st

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/29711/2014
IA/29710/2014

THE IMMIGRATION ACTS

At Field House
on 18th September 2015

Decision and Reasons Promulgated
on 3rd December 2015

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL FARRELLY

Between

DKT
DT
(ANONYMITY DIRECTION MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms M.Dogran, Counsel, instructed by Robinson Ravini and Co, Solicitors.
For the Respondent: Mr.T.Wilding, Home Office Presenting Officer.

DECISION AND REASONS

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original Appellant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.

Introduction

1. Proceedings before the First tier Tribunal were not anonymised. I am influenced by the fact that there is a child affected by this decision and at this stage have made an anonymity order.

2. Although it is the respondent who is appealing, for convenience I will continue to refer to the parties as they were in the First-tier Tribunal.

3. The first appellant is a national of India. She entered the United Kingdom in October 2005 along with her husband on a visit visa valid until March 2006. They overstayed. She gave birth to the second appellant, their son, in May 2007.

4. On 8 June 2012, solicitors acting for the appellant's applied for leave to remain. It was stated that shortly after the birth her husband deserted them.

5. This was refused on 12 August 2013. Judicial review proceedings were then brought and resolved when the respondent agreed to reconsider the matter. A further decision was issued on 7 July 2014 maintaining the refusal and giving appeal rights.

6. The appellant's appeal was heard by First-tier Judge Abebrese at Taylor House on 9 March 2015. In a decision promulgated on 26 March 2015 the appeals were allowed on the basis of Article 8.

The First tier decision.

7. The judge found the first appellant did not meet the requirements of appendix FM as a parent and that the appellants did not meet the requirements of paragraph 276 ADE. At paragraph 15 the judge concluded it was appropriate to carry out a freestanding Article 8 assessment. This was on the basis the decision did not fully consider the first appellant's circumstances and her responsibilities towards the second appellant as a sole parent and the second appellant's medical conditions. Reference was made to the decisions of Nagre and MF (Nigeria).

8. The judge found family and private life established and referred to the length of time the appellants had been in this country. Reference was made to the medical treatment the second appellant had been receiving. At paragraph 19 the judge noted his learning difficulties and referred to a report from a psychologist. This mentioned severe receptive and expressive language delay and other difficulties which impacted on his ability to progress at school. At paragraph 19 reference was made of section 117 (B), with the judge concluding it would not be in the public interest to remove the second appellant.

9. At paragraph 21 and 22 the judge states:

> "21. ... The tribunal does agree that direct evidence has not been brought forward by either the first or second appellant in relation to facilities in India

> which would be suitable, however this point has not been dealt with by the respondents in their decision under section 55 of the Borders Act 2009 in considering the best interests of the child. It is noted by the Tribunal that the respondents do discuss this matter under Article 3 of the European Convention on Human Rights but their decision is completely silent on the issue of section 55 and the need to take into consideration the best interests of the child. The Tribunal takes the view therefore that the reasoning and decision of the respondents is defective in law and is not in accordance with the approach that has been adopted in cases such as JO and Others (section 55) Nigeria [2014] UKUT 00517 (IAC). It is made clear in JO that it is an imperative duty on the part of the respondents in such cases to consider the section 55 duties. The Tribunal has also further taken into consideration the cases such as Zoumbas –v- Secretary of State for the Home Department [2013] UK SC 74.
>
> 22. The Tribunal therefore takes the view that for all of the above reasons it would not be in the public interest when one considers the case law, the statutory obligations of the Secretary of State under section 55 and also the public interest under Section 117 B of the Immigration Act 2014."

10. The judge concluded the decision to remove would not be proportionate. In support of this the judge referred to the psychologist report and the need for special requirements to be in place, the statutory duties in relation to the best interests of the child and the fact that child has never been to India and by then had resided in the United Kingdom for more than seven years. Finally, the judge stated that the child should not be penalised for his mother's actions in overstaying.

Permission to appeal

11. The application states that the judge should not have considered Article 8 when the rules were not met. Reference was made to Singh –v- SSHD [2015] EWCA Civ 74 where the court said there was no need to conduct an Article 8 examination outside the rules where, in the circumstances of the particular case, all the issues were addressed under the rules. It was also argued that in the proportionality assessment a relevant consideration should have been the failure to meet the rules.

12. The judge's reference to section 117B was also challenged on the basis as an overstayer little weight should be placed upon the first appellant's private life in the circumstance. There was no consideration of her ability to speak English or whether the appellants presented a burden upon the State.

13. It was also argued that at paragraph 21 of the decision the judge incorrectly placed the burden on the respondent to show what facilities would be available for the second appellant in India. The judge's comment that section 55 had not been considered was incorrect because this occurred when appendix FM was dealt with. In any event, if the judge felt the decision was defective the matter should have been remitted to the respondent rather than the appeal being allowed outright.

14. Finally, it was submitted that the judge failed to have regard to the fact that neither appellant had the right to be in the United Kingdom or to benefit from the facilities here. Reference was made to paragraph 60-62 of EV (Philippines) and others -v- SSHD [2014] EWCA Civ 874.

15. Permission to appeal was granted on the basis the grounds advanced were arguable, particularly in relation to how the judge dealt with section 117 B and the absence of consideration of what facilities were available in India for the second appellant .

The Upper Tribunal

16. Mr Wilding, Presenting Officer argued that the judge should not have gone on to consider a freestanding Article 8 claim and referred to paragraph 64 of Singh -v- SSHD [2015] EWCA 74. He also argued that the consideration section 117B was inadequate bearing in mind the first appellant had been here illegally since 2006. He also submitted it was incorrect to place the burden upon the respondent to show what facilities existed in India for the second appellant.

17. Ms Dogra referred me to her skeleton argument in which she refers to the decision of Dube (s117A-D) [2015] UKUT 90 which sets out that it is not an error of law to fail to refer to the considerations in section 117 if the relevant test has been applied. She did acknowledge that the judge failed to refer to the English language requirement and that an interpreter was used at the hearing. Whilst there was expenditure by the State on the second appellant there were serious medical issues.

18. She cites the decision of GAO and others (section 55 duty) Nigeria [2014] UKUT 00517 which refers to the duty on a decision maker to be properly informed of the position of a child affected by the decision. She submitted that it was for the respondent to consider what facilities were available in India. A failure to do so does not place a burden on the appellant. She submitted that in the decision the respondent failed to properly consider the second appellant's interests.

Consideration

Freestanding Article 8

19. I do not find it an error of law for First-tier Judge Abebrese to conduct a freestanding Article 8 assessment. It was accepted on behalf of the appellants that the rules were not met. In Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 640 (IAC) the Upper Tribunal said only if there are arguably good grounds for granting leave to remain outside the rules is it necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under them: R (on the application of) Nagre v Secretary of State for the Home Department [2013] EWHC 720 (Admin).There can be no presumption that the rules will be conclusive of the Article 8 assessment or that a fact-

sensitive inquiry is normally not needed. The second appellant's situation justified consideration outside the rules because of his educational and medical needs.

The second appellant

20. Section 55 of the Borders, Citizenship and Immigration Act 2009 requires the decision maker to be properly informed of the position of a child affected by the decision. There is an obligation to promote the best interests of the child, irrespective of their nationality.

21. In tandem with this it is the Article 8 assessment. The welfare of a child is a primary but not a paramount consideration. The longer a child is in the United Kingdom, then the more unreasonable it is to expect them to leave. The longer they are here the more they can put down roots and integrate. Seven years has historically been considered a milestone. It is believed the focus of young children until around the age of four or thereabouts is to their parents rather than their surroundings. Furthermore, seven years is only a guide and an assessment of the individual circumstances must take place. A decision maker is required to consider the family as a whole. Any health issues have to be taken into account. A relevant consideration is whether the family are being expected to leave as a unit and whether there are wider members of the family settled. The ties with the home country of the parents and the children have to be considered. What support, if any, will be available to them for resettlement is relevant. Any special features have to be factored into the evaluation. Exceptional circumstances means more than the unusual or the unique but is aimed at an outcome which will be particularly harsh.

22. An important consideration is whether the children or one of the parents is British. ZH Tanzania [2011] UKSC 4 emphasised the intrinsic importance of British citizenship.

23. In JO and Others (Section 55 duty) Nigeria [2014] UKUT 00517 (IAC) the Tribunal said the decision maker must conduct a careful examination of all relevant information and factors. At para 11 the Upper Tribunal President said :

> "I consider that, properly analysed, there are two guiding principles, each rooted in duty. The first is that the decision maker must be properly informed. The second is that, thus equipped, the decision maker must conduct a careful examination of all relevant information and factors."

At para 14 the President said:

> "One of the more intriguing questions thrown up by section 55 is whether it has a procedural dimension in certain cases. Furthermore, does it impose a proactive duty of enquiry on the Secretary of State's officials in some cases?"

24. This was not answered in the decision but in another Presidential decision, MK (section 55 – Tribunal options) Sierra Leone [2015] UKUT 223 (IAC), it

was held that where it is contended that either of the duties enshrined in section 55 of the Borders, Citizenship and Immigration Act 2009 has been breached, the onus rests on the appellant and the civil standard of the balance of probabilities applies. There is no onus on the Secretary of State. The main principle to be distilled from SS (Nigeria) is that in cases where the Tribunal is assessing the best interests of an affected child it should normally do so on the basis of the available evidence without more. The decision strongly discourages the Tribunal from conducting an inquisitorial exercise.

25. The respondent's letter of the 7 July 2014 gives reasons for the decision. At page 5 it sets out the section 55 consideration. It was noted the second appellant has been in the United Kingdom all of his life and been here more than seven years. However, if returned to India the respondent believed his mother could support him until he became used to living there. There is reference to objective information about India having a functioning educational system and a lack of evidence from the appellant that she could not maintain a child or provide for him. Reference is made at page 6 to the appellant's health issues and the decision-maker refers to the Country of Origin Information Response on the availability of medication for epilepsy as well as facilities for children with speech and communication problems.

26. First-tier Judge Abebrese did materially error in law at paragraph 21 of the decision in concluding the respondent had not considered section 55. Furthermore, the judge appears to be suggesting that the onus is on the respondent to investigate what facilities are available in India. However, the onus is upon the appellant to show the respondent has not discharged her section 55 obligations. The refusal letter shows consideration was given to the welfare of the second appellant. It was open to the appellant's representatives to provide evidence to indicate facilities would be inadequate. I do not find the respondent's decision was defective. If the judge had concerns the proper course would have been remittal to the Secretary of State for reconsideration.

Section 117.

27. I find the judge materially erred in law in the consideration of section 117.Consideration by judges of Article 8 outside the rules must be informed by the importance the Secretary of State attaches to the public interest. Section 117B makes public interest considerations applicable to all cases and states that it is in the public interest and the economic well-being of the United Kingdom that persons who seek to remain are able to speak English. This is because they are less likely to be a burden on the State and are better able to integrate into society. It is also in the public interest those who seek to remain in the United Kingdom are financially independent. Little weight should be given to a private life established by a person at a time when the person is in the United Kingdom unlawfully. The judge makes no reference to the first appellant's command of English, or the fact an interpreter was used at the hearing. She claims to have

been working as a carer but she must have been working illegally given her lack of status.

Conclusion.

28. It is my conclusion First-tier Judge Abebrese failed to demonstrate a proper and balanced assessment of all the relevant factors had taken place. I find the judge erred in law in the consideration of section 55 and has not demonstrated adequate consideration of section 117B. For these reasons the decision cannot stand. Consequently, the matter should be remitted to the First-tier tribunal for a de novo hearing.

Decision.

29. The decision of the First-tier Tribunal allowing the appeals of the appellants under Article 8 contains material errors of law and cannot stand. The decision is set aside and the appeals are to be reheard de novo in the First-tier Tribunal.

Deputy Upper Tribunal Judge Farrelly

st

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/29711/2014
IA/29710/2014

THE IMMIGRATION ACTS

At Field House
on 18th September 2015

Decision and Reasons Promulgated
on 3rd December 2015

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL FARRELLY

Between

DKT
DT
(ANONYMITY DIRECTION MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Directions

1. Relist for a *de novo* anonymised hearing in the First-tier Tribunal, excluding Judge Abebrese.
2. The appellant's representatives are to advise if an interpreter will be required.
3. The appellant's representative should prepare a skeleton argument setting out the specific features in line with the current case law which they say justify allowing the appeals on the basis of the immigration rules or Article 8. Bundles for hearing are to be prepared by the parties and exchanged in advance of the listed hearing.

Deputy Upper Tribunal Judge Farrelly