IAC-FH-NL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: IA/10272/2014
IA/10485/2014
IA/10486/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 10 March 2015	**On 23 March 2015**

Before

UPPER TRIBUNAL JUDGE ESHUN

Between

NIMESHKUMAR PATEL (FIRST APPELLANT)
NISHABEN PATEL (SECOND APPELLANT)
KRISHN PATEL (THIRD APPELLANT)
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr A Slatter, Counsel instructed by E2W (UK) Ltd.
For the Respondent: Ms A Weller, Home Office Presenting Officer

DECISION AND REASONS

1. The appellants have been granted permission to appeal the decision of First-tier Tribunal Judge Mayall dismissing their appeals against the decision of the respondent dated 4 February 2014 to refuse him leave to remain on human rights grounds and to remove him from the UK. In

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reality the first appellant is the only one with a right of appeal. The other named appellants are his wife and son. They are dependants. They have been issued with notices of immigration decision dated 10 February 2014 to remove them as illegal entrants under Section 10 of the Immigration and Asylum Act 1999. They are only entitled to appeal this decision under Section 82(1) of the 2002 Act after they have left the UK. They have erroneously lodge in-country appeals when they do not have the right to do so. I find in any event that the judge's decision is not affected by this administrative error.

2. The facts of this case are that the first appellant claims to have entered the UK as a visitor on 16 October 2000. He did not go back to India because he saw that it was good here. He thought he could earn money and then go back. He married Nishaben Patel who claims to have entered the UK as a visitor on 13 February 2006, in a religious ceremony on 24 August 2008. On 18 September 2009 their son Krishn Patel was born. On 27 September 2010 the first appellant made an application for leave to remain outside the Immigration Rules on compassionate grounds. On 12 October 2010 this application was refused with no right of appeal. He then applied for a reconsideration of the application on 7 December 2010 which was however rejected. He made a further application on 26 September 2011 for leave to remain outside the Immigration Rules on compassionate grounds. This was rejected on 3 October 2011. On 7 October 2011 he made an application on human rights grounds under Article 8. This was refused with no right of appeal on 1 November 2011. On 8 October 2012 he was informed of his immigration status and liability to be removed from the UK. On 12 October 2012 he requested reconsideration of the human rights Article 8 application under Appendix FM of the Immigration Rules. It was the refusal of this application which led to his appeal which was dismissed by First-tier Tribunal Judge Mayall.

3. Upon hearing oral evidence from the first appellant and his cousin, Jyotiben Patel, the judge was satisfied that the first two appellants are in a permanent relationship and that they intend to live together as husband and wife. He also accepted that the third appellant is their child. The first appellant arrived in the UK in October 2000 and the second appellant in February 2006. Their son was born here. The judge accepted that all three appellants have a close relationship with Jyotiben Patel. However, she does not live with the family. She lives some distance apart. Whilst she, no doubt, played some part in looking after the child, the judge was entirely satisfied that the extent of the relationship was considerably overstated by the witnesses. In particular, for example, in the witness statement the first appellant said that he had lived with his cousin ever since arriving. That was not correct. They have not lived together for some years. The judge was not satisfied that the relationship between the appellants and the cousin goes beyond the normal ones one would expect between adult relatives or between an adult relative and a nephew or similar. He was not satisfied that the relationship between them amounted to family life within the meaning of Article 8. He said there was

no doubt that the family would be removed as a whole. He did not consider that there would be any interference with the family life as a result.

4. With regard to private life, he noted that the first two appellants had been in the UK for a considerable period. The child has spent all of his life here. In that time they must have built up a private life. However it is common ground that they do not meet the private life provisions of the Immigration Rules. They clearly still have considerable ties in India.

5. The judge found that the first two appellants are relatively young. He had no doubt that having spent the majority of their lives in India, and been wholly conversant with the language and culture, they could easily re-adapt to life in India. Their son was at an age when he would readily adapt, the family as a whole having been mixing with the Indian Hindu community in the UK. There was nothing in the evidence to suggest that they would be any worse off than many other Indian families. It was conceded that there are schools available not least because the appellant's relative's children attend such schools. There was no evidence before him to suggest that the standard of education in India was not adequate.

6. The judge found that the first appellant has managed to find employment in the UK despite not being allowed to work legally. There was no reason to suppose that he could not find employment in India.

7. The judge accepted that removal would interfere with their private life. The judge went on to say that when considering Article 8 he must follow the approach set out by the Court of Appeal in Nigeria, **Haleemudeen** and **MM (Lebanon)**. The judge then went on to cite paragraphs 42 to 48 of **Haleemudeen**.

8. The judge then said that he must also apply the provisions of the 2014 Act. He must attach little weight to private life built up at a time when the appellants had no lawful right to remain.

9. The judge said that he must also have regard to the interests of the child as being primary, if not the primary consideration. He must do so in the context set out by the Court of Appeal in **EV (Philippines)** in carrying out the assessment of the best interests of the child on the basis that the facts are as they are in the real world. If the appellants have no right to remain that is the background against which the assessment must be conducted.

10. The judge found that he was wholly unable to detect any compelling or exceptional circumstances in this case. The family will be returned as a unit. They can readily adapt to life in India. In the circumstances he was entirely satisfied that the decisions in this case were entirely proportionate.

11. Permission was granted on the basis that the judge misdirected himself as to the proper basis for assessing the best interests of the child in light of the apparent contradiction between paragraphs 33 and 58 of the judgments in **EV (Philippines) [2014] EWCA Civ 874**. The argument in the grounds was that the best interests of the child are to be determined by reference to the child alone without reference to the immigration history or status of either parent. The judge erred in relying upon the minor appellant being "at an age when he would readily adapt". The grounds submitted that a similar comment was criticised by the former president in **E-A (Article 8 – best interests of the child) Nigeria [2011] UKUT 315 (IAC)** at [28].

12. Mr Slatter submitted that the judge appeared to adopt a **Kugathas** test when stating that he was not satisfied that the relationship between the various parties went beyond the normal ones one would expect. He said this was a misdirection in law as the **Kugathas** question was not whether the relationship went beyond a normal one, but whether there were elements of dependency involving more than the normal emotional ties.

13. I find that even though the judge did not correctly cite the **Kugathas** test, this was not material. On the evidence the appellants could not meet the **Kugathas** test for the reasons given by the judge.

14. The next argument by Mr Slatter was that the judge failed to perform a best interest assessment in relation to the minor appellant. He submitted that the judge's findings in respect of the third appellant overlooked the fact that he was born in the UK and has never lived in India. It was held in **EV (Philippines) EWCA Civ 874** that the best interests of the child are to be determined by reference to the child alone without reference to the immigration history or status of either parent.

15. I find that the judge considered all the evidence in respect of the child. He noted that it was conceded by the appellant's Counsel that thee are schools available in India and there was no evidence before him to suggest that the standard of education was not adequate. I rely on **Zoumbas [2013] UKSC 74** in which the Supreme Court held that there is no irrationality in the conclusion that it was in the best interests of the children to go with their parents to their country of origin. No doubt it would have been possible to have stated that, other things being equal, it was in the best interests of the children that they and their parents stay in the United Kingdom so that they could obtain such benefit as healthcare and education which the decision maker recognised might be of a higher standard than would be available in the Congo. But other things were not equal. They were not British citizens. They had no right to future education and healthcare in this country. They were of a close-knit family with highly educated parents and were of an age when their emotional needs could only be fully met within the immediate family unit. The Supreme Court also went to say that they saw no sustenance in the criticism that the assessment of the children's best interests was flawed

because it assumed that the parents would be removed to the Republic of Congo. In light of **Zoumbas**, and the fact that these appellants including their son, the third appellant, are not British citizens, I find no error of law in the judge's decision.

16. Mr Slatter submitted that the judge misdirected himself with regard to the approach he was required to follow in Article 8. Although the judge cited the case of **Haleemudeen** he failed to explain its relevance to the determination of the appeals. He argued that the appellants did not claim to have accrued any right to remain on the basis of the law prior to the introduction of HC 194. I agree with Ms Weller's submission that the judge cited **Haleemudeen** for what it said in respect of the assessment of proportionality.

17. I found no merit in Mr Slatter's argument that the judge's assertion that he must attach little weight to the private life built up when the appellants had no lawful right to remain, did not reflect the wording of the statute. Section 117B(4) states "Little weight should be given to (a) a private life that is established by a person at a time when the person is in the United Kingdom unlawfully". That is precisely what the judge did. The judge's use of the word "must" instead of "should" does not amount to a misdirection in law.

18. In his grounds Mr Slatter argued that the judge failed to have regard to the delay occasioned by the respondent in this case to remove the appellants and assessing whether there was a pressing social need to their removal from the UK. They had made applications to remain in 2010 and decisions had been made to remove in 2012 which did not attract a right of appeal. It was not until 2014 that reconsideration was given to the appellants' case. The judge recorded that submission at paragraph 37 and yet failed to consider the significance of this when assessing proportionality. Mr. Slatter relied on the decision in **EB (Kosovo) [2008] UKHL 41**.

19. On this issue I agree with Ms Weller's submission that the delay point was not raised by the appellant's Counsel below. In the light of the immigration history identified at paragraph 2 above, I see no discernible delay on the part of the respondent.

20. I find that the judge's decision does not disclose any error of law. The judge's decision dismissing the appellants' appeal shall stand.

Notice of Decision

The appeal is dismissed.

Signed
Upper Tribunal Judge Eshun

Date **20 March 2015**