Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: DA/01822/2013
IA/35730/2013
IA/35733/2013
IA/35741/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 17 February 2016	**On 19 February 2016**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR B P
MRS R B P
MISS Y B P
MISS V B P
(ANONYMITY DIRECTION MADE)

Respondents

Representation:
For the Appellant: Mr K Norton, Senior Home Office Presenting Officer
For the Respondent: Mr D Jones, Counsel

Anonymity
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
No anonymity order was made by the First-tier Tribunal. However, in the interests of protecting the identity of the two minor children in this case, I make an anonymity direction.

DECISION AND REASONS

Background

1. This is an appeal by the Secretary of State. For ease of reference, I refer below to the parties as they were in the First-Tier Tribunal albeit that the Secretary of State is technically the Appellant in this particular appeal. The Secretary of State appeals against a decision of a Tribunal of the First-Tier Tribunal consisting of the President, Mr M A Clements and First-tier Tribunal Judge Froom promulgated on 6 July 2015 ("the Decision") allowing the Appellants' appeals. I note at the outset a point made by Mr Jones that the Secretary of State's challenge to the Decision relates only to the First Appellant's appeal against the Secretary of State's decision dated 13 May 2013 that section 32(5) of the UK Borders Act 2007 applies to him. There is no challenge to [103] of the Decision allowing the appeals of the Second and Third Appellants refusing to vary their leave and directing their removal under section 47 of the Immigration, Asylum and Nationality Act 2006 or to the finding at [108] that it would be disproportionate to remove the Fourth Appellant on the basis that her mother is entitled to remain which led to the allowing of her appeal on human rights grounds. The fact that the Decision is only appealed in relation to the First Appellant appears from the Secretary of State's grounds seeking permission to appeal to this Tribunal and was not challenged in those grounds or by Mr Norton at the hearing. Indeed, it is the case that the Second Appellant has now been granted indefinite leave to remain and the Third Appellant's case remains under consideration in relation to settlement. An application for British citizenship has been made in respect of the Fourth Appellant following the grant of indefinite leave to her mother.

2. Permission to appeal the Decision was granted on 9 October 2015 by Upper Tribunal Judge Storey in the following terms:-

> "It is arguable that the First-tier Tribunal Tribunal erred in its approach to the issue of the best interests of the children and the issue of whether return to India for the family would be unduly harsh and that in both contexts undue weight was given to the putative British citizenship of the third and fourth appellants even though neither had made an application for such: see in this regard Oladeij (s3(1) BNA 1981) [2015] UKUT 326 (IAC) (21 May 2015) para 29"

The matter comes before me to determine whether the First-Tier Tribunal Decision involved the making of an error of law.

3. The background facts so far as it is necessary to recite them are that the First Appellant who is a national of India arrived in the UK on 13 June 2004 as a student. The Second Appellant is his wife and the Third Appellant his eldest minor daughter. They entered the UK on 31 December 2004 as his dependents. The Third Appellant, Y B, was at

that date aged about eighteen months. The Fourth Appellant, V B, is the First and Second Appellants' youngest minor daughter who was born in the UK on 10 April 2008. The First and Second Appellants also have a son, J B, who was born in the UK on 22 October 2012. No immigration decision has yet been taken in relation to him and he is not an Appellant in this appeal. The Appellants' leave was subsequently extended first as a student and then as a Highly Skilled Migration/Tier 1 migrant and dependents. The Appellants' last leave expired on 23 January 2013.

4. On 22 October 2010, the First Appellant was convicted of violent disorder and sentenced to three years' imprisonment. His appeals against conviction and sentence failed in the Court of Appeal. The circumstances of the offence are set out in the sentencing Judge's remarks cited at [6] of the Decision and I do not need to repeat those save to note that the Tribunal regarded the offence as very serious and was highly critical of the First Appellant's attempts to minimise his involvement in or responsibility for it ([110] to [113]). The Tribunal also rejected the First Appellant's contention that he was not the ringleader as he was described to be by the sentencing Judge.

5. As a result of the offence, the Respondent notified the First Appellant of his liability to deportation and thereafter made the decision to which I refer at [1] above and which is at issue in this appeal. The Respondent also made decisions refusing the Second to Fourth Appellants further leave to remain as the First Appellant's dependents in a Tier 1 application which he had made on 16 January 2013.

6. Prior to the hearing before the First-tier Tribunal, the Second and Third Appellants also made applications for indefinite leave to remain on 10 December 2014. Although those applications were voided by reason of section 3C(4) Immigration Act 1971, the Tribunal considered the issue of whether the Second and Third Appellants were entitled to indefinite leave to remain at [90] to [103] and determined that they were. The Tribunal also found at [108] that the removal of the Fourth Appellant would be disproportionate. As I note at [1] above, those findings are not challenged.

Submissions

7. Although Mr Norton relied in his oral submissions on four grounds as set out in the application for permission to appeal, there are in essence two grounds which are more fully particularised in the application for permission to appeal to the First-tier Tribunal. The first of those is a widely drafted ground that the Tribunal materially misdirected itself in relation to the meaning of "unduly harsh" and conflated that with the best interests of the minor children, that the Tribunal misdirected itself in relation to the requisite threshold for what is unduly harsh and failed to reason its assessment that deportation of the First Appellant would be unduly harsh. The second ground is more

narrowly confined. It asserts that the Tribunal placed significant weight on the fact that the Third and Fourth Appellants are entitled to make applications for British citizenship following the conclusion that the Second Appellant satisfies paragraph 276B of the Immigration Rules. It is submitted that since no such applications had been made, this was not a relevant factor. At the hearing, Mr Norton adopted those grounds and elaborated upon them.

8. Mr Jones in response submitted that there was no error in the Decision which was particularly carefully and thoroughly crafted. He noted that the factor which tipped the balance was the position of the Third Appellant and there was no undue focus on the possibility of applications for citizenship by the Third and Fourth Appellants. In fact, he noted, the Third Appellant was entitled to settlement in her own right due to length of residence (as the Tribunal found). The Tribunal's did not rely on the potential for her to acquire citizenship in light of its findings about the Second Appellant's entitlement to indefinite leave but on the potential for the Fourth Appellant and J B to do so. Applications for citizenship have now been made in relation to the Fourth Appellant and J B. Now that the Second Appellant has been granted indefinite leave to remain, those fall to be decided under section 1(3) of the British Nationality Act 1981 which is in mandatory terms and requires the Respondent to grant citizenship unless she refuses to do so in the exercise of her discretion in relation to good character.

9. In relation to ground one, Mr Jones again submitted that the position of the Third Appellant was crucial and the findings of the Tribunal were supported by evidence not only from an independent social worker but also a comment by the Office of the Children's Champion. Although the bulk of consideration of that evidence was in the context of the children's best interests (necessitated by the Respondent's failure to deal adequately with that issue), the Tribunal recognised that those were not a trump card when considering whether deportation of the First Appellant would be unduly harsh, in particular for the Third Appellant and went on to consider that issue separately. The Tribunal properly considered the seriousness of offending and did not accept all of the evidence of the Appellants, particularly in relation to their ties to India. The Tribunal had, he submitted, noted the threshold to be applied in relation to what is unduly harsh but was entitled on the evidence to reach the conclusion it had. He also noted that the Decision pre-dated the decisions of this Tribunal in MAB (para 399; "unduly harsh") USA [2015] UKUT 435 (IAC) and KMO (section 117 – unduly harsh) Nigeria [2015] UKUT 543 (IAC).

Discussion and conclusions

10. I can deal shortly with ground two. At [107] of the Decision, the Tribunal notes that, having allowed the Second Appellant's appeal on the basis that she was entitled to indefinite leave to remain on

grounds of long residence, this had implications for the Fourth Appellant and J B. Notably, the Tribunal said nothing there about the Third Appellant. That then feeds into the Tribunal's reasoning in relation to the Third Appellant on the basis that "the impending registration of her siblings as British citizen is also a factor militating against deportation". Firstly, it cannot be said that the Tribunal is there placing any significant weight on that factor. In any event, as I now turn to note, the First Appellant's appeal was allowed because of the Third Appellant's position and not that of the Fourth Appellant or J B. The reference to the potential entitlement of the Third Appellant's siblings as being "a factor" is something to which the Tribunal could have regard. The Tribunal placed no significant weight on that factor. It most certainly cannot be described as a decisive factor in relation to the position of the Third Appellant.

11. In order to understand the Tribunal's conclusions on ground one, it is necessary to set out the basis on which the First Appellant's appeal was allowed. The Tribunal expressly rejected paragraphs 399(b) and 399A of the Rules as a basis for the allowing of the appeal [126]. The Appellants did not submit that those would be reason to allow the appeal. The appeal was allowed on the basis of the First Appellant's relationship with his children and particularly with the Third Appellant. There is a typographical error at [139] where reference is made to paragraph 399(b) instead of paragraph 399(a) but nothing turns on that given the reasoning which follows:-

> "[137] We now apply the law to the facts as found by us, always bearing in mind that the best interests of the children are a primary consideration but not the only one.
>
> [138] No question of liability to deportation arises. We move on to consideration of whether the appellant can resist his deportation by showing he falls within Exception 1.
>
> [139] The presumption that the public interest requires the appellant's deportation can be rebutted if the appellant can show that he falls within the circumstances described in paragraph 399(b) [sic] of the rules. The rules have been amended to bring them into line with section 117C of the 2002 Act.
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> [140] There is no dispute over the fact that the appellant has a genuine and subsisting relationship with his children, who are under the age of 18 years. The third appellant had resided in the UK for more than seven years prior to the date of decision. <u>For the purposes of the appellant's appeal under this rule the determinative question is whether, on the basis of the facts found by us, it would be unduly harsh for the third appellant to live in India and it would be unduly harsh for her to remain in the UK without the appellant</u>.
>
> [141] After giving very careful consideration to the entirety of the evidence and the competing arguments ably put forward by the representatives, we have concluded that the appellant does meet the requirements of the rule and the appellant's appeal should be allowed. Our reasons are as follows.

> [142] We do not propose to repeat the matters which led us to conclude that the third appellant's particular circumstances meant her best interests require her to remain in the UK with both parents. This point is not a 'trump card' and we have paid close attention to the public interest factors deployed against the appellant by the respondent. We have in mind the undoubted seriousness of the offence, as reflected in the sentence, and the need to deter others, even though the appellant only poses a low risk of re-offending. However, we find that, in the particular circumstances of this case, similar considerations to those which led to our conclusion on best interests lead to a finding that family displacement or separation would be unduly harsh as far as the third appellant is concerned.
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> [143] In a sense, any enforced separation or displacement could be said to be harsh and clearly the test requires much more. In our judgment, the test of "unduly harsh" connotes a serious degree of harshness when the particular family's circumstances are considered. The circumstances required are somewhere below the degree of harshness required by paragraph 398, which uses the words very compelling circumstances *over and above* those described in paragraphs 399 and 399A.
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> [144] We remind ourselves that the third appellant is blameless as regards the circumstances which led to the current proceedings, although that is almost always going to be the case when this particular rule is applied. More importantly, we take into account the fact the third appellant's residence in the UK has been significantly longer than the seven-year period identified in the rule. She is now at an age where she is starting to build ties and to look outside the immediate family unit. The evidence shows it is more probable than not the appellant is unlikely to re-offend and he is capable of leading an industrious life in the UK. The protection of the public does not demand the separation or displacement of this family. Given her unusual sensitivities, as discussed above, we find it can properly be said that it would be unduly harsh on the third appellant to separate her from her father or her unusually close ties to the UK. As said, either course would have very deleterious consequences for her identity, self-esteem and development. The impending registration of her siblings as British citizens is also a factor militating against deportation. We allow the appellant's appeal under the rules."
>
> [my emphasis]

The above findings have to be read also in the context of the evidence of the independent social worker set out at [41] to [51] and other evidence in relation to the impact of the First Appellant's deportation on Y B and also of the Tribunal's findings in relation to the best interests of the children, particularly the Third Appellant at [127] to [136].

12. There is no basis for challenging the Decision on the ground that the Tribunal has conflated best interests with what is unduly harsh. Although the Tribunal refers as shorthand to its findings on the best interests of the Third Appellant in particular at [142] the Tribunal very

clearly distinguishes the issues by recognising that best interests are not a trump card and going on to refer to the public interest. The fact that the Tribunal says that similar considerations of the Third Appellant's position have led to its conclusions about whether family displacement or separation would be unduly harsh is not a basis for suggesting that the Tribunal has erroneously conflated the two issues.

13. Neither is there a basis for contending that the Tribunal has misunderstood that the threshold for what is unduly harsh is a high one. As I note at [9] above, the Decision pre-dates MAB where the threshold is explained in the way in which the Respondent describes it in her grounds. That is not to say though that a failure to refer to it in this way is a material error of law (and there obviously cannot be a failure to refer to the decision in MAB which was not in existence at the relevant time). The Tribunal has referred itself at [143] to the test as requiring something more than simply harsh. It recognises that the test cannot be as extreme as requiring something over and above paragraphs 399 and 399A as would be the case if the sentence were of four years or more. The Tribunal describes the test as requiring something of "a serious degree of harshness". I am satisfied that this does not show any failure to recognise the level of interference which is required in order to outweigh what the Tribunal notes is a heavily weighted scale in favour of deportation [39]. I have paid particularly close attention to the evidence which the Tribunal received in relation to the position of the Third Appellant and I have read the reports of the independent social worker and the comment of the Office of Children's Champion which are relied upon. The recitation of that evidence in the Decision is fairly summarised and I note that the Respondent does not take any issue with that. Worthy of particular note is the comment by the Office of Children's Champion when deportation action was authorised as cited at [79] that:-

> "Mr [P's] two daughters, aged nine and four, are likely to experience his detention and deportation as a significant loss. The deportation is likely to have a long term impact on their emotional development and on the family's finances."

I am satisfied that there is no error by the Tribunal in their analysis of the appropriate test or in relation to their application of that test to the facts of this case. The conclusion may not have been one I would have reached but I am satisfied that the Tribunal cannot be said to have reached a conclusion which was not open to it.

14. For the foregoing reasons, I am satisfied that there is no material error of law in the Decision and I uphold it.

DECISION

The First-tier Tribunal Decision did not involve the making of an error on a point of law. I therefore uphold the First-tier Tribunal Decision promulgated on 6 July 2015 with the consequence that the appeals of

the Appellants are allowed on the basis set out at the end of the First-tier Tribunal Decision.

Signed  Date 17 February 2016

Upper Tribunal Judge Smith