Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/07133/2016
HU/07139/2016
HU/07140/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 22 January 2018	**On 6 March 2018**

Before

DR H H STOREY
JUDGE OF THE UPPER TRIBUNAL

Between

RAJBEER [K] (FIRST APPELLANT)
PD (SECOND APPELLANT)
SS (THIRD APPELLANT)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr R Sharma, Counsel, instructed by Whitefields Solicitors
For the Respondent: Ms A Fijiwala, Home Office Presenting Officer

DECISION AND DIRECTIONS

1. The appellants are citizens of India. The first appellant is the mother of the second and third appellants; they were born in March 2008 and July 2009. The second appellant had not attained seven years' residence by the date of application (4 November 2015) but had by the time of the hearing before the First-tier Judge.

2. Following an error of law hearing on 16 October 2017 I decided to set aside for material error of law the decision of First-tier Tribunal (FtT) Judge Frankish sent on 31 January 2017 dismissing the appeal of the appellants against a decision made by the respondent on 26 February 2016 refusing them leave to remain. I concluded that the judge failed to apply the correct legal principles as set out in **MA (Pakistan) [2017] EWCA Civ 705**. At [116] his Lordship emphasised that it was important for decision makers to "recognise that particular weight had to be given to the fact that the child had been resident for seven years". I noted that the judge's error as regards reasonableness of return in relation to the second appellant brought into play s.117B(6) in relation to the first appellant. I concluded that before the decision could be re-made in this case there needed to be a further hearing. I stated:

> "That is principally for two reasons. First it does not seem to me that the judge's error points necessarily to a positive or negative outcome. As Mr Jarvis pointed out in one of the cases dealt with in **MA (Pakistan)** the Court of Appeal did not consider it was unreasonable for the children in the **AR** and **NS** cases who had been in the UK for over seven years to be removed. Second, the judge's finding in relation to the first appellant's ties in India appears to have rested simply on an assumption that as she still had a sister there, this automatically meant she would have help and support from family in India: at paragraph 24 the judge used the words "with all the connections and inestimable benefit of family ties that that provides". I am not prepared to decide this issue on the basis of a mere assumption and require the issue to be addressed by reference to the evidence and submissions related thereto. Given that it is less than a year since the hearing before the FtT, I do not envisage a need for further evidence regarding the appellants' circumstances in the UK, but I will not exclude further evidence being submitted within four weeks of this decision being sent, relating to the appellants' likely circumstances in India, including as regards whether the first appellant's history of ill-health makes it reasonably likely she will be able to find employment. I will list the hearing for one and a half hours."

3. At the resumed hearing, I heard submissions from the representatives. Miss Fijiwala highlighted that in a 2012 determination the First-tier Tribunal Judge Lloyd did not find the first appellant or her husband (Mr P Singh) credible including as regards the circumstances in which she came to the UK and in which the couple's relationship had broken down. It was unclear whether the first appellant had kept in touch with the parents of her husband who are after all grandparents. Even after the decision of 2012, the first appellant chose not to leave, even when she had the support of a husband. As regards her husband, he no longer lives with her but it remains unclear whether their relationship had in fact broken down. It was clear the first appellant's health had improved. She had not provided any further medical evidence. As regards her family in India, the first appellant states that her only sister remains there, but that is at odds with what she said to Judge Lloyd in 2012, when she said she had 3 sisters and a brother. There was a lack of evidence as to whether there was one remaining sister in India and as regards her siblings in Canada. The first appellant had worked unlawfully in the UK and so would be able to work lawfully in India. She would be able to afford accommodation there. There were no significant obstacles to her reintegrating into Indian society. She speaks the language and has lived within the same Indian community in the UK. She has

very little English and previously required an interpreter. Her private life in the UK has been precarious.

4. As regards the children, Miss Fijiwala said she accepted they had been in the UK for 7 years and the eldest would be eligible for British citizenship in March, but both children were still relatively young and adaptable and had limited ties outside their family. Both speak Punjabi. There were schools available in India. There was no up to date information about their progress in schooling in the UK.

5. As regards public interest factors, Miss Fijiwala said that on the findings of Judge Lloyd the first appellant had come to the UK on false pretences, she had not given credible evidence about her relationship with her husband, she had remained unlawfully in the UK for a number of years, she had worked illegally, she spoke little or no English and was not financially independent. On return she would have family available to help and family members in Canada would be able to help with support. She would have available medical treatment in India.

6. With reference to a handwritten statement from the first appellant dated 22 January 2018, Mr Sharma submitted that applying the approach set out in **EV (Philippines**) [2014] EWCA Civ 874, the second appellant was turning 10 in two months and so was no longer a young child. In March, he would be eligible to obtain British citizenship. Both children had been in the UK more than 7 years and neither had ever been to India. Whilst it has been found both are likely to speak Punjabi it will not be sufficient in their schooling. Their best interests clearly lay in remaining in the UK. Removal would disrupt their lives, notwithstanding their mother may be able to obtain some help in India directly or indirectly. Her brother and sister have now moved to Canada, so she has one remaining family member in India only. The first appellant's work skills would not assist in a village in India. She would not be supported by family members; her sister there does not work and has been ill for 12-13 years with a thyroid problem; her husband's army pension would not be able to cover her and her children's needs. By Indian traditions her in-laws would not support her. Her psychological condition has improved but there is still a risk of aggravation. As regards the first appellant's character, it is not the case that she used false pretences in coming to the UK. She did come as a fiancée; it was an arranged marriage to a different individual. There was insufficient evidence of bad character. In any event, her children should not be punished for any past wrongdoings by her.

7. On 31 January 2018, I issued further directions stating that I required the appellants' representatives to furnish suitable documentation to support the claim made in para 2 of the first appellant's latest witness statement regarding family members living in Canada. This was duly provided by her solicitors on 8 February 2018.

My assessment

8. I have taken into account all of the evidence including the first appellant's latest witness statement and the record of the oral evidence she gave before Judge Frankish. This case principally falls to be decided under paragraph EX.1(a) of Appendix FM of the Immigration Rules and s.117B(6) of the NIAA 2002. It is clear that the first appellant cannot meet the requirements of para 276ADE(1)(vi) as there are no very significant

obstacles to reintegrating into life in India once more. Mr Sharma did not seek to argue to the contrary before me.

9. The second and third appellants have attained over 7 year's residence in the UK and hence I must apply to these appeals the legal principles set out in **MA (Pakistan**). At [46] of **MA (Pakistan**), Elias LJ said:

> "46. Even on the approach of the Secretary of State, the fact that a child has been here for seven years must be given significant weight when carrying out the proportionality exercise. Indeed, the Secretary of State published guidance in August 2015 in the form of Immigration Directorate Instructions entitled 'Family Life (as a partner or parent) and Private Life: 10 Year Routes' in which it is expressly stated that once the seven years' residence requirement is satisfied, there need to be 'strong reasons' for refusing leave (para. 11.2.4). These instructions were not in force when the cases now subject to appeal were determined, but in my view they merely confirm what is implicit in adopting a policy of this nature. After such a period of time the child will have put down roots and developed social, cultural and educational links in the UK such that it is likely to be highly disruptive if the child is required to leave the UK. That may be less so when the children are very young because the focus of their lives will be on their families, but the disruption becomes more serious as they get older. Moreover, in these cases there must be a very strong expectation that the child's best interests will be to remain in the UK with his parents as part of a family unit, and that must rank as a primary consideration in the proportionality assessment."

10. At [116] his Lordship emphasised that it was important for decision makers to "recognise that particular weight had to be given to the fact that the child had been resident for seven years".

11. Accordingly, I give particular weight to the fact that the second and third appellants have been resident for over 7 years and recognise that they are entitled to succeed in showing that it would be unreasonable to expect them to leave the JUK unless there are strong reasons for denying them leave.

12. Having considered the evidence as a whole, I have concluded that there are strong reasons for denying the appellants leave.

13. First of all, I turn to consider the appellants' likely circumstances in India. Despite my previous directions, the evidence as to the precise situation of her sister there remains thin, but I am prepared to accept that in India the first appellant has only one sister now.

I am satisfied that on return to India she would be able to receive family support enabling her and her children to resume family life there. I do not consider that this would necessarily or at all come from the first appellant's sister, except in the form of short-term help with accommodation and support. However, I consider that it is reasonable to infer from the evidence available that the first appellant could look to her family members in Canada to assist financially. I also consider that if the first appellant was unable to find work in her home village that she would be able to relocate within India to an urban area where she could find work and would receive support from her Canadian family

members if she decided to take such a step or if earnings from her work proved insufficient. She has successfully completed a Beauty Course in the UIK and now has experience of self-employment as a result.

14. It is clear that the first appellant still has significant cultural, linguistic and social ties in India.

15. The first appellant has health problems. She was diagnosed with a mini stroke in 2009 at eight and a half months' pregnant and had to have an emergency caesarean section. She suffered similar symptoms in November 2015. The cardiologist at Wolverhampton Hospital in a letter dated 25 April 2016 states that she has "mild to moderate mixed mitral valve disease with severe LA dilation; previous cerebral infarct; severe iron deficiency anaemia; possible migraine". It appears she is on or may need to be on continuing medication. However, the medical evidence - which the first appellant has not seen fit to update- does not indicate that her health problems are serious or are ones for which she could not receive treatment in India and they have not prevented her from carrying out her parenting responsibilities and working.

16. The two children have never lived in India. Nevertheless, since their mother does not speak English, it is clear that they have been brought up speaking Punjabi at home and could quickly adapt to Punjabi at school. It is also a reasonable inference that they have been brought up to be familiar with India culture and customs and religious practices. The favourable testimonials from numerous friends indicate she maintains close contact with persons of Indian origin or roots. Although the two children have done all their schooling here, neither has started secondary school. They have put down roots in the UK but the evidence does not indicate that they have yet developed very significant social, cultural and educational links in the UK. The evidence is that the focus of their lives is still on their own family and on other children whose mothers are friends with the first appellant. Whilst I consider that their best interests on balance are to remain in the UK with their mother, I note that the best interests of the child assessment in their case is one in which there are factors indicating that they will be able to leave the UK and adapt to life in India without any significant detriment to their best interests.

17. There are significant public interest factors pointing towards a conclusion that it would be reasonable to expect the appellants to live their family life in India. The first appellant came to the UK in April 2007 on a 6 months family visit visa. Whether or not she came as a fiancé for an arranged marriage that was then cancelled or not, she was given very limited leave and yet chose to overstay. The first appellant has also worked here illegally in a self-employed capacity. That means her immigration misconduct goes further than mere overstaying. It is clear that she entered into her relationship with Mr P Singh at a time when she knew her immigration status was precarious. She has not been able to give a credible account t of the real circumstances as regards her relationship with Mr P Singh. Indeed, it is still not clear if he is still in the UK, whether he sees his children or has any contact with the first appellant or pays maintenance. The first appellant does not speak English. If she is able to support herself through self-employment, her situation cannot be described as financial independence in any lawful sense.

18. Mr Sharma has set much store by the fact that as of this month the oldest child becomes eligible to apply for British citizenship. I accept that if an application is made and the child becomes British, that will (1) mean that the second appellant is unremovable; and (2) necessitate the respondent reconsidering the first appellants' case under her policy for parents of British citizens and that, assuming the first appellant can satisfy the respondent there is no other primary carer, she is then likely to succeed under the policy, as it cannot be said that her immigration misconduct is at the very serious end of the spectrum, although it has gone further than lengthy overstaying. However, I must apply the law to the facts as they are now and am not prepared to decide the case on the basis of a fact that does not yet exist and whose coming into being is a contingent matter. It will be open to the first appellant to take steps outside the compass of these appeals which may result in her eventually being able to stay, but that should not determine how I decide this appeal.

19. As regards whether there are compelling circumstances that warrant a grant of leave outside the Rules, the reasons I have given above for concluding that it would be reasonable to expect the children to return with the first appellant to India also serve as reasons for my conclusion that dismissing her appeal would not lead to unjustifiably harsh consequences. The appellants may face hardships and difficulties in adjusting to a very different life and society in India and the schooling and health facilities in India will be of a lesser quality than in the UK, but I do not consider that the family's circumstances as a whole demonstrate compelling circumstances. Nor do I consider that either of the two children have been able to show they would face very significant obstacles to reintegration into Indian society on return.

20. For the above reasons, I conclude:

The decision of the FtT judge has already been set aside for material error of law;

The decision I re-make is to dismiss the appellants' appeals.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

I have decided not to anonymise the first appellant but to anonymise the identity of the two minor appellants. In relation to them only, unless and until a Tribunal or court directs otherwise, the second and third appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them. This direction applies both to the second and third appellants and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date: 4 March 2018

H H Storey

Dr H H Storey
Judge of the Upper Tribunal