



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: HU/02795/2018

THE IMMIGRATION ACTS

Heard at North Shields (Kings Court)
On 26th April 2019

**Decision & Reasons
Promulgated**
On 10th May 2019

Before

**UPPER TRIBUNAL JUDGE DAWSON
DEPUTY UPPER TRIBUNAL JUDGE HOLMES**

Between

**JUWAIRIYYAH [D]
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Mohammed instructed by Kingston Law PSB regulated.
(Newcastle)

For the Respondent: Ms Petterson, Senior Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Hands, who for reasons given in her decision dated 25 April 2018, dismissed the appellant's appeal against the Secretary of State's decision dated 3 January 2018 refusing the appellant's human rights claim. She had sought further leave to remain in the United Kingdom based on her private life (the

“ten year route” so described). She is a national of India and was a minor at the date she made her application. She had entered the United Kingdom in December 2009 as a dependant on a Tier 4 Student, her mother. The Secretary of State had considered the appellant had not met all the requirements of Appendix FM or paragraph 276ADE of the Immigration Rules and furthermore there were no exceptional circumstances which justify the grant of leave. The judge concluded that the interference with the family and private life of the appellant was proportionate with reference to the public interest in maintaining immigration control.

2. On a renewed application for permission to appeal, in addition to observations on the refusal of permission by First-tier Tribunal Lever, the grounds seeking reconsideration are that:

- (i) The judge had erred in determining that the appellant’s parents would be expected to leave the United Kingdom and accordingly the appellant should return with them.
- (ii) The judge erred in law in determining that the parents’ immigration status was determinative in deciding the appellant’s appeal.
- (iii) The judge erred in law in her consideration of the appellant’s appeal outside the Immigration Rules.

2. In granting permission to appeal Deputy Upper Tribunal Judge Jordan considered that if the appellant had established that she had a right to remain when a minor, it was arguable that her attaining adulthood subsequently should not have made a decisive difference.

3. In a detailed decision the judge set out her understanding of the evidence before her, which included her understanding of not only the history of the appellant’s private life in the United Kingdom, and her studies, but also the circumstances and immigration status from time to time of her parents. It is not in dispute before us that the judge, correctly, accepted that the appellant’s Article 8 rights were engaged by the decision under appeal [30]. The focus of the hearing before us was upon whether the judge’s decision demonstrated that she had misunderstood the true position, and thus had approached the issues raised by paragraph 276ADE(iv) and the proportionality balancing exercise upon the wrong basis.

4. The judge began her findings upon the timing of the application and the appellant’s parents’ immigration status at that date at [30], which included the observation that the question was whether it was reasonable for the appellant to return to India having been here for seven years lawfully. She continued:

“... Whilst her parents remained lawfully in this country because of an application made by her mother, they did not have an immigration status in this country and therefore, would be expected to leave. As a child, the Appellant’s best interests is [sic] to remain with her parents and therefore given the Appellant’s circumstances, it would be reasonable to expect her to leave with her parents.”

- 5.** In respect of the appellant's proposals for the future, including her course of studies, the judge explained at [42]:

"42. The Appellant has not provided sufficient satisfactory evidence to establish that she could not continue with these plans if she were to leave the United Kingdom. I accept that it may be the case the continuation of her education may be delayed by up to two years, although she is the author of her own destiny in this regard as it has been open to her to explore education in India as well as in the United Kingdom and she is unaware of whether or not her current exam results would be sufficient to gain a place of study at university in India, whether the education there is of a less practical nature than in the United Kingdom or not. I am satisfied, therefore, that the Appellant's education will be able to continue should she leave the United Kingdom and if it does not, then that is choice she will personally have made and not because of the Respondent's decision."

- 6.** The judge then returned to the appellant's parents' status at [43]:

"43. The Appellant's parents' status in the United Kingdom is also precarious and therefore it cannot be relied upon. They will still be able to provide financial support for the Appellant in India and if they are not willing to return to India themselves to be with her, they both have family there that can provide her with accommodation and emotional support if necessary."

- 7.** Before concluding at [44] and [45] as follows:

"44. I am not persuaded by Mr. Mohammed's argument that this case is on all fours with PD and Others. This Appellant has spent more of her life in India than she has in the United Kingdom. Her education began there. She has extensive family ties and has visited regularly. She speaks the language. Whilst it is accepted she has continued her education in the United Kingdom, made friends and partaken in extra-curricular activities, her age is such that she is on the cusp of moving to a new phase in her life, when she will commence tertiary education most likely outside her current home and this can be achieved as easily in India as it can in the United Kingdom. The Appellant's mother was able to attain sufficient academic ability in India to successfully apply to an education establishment in the United Kingdom which is evidence of the availability of education as required by the Appellant in India. Further, her wider family there can provide such emotional support as she requires until she meets new friends and forms her own social network. She will be able to maintain links with her United Kingdom friends by modern social media. The dominant factors referred to in PD are outweighed by these facts and those I found in paragraph 34 above. I find it would be reasonable to expect the Appellant to leave the United Kingdom.

45. In these circumstances, I find that, on a balance of probabilities, this interference in the family and private life of the Appellant by the decision not to allow her leave to remain in the United Kingdom is proportionate when weighed against the legitimate

aim of immigration control by the implementation of the Immigration Laws of the United Kingdom.”

- 8.** Following some discussion, the parties were agreed before us that the most recent grant of leave to remain made by the respondent to the appellant, and to her parents, had expired on 27 December 2016. On 23 December 2016 the appellant’s parents applied to vary their grant of leave to remain as entrepreneurs. On the same date the appellant made her own discrete application to vary her leave. Since she was then still under the age of 18, her application was based on seven years presence in the United Kingdom pursuant to Rule 276ADE(iv). Thus contrary to the judge’s understanding, the applications by the appellant and her parents to vary their leave were made when each member of the family had leave to remain in the United Kingdom.
- 9.** The appellant’s father has throughout been a dependant upon applications made by his wife. She had first entered the United Kingdom with leave as a student and obtained extensions of that leave initially as a post-study work migrant but subsequently as an entrepreneur. The reason why her application was refused in November 2017 was because the Secretary of State had not awarded all the points required in relation to the investment provisions in Appendix FM-SE. In a covering letter a human rights claim had also been made, but nevertheless the appellant’s mother was not offered a right of appeal in the refusal letter. In the circumstances Mr Mohammed indicated that the appellant’s parents had an outstanding application for permission to appeal the adverse decision made in relation to their renewed entrepreneur extension application in reliance on the decision of the Court of Appeal in *Ashish Balajigari v SSHD & Ors* [2019] EWCA Civ 673.
- 10.** Before us, Ms Petterson accepted that the judge had made a material error as to the immigration status of the appellant and her parents at the date of the application, and that this error went to the heart of her consideration of the issue of reasonableness raised by paragraph 276ADE(iv). In turn, the same error went to the heart of her consideration of where the public interest lay. She accepted that the decision could not be sustained. In our judgment we consider Ms Petterson was correct to concede the matter.
- 11.** Both parties accepted that the decision should be set aside and remade, and that the appropriate forum for doing so is the First-tier Tribunal. Thus we remit the appeal for hearing by a differently constituted Tribunal. We make no observation on the merits of the application for permission to appeal by her parents, but simply observe that if the appellant’s mother is successful in establishing a right of appeal that it would clearly be sensible for both appeals to be heard together in the First-tier Tribunal. Having heard the parties, we make the following directions;

 - i) The appeal is to be heard at the North Shields hearing centre.
 - ii) No interpreter is required.
 - iii) The appeal is not to be listed for hearing before 1 June 2019

Signed
UTJ Dawson
Upper Tribunal Judge Dawson

Date 8 May 2019