Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/26903/2014
IA/26904/2014
IA/26910/2014

THE IMMIGRATION ACTS

Heard at Field House
On 11 February 2016

Decision & Reasons Promulgated
On 26 February 2016

Before

DEPUTY JUDGE DRABU CBE

Between

J K B
R K
J K B

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Ms I Mahmud of counsel instructed by Jasvir Jutla & Co, solicitors
For the Respondent: Ms J Isherwood, Senior Presenting Officer.

DECISION AND REASONS

1. The appellants are nationals of India. The first appellant is the husband of second appellant and the third appellant is their child. They appeal, with permission granted by Upper Tribunal Judge Canavan on 13 August 2015, against the decision of Judge Coaster of the First Tier Tribunal dismissing their appeals against the respondent's decision to refuse them leave to

remain. The third appellant is seven years old and the first and second appellant have another child born in the UK who is 4 years old and whose appeal is entirely dependant on the outcome of the appeals of the three named appellants or at the very least the outcome of the appeals of the first and second appellants.

2. In granting permission to appeal, Upper Tribunal Judge Canavan in her decision said, "The third ground of appeal argues that the First-tier Tribunal Judge did not place sufficient weight on the best interests of the children and did not make specific findings in relation to Section 55. The First-tier Tribunal Judge referred to one relevant authority and considered the position of the two children in some detail [59-69]. It was no incumbent on him to make separate findings under Section 55, which imposes a duty on the Secretary of State, if the welfare of the children was properly considered. However, it is at least arguable that the First –tier Tribunal Judge did not indicate whether e considered the interests of the children as a primary consideration, nor did he consider all the issues outlined by the Court of Appeal in **EV (Philippines) v SSHD [2014] EWCA Civ 874**. No clear findings were made as to whether, it was reasonable to expect the oldest child to return to India and whether as a result, she met the requirements of the immigration rules. While the First-tier Tribunal Judge wrote a careful and detailed decision it is at least arguable that he may have erred in his assessment of the weight to be placed on the best interests of the children".

3. Having regard to the decision of the President of the Upper Tribunal The Hon. Mr Justice McCloskey in **Nixon [2014] UKUT 00368 (IAC)**, I am not sure whether the permission granted by Upper Tribunal Judge Canavan in the above terms meets the statutory requirements to which the President drew attention in the Nixon decision. However, this point was not taken by Ms Isherwood, the respondent's representative in her submissions before me at the hearing.

4. For the appellants Ms Mahmud of Counsel argued that the First Tier Tribunal Judge's assessment of proportionality was flawed. She said that the eldest child of the appellants was born in the UK and had lived in the UK for all the eight years of his life. He had never been to India and neither of the couples' children have had any contact with any family member in India. She drew my attention to the contents of Paragraph 35 of the Court of Appeal decision in **EV (Philippines)**. She also relied on paragraph 13 of the decision of the Administrative Court in **Tinizarey [2011] EWHC 1850 Admin**. Ms Mahmud contended that the First tier Tribunal Judge should have considered the best interests of the children in isolation of the immigration history of the parents.

5. Ms Isherwood argued that the determination of the First tier Tribunal Judge does not disclose any material error of law. The appellants according to her were simply trying to reargue the merits of the case. She asked me bear in mind the contents of paragraph 34(b) of the decision in **AJ (India)**. She argued that the impugned decision had taken all the relevant factors

into account and had been entitled in law as well as on facts to come to the conclusion that the appeals be dismissed.

6. In her response to the arguments advanced by Ms Isherwood, Ms Mahmud introduced a new factor. She argued that the First tier Tribunal had failed to have regard to the difference in the castes of the parents – the first and the second appellant. According to her the cast difference in parties to a marriage can be very important and that whilst inter faith marriages in India are received with more acceptance, the inter caste marriage are not. To this argument of Ms Mahmud, Ms Isherwood quite properly drew my attention to the contents of paragraph 66 of the determination of the First tier Tribunal. It had noted that no evidence had been adduced in support of the argument that had been advanced on behalf of the appellants. I also noted that permission to appeal had been specifically refused on this ground as is evident from paragraph 2 of the decision of Upper Tribunal Judge Canavan.

7. Having heard the arguments from representatives I adjourned the hearing to consider all the relevant papers and the relevant authorities and make a reasoned decision in the light thereof and which I now give as follows.

8. I dismiss the appeals as I find no material error of law in the determination of Judge Coaster, a Judge of the First Tier Tribunal. Described by the Upper Tribunal Judge Canavan as "a careful and detailed decision", with which I respectfully agree, Judge Coaster carried out a full and thorough examination of all the relevant facts including in particular those facts which had an impact on the determination of the best interests of the children. The Judge has demonstrated that in assessing proportionality he paid full regard to the birth, length of residence and all other factors listed in **EV (Philippines)** decision. What weight the Judge gave to each factor is a matter that was open to him but he did not ignore consideration of any of the material fact. The argument that Judge Coaster should have determined best interests of the children "in isolation" of the immigration history of the parents is, with great respect, absurd as it is their immigration history that is the cause of the decision of the respondent. Also such submission has no basis in any of the authorities relevant to the determination of the best interests of children which of course must be a primary consideration but is not and cannot be the only or sole consideration. Ms Mahmud's reliance on the contents of paragraph 35 of the Court of Appeal decision in **EV (Philippines)** is very selective as the paragraphs that follow – 36, 37 and 38 make it clear that the best interests of the child have to be weighed on the totality of all the evidence and in proportionality exercise "there falls to be taken into account the strong weight to be given to the need to maintain immigration control in pursuit of the economic well-being of the country and the fact that, *ex hypothesi*, the applicants have o entitlement to remain. The immigration history of the parents may also be relevant e.g. if they are overstayers, or have acted deceitfully." [paragraph 37 of the decision in **EV (Philippines)**]. I have also borne in mind paragraph 58 of the decision [author Lord Justice Lewison]. Lord Justice Lewison states, "In my

judgment, therefore, the assessment of the best interests of the children must be made on the basis that the facts as they are in the real world. If neither parent has the right to remain, then that is the background against which the assessment is conducted. Thus the ultimate question will be: is it reasonable to expect the child to follow the parent with no right to remain to the country of origin?" That is precisely what Judge Coaster used as the test for his decision. Appeals are therefore dismissed.

K Drabu CBE
Deputy Judge of the Upper Tribunal.
23 February 2016