Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Numbers: IA/14472/2015**

IA/14478/2015

IA/14484/2015

THE IMMIGRATION ACTS

Heard at Birmingham	**Decision & Reasons Promulgated**
On 12 September 2017	**On 21 September 2017**

Before

UPPER TRIBUNAL JUDGE CHALKLEY

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRS PREETI VIMALKUMAR VYAS
MR VIMALKUMAR GANPATIPRASAD VYAS
MISS VIDHI VIMALKUMAR VYAS
(ANONYMITY DIRECTION NOT MADE)

Respondents

Representation:

For the Appellant: Mr D Mills, Senior Home Office Presenting Officer
For the Respondents: Mr Abu Sufian of Counsel

REASONS FOR FINDING AN ERROR OF LAW

1. In this appeal, the appellant is the Secretary of State for the Home Department to whom I shall refer as, "the claimant". The first named and

principal respondent ("principal respondent") is a citizen of India born on 23rd August 1985.

2. On 14th March 2013, the principal respondent applied for indefinite leave to remain as a Tier 2 Migrant. The second and third named respondents claimed as her dependants. A letter from the principal respondent's sponsor submitted with the application was subsequently discovered by the claimant to be false. Before the principal respondent's application of 14th March, 2013 was considered, she submitted a further application for leave to remain as a Tier 4 (General) Student Migrant. This variation was submitted under the Rules. The variation application was made on 17th October 2013, and it is clear from documents supplied by the principal respondent that representatives on her behalf wrote on several occasions to the claimant seeking a decision on both applications.

3. In a decision dated 27th March 2015, the claimant refused the application because with her Tier 2 application the principal respondent submitted a false document. The claimant, therefore, refused the application under paragraph 245ZX(c). The respondents appealed and their appeals were heard by First Tier Tribunal Judge Lagunju.

4. The First Tier Tribunal Judge noted that the principal respondent had gone to great lengths to seek redress from the police and various agencies, claiming that she was a victim of fraud. It was suggested on her behalf by Counsel that she notify the Home Office that she had been a victim of fraud, but Mr Mills pointed out that the only correspondence the Home Office had received in connection with the respondents' original application was from representatives who were seeking a response in connection with the variation application. Those representatives did not indicate that the principal respondent had been the victim of fraud.

5. The judge found that the application was correctly refused under paragraph 322(1A) of Statement of Changes in Immigration Rules HC 395, as amended.

6. The judge noted that the respondents relied on family and private life in the United Kingdom and could not meet the requirements of FM of the Rules. The judge was satisfied that the provisions of paragraph 276ADE(1) would not be breached either, and went on to consider the application under Article 8.

7. In the determination, paragraphs 27 to 34, the judge said this:-

> "27. When considering Art 8 of the ECHR I keep authorities such as **Razgar** and **Huang** in mind. Although family life could continue unhindered, as they would return as a family unit, I accept however in the time the [respondents] have been in the UK they have established a degree of private life.
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> 28. I find the decision is in accordance with the law and in keeping with the legitimate aim pursued.

29. When considering proportionality I have in mind the minor [respondent] who has lived in the UK for 7 years now. I note however that at the time of the application she had not attained 7 years in the UK thus she does not meet the rules. I consider her as a primary consideration and have her best interests in mind in line with s.55 of the Borders, Citizenship and Immigration act 2009. I find her length of residence relevant and significant.

30. She has established a life in the UK, formed relationships and ties to her peers and friends and according to the evidence from her school contained in the bundle, she has integrated well in the UK. I do not find it would be in the public interest to remove her from the UK after attaining what is recognised as a significant length of time in a child's life.

31. I note in line with **Azimi-Moayed**, she entered the UK when she was 4 years old, thus is now at an age in which she has begun to establish her own independence and form her own private life. In line with the [claimant's] own policy I do not find strong reasons have been shown to justify removal. I therefore conclude it would not be proportionate or reasonable for the child to leave the UK.

32. In this respect I also consider s.117B of the Nationality, Immigration and Asylum Act 2002 (as amended by the Immigration Act 2014) in relation to the adult [respondents]. I reduce the weight I attach to the [respondents'] private life given that their leave has always been precarious. I note also that the [respondents] are likely to have benefited from the UK financially as their child has been receiving an education.

33. I balance these factors against the considerations in s.117B(6), the public interest does not require the removal of the parents of a qualifying child. I find the [respondents] have shown that they have a genuine and subsisting relationship with their child who has now lived in the UK for 7 years and for the reasons I give above it would not be reasonable for her to leave the UK at this stage in her life.

34. On balance, I find the decision does amount to a disproportionate interference in the Art 8 rights of the [respondents]."

8. The claimant sought and obtained leave to appeal, suggesting that the judge had erred in law by treating the relationship between the principal respondent and her child and any associated best interests as a "trump card" and in doing so it is asserted that the judge has placed the consideration of the child's "best interests" above that required, namely a primary consideration making it the primary consideration above that of the public interest. In doing so, his balancing exercise, it was suggested, is flawed and therefore unreliable. It was suggested that the consideration of the child's best interest was an exercise to be conducted separately but within the proportionality analysis of the assessment of what is in the public interest. The judge erred in his approach to the child's best interests. This family entered the United Kingdom on a temporary basis and at all times their position has been precarious, and on the understanding that at some point they would be returning to India. This factor has not been applied to the balancing exercise. Further, the judge has failed to identify what is exceptional on the facts, such as to warrant consideration outside the Immigration Rules which the judge had found were not met.

9. In addressing me Mr Mills reminded me that the principal respondent's child was 14 at the time of arrival in the United Kingdom and 11 at the time of the hearing. The judge has simply not considered the interests of the child and the public interest in maintaining immigration control. The best interests of the child must be to remain with her parents, but the best interests of the child are not the only primary consideration and they do not of themselves have the status of the paramount consideration. The issue for the judge was to decide whether or not it would be reasonable to expect the child the leave the United Kingdom. The judge should have identified the public interest engaged, measured its strength and determined whether the private and family life factors advanced on behalf of the respondent outweighed the public interest to the extent that the decision was disproportionate. In this case the application could not succeed under the Immigration Rules but the judge does not identify what facts warrant the granting of leave outside the Immigration Rules.

10. On behalf of the respondents, Mr Sufian reminded me that the application took an extremely long time for the claimant to consider. It was during this period that the principal respondent told the Home Office that her application contained a full sponsorship letter.

11. Mr Mills pointed out that in fact no communication was ever received from the principal respondent pointing out that the document on which she relied for her original application was false. Several letters were received from her representatives but they were all chasing the Home Office for a decision.

12. Mr Sufian suggested that the judge had applied *MA (Pakistan) & Others v Secretary of State for the Home Department* [2016] EWCA Civ 705. Counsel suggested that the judge had clearly applied *Nagre* [2013] EWHC 720, *MF (Nigeria)* [2013] EWCA Civ 1129 and *AE (Algeria)* [2014] EWCA Civ 653. The judge considered proportionality and concluded that it was in the best interests of the child to remain in the United Kingdom. The judge applied *Azimi-Moayed & Other (decisions affecting children; onward appeals)* [2013] UKUT 00197 and concluded that it would not be proportionate or reasonable for the child to leave the UK. The judge went on to consider Section 117B(6).

13. I asked Counsel if he could respond specifically to the challenges raised by Mr Mills and suggested that I would adjourn the matter in order that he could consider those specific challenges if he would like me to. He indicated that he would welcome an adjournment and I agreed to adjourn until the end of my list.

14. At 11:45, when I had completed the remaining matters in my list, I asked Counsel whether he was in a position to proceed and whether he had had sufficient time. He told me that he would appreciate further time and asked for a further hour. I suggested that I would allow him until 2 o'clock.

15. On resuming the hearing at 2 o'clock I asked Mr Sufian if he had sufficient time and whether he was now in a position to address me. He told me he was.

16. Counsel told me that the judge had properly considered the matter under Article 8, having found that the respondent could not succeed under the Immigration Rules. The judge was entitled to do that following the decision in *Nagre*. He submitted that the Immigration Judge had properly considered the best interests of the respondent's child and it was clear from paragraph 27 that she considered *Huang*. In paragraph 29 of the determination, the judge bore in mind that the minor respondent had lived in the United Kingdom for seven years and had started to acquire her own family and private life. In paragraph 30 of the determination, the judge noted that the principal respondent's daughter had formed relationships and ties to peers and friends at school and concluded that it would not be in the public interest to remove her from the United Kingdom. At paragraph 31 the judge noted that in line with *Azimi-Moayed* the child had entered the United Kingdom when she was 4 years old and had now began to form her own independence and private life and there were no strong reasons shown to justify her removal.

17. Mr Mills responded by pointing out that the judge had erred by finding that the best interests of the child were determinative of her proportionality exercise.

18. I reserved my determination.

19. In Article 8 appeals the best interests of the child assessment should normally be carried out at the beginning of the balancing exercise. It is clear that this judge has found the best interests of the principal respondent's daughter are determinative of proportionality. It must clearly be in the best interests of the child to remain with her parents, but as the Supreme Court said in *Zoumbas v Secretary of State for the Home Department* [2013] UKSC 74 the best interests of the children are a primary consideration, but may be outweighed by the cumulative effect of other matters that weigh in the public interest.

20. It seemed to me that the judge had clearly erred in paragraph 31 by looking for what she described as being, "strong reasons" to justify the claimant's decision to remove. The judge appears to have overlooked that a child's best interests are a primary consideration, but they are not paramount. The judge should have identified the public interest engaged, measured its strength and determined whether the private and family life factors advanced on behalf of the respondent outweighed the public interest to the extent that the decision was disproportionate. What was required was for the judge to consider all issues in the round and conclude whether removal of the respondents was a proportionate response by the claimant. It is relevant that the claimant's immigration appeal was correctly refused under paragraph 322(1A) of the Immigration Rules. It

was also relevant that the principal respondent was initially granted leave to enter as a Tier 4 Student in 2009 on a temporary basis. It was necessary for the judge to consider whether, considering all the evidence in the round, it would be unreasonable to expect the principal respondent's child to leave the United Kingdom with her parents. In considering proportionality the judge appears to ignore the fact that the respondents cannot succeed under the Immigration Rules.

21. I have concluded that the determination is flawed and cannot stand. I set it aside.

22. I have given consideration to retaining the appeal in the Upper Tribunal and hearing it myself but, given the lengthy delays that can result, I have concluded that it is in the interests of justice that the matter should be remitted to the First-tier Tribunal for a de novo hearing afresh before a judge other than First-tier Tribunal Judge Lagunju. Two hours should be allowed for the hearing of the appeal.

Richard Chalkley

Upper Tribunal Judge Chalkley **Date: 20 September 2017**