21. In my view, on the evidence in this case it would be in the children's best interests to return to India with their parents and in my view it follows that it would be reasonable pursuant to paragraph 276ADE and Section 117B(6) of the 2002 Act. It follows in my view that in light of these findings the appeal must fail under Article 8 outside of the Rules. Mr Harris conceded that the success of the appeal depended on the children. I have made an anonymity direction in the light of the child appellants.

Notice of Decision

The appeal is dismissed under the Immigration Rules and on Human Rights grounds.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Joanna McWilliam Date 12 January 2015

Deputy Upper Tribunal Judge McWilliam