Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/48951/2014
IA/49231/2014
IA/49239/2014
& IA/49248/2014

THE IMMIGRATION ACTS

Heard at Centre City Tower, Birmingham	**Determination Promulgated**
On 24 September 2015	**On 30 October 2015**

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL ROBERTSON

Between

Mr M N M K (A1)
Mrs B F J (A2)
Miss W M K (A3) &
Master M M K (A4)
(ANONYMITY DIRECTION MADE)

Appellants

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S Chelvan, Counsel, instructed by One Immigration (Leicester)
For the Respondent: Mr N Smart, Senior Presenting Officer.

DETERMINATION AND REASONS

Immigration History

1. A1 is the husband of A2 and A3 and A4 are their children. They are all citizens of Mauritius. A1 and A2 came to the UK in 2002. Their leave expired in 2008. A1 and A2 were born in the UK on 17 July 2005 and 6 February 2008 respectively. The Appellants applied for leave to remain in the UK on 7 July 2012 on human rights grounds and their applications were refused on 31 July 2013. The Respondent then reconsidered, and maintained the refusal of their applications, the reasons for which are contained in a letter, dated 19 November 2014 (the RL).

2. The Appellants appealed and their appeals were heard and dismissed by First-tier Tribunal Judge Chapman (the Judge) in a decision dated 17 March 2015. The Appellants applied for permission to appeal on the basis that:

    a. The Judge's findings in relation to the appeal on the grounds that the decision was not in accordance with the law were flawed partly due to inconsistencies within the decision and partly due to the failure by the Judge to consider and apply the guidance in **JO and Others (section 55 duty) Nigeria [2014] UKUT 517 (IAC)**;

    b. The Judge accepted assertions made in the RL by the Respondent without having sight of the background evidence relied on by the Respondent in support of her assertions;

    c. The Judge conflated the assessment of the Appellants' claims under the Immigration Rules with the Article 8 assessment rather than considering the Appellants' appeals under the Immigration Rules and then under Article 8, which resulted in the failure by the Judge to recognise the different positions of A3 and A4 under the Rules, and to the provisions of s 117B being imported into the assessment under the immigration Rules; and

    d. The Judge made findings of fact that were not open to him at paras [45 – 50] and failed to take into account, in his Article 8 assessment, that A3 would be in a position to register as a British national four months from the date of hearing and did not consider the explanatory memorandum to the Statement of Changes in Immigration Rules 13 June 2013, which provided decision makers with guidance on how applications from the parents of British citizens and other children who had been in the UK for a continuous period of 7 years should be dealt with.

3. Permission was granted on the basis that the grounds raised arguable errors of law in the approach to the child Appellants.

4. Although there was a Rule 24 response from the Respondent, this did not deal substantively with the grounds of application because the drafter of the grounds had neither the file nor the decision before him.

5. At the hearing, Mr Chelvan provided copies of the fax sent to the Tribunal but not received by me. This was additional evidence provided under paragraph 15 (2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008, which related to an application by A3 to register as a British citizen. However, there was no need to admit this evidence; it was evidence that could not have been before the First-tier Tribunal because A3 was not at that point entitled to apply for registration as a British citizen. The Judge could only consider the facts as they were at the date of decision and he accepted that A3 would be entitled to such registration in the future at [34]. The additional evidence did not therefore assist in establishing whether or not the Judge materially erred in law.

6. During the hearing, I heard submissions from Mr Chelvan and Mr Smart to which I will refer where necessary in the context of my decision. Following submissions, I reserved my decision.

Submissions, analysis and decision

7. As to the claim of failure by the Judge to apply **JO**, this ground was not substantiated during submissions. The Judge found that the decision was in accordance with the law. Mr Chelvan submitted that the Judge had quite clearly stated at [28] "I reject the submission that the best interest of the third and fourth appellants were properly considered by the Respondent when making the decision in this matter", and that the Respondent had not applied for a slip rule amendment and could not now submit that this was merely a typographical error. However, it is quite clear from a full reading of [28] that all that has been omitted from the first line of [28] is the word 'not' after 'were', particularly when the Judge concludes [28] with "Whilst the appellants may not agree with the conclusions reached, it does not mean that the relevant material was not taken into account nor the relevant considerations made. On the evidence, I find it likely that they were, and therefore find that the decision was made in accordance with the law." Furthermore, as submitted by Mr Smart, it is clear that when the Judge starts [28] with the words 'I reject the submission' he is referring back to the submission made by the Appellant's representative as recorded at para [23]. I find that it can reasonably be inferred that the Judge was rejecting the submission that the decision was not in accordance with the law at [28], and that this is what he intended when he referred to this ground of appeal at the end of his decision.

8. **JO** provides that the Respondent must consider and engage with the evidence presented by the Appellants to the Respondent. When asked by me to identify the evidence that was placed before the Respondent which the Respondent failed to engage with in the decision letter, Mr Chelvan was unable to point to any such evidence. Furthermore, as submitted by Mr Smart, **MK (section 55 – Tribunal options) Sierra Leone [2015] UKUT 00223 (IAC)** provided that there was no need to refer to statutory guidelines if it was clear that the best interests of the children had been

considered. I find that the Judge was entitled to find that the decision of the Respondent was in accordance with the law and there is no arguable merit in the grounds at paras 2 – 9.

9. I turn now to the various submissions in the grounds in relation to the evidence before the Judge and the findings of fact made by him as set out in the grounds at 15 – 22. The Judge stated that he did not have any objective evidence before him to confirm the assertions made by A1 and A2 as to the lack of prospects for their children in Mauritius; he was right to so state because there was no objective evidence before him and A1 and A2 were not objective witnesses. Whilst it is fair to say that the Respondent did not provide evidence to support the assertion in the decision letter as to educational provision in Mauritius, it is also fair to say that the Judge did not rely on this assertion. In the absence of background evidence to support the assertions of A1 and A2, he drew inferences from the evidence they provided to him, which he was entitled to do. Objections were raised in the grounds of application in relation to the Judge's findings at [45 – 50]. I have read the grounds and the decision and I find that the Judge was entitled to make the findings that he made on the evidence before him and the grounds amount to no more than a disagreement with those findings. His findings of fact at [45 – 50] and [52 – 54] are therefore preserved.

10. As to Article 8, Mr Smart was on notice from me during the hearing that there was some substance to the grounds in relation to Article 8. Mr Smart submitted that the Judge did not err in his assessment under para 276ADE (1) (vi) of the Immigration Rules and under Article 8 by considering them together; he had not been required to consider the provisions of para 276ADE (1) (vi) as can be seen from the submissions on behalf of the Appellants at [23], and the Judge therefore dealt with the appeal on this basis. Mr Smart submitted that although the Judge's handling of the issues at [54] was not ideal, he had addressed each of the provisions of s 117B of the Nationality, Immigration and Asylum Act 2002 and made proper and reasonable findings and there was no material error of law in his approach.

11. It is, however, clear from the decision at [39] that it was submitted that A3 and A4 were entitled to a grant of leave to remain under paragraph 276ADE (1) (vi). The relative positions of these two Appellants were not considered under 276ADE (vi) separately by the Judge; A3 had lived in the UK continuously for a period of 7 years at the date of application and A4 had not. Furthermore, whilst the Judge did not have the benefit of the guidance in **Bossade (ss.117A-D-interrelationship with Rules) [2015] UKUT 00415 (IAC)**, as provided therein it is necessary to consider the provisions of the Immigration Rules before considering the appeals under Article 8 and the provisions of s 117A-B do not have any direct application to the Immigration Rules.

12. The difficulty with conflating the assessment under the Immigration Rules and under Article 8 is that the assessment of reasonableness under para 276ADE does require the Judge to import into it the requirements of s 117B of the Immigration Rules pursuant to **Bossade**. Whilst it may have been possible to consider the decision as a whole and it may have been clear that the Judge in fact dealt with the appeal on the basis of para 276ADE (vi) first and then turned to the appeal under Article 8, having first reminded himself of the legal provisions at [39 – 43], he in fact clearly states, at [43], "the final step in **Razgar** [2004] is whether the refusal to give leave is proportionate to the legitimate aims pursued. Since this seems to be a similar test to that of "and it would not be reasonable to expect the applicants to leave the UK" (in paragraph 276ADE (iv)), I deal with the issue of proportionality and reasonableness together." It is therefore not clear what factors he in fact considered in his assessment of reasonableness under 276ADE (vi). Furthermore, when considering the appeal of A3, the Judge did not consider the weight, if any, to be attached to the fact that A3 would be entitled to register as a British citizen four months from the date of hearing. I find that in considering proportionality and reasonableness together, the judge materially erred in law in his approach. The decisions under the Immigration Rules and under Article 8 must therefore be set aside.

13. As to the remaking of the decision, Mr Chelvan submitted that the matter should be remitted to the First-tier Tribunal for a rehearing of all the issues in the event that I find that the Judge had materially erred in law. However, if I were to decide that it was not appropriate to remit the matter to the First-tier Tribunal, he asked for a resumed hearing for the consideration of up to date evidence and submissions. Mr Smart submitted that I had sufficient evidence before me on which to make a decision and the decision should be made by the Upper Tribunal.

14. I have preserved the findings of fact made by the Judge at [45 – 50] and [53 – 54]. However, given the errors in approach in the determination of the appeals under the Immigration Rules and under Article 8, there was no structured substantive consideration of the appeals of A3 and A4, nor were there separate findings of fact in relation to each child. As I have found that there is a material error of law in the decision of Judge Chapman, it is open to the Appellants to provide evidence in relation to the current position of all Appellants under Article 8 for findings of fact to be made. In the circumstances, I consider it appropriate to remit this hearing to the First-tier Tribunal pursuant to paragraph 7.2(b) of the Practice Statements relating to the Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal.

Decision

15. As set out above, the decision of Judge Chapman contained material errors of law in relation to the determination of the appeal under the Immigration

Rules and under Article 8 ECHR and the decisions in relation to both are set aside. The Judge's findings of fact at paras [45 – 50] and [53 – 54] are preserved.

16. The matter is to be remitted for hearing before the FtT with the following directions:

    a. The Appellant shall file and serve:

        i. A comprehensive bundle of documents that were before the First-tier Tribunal at the date of the last hearing.

        ii. Any additional evidence, including statements, to be relied on for the purposes of the substantive hearing.

    b. The matter is to be listed with a time estimate of 2 hours.

    c. It is my understanding that an interpreter is not required. If the Appellants need an interpreter, they or their representatives must contact the Tribunal and confirm the language and dialect required.

    d. This matter is not to be listed before Judge Chapman.

Anonymity

17. The First-tier Tribunal did not make an order pursuant to Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum chamber) Rules 2014. Mr Chelvan asked for a direction to be made. As the determination dealt with the appeals of two minor appellants, I find that an anonymity direction is appropriate. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies both to the Appellants and the Respondent. Failure to comply with this direction could lead to contempt of Court proceedings.

Signed Date

M Robertson
Deputy Judge of the Upper Tribunal