Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/17939/2014
IA/17943/2014

IA/17948/2014
IA/17956/2014

THE IMMIGRATION ACTS

Heard at Field House **Decision & Reasons Promulgated**
On 17 December 2015 **On 18 January 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE I A M MURRAY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

G M P
T P
K P
T P
(ANONYMITY ORDER MADE)

Respondents

Representation:

For the Appellant: Mr Tarlow, Home Office Presenting Officer
For the Respondents: No appearance

DETERMINATION AND REASONS

1. The Appellant in these proceedings is the Secretary of State. However for convenience I shall now refer to the parties as they were before the First-tier Tribunal.

2. The Appellants were born on 17 March 1969, 18 January 1966, 10 January 2000 and 3 January 2008 respectively. The first and third Appellants are Mauritian nationals. The second and fourth Appellants are South African nationals. The first and second Appellants are husband and wife. The fourth Appellant is their daughter. The third Appellant is the first appellant's daughter from a previous relationship. They appealed against the decision of the respondent dated 31 March 2014 refusing their applications for further leave to remain in the United Kingdom under Article 8 of ECHR taking into account section 55 of the Borders, Citizenship and Immigration Act 2009 and the Immigration Rules. Their appeals were heard by Judge of the First-tier Tribunal Blundell and he allowed the third Appellant's appeal under paragraph 276 ADE(1) of the Immigration Rules and allowed the first, second and fourth Appellants' appeals under Article 8 of ECHR in a decision promulgated on 16 March 2015. An application for permission to appeal was lodged and permission was refused by Judge of the First-tier Tribunal Davidge on 11 May 2015. Permission was then granted by Deputy Upper Tribunal Judge Kamara on 24 July 2015. The permission states that it is arguable that the First-tier Tribunal Judge erred in failing to consider the possibility of the Appellants (2 of them are South African nationals) residing in South Africa.

3. There is no Rule 24 response.

4. The error of law hearing took place on 18 November 2015 and I found there to be an error of law in the First-tier Tribunal Judge's decision, as although he properly considered all the evidence relating to Mauritius in detail and gave this anxious scrutiny, he did not give the same anxious scrutiny to the return of the appellants to South Africa. I found this to be a material error of law finding that the issues relating to the family returning to South Africa and the education and medical treatment available there had not been properly considered.

5. This is the second stage of that error of law hearing. An email was sent to the Tribunal dated 16 December 2015 from Chambers Solicitors, London, who act for the Appellants. It states that Chambers are not in funds for this hearing and will not be attending. The email states that the Appellants will not be attending either. The email asked that the case be dealt with on the papers.

6. Written submissions were received on behalf of the Appellants on 17 December 2015, the date of the hearing.

7. I heard submissions from the Presenting Officer who submitted that the Appellants have not discharged the burden of proof as they have not shown they are unable to go to live in South Africa. He submitted that one of the parents and one daughter have South African passports and the burden of proof lies on the Appellants. He submitted that no reasons have been put forward to show that they are unable to live there. He submitted that although the education and medical facilities may not be free in South

Africa that is not a reason for the Appellants remaining in the United Kingdom.

8. The Presenting Officer submitted that there is nothing compelling or exceptional in this case. He submitted that one adult and one child are citizens of Mauritius and the other adult and the other child are citizens of South Africa. He submitted that the burden of proof is on the Appellants and it has not been discharged and I was asked to dismiss the appeal.

9. I considered the written submissions from the Appellants` representatives. The history of this case is that on 9 August 2003 the first Appellant entered the United Kingdom with valid leave as a visitor and switched his status to that of a student. This was granted until 31 October 2004. The third Appellant joined him in April 2005. The second Appellant came to the United Kingdom on 18 January 2006. The second and third Appellants were the first Appellant's dependants. The fourth Appellant was born in the United Kingdom. On 11 August 2011 the first Appellant submitted an application seeking leave to remain outside the Rules which was refused. The appeal was refused on 25 January 2012 but the family remained in the United Kingdom and made a further application on 13 March 2013 which was refused. The appeal was dismissed on and appealed. It is this appeal that I am dealing with. The only issue which I have to make my decision on is whether the Appellants can go to live in South Africa. Two of them are citizens of South Africa. At the error of law hearing on 18 November 2015 the second stage hearing did not go ahead. It was stated that additional evidence on South Africa was required, including the family's connections to South Africa and the education and medical treatment available there.

10. The Appellants` submissions refer to the issues as being:-

    (a) The third Appellant going to a country she has never lived in before, in consideration of the Immigration Rules paragraph 276ADE(iv). In the alternative to this is the Tribunal's consideration of Article 8 ECHR (if relevant).

    (b) The fourth Appellant going to a country she has never lived in before where she does not meet the requirements of the Rules and thus, should be considered under Article 8 ECHR.

    (c) The first Appellant going to live in a country he has visited but never lived in before where he does not meet the requirements of the Rules and thus should be considered under Article 8 ECHR.

    (d) The second Appellant returning to a country of which she is a national where she does not meet the requirements of the Rules and thus should be considered under Article 8 of ECHR.

11. The submissions state that the third Appellant has accrued more than 7 years residence in the UK. She has been in full time education. The submissions refer to problems the third Appellant had relating to her history in Mauritius. I was asked to consider the psychological reports on the third Appellant. The submissions state that the third Appellant has complications regarding her physical health and has been receiving support from the NHS. The submissions state that the third Appellant's claim meets the terms of the Immigration Rules, paragraph 276ADE(iv) and that reasonableness should be considered. I was referred to the case of EV Philippines and Others [2014] EWCA Civ 874 relating to the best interests of the child.

12. The submissions go on to deal with the fourth Appellant and put forward a similar argument. The issue in her claim is that of proportionality and I was referred to **Razgar (2004) UKHL 27**.

13. The submissions state that neither child has had any connection with South Africa apart from the second Appellant being a South African national. (The fourth Appellant is also a South African national).

14. The submissions state that the second Appellant owns a property in the UK and the entire family resides there. The first Appellant has been studying in the UK and has had health issues. The submissions state that both children have spent a significant amount of time in the United Kingdom and although there is no evidence that there may or may not be the opportunity for the third Appellant to go to South Africa, she has had most of her education in the United Kingdom, as has the fourth Appellant. This is the only country they have ever known.

15. The points raised in the submissions of the Appellants relating to Mauritius have all been dealt with in the First-tier Tribunal's determination promulgated on 16 March 2015. As I stated in my error of law decision on 18 November 2015 I accept that anxious scrutiny has been given to the Appellant's situation were they to return to Mauritius. In particular, weight was given to the third Appellant's history in Mauritius. I find that had the third Appellant not had these issues relating to Mauritius the judge might well have reached a different decision on Article 8 of ECHR relating to the other three Appellants.

16. There was however a material error of law in the First-tier Tribunal's decision as the return of the Appellants to South Africa was not considered. The second stage hearing was adjourned to enable evidence to be provided by the Appellants about the education and medical treatment available in South Africa and the family's connections to South Africa.

17. I accept that the firm of solicitors was unable to represent the Appellants because of lack of funds but had the Appellants attended this hearing I find that questions could have been asked about the family's connections

to South Africa and research could have been carried out by the Appellants about the education and the medical facilities available there. As it is I have considered the COI report on South Africa which is in the public domain.

18. As the Appellants did not appear for the hearing they have not shown that they are unable to go, as a family, to live in South Africa. The burden of proof is on the Appellants. The second and fourth Appellants are South African. The fact that education and medical facilities are not free there does not go to the core of this claim. Nothing is before me to show that there are compelling and exceptional circumstances in this case. The Appellants have not discharged the burden of proof.

19. Based on what I have before me I find that the Appellants, as a family, can go to South Africa. Nothing has been provided to show that family reunion there would not be possible. Two of the Appellants are South African nationals.

20. With regard to the best interests of the children I have noted that they have been educated in the United Kingdom. Although the third Appellant's application can meet the terms of the Immigration Rules, none of the other Appellants' claims can satisfy the Rules and I have to consider Article 8 outside the Rules relating to Appellants one, two and four. The third Appellant cannot remain on her own in the United Kingdom as she is a minor.

21. The best interests of the children must be to remain with their parents. I have considered the terms of the said case of EV (Philippines) and the other cases referred to in the appellants' written submissions. The fourth appellant is only 7 years old. It is true that she and her sister have always been educated in the United Kingdom but the objective evidence on South Africa makes it clear that there is a satisfactory education system there. If they go to South Africa as a family I find that the interference with their rights will not breach Article 8. Neither of the children is British. There is nothing before me to indicate that the third appellant does not have the opportunity to go to South Africa.

22. Proportionality has to be assessed. The fact that these 3 Appellants' applications cannot meet the terms of the Rules has to weigh against them. I have to consider the necessity for effective immigration control. None of these 3 Appellants have any right to be in the United Kingdom. They have overstayed and were aware of this. They waited for the third Appellant to have been in the United Kingdom for more than 7 years before their application was made.

23. The best interests of the children is a primary consideration but is not the primary consideration.

24. I have noted the first Appellant's health issues and the third Appellant's health issues but there are good medical facilities in South Africa and I find they will be able to access treatment there.

25. It is unfortunate that the Appellants did not attend court to give evidence of their family connections to South Africa but based on what is before me, when proportionality is assessed, public interest must succeed when weighed against the first, second and fourth Appellants` human rights. These are Appellants who are in the United Kingdom and are accessing the National Health Service and the education system. They have no right to be here and this must be against public interest.

26. The Appellants have not discharged the burden of proof. It would not be unreasonable for the children to go to South Africa with their parents as a family.

27. I have to consider the said case of Razgar and consider the Appellants' family life. They can all be removed together to South Africa so their family life will not be breached. With regard to their private life I have to consider Part 5A of the Nationality Immigration and Asylum Act 2002 and Sections 117A-D. The fourth Appellant was born in the United Kingdom at a time when the first and second appellants' leave was precarious. For the same reasons as in paragraph 25 hereof, when proportionality is assessed public interest must succeed. There will be an interference with their private life but because of the public interest considerations there will be no breach of Article 8 of ECHR. It is not engaged.

DECISION

28. I dismiss the appeals of Appellants one, two and four under the Immigration Rules.

29. I dismiss the human rights appeals of Appellants one, two and four.

30. The appeal of the third Appellant under the Immigration Rules succeeds but I find it would not be unreasonable to expect her to go with her family members to South Africa.

31. Anonymity has been directed.

Signed Date

Deputy Judge of the Upper Tribunal