IAC-FH-NL-V2

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/49932/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 5 March 2015	**On 13 May 2015**

Before

THE HONOURABLE MR JUSTICE COLLINS
SITTING AS A JUDGE OF THE UPPER TRIBUNAL
UPPER TRIBUNAL JUDGE GOLDSTEIN

Between

JS
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr P Duffy, Home Office Presenting Officer
For the Respondent: Miss M Attcha, Solicitor instructed by Ebraham Solicitors

DECISION AND REASONS

1. This appeal has a very unfortunate history. The appellant is the son of parents from India who came to this country and remained here unlawfully. We do not need to go into the full details: suffice it to say that their claims were considered in terms of Article 8 and were dealt with in considerable detail by First-tier Tribunal Judge Rose in November 2013. In the course of that decision he had to consider the position of the present

appellant, their child. I will refer to him as their child; in fact the father is the stepfather, the natural father not being on the scene at all.

2. Judge Rose had to consider and did consider in detail Section 55 of the 2009 Act and what the best interests of the child were. His decision ante-dated the 2014 Act so he did not need to go into Section 117B of that Act which affects the position in relation to Article 8 and indirectly also the position of children who are to be considered under Section 55. Judge Rose went through the matter in detail and what he concluded, having referred to all material evidence and the relevant authorities was as follows, and it is in paragraph 48 of the determination:

> "His best interests lie in remaining with his mother and the second appellant (the stepfather). The appellants are Indian citizens and have continuing family and linguistic ties with India. I have no reason to find that their cultural and religious ties have diminished significantly. I have no reason to find that Jay is a British citizen or that he would not be permitted to remain in India with the appellants as an Indian national. He speaks Gujarati and has mixed with the Indian community in the United Kingdom. He is progressing well at school in the UK but it was not contended that he would not be able to continue his education in India, and it is likely that he would be able to adapt and to make new friends there. He has now been living in the UK for more than seven years but his place of residence while he was a baby and a very young child are of less importance than later years in assessing his best interests. There was no evidence that he would be disadvantaged in India as a consequence of not being the second appellant's natural son."

3. The claims by the parents were rejected. As we have said their immigration history is exceedingly poor so we are faced with the position so far as this appeal is concerned with the knowledge that both parents have no leave to remain and have failed in their appeals against removal. It cannot conceivably be suggested that it would be in the child's interest that he should remain here on his own. Equally, as we have said and shown, Judge Rose went into the matter in detail and concluded that it was not in the best interests of the present appellant that he should be able to remain so that his parents' removal would be prevented.

4. He was made subject of a Section 10 notice and Miss Attcha on his behalf has submitted that it was necessary in those circumstances for him to make a separate appeal. That clearly was not necessary because if she had applied her mind properly to the situation following Judge Rose's decision which was not overturned then she would have been bound to recognise and to advise the parents that there was no chance that an appeal by this appellant could succeed. Unfortunately, not only did she not give that advice which she ought to have given, but persisted in an appeal. It was a further unfortunate matter that First-tier Tribunal Judge Monro before whom this appeal came decided on 19 May last year that there was no valid appeal because there had been no application by this appellant under human rights and therefore there was no right to an in-country appeal and so he did not consider the merits of the appeal. It is perhaps exceedingly unfortunate that he did not make it clear that there was indeed no merit in the appeal and so even if there had been a right of

appeal it would have been bound to have been dismissed. However that did not happen. We should say that the mother had not made an independent human rights application but it was accepted that she had an in-country right of appeal.

5. In due course the matter came before this Tribunal. Mr Justice Davis and Upper Tier Tribunal Judge Gill decided in October of last year that Judge Monro had been wrong to take the view that there was no in-country right of appeal. That it seems to us was an inevitable decision because a minor cannot be expected to make his own application in circumstances such as this, particularly a minor of the age of this appellant, and in those circumstances any application will inevitably be made by another and in this case by the obvious other, namely a parent, and as we say in those circumstances we are not in the least surprised that this Tribunal took the view that Judge Monro had been wrong. It was in our judgment unfortunate that instead of directing that this appeal remain live the Tribunal did not decide then and there on the merits because it was clear in our judgment that there could be no conceivable merit. The Tribunal had before it the decision of Judge Rose and they referred to **Devaseelan** but they left open the possibility that there might be a claim. That is regrettable because it has resulted in false hope for the family and further cost which should not have been incurred. For the reasons we have given it is clear that this appeal is completely and utterly without merit. As the Secretary of State indicated in the letter of 14 January 2015 opposing the appeal, it was considered that the determination of Judge Rose, in the absence of evidence to the contrary, was definitive of the factual matrix of the family's position. There is no evidence which goes against any finding made by Judge Rose. We have dealt with this perhaps at rather greater length than might otherwise have been necessary because we are appalled at what has happened in this case and the conduct of the solicitor concerned. This was an utterly negligent approach and we have no doubt that it is appropriate in the circumstances that a transcript of this judgment should accompany a report to the disciplinary body of the solicitors for them to take any action that they consider appropriate. Furthermore the solicitor will appreciate that this means that there will be focus upon her and her firm in relation to any other cases that are brought before this or indeed any Immigration Tribunal and care must be taken to ensure that nothing like this happens again. Although we can of course make no order to this effect we would express the hope that no money is taken from this family by this firm of solicitors in all the circumstances. As it is this appeal is dismissed.

Notice of Decision

The appeal is dismissed.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant

and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed: Dated: **13 May 2015**

Mr Justice Collins
Sitting as a Judge of the Upper Tribunal