Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/09461/2015
IA/09465/2015
IA/09468/2015
IA/09475/2015

THE IMMIGRATION ACTS

Heard at Field House, London
On 21st April 2016

Decision & Reasons Promulgated
On 6th May 2016

Before: DEPUTY UPPER TRIBUNAL JUDGE MCGINTY

Between:

(1) MRS MEENAKSHI JOLLY
(2) MR SACHIN JOLLY
(3) MISS BHUSHITA JOLLY
(4) [G J]

(Anonymity Direction not made)

Appellants

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Ms B Jones (Counsel)
For the Respondent: Mr Duffy (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. This is the Appellants' appeal against the decision of First-tier Tribunal Judge Geraint Jones QC which was promulgated on the 1st October 2015, in which he

dismissed the Appellants' appeals under the Immigration Rules and on Human Rights grounds.

Background

1. The First and Second Appellants are married. The Third and Fourth Appellants are their daughters, the Third Appellant being born on the 22nd August 1999 and the Fourth Appellant being born on the [ ] 2005. The Appellants are all citizens of India.

2. The First Appellant was initially granted a student visa between the 22nd July 2007 and the 22nd November 2010. The other Appellants entered the UK as her family and Dependents. That visa was extended until the 11th February 2012 and thereafter leave was extended to the First Appellant with the other Appellants being her family dependents until the 22nd December 2014.

3. On the 18th December 2014 the Appellants applied for leave to remain in the United Kingdom on the basis that their removal would amount to breach of their right to a private life under Article 8. Those applications were considered by the Respondent, but each application was refused in refusal letters dated the 23rd February 2015. Mrs Jolly's application was refused on the basis that it was not accepted that there would be very significant obstacles to her integration into life back in India for the purposes of paragraph 276ADE(1)(vi) of the Immigration Rules, she having lived in India for 26 years prior to visiting the UK for the first time and she being able to speak Punjabi and Hindi. It was further found that there were no exceptional circumstances, outside of the Immigration Rules, bearing in mind the duty to promote and safeguard the welfare of children in the United Kingdom in accordance with Section 55 of the Borders, Citizenship and Immigration Act 2009, despite the fact that her children who were then aged 15 and 10 years old had been living in the United Kingdom since they were 8 and 2 years old respectively, that would merit leave being granted outside of the Immigration Rules.

4. It was found by the Respondent originally that both children could communicate in English, Punjabi and Hindi and that both Mrs Jolly and her husband were born in Delhi and that both children had visited India and had maintained cultural

and ethnic ties to India and had been brought up in a household consisting of Indian nationals.

5. Mr Jolly's application was refused under paragraph 276ADE(1)(vi) on the basis that it was not accepted that there would be very significant obstacles to his integration back into life in India given that he lived with his wife and children who were Indian nationals and had retained his ability to speak local languages and had maintained cultural ties to India.

6. The two children's applications were said to have been considered under Appendix FM and paragraph 276AD(1) but it was found that as their parents' applications had been refused under Appendix FM, their applications fell to be refused on the basis they did not meet the requirements of paragraph E-LTRC.1.6 of the Immigration Rules.

7. The Appellants sought to appeal those decisions to the First-tier Tribunal and that appeal was heard before First-tier Tribunal Judge Geraint Jones QC at Richmond on the 25th September 2015.

The Decision of First-tier Tribunal Judge Geraint Jones QC

8. In his decision First-tier Tribunal Judge Geraint Jones QC did not accept the evidence given by the First Appellant Mrs Jolly that the two children did not speak Hindi to any significant extent and he found that both the Third and Fourth Appellants speak and understand Hindi and use it at home [28]. He found that there was no evidential basis to support the submission made by Miss Jones on behalf of the Appellants that the children could not read or write Hindi or that they had failed a school entrance test in India. First-tier Tribunal Judge Geraint Jones QC found at [30] that the evidence regarding the children's limited ability in Hindi was "something of an exaggerated afterthought" and he was not satisfied on the evidence that the Third and/or Fourth Appellant had actually taken school entrance tests in India but failed.

9. Judge Geraint Jones QC further found at [31] that the Appellants' private life had been established during a time when their leave had been precarious in the sense that none of them had indefinite leave to remain. Judge Geraint Jones QC went on to consider that the Third Appellant had just begun her "A" level

courses at school and noted the submissions that had been made regarding the fact that she had no desire to live in India and might face linguistic difficulties, but found specifically that she could speak and understand Hindi and did not accept that she could not read or write Hindi. He found that she might not be as competent in reading and writing Hindi as English (being the medium through which she had been taught at school). He found that there were no significant linguistic or educational impediments to the Third Appellant residing and pursuing her education in India.

10. He went on to consider the case of EV Philippines [2014] EWCA Civ 785 in respect of whether or not it would be reasonable for a child who had been resident in the United Kingdom for more than 7 years to leave the United Kingdom. However Judge Geraint Jones QC found that it was common ground that either the entire family would stay or the entire family would leave. He bore in mind that the Third Appellant was 6 weeks into the start of her 2 year "A" level course, but found that it would not be unreasonable to expect an Indian citizen who lives with her nuclear family to have a short break in her educational continuity and to resume her education back in India [43].

11. In respect of the Fourth Appellant Judge Geraint Jones found that she also had spent more than 7 years in the UK and was now aged 10 years old [45]. He noted that she also had attended school and plainly had made good progress, but found that she was even younger and therefore better able to adjust to life in the country of her citizenship and that she would remain under the protection of her nuclear family and be able to continue her education in India. He further found that the Second Appellant would be able to successfully engage in the labour market, so as to earn a living for the family. He therefore found that it would not be unreasonable to expect the Third and Fourth Appellants to leave the United Kingdom for the purposes of paragraph 276ADE(1)(iv).

12. Judge Geraint Jones QC went on to note that the case for the First and Second Appellants was not put on the basis of paragraph 276ADE, but was put on the basis of reference to Section 117B(6) of the 2002 Act, which stated that the public interest did not require a person's removal where that person had a genuine and subsisting parental relationship with a qualifying child and it would not be reasonable to expect the child to leave the United Kingdom. However

the First-tier Tribunal Judge found that "private life over and beyond that associated with the nuclear family and, as a matter of common sense, engagement with a circle of friends and acquaintances has not been established" at [48]. He went on to consider that although the First Appellant was pregnant the Respondent would defer the departure date or grant temporary admission until such time as medical conditions meant that travel could be undertaken by her.

13. Judge Geraint Jones QC then considered the claim under Article 8 outside the Immigration Rules and found that there was nothing disproportionate in expecting a family of foreign nationals to return the country of their nationality after they have been in this country on the basis that they were here temporarily throughout the first named Appellant's time as a student and that family life could continue in India as could their private life and that friends and acquaintances could be contacted through familiar electronic means of communication, as well as being visited [52]. He therefore dismissed the appeals of each of the Appellants under the Immigration Rules and on Human Rights grounds.

14. The Appellants have sought to appeal against that decision to the Upper Tribunal.

The Grounds of Appeal

15. Within the Grounds of Appeal it is argued, inter alia, that there was no clear reason for the First-tier Tribunal Judge not to accept that the solicitors had made a mistake in the application form in stating that the Third and Fourth Appellants spoke Hindi. It is argued that the Judge had not commented that speaking some Hindi did not mean that the Third Appellant could read or write or use Hindi as a medium of studies, if she were removed from the United Kingdom and that the First Appellant in her evidence had mentioned that the children had failed an entrance exam in India, as they did not understand Hindi or read and write Hindi. It is argued that the Judge had not considered these issues in his determination and therefore erred in law. It is further argued that the First-tier Tribunal Judge was not clear in his reasoning as to why he had found that it was improbable that the Fourth Appellant was not conversant with

Hindi, when she had come to the UK as a 3 year old and had lived in the UK for the whole of her life there afterwards. It is argued that it is not practical or probable that such a child would successfully converse in Hindi and be able to read and write Hindi and that the Judge had neglected such important evidence and had not discussed such evidence in his determination.

16. Next, it is argued that the Third Appellant had started her "A" levels and the Fourth Appellant receives primary education and that grave and irreparable disruption to their studies would occur if they were removed from the UK which would destruct their future when they become adults. It is argued that the Judge has not discussed why it would be unreasonable to send the children to India, when they are fully adopted to the educational and school life in the United Kingdom. It is argued that the Judge has failed to assess the Appellants' private lives and in particular that of the Third and Fourth Appellants if they are sent from the United Kingdom and that the children had built up extensive private ties with their teachers and friends and their society.

17. Next it is argued that the Judge has not referred to the requirements of Appendix FM under the Immigration Rules in respect of family life as a parent and that not considering the case under the Immigration Rules in respect of the First and Second Appellants is argued to be clear error of law. It is argued the Judge failed to refer to various letters submitted by friends and family of the Appellants including the friends of the Third and Fourth Appellants when considering the private life that they had formed at [48]. This is said to be a clear error or law.

18. It was further argued that the Fourth Appellant receives continuous treatment for health issues related to her food allergy and that her welfare would be at risk if she were removed and that the Judge had not made reference to these important issues.

<u>The Grant of Permission to Appeal</u>

19. Permission to appeal has been granted by First-tier Tribunal Judge Hollingworth on the 25th February 2016 in which he found that:

"1) It is arguable that the Judge has not provided a sufficient analysis of the degree to which the Third and Fourth Appellants have become integrated into United Kingdom society across the social, educational and cultural spectrum, each having spent in excess of 7 years in the United Kingdom. It is arguable that the Judge has attached disproportionate weight in the light of this to other factors.

2) Further, it is arguable that the construction placed by the Judge on the provisions in Section 117B(6) as referred to at paragraphs 47 and 48 of the decision attaches insufficient weight to the rationale of the adoption of a period of 7 years or in excess of 7 years in relation to an Appellant as a period of significance.".

The Rule 24 Reply

20. Within the Rule 24 Reply dated the 21st March 2016, the Respondent argues that the First-tier Tribunal Judge directed himself appropriately. It is argued that the complaint that the First-tier Tribunal Judge failed to consider paragraph EX1 for the partner route is wholly without merit as the First and Second Appellants fail the eligibility requirements on account of their status. It is was argued that in any event the evidential test was considered under paragraph 276ADE(1)(iv) by the First-tier Tribunal Judge and that the Judge had reminded himself of the factors identified in EV Philippines and considered the education in the United Kingdom and India, citizenship, language, cultural norms, accommodation, welfare, age and interference with family life. It is argued that 7 years plus is not determinative of a test under paragraph 276 or Section 117B(6) and the First-tier Tribunal Judge fully engaged with the evidence before him and that the Appellants' Ground of Appeal amount to no more than disagreement with the findings.

21. It is argued that the Appellants' complaint that the Judge erred in finding no private life at paragraph 40 misrepresented the First-tier Tribunal Judge's findings because at paragraph 50 the Judge found that private life was sufficient to engage Article 8, but it is said that in the light of Miah (section 177B NIAA 2002 – Children) [2016] UKUT 00131 (IAC) the Judge's findings that the private

life of the Appellants was insufficient to outweigh the public interest could not be criticised as pursuant to Section 5A, it carried little weight.

22. It was on this basis that the case came before me in the Upper Tribunal.

Concessions and my findings on error of law and materiality

23. At the Oral Appeal Hearing, Mr Duffy on behalf of the Secretary of State conceded that the decision of First-tier Tribunal Judge Geraint Jones QC did in fact contain a material error of law. He conceded that although First-tier Tribunal Judge Geraint Jones QC had at [38] considered the case of EV Philippines [2014] EWCA Civ 785, where he said that the Court of Appeal had listed several factors that may be relevant when considering Section 55 of the 2009 Act and that Lord Justice Clarke had referred to the "best interests" of the child, that Judge Geraint Jones QC had not actually then gone on to make any specific findings as to what were in the best interests of either the Third or Fourth Appellant.

24. He conceded that a consideration of the 2 children's best interests for the purposes of Section 55 would feed into the proportionality assessment that the Judge had to make under paragraph 276ADE and also when considering any private or family life for the purposes of Article 8 outside of the Immigration Rules and that the Judge's failure to make specific findings as to what was actually within the best interests of the children did amount to a material error of law, such that the decision of First-tier Tribunal Judge Geraint Jones QC should be set aside in its entirety and remitted for a re-hearing de novo.

25. In light of that concession, I do find that the decision of First-tier Tribunal Judge Geraint Jones QC does contain a material error of law in respect of his failure to actually make findings regarding what were the best interests of the 2 children, being the Third and Fourth Appellants, for the purposes of Section 55 of the Borders, Citizenship and Immigration Act 2009 and that as a result First-tier Tribunal Judge Geraint Jones QC has not properly analysed the case under paragraph 276ADE or in respect of Article 8 outside of the Immigration Rules. I therefore do set aside the decision of First-tier Tribunal Judge Geraint Jones QC as it does contain a material error of law. The appeal is remitted back to the

First-tier Tribunal for a hearing de novo before any First-tier Tribunal Judge other than First-tier Tribunal Judge Geraint Jones QC.

26. Further, in light of those concessions, both parties agreed that I did not need to go on to make findings in respect of the second ground upon which permission to appeal had been granted in terms of whether or not the First-tier Tribunal Judge had attached sufficient weight to the rationale of the adoption of a period of 7 years or in excess of 7 seven years as a period of significance under Section 117B(6) of the Nationality, Immigration and Asylum Act 2002, as amended. Miss Jones stated that this was especially the case given that clarification on this issue was likely to be provided by the Court of Appeal in test cases currently before the Court of Appeal on the 4th and 5th May 2016.

27. Notice of Decision

28. The decision of First-tier Tribunal Judge Geraint Jones QC does contain a material error of law and is set aside in its entirety;

The matter is remitted back to the First-tier Tribunal for a hearing de novo before any First-tier Tribunal Judge other than First-tier Tribunal Judge Geraint Jones QC.

Signed

Rob McGinty

Judge of the First-tier Tribunal McGinty Dated 23rd April 2016