



**Upper Tribunal  
(Immigration and Asylum Chamber)**

**Appeal Number: IA/40267/2013  
IA/40283/2013  
IA/40273/2013**

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 14 January 2014**

**Decision Promulgated  
On 30 January 2015**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE BIRRELL**

**Between**

**KARIMBHAI RAHIM MOMIN  
ASMITA KARIMBHAI MOMIN  
IHAD MOMIN  
(ANONYMITY DIRECTIONS NOT MADE)**

Appellants

**And**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr G Davison counsel instructed by AKL Solicitors

For the Respondent: Mr P Duffy Senior Home Office Presenting Officer

**DECISION AND REASONS**

**Introduction**

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this

Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. This is an appeal by the Appellants against the decision of First-tier Tribunal Judge Boyd promulgated on 1 October 2014 which dismissed the Appellants' appeals on all grounds.

#### Background

3. The first two Appellants are a husband and wife born on 23 January 1976 and 1 June 1979 and the third Appellant is their child born on 16 June 2009 and they are all nationals of India.
4. On 2 May 2013 the Appellants applied for leave to remain in the United Kingdom outside of the Immigration Rules under Article 8 ECHR.
5. On 1 October 2013 the Secretary of State refused the Appellants' applications and made directions for the Appellants removal. The refusal decision was made by reference to the Immigration Rules which address Article 8 claims and also considered whether there were any exceptional circumstances in the Appellants case such that the refusal was disproportionate. The letter set out the reasons why the Appellants did not meet the requirements of Appendix FM and paragraph 276ADE and also considered the third Appellants medical condition but found in essence that there was treatment available for his condition in India and his medical circumstances did not warrant a further grant of leave outside the Rules.

#### The Judge's Decision

6. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Boyd ("the Judge") dismissed the appeal against the Respondent's decision. The Appellants conceded that they could not meet the requirements of the Rules and that the appeal was pursued on the basis of 'Article 8 outside the Rules only and that claim arose out of the second Appellant's ill health only. Discretionary leave had previously been issued and they were looking for another grant of Discretionary leave.'
7. The Judge found that the third Appellant had a heart condition which had required two episodes of cardiac surgery in March 2013 and December 2013. He found that leave had previously been granted to allow for the surgery and then to allow a recovery period and he found that those grants were based on medical evidence stating that the third Appellant was unfit to travel either at the time of the

first surgery in March 2013 or at the time of the second surgery in December 2013. While the Judge heard evidence from the first Appellant to suggest that there had been no improvement in his sons condition the Judge found that this was not supported by the medical evidence. He found that before him there was 'no real evidence' as to the extent of the December 2013 surgery and what the result was. He found that that the most recent letter from the hospital dated 19 August 2014 from Dr Slavik no longer stated that he was unfit to travel and he noted that his school report confirmed he was a child who hopped, skipped and ran. The judge found on the basis of the evidence before him the operations had been successful and no further operation was anticipated and that there was adequate treatment available in India and there was no evidence to suggest that the type of medication he was required to take was unavailable in India. He therefore dismissed the appeal both under the Rules and Article 8.

8. Grounds of appeal were lodged and on 2 December 2014 First-tier Tribunal Judge Levin gave permission to appeal stating that given the child Appellant's medical condition it was arguable that the Judge failed to consider the proportionality of the Respondent's decisions on both private life and family life grounds and in so doing to have sufficient regard to the best interests of the child under s 55 of the Borders Citizenship and Immigration Act 2009.

9. At the hearing I heard submissions from Mr Davison on behalf of the Appellant that :

(a) He accepted that between March – June 2013 the Appellant had been granted discretionary leave as a result of the child Appellant's ill health. The letters in the Respondent's bundle stated that the Appellant was unfit to fly and required further surgery which he had in December 2013.

(b) The Judge had focused on the operation and its success and had failed to look forward.

10. On behalf of the Respondent Mr Duffy submitted that :

(a) The findings made by the Judge were open to him on the basis of the evidence before him.

- (b) The decision was solely concerned with the child's health, which was the basis of which the case was put. Therefore the Judge took into account the best interests of the child and the decision to remove them was proportionate.
- (c) The previous grants of leave had been on the basis that the child was not fit to fly. There was now evidence that he was on the road to recovery and was able to return and receive treatment in India.
- (d) Adequate reasons for the decision were given.
- (e) The Judge made a finding that there was adequate treatment in India

### **Finding on Material Error**

11. Having heard those submissions and read the Grounds of Appeal and the Rule 24 Notice I reached the conclusion that the Tribunal made no material errors of law.
12. The first ground argued had been that the Judge failed to apply section 117B of the Nationality Immigration and Asylum Act 2014. This ground was misconceived and was not one that Mr Davison sought to pursue. The Judge made clear in paragraph 11 of the determination that in so far as it was relevant to the case before him he took those provisions into account.
13. The second ground suggests that the Judge failed to consider the witness statements and medical evidence before him and give adequate reasons for his decision. I am satisfied that the Judge took into account all of the relevant evidence. The Judge set out in careful detail at paragraphs 8-11 the oral evidence of the First Appellant that supplemented his witness statement. At paragraphs 12 -15 the Judge set out a detailed, accurate and careful analysis of the medical evidence making a number of references to documents within the Appellants bundle. Mr Davison when asked was unable to identify any specific piece of evidence, documentary or otherwise, that the Judge had failed to take account in reaching his decision. I am therefore satisfied that this is a challenge to the weight that the Judge gave to the various pieces of evidence and that this was a matter for him unless irrationality or perversity is being alleged which Mr

Davison quite properly accepted was not the case as such an argument would have no merit.

14. The third ground suggests that the Judge's assessment of whether there were exceptional circumstances by reference to the child Appellants' ill health failed to take into account the Immigration Directorates Instructions on Exceptional Circumstances. I am satisfied that this case was put to the Judge on the basis only of the child's ill health and the entire decision was focused on that issue.
15. I am satisfied that in determining the outcome of the case the Judge properly directed himself in paragraph 11 as to the law including a recognition that this case would involve an assessment of Article 8 outside the Rules as it was conceded that the Appellants could not meet the requirements of the Rules and that his decision was also required to take into account the best interests of the child. The careful focus of the child's health makes it clear that this was in the forefront of the Judge's assessment under Article 8.
16. I am satisfied that it was open to the Judge on the basis of the medical evidence before him to find that the previous grants of Discretionary Leave had been underpinned by medical evidence that he was unfit to fly as this was specifically stated in the medical evidence. This leave as a matter of fact allowed him to have the two operations that he required.
17. The latest medical evidence that was before the Judge was dated 19 August 2014 and was found at page 49 of the Appellants' bundle made no suggestion that he was unfit to fly or indeed required further surgery. There was also evidence before the Judge that the child Appellant was demonstrating improved strength at school by skipping, running and hopping. The Judge referred to this evidence at paragraphs 13- 14 and indeed to an earlier letter from the GP at page 42 which confirmed that the child Appellant's medical condition, while requiring medication for the residual findings of the surgery, had improved. I am satisfied that on the basis of the evidence before him and in the absence of any medical evidence to the contrary the Judge was entitled to conclude that the third Appellant was fit to travel.

18. The Judge then assessed whether there was medication and follow up available in India as was suggested in the refusal letter by reference to Country Information. The Judge properly recognised that caselaw requires not equivalence of treatment but adequacy and availability of treatment. The Appellant's provided no evidence as to available treatment and appear to have relied merely on Dr Slaviks comment in the letter at page 49 that he was 'not certain' that such treatment was available in India. By contrast the Respondent provided evidence in Annex B of their bundle that the Judge referred to in paragraph 16 of his decision suggesting that such treatment was indeed available.

19. I am satisfied that it was therefore open to the Judge to conclude that in the circumstances the basis for the grant of discretionary leave had changed and there was, in the light of the improvement in the child's health, the lack of contra indications to travel and the availability of treatment in India nothing to suggest that returning to India with his family was anything other than in the child's best interests.

20. I was therefore satisfied that the Judge's determination when read as a whole set out findings that were sustainable and sufficiently detailed and based on cogent reasoning and the decision should stand.

## **CONCLUSION**

**21. I therefore found that no errors of law have been established and that the Judge's determination should stand.**

## **DECISION**

**22. The appeal is dismissed.**

Signed

Date 29.1.2014

Deputy Upper Tribunal Judge Birrell