Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/33379/2014
IA/33384/2014

THE IMMIGRATION ACTS

Heard at : IAC Stoke
On : 6 July 2015

Decision and Reasons Promulgated
On 9 July 2015

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

BILKEES RASHID SHAH
SYED HIBA ABID ANDRABI

Respondents

Representation:

For the Appellant: Mr A McVeety, Senior Home Office Presenting Officer
For the Respondent: Ms S Lee, instructed by Salam & Co Solicitors

DETERMINATION AND REASONS

1. This is an appeal by the Secretary of State for the Home Department against the decision of the First-tier Tribunal allowing Ms Shah's appeal, and that of her daughter, against the decision to refuse to vary their leave and to remove them from the United Kingdom.

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2. For the purposes of this decision, I shall hereinafter refer to the Secretary of State as the respondent and Ms Shah and her daughter as the appellants, reflecting their positions as they were in the appeal before the First-tier Tribunal.

3. The appellants are citizens of India born on 24 December 1976 and 7 July 1999 respectively, and are mother and daughter. They arrived in the United Kingdom on 18 February 2014 with leave to enter as visitors until 4 August 2014. Prior to the expiry of their leave, on 5 June 2014, they applied for leave to remain on the basis of their family and private life with the first appellant's husband and the second appellant's father, Syed Abid Ali Andrabi, the sponsor, who had been granted discretionary leave to remain in the United Kingdom until May 2016 on the basis of exercising access rights to his other daughter from a different relationship.

4. The history of the first appellant's relationship with the sponsor is of relevance and I therefore set it out at this point. The first appellant and her husband, the sponsor, were married in an arranged marriage in August 1998 and had their daughter, the second appellant, in July 1999. Owing to tensions between the families of the first appellant and her husband, arising as a result of the first appellant's family being very conservative whereas her husband's were not, the couple separated in 2007 and divorced in September 2008. The sponsor moved to South Africa and married a South African national and they moved together to the United Kingdom and had a daughter, Safiya, born in May 2009. That relationship broke down and the couple divorced in January 2010. The sponsor was able to remain in the United Kingdom with discretionary leave on the basis of his relationship with his daughter Safiya who had indefinite leave to remain in the UK. The appellants in the meantime were living with the first appellant's parents in Kashmir but were finding it difficult because of their conservative attitude. The first appellant then made efforts to reconcile with the sponsor. The appellants applied for visit visas in 2012 which were refused, but following an appeal were later granted in February 2014. Whilst waiting for the appeal the first appellant and the sponsor re-married in secret, in Kashmir, on 10 July 2013 and the sponsor returned to the United Kingdom. The appellants travelled to the United Kingdom in February 2014 as visitors intending to return to India, but decided to stay and they then made their applications for leave to remain.

5. The appellants' applications were refused by the respondent on 6 August 2014 on the basis that they could not meet the requirements of the Immigration Rules under Appendix FM or paragraph 276ADE and that there were no exceptional circumstances justifying a grant of leave outside the Rules.

6. The appellants appealed against that decision and their appeal came before First-tier Tribunal Judge Gurung-Thapa on 29 October 2014, where the sole issue was Article 8 outside the Immigration Rules, it having been accepted that they could not meet the requirements of the Rules. The first appellant, in her evidence, said that she could not return to India and make a spouse application from there, as her parents did not recognise her marriage and in any case she was having difficulties conceiving due to medical problems and needed to be with her husband. Her husband used to visit India every year after their divorce, to see his daughter and in 2009 he made an unsuccessful application for his daughter to join him in the United Kingdom. The judge also heard from the second

appellant and the sponsor, who gave evidence that his two daughters got on very well together and that Safiya would come to stay with them twice a week. The judge found that family life existed between the sponsor and the appellants and, following the approach in R (Razgar) v SSHD (2004) UKHL 27, concluded that the appellants' removal would be disproportionate and in breach of Article 8. She accordingly allowed the appeals.

7. Permission to appeal to the Upper Tribunal was sought by the respondent on the grounds that the judge had failed to explain what compelling factors had led her to allow the appeal and had failed to explain what contrary factors had been weighed in the balancing exercise.

8. Permission to appeal was granted on 7 January 2015.

Appeal Hearing

9. At the hearing Mr McVeety submitted that there was nothing in the judge's decision to show that she had considered any countervailing factors or that she had given any thought to the more recent case law regarding to the best interests of the children since ZH Tanzania (FC) v SSHD [2100] UKSC 4. There was a complete failure to give adequate reasons for allowing the appeal.

10. Ms Lee submitted that the grounds of appeal were mere disagreement and that the judge had made detailed findings and considered all relevant factors. The findings that she made were open to her. There was no error of law.

11. Mr McVeety reiterated his previous submissions in his response.

Consideration and Findings

Error of Law

12. I find myself in agreement with Mr McVeety that there is a lack of adequate reasoning by the judge in reaching the conclusion that she did and I do not agree that the grounds of appeal simply demonstrate a disagreement with her decision.

13. Reading the decision as a whole it seems to me that, whilst the judge stated at paragraph 44 that the best interests of the child did not always determine the case, that is precisely what occurred in this case and that appears to have been the judge's sole reason for allowing the appeals.

14. As regards the finding itself that the best interests of the second appellant were to remain in the United Kingdom, Ms Lee pointed out that that finding had not been challenged in the grounds. That does appear to be the case, although I agree with Mr McVeety that the reasoning behind the judge's conclusion does not take account of recent case law and shows a failure to consider how the burden of proof had been met by the appellants on the evidence available, in that respect, pursuant to the guidance in MK (section 55 – Tribunal options) Sierra Leone [2015] UKUT 00223. There was no regard by the judge to the factors referred to in EV (Philippines) & Ors v Secretary of State for the Home Department [2014] EWCA Civ 874 in assessing the best interests of a child. That is

particularly relevant in this case in that the second appellant had lived in the United Kingdom for only eight months at the time of the appeal hearing, had only known her half-sister for that short period and had not lived with her father for 7 years, whilst she had spent 15 years of her life in India and was attending school there and presumably had developed close friendships there, albeit that she did not like living with her grandparents.

15. Having, in any event, found that it was in the best interests of the second appellant to live with both parents in the United Kingdom the judge plainly failed to consider any countervailing factors in conducting the Article 8 proportionality balancing exercise and failed to explain what compelling circumstances there were to justify a grant of leave outside the Rules. That was particularly relevant in light of the above considerations and in light of the following observations of the Court of Appeal in EV (Philippines):

> "34. In determining whether or not, in a case such as the present, the need for immigration control outweighs the best interests of the children, it is necessary to determine the relative strength of the factors which make it in their best interests to remain here; and also to take account of any factors that point the other way.
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> 35. A decision as to what is in the best interests of children will depend on a number of factors such as (a) their age; (b) the length of time that they have been here; (c) how long they have been in education; (c) what stage their education has reached; (d) to what extent they have become distanced from the country to which it is proposed that they return; (e) how renewable their connection with it may be; (f) to what extent they will have linguistic, medical or other difficulties in adapting to life in that country; and (g) the extent to which the course proposed will interfere with their family life or their rights (if they have any) as British citizens.
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> 36. In a sense the tribunal is concerned with how emphatic an answer falls to be given to the question: is it in the best interests of the child to remain? The longer the child has been here, the more advanced (or critical) the stage of his education, the looser his ties with the country in question, and the more deleterious the consequences of his return, the greater the weight that falls into one side of the scales. If it is overwhelmingly in the child's best interests that he should not return, the need to maintain immigration control may well not tip the balance. By contrast if it is in the child's best interests to remain, but only on balance (with some factors pointing the other way), the result may be the opposite.
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> 37. In the balance on the other side there falls to be taken into account the strong weight to be given to the need to maintain immigration control in pursuit of the economic well-being of the country and the fact that, *ex hypothesi*, the applicants have no entitlement to remain. The immigration history of the parents may also be relevant e.g. if they are overstayers, or have acted deceitfully."

16. The judge, at paragraph 40, stated that she had regard to Section 117B of the Nationality, Immigration and Asylum Act 2002 and at paragraphs 40 to 42 considered factors which she did not accept as compelling or in themselves sufficient to outweigh the public interest. At paragraphs 43 to 45 she then concluded, as already discussed, that the best interests of the child were such that the appellants' removal was disproportionate. What she failed to do, however, was to demonstrate that she had placed in the balance and addressed the various counter factors weighing against the appellants, such as the short period of time that they had been in the United Kingdom, the fact that they had lived apart from the sponsor for 7 years, the fact that they had come here only as visitors and the

fact that the sponsor's status was only temporary and, as considered in AM (S 117B) Malawi [2015] UKUT 0260, precarious. Neither was there any consideration of whether or not it would be unreasonable for the appellants to return to India and continue their family life with the sponsor through visits, as had been the case previously, or for the sponsor to return with them. It is also significant that the judge considered as a positive factor that the appellants were both financially independent in that they were being maintained by the sponsor. However, as Mr McVeety pointed out, the sponsor was not able to maintain the appellants in accordance with the financial requirements of the Immigration Rules as his income fell below the required level.

17. For all those reasons I agree with the respondent that the judge's decision contains errors of law and has to be set aside. Both parties agreed that the decision could simply be re-made on the evidence available without a further hearing, since there was no challenge to the facts.

Re-making the Decision

18. For the reasons given above I find that the appeals have to be dismissed. Although the second appellant has stated that she wishes to remain in the UK with her father and half-sister and does not like living with her grandparents in India, the evidence falls well short of demonstrating that it is in her best interests to remain in the United Kingdom, considering the limited amount of time spent in the United Kingdom with her father and half-sister and the ties that she has established in India. However, even accepting that her best interests do lie in remaining here with both parents and that her best interests are a primary consideration, there are various significant factors weighing against the appellants, as set out above.

19. Section 117B(1) of the 2002 Act states that the maintenance of effective immigration controls is in the public interest. The appellants cannot meet the requirements of the Immigration Rules. The sponsor is not able to maintain them to the level required under the Rules and they cannot therefore be considered as being financially independent. There is no evidence to show that it would be unreasonable for the appellants to return to India and conduct their family life with the sponsor through regular visits, as occurred previously. It is, alternatively, open to the sponsor to return to India with them and maintain his family life with Safiya through visits to the United Kingdom. Any fertility treatment the couple wish to have can be undertaken in India. The sponsor is not settled here but only has limited leave. If and when he becomes settled here, the appellants can then apply to join him. The appellants, if not able to live with the first appellant's parents, are able to stay temporarily with the sponsor's family and there is no reason why they cannot live independently thereafter. The first appellant has qualifications in India and was in long-term employment prior to coming to the United Kingdom and there is no reason why she could not resume that employment or find a new job on return and support herself and her daughter with the sponsor's assistance. The second appellant could return to her school and resume her education there.

20. In all the circumstances I find that there are no compelling circumstances justifying a grant of leave outside the Immigration Rule. I do not accept that the appellants' removal to

India would be disproportionate and I find that their removal to India would not be in breach of Article 8.

21. The appeals are therefore dismissed on all grounds.

DECISION

22. The making of the decision of the First-tier Tribunal involved an error on a point of law. The Secretary of State's appeal is accordingly allowed and the decision of the First-tier Tribunal is set aside. I re-make the decision by dismissing Ms Shah's appeal and that of her daughter.

Signed
Upper Tribunal Judge Kebede