Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/05538/2015
HU/07580/2015
HU/07585/2015

THE IMMIGRATION ACTS

Heard at Field House	Decision and Reasons Promulgated
On 4th September 2018	On 9th October 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE FARRELLY

Between

MR JOHN MATHEW
MRS GRACE JOHN MATHEW
MISS JISA GRACE JOHN
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellant: Ms M Gherman, Counsel, instructed by Masters Solicitors.
For the respondent: Mr E Tefan, Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The second appellant came to the United Kingdom on 2 February 2010 with leave as a student. The first appellant, her husband, came with their daughter, the third appellant, the following year, on 10 February 2011. All are nationals of India. The third appellant was born on 26 September 2000 which means she was 10 years of age when she arrived.

2. Applications were made on their behalf on 21 July 2015 for leave to remain on the basis of their family and private life. Those applications were refused on 26 August 2015. They could not meet the eligibility requirements as they were not British or settled and at that stage the third appellant had not lived in the United Kingdom for at least seven years.

3. Regarding their private life they had not been here the necessary length of time and very significant obstacles to their integration into life in India was not identified. At the time of application the third appellant had been in the United Kingdom for four and half years.

4. No exceptional circumstances were identified. The respondent had regard to the section 55 duty and concluded that her best interests were to be with her parents who could care for her in India. There she would have access to education and healthcare albeit to a different standard than that in the United Kingdom.

5. Their appeals were heard by First-tier Tribunal Judge Hussain at Hatton Cross on 27 February 2017. In a decision promulgated on 24 April 2017 the appeals were dismissed.

6. The appellant was represented by Counsel at that hearing and it was accepted that the requirements of appendix FM could not be met. Rather, reliance was placed upon the provisions of paragraph 276 ADE (vi). The focus was upon the third appellant, with her mother stating that she her daughter could no longer adequately converse in her first language, Mayalam.

7. Under the heading `Findings' the judge at paragraph 14 set out what the second appellant said in her statement about her daughter's ability to adjust to life in India. She referred to her having formed friendships in school here and that she was doing well and becoming more independent. At paragraph 15 the judge recorded that they had no reason to doubt the truthfulness of this evidence. The judge considered whether there would be very significant obstacles to their reintegration into India.

8. The judge acknowledged that the third appellant in particular would have adjustment issues but concluded she could adapt. The judge also acknowledged that she might lose out on education as she would have to make a fresh start in India. However, India has an education system and English is widely spoken. The judge felt that her time here might place her at an advantage. The judge referred to the statements of the appellants and did not find very significant obstacles to their reintegration**.** Regarding any claim outside the immigration rules, the judge recorded the length of time the family had been here and accepted they would have friends here and had put down roots. However, they were aware their leave did not mean they could stay permanently. The conclusion was at the decision was proportionate.

The Upper Tribunal

9. Permission to appeal was granted on the basis that the assessment outside the rules was inadequate. There was no reference to the criteria set out in section 117 B. Whilst the policy reflected in section 117 B in relation to children is seven years (which the third appellant had not achieved at that stage) it was arguable the judge had not fully analysed her integration.

10. Ms Gherman pointed out that there was no reference in the judge's decision to the section 55 duty or the considerations in section 117 B. There was no consideration of the third appellant's best interests before the proportionality exercise was undertaken. The judge at paragraph 50 had accepted the account given by the child's mother about likely problems with reintegration.Ms Gherman initially argued that the judge did not have proper regard for the fact the third appellant was a qualifying child. However she had miscalculated her age and accepted that at the time of the hearing before the First tier judge she had been here six years and so was not a qualifying child.

11. She also argued that the article 8 rights of the first and second appellant had not been properly considered. The family have integrated. The first appellant was involved with the church and thy would pay him a salary. The second appellant could be engaged as a nurse which is a sector in need.

12. In response, Mr Tefan accepted that the judge had not identified the child's best interests before undertaking the proportionality exercise. There was also an absence of reference to section 55 albeit the judge does make some comments about her being in education. He submitted it was unbelievable that the third appellant would forget her mother tongue.

13. I reserve my decision on the error of law issue. Ms Gherman said that an appeal bundle had been prepared so that if a material error were found I could go on to remake the decision without hearing further evidence. Mr Tefan indicated no objection to this.

Consideration

14. The decision is brief but in itself this is not a fault. However, the analysis of the article 8 issues arising is very limited. The approach is incorrect and lacks structure. The starting point is to determine the child's best interests. This is to be done aside from any question of proportionality. It is only when this is determined that the proportionality question arises. Thereafter there is an obligation to consider the factors in section 117 B. The judge has not followed this sequential procedure.

15. The respondent took the decision on the application on 26 August 2015. The reasons for refusal at paragraph 69 referred to an earlier human rights application which was refused on 12 August 2013 with no right of appeal. The respondent acknowledges that this was in error. The application for permission suggests this error and subsequent delay meant the family's greater integration as a consequence should have been taken into account in assessing the proportionality of the decision.

Error of law

16. I find that the decision does materially err in law and cannot stand. The judge's findings are brief and are directed towards paragraph 276 ADE (vi) of the immigration rules and whether there would be very significant obstacles to the family's reintegration into India. The judge concluded that very significant obstacles had not been established but did not go into any details. In particular there is no proper consideration of the best interests of the child involved. There is also no reference to the considerations in section 117 B.

17. The parties before me agreed that if an error were found I was in a position to remake the decision without hearing further evidence. The main thrust of the appeal has been the position of the child who now in fact is a young woman. She entered the United Kingdom when she was 10.

18. I would agree with the presenting officer that is not credible she would not have some understanding of the language of her home country. She would be in a position to adapt to the language and customs. She will have been influenced by her parent's background in growing up and she did lead the early part of her life in India. I also agree that time in the United Kingdom would be of benefit to her on return to her home country. However, as the judge acknowledged, there would be issues of adjustment for her and she will lose out in terms of education because of the disruption.

19. She is now almost an adult. Most significantly at this point she has been in the United Kingdom over 7 years. She has also integrated into life here. She is

living in a settled home environment. She, along with her parents, want to remain here and see their future is being here. Time has moved on. There was a delay of almost 2 years when the respondent did not deal correctly with an earlier application. The longer the family have remained here the greater the ties.

20. In MT and ET (child's best interests; extempore pilot) Nigeria [2018] UK UT 88 the Upper Tribunal reiterated the proposition that a pre-school child would have difficulty establishing article 8 rights outside that with their parents. The position changes over time and an assessment of the best interests must adapt to a wider focus, for instance, on the child's position in the wider world including their schooling.

21. The respondent's own guidance requires decision-makers to have regard to the best interests of the child and whether removal is appropriate in light of all the circumstances.

22. It is my conclusion that the best interests of the 3rd appellant would be to remain here with her parents.

23. I have considered the public interest as set out in section 117 B. The 1st appellant is a Minister of religion and has references from his church. He is paid a stipend. The 2nd appellant trained as a nurse in India and has obtained NVQ qualifications here. The family do not have a poor immigration history. There is no criminality. They speak English. They are likely to be self-sufficient. There is evidence of integration. There is no dispute that they are living as a family unit with the 3rd appellant. If they returned to India they would have to start their life over again.

Conclusion

24. Having regard to all the circumstances it would be a disproportionate interference with the established article 8 rights of the family to expect them to leave. I remake the decision allowing the appeals under article 8 .

Decision

The decision of First-tier Tribunal Judge Hussain materially errs in law and is set aside. I remake the decision allowing the appeals on the basis of article 8.

Francis J Farrelly

Deputy Upper Tribunal

Dated 02 October 2018