IAC-FH-AR-V1

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/26912/2014
IA/26933/2014
IA/26935/2014

THE IMMIGRATION ACTS

Heard at Taylor House	**Decision & Reasons Promulgated**
On 17 February 2015	**On 23 February 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

GANNESWAREE NARAYYA
MANISHRAO NARAYYA
NAGESRAO NARAYYA
(ANONYMITY ORDERS NOT MADE)

Respondents

Representation:
For the Appellant: Mr N Bramble, Senior Home Office Presenting Officer
For the Respondents: Ms C Fielden, Counsel, instructed by Raj Law Solicitors

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Majid promulgated on 12 November 2014 allowing each of the linked appeals of

Mrs Narayya, Mr Narayya and their son Master Narayya against decisions of the Secretary of State for the Home Department dated 18 June 2014 to remove them from the United Kingdom.

2. Although before me the Secretary of State is the appellant and the Narayyas are the respondents, for the sake of consistency with the proceedings before the First-tier Tribunal I shall hereafter refer to the Narayyas as the Appellants and the Secretary of State as the Respondent.

Background

3. The Appellants are nationals of Mauritius. The First appellant, Mrs Ganneswaree Narayya was born on 21 July 1970; the Second Appellant, her son, Manishrao Narayya, was born on 4 July 2003; and the Third Appellant, Mr Nagesrao Narayya, the husband of the First Appellant and father of the Second Appellant, was born on 14 November 1965.

4. The Appellants arrived in the United Kingdom on 15 March 2004. At that time in addition to the three named Appellants, two other children of the family also travelled to the United Kingdom. I am told today that of those two children one of them returned to Mauritius approximately five years ago, and the other is present in the United Kingdom awaiting a decision from the Respondent in respect of his own immigration status.

5. Having arrived in the United Kingdom in March 2004, the Third Appellant applied for leave to remain as a student on 12 August 2004 which was granted on 15 October 2004 until 30 November 2005. The papers on file make reference to an application having been made by the First Appellant and her children for further leave to remain as visitors. Be that as it may, when the Third Appellant subsequently applied for further leave to remain as a student in November 2005 the First Appellant and the three children were included in that application as dependants. Leave was granted, and indeed successive leaves were granted until 31 March 2009.

6. On 30 March 2009 an application was made on human rights grounds in the name of the Third Appellant, with his wife and two youngest children included as dependants. This was refused on 23 September 2009. Although the documents before the First-tier Tribunal do not reveal the intervening immigration history, it has become apparent today that in or about that time there was an appeal before the First-tier Tribunal.

7. Mr Bramble has been able to produce from the Respondent's file today documents relating to linked appeals under the references IA/30193/ 30195/ 30196 and 30197/2010, being appeals in respect of the three Appellants before me and one other of the children, heard on 9 November 2010 at Taylor House. Those appeals were dismissed on immigration grounds and on human rights grounds in a decision promulgated on 17 November 2010. An application for permission to appeal to the Upper Tribunal was refused in the first instance by First-tier Tribunal Judge Spencer and in due course by Upper Tribunal Judge Warr on 11 May 2011.

8. Those appeals were not overtly apparent in the documents before the First-tier Tribunal - although there was a reference to the Appellants having become 'appeal rights exhausted' in May 2011, which should have indicated to a reader of the Respondent's bundle the likelihood of earlier appeal proceedings.

9. Notwithstanding the adverse decision in their appeals, the First Appellant made an application for leave to remain with her husband and youngest child as dependants on 11 September 2012. That application was refused on 18 July 2013 but no appealable immigration decision was made at that time.

10. There then followed judicial review proceedings under the reference CO/15751/2013 lodged on 18 October 2013, which resulted in a Consent Order on 7 March 2014 to the effect that the Respondent would give further consideration to the cases and if making an adverse decision would make a decision that attracted a right of appeal. It is in those circumstances that the Respondent reached decisions on the Appellants' cases expressed through a 'reasons for refusal' letter ('RFRL') dated 16 June 2014, and issued Notices of Immigration Decision on 18 June 2014 that the Appellants be removed from the United Kingdom in consequence of the rejection of their application.

11. The Appellants appealed to the IAC. The First-tier Tribunal Judge allowed the appeals for reasons set out in his decision.

12. The Respondent sought permission to appeal which was granted by First-tier Tribunal Judge Astle on 5 January 2015.

Consideration

13. I have no real hesitation in concluding that the decision of the First-tier Tribunal Judge should be set aside for error of law. Indeed Ms Fielden in written submissions prepared for today's hearing states "It is difficult to oppose the Respondent's arguments", and essentially focuses in her written submissions on the merits of the case and the potential relevance of new evidence in the event of a rehearing.

14. In her oral observations today Ms Fielden indicated that she did not have express instructions to concede the issue of error of law, but she declined to advance any submissions resisting the substance of the Respondent's challenge.

15. The First-tier Tribunal Judge errs in the following respects:

    (i) No proper engagement with the facts of the appeals is discernible;

    (ii) There is no reference to or attempt to consider the cases within the framework of the Immigration Rules, which are 'in play', and should

form a starting point for any consideration of the issues relating to human rights;

(iii) Insofar as the Judge has conducted a freestanding Article 8 assessment there is no identification of the public interest considerations;

(iv) The Judge has misdirected himself as to the role of the welfare and best interests of children.

16. It is not necessary for me to expand on the second and third points that I have just identified: they are readily discernible from any reading of the First-tier Tribunal Judge's decision. I merely observe in this content that the concluding sentence of the substance of the determination at paragraph 25 is in these terms: "I am persuaded that the Appellant [sic.] comes within the law and can benefit from the relevant Immigration Rules as amended and the protections of the ECHR". This passage leaves it unclear whether the Judge is allowing the case under the Rules or under the ECHR outwith the Rules. The body of the determination in no way enlightens the reader in this regard.

17. In respect of the apparent failure properly to engage with the facts, I note the following. Although the decision is littered with references to having read the materials, having had regard to the applicable law and it not being necessary to give reasons for every finding of fact "*and waste paper in detailing obvious reasons*" (paragraph 6), such comments do not obviate the Judge from needing to demonstrate an engagement with any controversial issues and explain with clarity the key reasons for reaching a decision. The decision herein is patently lacking in this regard.

18. In a decision of approximately five pages the only readily discernible case specific passages, that is to say passages that address the facts of the particular case, are as follows:

(i) At paragraph 7, when recording the evidence of the First Appellant:

> "She further emphasised that the Second Appellant, her son, has spent all of his life in the UK. In the previous 11 years he has developed his friendships and had his schooling here. His best interests require that he should not be removed to Mauritius which is a totally alien country to him."

(ii) At paragraph 10, the Judge says this in the context of the best interests of the Second Appellant:

> "After perusing the statement of the Appellant dated 24 October 2014 carefully, I can say that the "best interest" of the Second Appellant (the biological son of the Principal Appellant) is paramount in this case and to remove him to Mauritius he should not be separated from his mother. Further, he has spent all of the 11 years of his life in this country and his removal will bring him serious hardships in schooling etc."

(I shall comment further in regard to the reference to paramountcy. Over and above that, it is unclear what the Judge means in the phrase "to remove him to Mauritius he should not be separated from his mother" in circumstances where it is proposed that the Appellants be removed as a family unit.)

(iii) At paragraph 12 of the decision in respect of the submissions:

> "Mr Harris agreed with the Presenting Officer that in this appeal the second Appellant (11 years old boy) is the crucial Appellant in this case; if the boy's appeal is successful then the mother will automatically succeed."

(iv) At paragraph 23 the Judge states:

> "Powerful factors are outlined in respect of this Appellant in paragraph 10 above"
>
> (which I have already quoted above).

(v) At paragraph 24 the Judge states:

> "The rule of law should benefit these Appellants - the Principal Appellant can benefit logically with the lawful consideration of the "best interest" of the second Appellant. I must say that the "father" [sic] of the child can also benefit from his son's interest being supreme."

19. It may be seen that each of those passages really say more or less the same thing, and it is no more than to identify that the Second Appellant has spent a considerable period of time in the United Kingdom. This is far from a proper rehearsal of all relevant facts, and far from a proper engagement with all relevant issues. Whilst the Judge asserts that he has "outlined the evidential elements of the evidence adduced on behalf of the Appellant which are relevant to the fair disposal of this appeal" (paragraph 8), in my judgement it is not evident to the reader that the Judge has done so.

20. In respect of the role of welfare and/or 'best interests', the First-tier Tribunal Judge repeatedly refers to the interests of the Second Appellant as being *paramount* rather than being *a primary consideration*. See, for example, at paragraph 10 (from which I have already quoted above), but also: at paragraph 15, "The "best interest" of the child is paramount in this case"; paragraph 17, "the Supreme Court unanimously held that the best interests of the child had to be considered and given paramount weight as part of the assessment of proportionality under Article 8 ECHR"; and paragraph 24, where in the quotation already given above the Judge refers to the "son's interests being supreme".

21. Whilst the Judge makes appropriate references at paragraphs 18 and 19 of the determination to welfare and best interests, it is not apparent in light of the other references to paramountcy that he has understood or applied the appropriate jurisprudence. This is particularly so given the fact that the

quotation from **ZH (Tanzania) [2011] UKSC 4** reproduced at paragraph 18 is preceded by the assertion at paragraphs 17 that "the Supreme Court unanimously held that the best interests of the child have to be considered and given paramount weight…".

22. In the circumstances I find that the decision of the First-tier Tribunal Judge was significantly and seriously flawed for a material error of law and must be set aside.

23. The decision in the appeal accordingly needs to be remade. It seems to me that both parties, that is to say the Appellants and the Secretary of State, have been denied a fair hearing in respect of the First-tier proceedings which leans heavily in favour of this matter being remitted to the First-tier Tribunal.

24. As Mr Bramble identifies, there is no factual matrix of findings discernible on the face of the determination from which the Tribunal can go forward to re-evaluate the Appellants' case. It is also significant, it seems to me, that it is only today that it has become clear that there were earlier appeal proceedings in 2010; necessarily neither representative had turned their mind to the significance of those proceedings in the context of a proportionality test - whether that is by reference to the concept of reasonableness under paragraph 276ADE in respect of the Second Appellant or in the wider context of a freestanding Article 8 consideration.

25. It also may be the case that further consideration will need to be given to the position of the other two children (now adults), one of whom awaits a decision from the Respondent and one of whom has returned to Mauritius, in so far as it relates to any issues of reasonableness and/or proportionality.

26. In all of those circumstances in my judgement this case should go back for reconsideration with all issues at large before the First-tier Tribunal.

27. The Appellants in particular should be aware that they may need to address the issue of reasonableness and/or proportionality in light of their electing to remain in the United Kingdom notwithstanding the dismissal of the earlier appeals referred to in the body of this decision.

Notice of Decision

28. The decision of the First-tier Tribunal contained material errors of law and is set aside.

29. The decision in the linked appeals is to be remade before the First-tier Tribunal before any judge other than First-tier Tribunal Judge Majid with all issues at large.

The above represents a corrected transcript of an ex-tempore decision given at the hearing on 17 February 2015.

Signed Date: **21 February 2015**

Deputy Upper Tribunal Judge I A Lewis