



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/01691/2016
IA/01693/2016
IA/01692/2016

THE IMMIGRATION ACTS

Heard at Field House
On 14 May 2018

Decision & Reasons Promulgated
On 24 May 2018

Before:

UPPER TRIBUNAL JUDGE GILL

Between

N J P
P G P
Master P G P
(ANONYMITY ORDER MADE)

Appellants

And

The Secretary of State for the Home Department

Respondent

Anonymity

I make an order under r.14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008 prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the minor appellant. For that reason, this anonymity order extends to his parents, the other appellants. No report of these proceedings shall directly or indirectly identify them. This direction applies to both the appellants and to the respondent and all other persons. Failure to comply with this direction could lead to contempt of court proceedings.

The parties at liberty to apply to discharge this order, with reasons.

Representation:

For the Appellant: Mr S Khan, of Counsel, instructed by Malik & Malik Solicitors.
For the Respondent: Mr S. Kotas, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction and background facts:

1. The issue in these appeals is whether Judge of the First-tier Tribunal R Hussain materially erred in law in his consideration of the Article 8 claims of the appellants. They had appealed to the First-tier Tribunal against decisions of the respondent dated 17 March 2016 (in respect of the first appellant) and 29 January 2016 (in respect of the second and third appellants) by which he refused their applications for leave to remain on the basis of Article 8. The judge dismissed the appeals.
2. The appellants are nationals of India. The first appellant is the wife of the second appellant. They were born, respectively, on [] 1983 and [] 1977. The third appellant is their son, born in the UK on [] 2009.
3. As at the date of the application for leave to remain, the third appellant was six years old. By the date of the hearing before the judge, he was 7 years 9 months old and had lived in the United Kingdom since birth.

Immigration history

4. The second appellant claimed to have arrived in the United Kingdom on 30 December 2004 as a visitor, aged 27 years. His leave expired on 21 June 2005. He has remained without leave since. The first appellant arrived in the United Kingdom on 13 April 2008 as a student, aged 24 years 9 months. Her leave as a student was subsequently extended until 2 December 2013. She has remained without leave since.
5. The first and second appellants made previous applications for leave to remain on the basis of Article 8 which were refused.

The judge's decision

6. The judge found that the appellants' Article 8 claims could not succeed under the Rules. In this regard, he made the following findings:
 - (i) For the purposes of Appendix FM, the first appellant could not succeed under the partner route because her partner was not a British citizen or had settled status.
 - (ii) The third appellant was not a qualifying child as at the date of his application for leave to remain because he had not lived in the United Kingdom for at least 7 years as at the date of application.
 - (iii) For the purposes of para 276ADE(1)(vi), there were no very significant obstacles to the first appellant's or the second appellant's reintegration in India. In this regard, he noted that they had lived in India for the majority of their lives.
7. In assessing the Article 8 claims outside the Rules and applying s.117B of the Nationality, Immigration and Asylum Act 2002 (the "2002 Act"), he said, at para 27, that he was not satisfied that the first appellant could speak the English language or

that the appellants were financially independent. He took into account the immigration history and said, at para 28, that there were powerful reasons weighing in favour of removal. Paras 27 and 28 of the judge's decision read:

"27. For the purposes of Section 117B:

- (i) The Appellants do not meet the requirements of any Immigration Rules that would entitle them to remain in the United Kingdom as set above. The Appellant entered the UK with limited leave as a student and then remained without leave. The maintenance of effective immigration controls includes the removal of all those who have no leave to remain in the UK. It follows that there is a public interest in this respect in removing the Appellant.
- (ii) It is in the public interest and in particular the interests of the economic wellbeing of the country that persons seeking to remain here should speak English. The appellant gave her evidence in English and has studied in the UK. However an interpreter was requested and asked to remain available during the hearing to assist when necessary, in addition there is no evidence of either the first or second appellant having passed the life in the UK test. I am therefore not satisfied that the appellants have adequate English speaking skills.
- (iii) It is also in the public interest and in particular the interests of the economic wellbeing of the United Kingdom that such a person should be financially independent. The appellants did not provide evidence that they were working or able to support themselves, indeed it was their evidence that they were supported by family and friends. Although the first appellant has been a student in the past and has some qualifications I am unable to assess any earning capacity. I find that the appellant is not financially independent.
- (iv) Little weight is to be given to a private life that is established by a person at a time when they are in the United Kingdom unlawfully or at a time when that person's immigration status is precarious. Those are clearly relevant factors here because the Appellant entered the UK with limited leave as a student which was extended until 2.12.2013. Thereafter she remained in the UK without leave. The second appellant arrived a visitor and remained without leave at the expiry of such leave and therefore their immigration status has been precarious throughout.
- (v) The third appellant, born [] 2009, is now a qualifying child.

28. It follows from the above that there are powerful reasons weighing in favour of removal."

8. At para 30, the judge referred to the fact that the third appellant had commenced education in the United Kingdom, that he attends mainstream primary education and appears to be performing well. At para 31, he referred to s.55 of the Borders, Citizenship and Immigration Act 2009 and at paras 32-33, he quoted from ZH (Tanzania) v SSHD [2010] UKSC 4 and EV (Philippines) v SSHD [2014] EWCA Civ 874.

9. At para 34, the judge quoted at length from MA (Pakistan) [2016] EWCA Civ 705. He quoted from paras 42, 49, 54 and 103. At para 35 of his decision, the judge said that it was in the best interests of the third appellant for him to remain in the United

Kingdom. At para 36, he found that it would be reasonable for the third appellant to leave the United Kingdom. At para 37, he set out his overall conclusion. It is necessary to quote paras 34-37 of the judge's decision. They read:

"34. In MA (Pakistan) 120161 EWCA Civ 705 it was held that

"42... As Lord Justice Laws pointed out in *In the matter of LC, CB (a child) and JB (a child)* 120141 EWCA Civ 1693 para.15, it is not blaming the child to say that the conduct of the parents should weigh in the scales when the general public interest in effective immigration control is under consideration. The principle that the sins of the fathers should not be visited upon the children is not intended to lessen the importance of immigration control or to restrict what the court can consider when having regard to that matter. So if the wider construction relied upon by the Secretary of State is otherwise justified, this principle does not in my view undermine it.

49. Although this was not in fact a seven year case, on the wider construction of section 117B(6), the same principles would apply in such a case. However, the fact that the child has been in the UK for seven years would need to be given significant weight in the proportionality exercise for two related reasons: first, because of its relevance to determining the nature and strength of the child's best interests; and second, because it establishes as a starting point that leave should be granted unless there are powerful reasons to the contrary.

54...There is nothing intrinsically illogical in the notion that whilst the child's best interests are for him or her to stay, it is not unreasonable to expect him or her to go. That is so even if the reasonableness test should be applied so as to exclude public interest considerations bearing upon the parents."

103. In my judgment, the observation of the judge to the effect that people who come on a temporary basis can be expected to leave cannot be true of the child. The purpose underlying the seven year rule is that this kind of reasoning ought not to be adopted in their case. They are not to be blamed for the fact that their parents overstayed illegally, and the starting point is that their status should be legitimized unless there is good reason not to do so. I accept that the position might have been otherwise without the seven years' residence, but that is a factor which must weigh heavily in this case. The fact that the parents are overstayers and have no right to remain in their own right can thereafter be weighed in the proportionality balance against allowing the child to remain, but that is after a recognition that the child's seven years of residence is a significant factor pointing the other way."

35. Given that the third appellant is 8 years of age and been in the UK since birth he is therefore a qualifying child and I find it is in his best interest to remain in the UK.

36. However, as noted above, neither the first nor second appellant can succeed under the immigration rules. Their leave has been precarious throughout and subsequently unlawful. There is no evidence of any English speaking qualifications and I am therefore not satisfied that

they can adequately speak English. The appellant's stated that they were supported by family and/or friends and so did not demonstrate that they are financially independent. With regards to the third appellant any education that he has commenced is at the very early stages of his life. There will be little or no interruption to his education as it is not at a critical stage such as in the middle of exams. In any event children change schools at various stages of their lives and thereby have periodical stages when there is a change of classmates, new teachers and environment. It is, therefore, highly unusual for a child in the UK itself to complete the entirety of their education within one school. Whilst the appellants appear to have family in the UK they also have some family in India. They confirmed that they have contact with their respective parents and other family in India. I find that that the third appellant is able to communicate in Gujarati/ Hindi as confirmed in the appellant's witness statement. For the above reasons I find that it would not be unreasonable for the third appellant to leave the UK and locate as a family unit with the first and second appellants to the country of his nationality.

37. On the evidence I conclude that the appellant and his family could continue their private and family life in India. Clearly it would be difficult for the appellants to leave behind friendships that may have been formed but bearing in mind the public interest requirement of the maintenance of immigration control under Section 117B I conclude that the decision in this case was and is proportionate."

The grounds

10. The grounds may be summarised as follows:

- (i) The judge failed to consider the private life claim of the third appellant or the second appellant. He only considered the private life claim of the first appellant.
- (ii) The judge erred in reaching his finding that he was not satisfied that the first appellant spoke the English language to the required standard. The fact that an interpreter was present to assist if required is not indicative of an inability to speak English, given the use of legal jargon at a Tribunal hearing and the high pressure. The 'Life in the United Kingdom' test is not a requirement of s.117B of the 2002 Act.
- (iii) The judge speculated when he said at para 36 that it was "*highly unusual for a child in the UK itself to complete the entirety of their education within one school*". The judge considered only the impact of the third appellant moving school and failed to consider the impact of him moving country and adapting to a change of culture.
- (iv) The judge failed to have regard to the principles set out in PD and others (Article 8 - conjoined family claims) Sri Lanka [2016] UKUT 00108 (IAC) to the effect that, if a child's appeal is to succeed, it would be unlawful for the parents of that child to have their appeals refused. The grounds contend that, in the instant case, the judge "*reached the reverse conclusion by finding that the third appellant's appeal as a child would succeed based on his best interests [35] but for his parents not meeting the requirements of the Immigration Rules and based on flawed findings in respect of section 117B*".

Submissions

11. Mr Kotas accepted that there was some inherent tension in the judge saying that the first appellant gave her evidence in English and his finding that he was not satisfied that she could speak English adequately.
12. Mr Khan informed me that the first appellant had given her evidence entirely without the assistance of the interpreter, although the interpreter was present to assist if necessary. The 'Life in the UK' test is not a requirement under s.117B. He submitted that the judge therefore erred in reaching his finding that he was not satisfied that the first appellant spoke English adequately. He submitted that this error was material because the judge took it into account in reaching the conclusion that it would be reasonable for the third appellant to leave the UK, at para 35.
13. Mr Khan submitted that the second error made by the judge was that he failed to take into account the impact of the third appellant moving to India. He failed to take into account that India is alien to the third appellant who grew up thinking that he is British. He only took into account the impact of changing schools but omitted the impact of moving to a different country. This was a material error, in his submission.
14. In the event that I concluded that the judge had materially erred in law, Mr Kotas submitted that, as there was no factual dispute, the Upper Tribunal could proceed to re-make the decision on the basis of submissions. Mr Khan submitted that the Upper Tribunal could proceed to re-make the decision on the basis of the documentary evidence that was before the judge. He said that there had not been any change in circumstances since the hearing before the judge.

Assessment

15. I do not accept that the judge only considered the impact of the third appellant moving schools and failed to consider the impact on the third appellant of moving to a country that was alien to him. In the first place, that was the whole point of the appeal, i.e. whether the appellants should be removed to India. More importantly, it is plain, from the very fact that he found (at para 36) that the third appellant is able to communicate in Gujarati / Hindi, that he *did* take into account the impact on the third appellant not only of moving schools but of moving to a different school in a different country. Furthermore, at para 37, he took into account that it would be difficult for the third appellant to leave behind friendships that may have been formed. I therefore reject this ground.
16. Before I deal with the ground as to whether the judge erred in law in reaching his finding that he was not satisfied that the first appellant spoke English adequately, I shall deal with the written grounds that were not pursued at the hearing before me.
17. If the ground summarised at my para 10(i) includes a submission that the judge failed to consider the private life claim of the second appellant, I do not accept that the judge erred in this way. It is plain from para 19 that the judge concluded that there would not be very significant obstacles to the second appellant's reintegration in India for the purposes of para 276ADE(1)(vi) of the Rules. That was a finding that was

determinative of the second appellant's private life claim. To the extent that this ground also contends that the judge failed to consider the private life of the first appellant, it is wrong because it is plain that the judge did consider the private life of the first appellant.

18. In relation to the ground summarised at my para 10(iv), it is simply not the case that the judge found at para 35 that the third appellant's appeal would have succeeded but for the fact that his parents do not meet the requirements of the Rules. At para 35 of his decision, the judge found that it would be in the best interests of the third appellant for him to remain in the United Kingdom. That is not a finding (as contended in the grounds) that the third appellant's appeal would have succeeded but for the fact that his parents did not meet the requirements of the Rules.
19. Furthermore, it is simply not the case that the judge did not apply PD and others. When his decision is read as a whole, it is plain that a large part of his reasoning concerned the private life claim of the third appellant. Paras 30-36 were devoted to the third appellant's claim.
20. The only reasonable inference that one can draw is that the judge was fully aware that, as the private life claims and family life claims of the first and second appellants could not succeed under the Rules, their Article 8 claims outside the Rules turn upon the private life claim of the third appellant outside the Rules. Having concluded that it would be reasonable for the third appellant to leave the United Kingdom and having given his reasons for reaching that finding, he found that the decision was proportionate in relation to all of the appellants. It is simply not the case that his approach was inconsistent with PD and others.
21. I turn now to the judge's assessment of the first appellant's English language ability.
22. The first appellant gave evidence in English. Although an interpreter was present to assist if necessary, the judge did not note that she had experienced any difficulties in giving her evidence in English. He did not say that the interpreter was used. He did not explain why the mere fact that an interpreter was present to assist if necessary indicated that the first appellant could not speak English adequately, given that the interpreter was apparently not used. I also agree with Mr Khan that the 'Life in the UK' test is not a requirement in order to establish that one is able to speak English adequately.
23. I therefore agree that the judge erred in law in reaching his finding that he was not satisfied that the first appellant speaks English adequately.
24. However, I am satisfied that this error was not material to the judge's finding that it would be reasonable for the third appellant to leave the United Kingdom for reasons which I will now give.
25. An ability to speak English adequately is, at best, a neutral factor, as Mr Kotas submitted. I acknowledge that there is a difference between the fact that the judge took his adverse finding into account as a *negative* factor and the fact that, if he had not erred, it would have been a *neutral* factor at best. I am satisfied that this difference could not have made a material difference to the outcome, for the following reasons:

- (i) The judge identified the factors that indicated that there were powerful reasons weighing in favour of immigration control at paras 27 and 28. Of these factors, the lack of ability to speak English was but one factor.
 - (ii) The other factors were that the appellants were not financially independent and the immigration history of the first and second appellants.
 - (iii) I am satisfied that, given the judge's findings as to the lack of financial independence, the immigration history of the first and second appellants, his assessment of the impact of the third appellant moving to a different school in a different country (para 36) and that he took into account that it would be difficult for the third appellant to leave behind friendships he has developed in the United Kingdom (para 37), the error he made in reaching his finding that he was not satisfied that the first appellant was able to speak English adequately is not material, on any legitimate view. Even if he had not made the error, he would have been bound to reach the same conclusion, on any legitimate view.
26. Finally, in granting permission, Judge of the First-tier Tribunal Shimmin added that it was arguable that the judge failed to take into account, or to take sufficient account of, the third appellant having been born in the United Kingdom and lived in the United Kingdom for in excess of seven years.
27. Mr Khan (rightly) did not pursue this at the hearing. In any event, the judge quoted at length from MA (Pakistan), including the paragraphs which referred to the significance of the fact that the child has lived in the United Kingdom for at least seven years, the weight to be given to that fact and that powerful reasons are required not to grant leave to the child. Not only did the judge refer in terms to MA (Pakistan), he mentioned, in terms at para 28, the formulation that there were "*powerful reasons*" weighing in favour of removal. It is therefore simply not the case that the judge failed to take into account the fact that the third appellant had lived in the United Kingdom for a period in excess of seven years and given it significant weight.
28. To say that the judge failed to take "*sufficient account*" of the fact that the third appellant had lived in the United Kingdom for a period in excess of seven years goes to weight. It is trite that arguments as to weight rarely establish an error of law. In the instant case, it cannot be said that the judge's decision was one that no reasonable judge could have made in the circumstances of this case.
29. I have therefore decided not to set aside the judge's decision.

Decision

The decision of Judge of the First-tier Tribunal R Hussain did not involve the making of an error on a point of law such that it fell to be set aside.

The appellants' appeals to the Upper Tribunal are dismissed.



Signed
Upper Tribunal Judge Gill

Date: 22 May 2018