**UPPER TRIBUNAL**
**(IMMIGRATION AND ASYLUM CHAMBER)**

**APPEAL NUMBERS: IA/47019/2014**
**IA/47032/2014**
**IA/47050/2014**

**THE IMMIGRATION ACTS**

| **Heard at: Field House on** | **Decision and Reasons Promulgated** |
|---|---|
| On 26 November 2015 | On 19 January 2016 |

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE MAILER**

**Between**

**G A J**
**A V J**
**A A J**
**ANONYMITY DIRECTIONS MADE**

**Appellants**

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

**Respondent**

**Representation**
**For the Appellants:** **Mr R Subramanian, Lambeth Solicitors**
**For the Respondent:** **Ms J Isherwood, Senior Home Office Presenting Officer**

**DETERMINATION AND REASONS**

1. I continue the anonymity directions made. This direction is to remain in place unless and until this Tribunal or any other appropriate court, directs otherwise. As such, no report of these proceedings shall directly or indirectly identify the appellants or any member of their family. Failure to comply with this direction could amount to a contempt of Court.

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2. The appellants are nationals of India, born on 20 April 1977, 26 October 1978 and 19 December 2007 respectively. The appellants are a family unit consisting of the mother, father and their child, AAJ, the third appellant. Their daughter, AJ, who was born in Ealing, London on 2 October 2012, is also a member of the family. She also made a dependent application which was refused in line with the appellants' refusals. She however was not granted a right of appeal as the refusal of her application for leave to remain was not an immigration decision within section 82(2)(d) of the 2002 Act. The respondent gave the same response in respect of AJ's decision regarding the s.55 duty, that she gave the other appellants.

3. I shall refer to the first appellant as 'the appellant'. She was granted leave to enter the UK as a student in 2009.

4. The appeal by the appellants against the decisions of the respondent to refuse to grant them leave to remain in the UK as a Tier 4 (Student) migrant and her dependants under paragraph 245ZX and paragraph 319C, respectively, of the Immigration Rules, as amended, were dismissed by First-tier Tribunal Judge A Cresswell under the Immigration Rules and the Human Rights Convention.

5. The relevant facts are that the appellants originally entered the UK as a student and dependants on 22 September 2009 valid until 23 January 2011. Their leave was extended on that basis until 26 January 2014. On 19 November 2013, their leave to remain was curtailed until 18 January 2014.

6. On 17 January 2014 the appellants made their respective applications for leave to remain which were refused on 7 November 2014. Decisions were also made to remove the appellants from the UK by way of directions under s.47 of the Immigration, Asylum and Nationality Act 2006. These decisions were the subject matter of the appeals.

7. The only documents submitted with the applications were their passports and expired biometric residence permits.

8. The appellants were issued one-stop notices under s.120 of the Nationality, Immigration and Asylum Act 2002, in which they were required to make a statement of any additional grounds they wished to rely on as to why they should not be removed or required to leave the UK.

9. In the decision letters the respondent contended that consideration had also been given to s.55 of the Borders, Citizenship and Immigration Act 2009 which imposed on her the duty to consider the effect on any children of a decision to refuse leave or remove against the need to maintain the integrity of immigration control.

10. The respondent concluded that the need to maintain the integrity of the immigration laws outweighs the possible effect on them that might result from their having to re-establish family life outside the UK.

11. Their appeals to the First-tier Tribunal were considered on the papers. Judge Cresswell had regard to the refusal statement, the respondent's bundle, the notice of

appeal from the appellants and documents attached to the appeal and received since that notice [7].

12. Each appellant provided the same 'initial grounds of appeal', referred to at B, page 7 of IAFT-1. It was further stated at section C of the notice of appeal that other supporting documents, witness statements and further grounds they intended to rely on, would be sent.

13. The same grounds of appeal accompanying the notices of appeal dated 18 July 2014 contended in each case that the appellant "... had complied all the rules of immigration for the time being in force for leave to remain in the UK". It was asserted that the appellant "required consideration" under the general grounds of acceptance outside the immigration rules, using discretionary powers "of the immigration officer." Moreover, the appellant's right to private life, liberty and family life under Article 8 has been adversely affected by the decision.

14. Further grounds of appeal dated 15 May 2015 were subsequently produced to the First-tier tribunal.

15. In his determination Judge Cresswell has set out in detail the requirements of the relevant immigration rules. He noted that further grounds of appeal were submitted as written submissions, but that no further evidence was submitted.

16. He found that as there was no CAS submitted with the application, the appellant could not meet the requirements for leave to remain as a student which meant that her husband and son could not meet the requirements as her dependants [15(ii)].

17. He referred to the additional grounds of appeal dated 15 May 2015. These set out the provisions of the rules with regard to the applications for leave to remain as a student. In addition there are various contentions made in respect of the "fairness principle decisions".

18. Various authorities were referred to and relied on. At paragraph 11(x) of the further grounds it is contended that the respondent has not properly applied the best interests of the child under s.55 of the 2009 Act. There is reference to ZH (Tanzania) and similar cases, including the decision in Razgar.

19. It is also contended from paragraph 17 of the furtherer grounds that "the appellant has established a private and family life in the UK and invested time and substantial amounts of money into the studies." There is also reference at paragraph 18 of the grounds to CDS (PBS, "available", Article 8) Brazil [2010] UKUT 305 (IAC) and other decisions.

20. It was contended that the appellant clearly has a private and family life as a points based migrant with a business in which "he (sic) has invested heavily" which deserves respect. It is also asserted that "... the economic well being of the UK under Article 8(2) would only be enhanced and not disadvantaged if this appellant were allowed to remain. Accordingly the refusal of further leave amounts to a disproportionate breach of the appellant's Article 8 rights".

21. It is finally contended that in the light of the above "... the appellant believes that no reasonable authority would have come to the same conclusion as has been reached in the 'Wednesbury Unreasonableness' ...". The appellant has established a private and family life here in the UK "with his partner, friends and the community".

22. There is a reference at paragraph 20 of the grounds to the s.120 notice and it is stated that "the appellant reserves the right to amend these grounds or advance additional grounds if necessary."

23. When referring to the additional grounds Judge Cresswell stated at [15(iii)] that the submissions in these 11 pages

> "... miss what is a very simple issue here. This family came to the UK so that the appellant could study accompanied by her loved ones, and for no other reason; she is not studying any more. So, why can she and her family not go home as planned? Or why should they not go home as planned?"

24. In 'exploring these questions below' he was critical of the appellants' solicitors' approach to this case [15(v)], noting that the submissions on her behalf pointed out that the appellant was badly let down having paid £3,000 to the college which then lost its licence. She was seeking return of her money and trying to find a new sponsor. She could not however obtain a further CAS because she could not show progression and did not have valid leave. Her leave was curtailed solely due to the suspension of her college. She had not been treated fairly.

25. He stated at [15(vi)] that he had a lot of sympathy with the appellant's account of how the present situation was reached.

26. He noted at [15(vii)] that the submissions suggested that the best interests of the child had not been considered. He went on to state that the submissions however did not tell him "... one word about AAJ so that I can give full consideration to her position. A Tribunal can only make decisions based on the evidence before it; it is for the appellant to provide information about the best interests of the child ...".

27. He found at [15(viii)] that it was proper to include the removal directions accompanying the refusal letters.

28. He stated that no reason was given as to why the appellants cannot now return to India. There was no suggestion that if allowed to remain, the appellant would be able to study. There was no information as to what AVJ is doing in the UK. Judge Cresswell could thus not see how it could be suggested that the appellant has not been treated fairly by the respondent. She cannot meet the rules, which is not the fault of the respondent [15(x)].

29. He found that the appellant had failed to satisfy the requirements under the rules and that the decision was in accordance with the law [17].

30. He then proceeded to consider from [17] onwards their Article 8 appeal. He set out in full the provisions of the Nationality, Immigration and Asylum Act 2002, s.117A-B; he referred to relevant passages from well known decisions such as Razgar, Huang and

EB (Kosovo). He also referred to MK (Best interests of the child) India [2011] UKUT 00475 and the decision in Azimi-Moayed and others [2013] UKUT 00197.

31. He concluded that the refusal of leave to remain did not interfere with private life for the purposes of Article 8(1). The interference is in accordance with the law. He repeated that the appellant is not studying and had provided no evidence that she would be accepted at a college and gave no reason why she and her family "... could not simply return to India immediately" [25].

32. At [26] he stated that "... I start as I must with an assessment of the best interests of the child". Normally it is in their best interests that they live with and are brought up by their natural parents. That would not change for this child on return to India as a family with her parents. The child is not British and will not therefore have expectations of a better life in the UK than India. She is young and has been brought up in an Indian household and will adapt to life in India [26].

33. After considering the best interests of the child within the context of the interests of the whole family, and the interests of the State, he found the interference to be proportionate [27]. He considered the "guidance" on proportionality in SS (Nigeria) v SSHD [2013] EWCA Civ 550 as well as the practical and compassionate circumstances which underline the rules (Patel v SSHD [2013] UKSC 72). He also considered Zoumbas v SSHD [2013] UKSC 74 when considering the best interests of the non-British child. He did not refer to the second child, AJ, who was two years and seven months old at the date of the determination.

34. He repeated at [27] that he had been given little detail of the private life of the appellants save for knowing that the appellant has been in the UK for five years and has a young child and that she lives with her and her partner. There were no circumstances which suggested that this is a case where the application of the rules leads to a disproportionate outcome.

35. He stated that he has followed the requirements of s.117A and B of the 2002 Act as well as the guidance of AM (s.117B Malawi) [2015] UKUT 0260 when considering those sections.

36. He concluded that these appellants who came to the UK 'without any hope of staying', who have obtained the benefit from their stay whilst building a private life, but have built their private life in the knowledge that there was a real likelihood that they would not be able to remain. They would be returning to a country whose culture and language they are familiar with and no substantive reason was given as to why the whole family could not return together [27].

37. On 20 August 2015, First-tier Tribunal Judge P J M Hollingworth granted permission to the appellants to appeal. He stated that in the circumstances an arguable error of law has arisen given the decision has been made in the absence of sufficient information being provided to the Judge in relation to the child in order to enable s.55 to be applied. "The corollary of the duty of the Court is the provision of sufficient evidence".

38. Mr Subramanian produced his skeleton submissions.

39. He referred to the Upper Tribunal's decision in MM (Unfairness; E&R) Sudan [2014] UKUT 105. He referred to the headnote which states that where there is a defect or impropriety of a procedural nature in the proceedings at first instance, this may amount to a material error of law. A successful appeal is not dependent on the demonstration of some failing on the part of the First-tier Tribunal. An error of law may be found to have occurred in circumstances where some material evidence, through no fault of the First-tier Tribunal, was not considered resulting in unfairness.

40. In MM, grant of permission to appeal was based on a piece of evidence that was not considered at first instance. That was a letter addressed by the appellant's solicitors to the UKBA. The Upper Tribunal was satisfied that on the evidence, this letter was transmitted by fax on the date that it appears and was received by the addressee on that date. The appellant had claimed that the record of her answers as set out in the asylum interview record was wrong. She stated that she had discussed this matter with her solicitor who told her that he would send a letter to the Home Office pointing out the mistake.

41. The First-tier Judge found that the appellant's solicitors did not write to the Home Office pointing out such a significant error in the interview. Accordingly he found that the fact that the appellant has given an inconsistent account as to whether it was the same three police officers who had raped her and who subsequently attempted to rape her at a later stage is a material inconsistency which damaged her credibility.

42. The ground of appeal to the Upper Tribunal was that the solicitor's letter was neither mentioned nor produced at the first instant hearing. That was considered to be an arguable procedural irregularity.

43. The Upper Tribunal noted the pivotal importance of the error of fact upon which the reasoning of the Judge was demonstrably based. That helped to explain why there is room for departure from an inflexible application of common law rules and principles where this is necessary to redress unfairness. That is especially so where the respondent has failed to cooperate to achieve a correct result.

44. It was found that the solicitor's letter was on any showing an important piece of evidence. It derived the status from the course which the hearing took when the appellant in cross examination made the claim that the interview record was erroneous **and** that she had promptly instructed her solicitors to this effect, **and** had been informed by them that they would write to the secretary of state in appropriate terms. The Judge made a positive finding that there was no such letter. Building on that finding, he found that this reinforced a material inconsistency. The Judge disbelieved the appellant's claim concerning her instructions and their response that they would write a letter.

45. Mr Subramanian also referred to the decision in JO and Others (s.55 duty) Nigeria [2014] UKUT 00517. The duty imposed by s.55 of the 2009 Act requires the decision maker to be properly informed of the position of a child affected by the discharge of an immigration etc. function. Thus equipped, the decision maker must conduct a careful examination of all relevant information and factors.

46. Being adequately informed and conducting a scrupulous analysis are elementary prerequisites to the interrelated tasks of identifying the child's best interests and then balancing them with other material considerations.

47. The question whether the duties imposed by s.55 have been duly performed in any given case will invariably be an intensely fact sensitive and contextual one. In the real world of litigation, the tools available to the Court or Tribunal considering this question will frequently be confined to the application or submission made to the secretary of state and the ultimate letter of decision.

48. At the hearing, Mr Subramanian conceded that the appellants could not qualify under the immigration rules. The third appellant came to the UK when she was two years old. She will be eight years old in December 2015. He relied on the decision in Azimi-Moayed, *supra*, and in particular the headnote at 1(iv). The Tribunal noted that seven years from age 4 is likely to be more significant to a child than the first seven years of life. Very young children are focused on their parents rather than their peers and are adaptable.

49. Mr Subramanian submitted that the best interests of the child had not been properly considered. The respondent and the Judge should have requested more details about the child. The appellants were not represented when the applications were submitted. There were no accompanying letters or statements that were sent.

50. He submitted that in the absence of information, the conclusions reached at [26] were unfair. In the circumstances the Judge was obliged to ensure that further evidence relating to the appellant's position was made available.

51. On behalf of the respondent, Ms Isherwood submitted that there had been no material error of law. The background to the appeal was that there was an application by the principal appellant for further leave to remain as a Tier 4 student and the other appellants as her dependants. The mere fact that she was a successful student who did not comply with the rules did not mean that the appeal should be allowed under Article 8.

52. She submitted that from the pre-action protocol letter sent to the respondent by the appellant's solicitors, it was stated that during the 'Pendency' of her application under the Tier 4 rules the respondent withdrew the licence of the sponsor. The Home Office however gave her 60 days to find a new sponsor which she was not able to do, claiming that she did not have valid leave to remain.

53. It was contended that the appellant's second child, AJ, born on 2 October 2012, had not been granted an in country right of appeal and that the secretary of state had failed to have regard to the best interests of the third appellant namely AAJ, who was born in India.

54. Ms Isherwood referred to the respondent's response to the pre-action protocol letter where it is asserted that the respondent has considered her duties under s.55 of the 2009 Act. Consideration was given in the decision dated 7 November 2014 to the s.55 duties, where it was concluded that the need to maintain the integrity of

immigration laws outweighs the effect on the appellant and her children that might result from her and her children having to re-establish family life outside the UK.

55. She submitted that the only evidence supplied in respect of the child was that set out in the application form, referring to her as an Indian national.

56. The appellants came to the UK as a family in 2009. The third appellant was then two years old. The appellants were legally represented in the appeal. The grounds were prepared by their solicitors. However, the only 'grounds' before the Judge were the several pages setting out case law. No evidence was produced about the children, and in particular there was no submission or assertion as to why they would not be able to return to India. There had been no challenge under the Rules.

57. The burden rests of the appellant. Accordingly, the conclusion by the Judge that decisions can only be based on evidence before the Tribunal was legally correct. It was not for the Judge to afford the appellants a further opportunity when they decided to have a paper appeal without producing any evidence. The Judge noted that the family came to the UK so that the appellant could study, accompanied by her loved ones and for no other reason. She is no longer studying here. Nor was there any information produced with regard to the child's position in the UK.

58. At [26] the Judge had at the “forefront” of his decision the assessment of the best interests of the child. The application to remain in the UK was always in a temporary capacity. Now it appears that the parents are trying to stay indefinitely in the UK 'on the basis of the unspecified alleged rights of the children'.

**59.** Moreover, and in any event, no other conclusion would have been reached.

**Assessment**

60. The appellants were represented by solicitors before the First-tier Tribunal. Notices of hearing, which included directions, were sent to the solicitors as well as to the appellant at the addresses on record.

61. The appellants were directed to send copies of all documents to the Tribunal and to the other party that they wished to rely on in support of the appeal. They were informed that it was important to submit all documents as soon as possible as the respondent will review the evidence before the hearing, which could result in the decision being reversed in the appellants' favour.

62. The appellants' solicitors subsequently confirmed that the appeals would now be dealt with on the papers.

63. At the date of hearing on 21 May 2015, the Judge identified the documents before him. This contained the further grounds of appeal and supplementary documents to which I have already referred.

64. However, there was no further evidence submitted by way of documentation, witness statements or otherwise, and in particular none relating to the third appellant or the younger child.

65. Nor was any further information given beyond the facts set out in the application form on behalf of the third appellant. The respondent had received a pre-action letter of protocol regarding the younger child, AJ, in which it was contended that there had been a failure to have regard to the best interests of the children. However, no further evidence relating to those children accompanied that letter. Nor was any further information ever sent to the respondent. On 5 December 2014 the respondent replied to the pre-action protocol letter, noting that the respondent had considered her duties under s.55 of the 2009 Act.

66. It was contended in the grounds seeking permission to appeal that the appellants, by changing their solicitors, have demonstrated that their position has not been presented properly to the Tribunal.

67. I do not find that there was a defect or impropriety of a procedural nature in the proceedings at first instance giving rise to any material error of law. There is no evidence as to what instructions, if any, the appellants gave to their former solicitors. Moreover, both the solicitors as well as the appellants were directed to supply all the evidence sought to be relied on in support of the appeal. It was moreover the appellants' election to have the appeal determined on the papers without attending the hearing in order to give evidence.

68. In those circumstances, the Judge made his decision regarding the best interests of the child based on the evidence and information originally produced to the respondent in the application itself and on the additional grounds of appeal dated 15 May 2015.

69. It is submitted that the conclusion at [26] was made without any consideration of the third appellant's expectations in the UK. The Judge however considered the best interests of the child as a first consideration [26] and has noted that she is not British and has no expectations of a better life in the UK than in India. She is still young and has been brought up in an Indian household and will adapt well to life in India. Nor was any substantive reason given as to why the whole family could not return together.

70. The Judge had moreover been given very little information about the private life of the appellants; apart from knowing that the appellant herself had been in the UK for five years and has a young child who lives together with her and her husband, there were no circumstances suggesting that the decision taken was disproportionate [27].

71. The Judge did not in his decision address the interests of the younger child born on 2 October 2012. However, there is no contention that the outcome of any decision with respect to the s.55 considerations of the younger child would have been any different if her interests had been separately considered. There are no special features or factors identified in respect of the children or either of them, which they claim should have been considered in discharging the s.55 duty.

72. The Judge at [27] referred to the statement of Lord Carnwath in <u>Patel and others v SSHD</u> [2012] UKSC 72, to the effect that Article 8 is not a general dispensing power. While one may sympathise with the call for common sense in the application of the rules to graduates who have been studying in the UK for some years, such

considerations do not by themselves provide grounds of appeal under Article 8 which is concerned with private or family life, not education as such. The opportunity for a student to complete his course of study in this country, however desirable in general terms, is not itself a right protected under Article 8.

73. I do not find that the decision relied on by Mr Subraniam in MM v SSHD, *supra*, assists the appellants in the appeal. Unlike in MM's case, there was no unfairness resulting from any misunderstanding or ignorance. In that case, the Tribunal had rejected the credibility of that appellant's claim that she had instructed her solicitors to correct the interview records. The Judge's belief was founded substantially in that case on a mistake of fact. That mistake led to the finding that she had been lacking in credibility and the overall assessment of her claim.

74. In this case however no such comparable or analogous situation arose giving rise to any mistake being made. No documentary material, written evidence and statements were submitted with their applications. No submissions were made regarding the integration of the family in the United Kingdom life and culture; nor was any issue raised of the absence of any links with India. There was no assertion that the children would not be supported in India. It has not been suggested that there are any special features requiring further investigation of the children's interests. Nor has any evidence subsequently been produced or any submissions made regarding the best interests of the children which militate against their return together with their parents to India.

**75.** Having regard to the circumstances as a whole and in the light of the facts before the First-tier Tribunal, his findings at [26] are sustainable, and have not been shown to be irrational or perverse in any way.

**Notice of Decision**

The decision of the First-tier Tribunal did not involve the making of any material error of law. The decision shall accordingly stand.

Anonymity directions continued.

Signed Date 11 December 2015
Deputy Upper Tribunal Judge Mailer