



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/09729/2018
HU/09730/2018
HU/09732/2018
HU/09733/2018

THE IMMIGRATION ACTS

Heard at Field House
On 27th February 2019

Decision & Reasons Promulgated
On 11th March 2019

Before

Upper Tribunal Judge Chalkley

Between

MRS D T (FIRST APPELLANT)
MR V C J (SECOND APPELLANT)
MISS D V (THIRD APPELLANT)
MR D V (FOURTH APPELLANT)
(ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant:

Mr D Coleman of Counsel

For the Respondent:

Ms N Willocks-Briscoe, Home Office Presenting Officer

REASONS FOR FINDING AN ERROR OF LAW

Anonymity Direction Made

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 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.

I make this order because the second and third appellants minors.

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

1. These are linked appeals. The first appellant was born on 1st December 1980, the second appellant on 14th April 1978 and they are married. The third and fourth dependants are their children, the third appellant was born on 31st October 2006 and is therefore now currently 12 and the fourth appellant was born on 14th December 2010 and is therefore currently 8. All are citizens of India.
2. The first named appellant arrived in the United Kingdom on 1st April 2009 with a student visit visa valid from 16th February 2009 to 31st July 2012. His dependent spouse the second appellant arrived on 11th November 2009 with leave as a dependant of the first named appellant. On 31st July 2012 the first named appellant applied for further leave to remain as a student and this was refused with a right of appeal on 7th March 2013. The second named appellant's application was refused in line with the first named appellant. The appeal was dismissed on 29th May 2013. Permission to appeal to the Upper Tribunal was granted on 1st July 2013 but the Upper Tribunal dismissed the appeal on 23rd September that year. Permission to appeal to the Court of Appeal was refused by the Upper Tribunal on 2nd May 2014 and by the Court of Appeal itself on 5th February 2015. On 23rd February 2015 the first named appellant applied for leave to remain outside the Rules. This was refused and certified as unfounded with an out of country right of appeal on 28th May 2015. I should have mentioned that the third appellant also entered the United Kingdom on 11th November 2009 presumably accompanying her mother, the second named appellant.
3. On 17th April 2018 a decision was made by the Secretary of State to refuse the appellants' applications and they appealed to the First-tier Tribunal. The appeal was heard by First-tier Tribunal Judge M P W Harris at Hatton Cross on 8th November 2018. He noted that the third appellant was at that time 11 years of age and had spent just under 9 years in the United Kingdom. On the basis of oral and documentary evidence before him he found that she had spent the formative years of her life in this country during which time she had established ties and links identified as significant in *MA (Pakistan)*. He concluded that the appellant satisfied paragraph 276ADE(1)(iv) and succeeded in the appeal. He went on to allow the

appeals of the first, second and fourth appellants. The judge noted at paragraphs 19 to 22 that the third appellant had been brought up as Roman Catholic and was satisfied that there were Catholic churches and communities in India which would be open to the third appellant to join. He noted that the first and second appellants had a social and family network to assist them to re-adjust to their lives in India and that there was a functioning education system which the third appellant would be able to access. There was nothing in the evidence to suggest that the third appellant would be unable in time to become fluent in Malayalam the language most commonly spoken in the home area of the appellant.

4. The respondent sought and was granted permission to appeal. The basis on which permission was granted is as follows:
 - “1. It is respectfully submitted that the First-tier Tribunal have erred in allowing the appeal on the basis that it would not be reasonable to expect the appellant’s child as a British citizen to accompany him to Bangladesh. It is asserted that in reaching this conclusion the Tribunal fails to consider proper country guidance in this regard as dictated by the recent case of *KO (India) and Others v Secretary of State for the Home Department* [2018] UKSC 53 that finds a ‘real world’ test is to be applied in cases where one or more parents of a qualifying child have no legal right to stay in the United Kingdom and their conduct dictates they should be removed.
 2. It is asserted that the First-tier Tribunal has failed to apply the test adequately and that they have failed to consider the conduct of the appellant’s parents in their deliberate and calculated breaches of the Immigration Rules and any associated public interest factors this raises as to the responsibility for their removal. It is respectfully asserted that the First-tier Tribunal has misdirected and ignores the finding in *KO (Nigeria)* where the Supreme Court found that the Tribunal erred in law in that a British child could not be expected to relocate outside the UK (paragraph 44 of the judgment). The fact that a child is British does not in itself render removal of a parent unduly harsh. Even if the consequence is that the child will leave the UK it is asserted that the applicant in this case had no valid basis to stay since the expiry of the lead applicant’s student leave in 2012 and had made it quite clear that they were aware that they should have left the UK in 2015 following rejection of their application to remain in the UK outside the Immigration Rules and as such this is a very weighty factor to be considered in any balancing exercise. It is accepted that the children are best placed in remaining with their parents and that there are no serious obstacles to integration and as such if the real world test is applied it is respectfully submitted that this is clearly as a family unit in India their country of origin along with the rest of their extended family members.”
5. The grounds appear to be wrong in that they assume that the third appellant is British. She is not a British subject, although she is of course a qualifying child under the Immigration Rules.
6. For the respondent Ms Willocks-Briscoe told me that the judge started his assessment on the basis that the children should remain with their parents and looks at various elements of private life, finding that every aspect of private life would be replicated on return. They have been without leave since 2015. Unfortunately, the judge does not say what it is the judge finds that satisfies him that the third appellant’s ties with

the United Kingdom would be greatly disrupted. The ties are not identified. Counsel sought to persuade me that the judge had not erred and that he had properly applied *MA (Pakistan)*. He suggested that the decision of the Supreme Court in *KO* did not depart at all from the existing case law and that the judge had not erred.

7. I have concluded that the determination does contain an error on the part of the judge. I believe it was incumbent upon him to say why he was allowing the appeal with sufficient clarity for both parties to understand. He does not identify what it is he finds that satisfies him that the third appellant's ties with the United Kingdom would be greatly disrupted. The ties are not identified. I concluded that I must set aside the determination and that the appeal should be remitted to the First-tier Tribunal for a hearing afresh by a judge other than Judge Harris.

Richard Chalkley

Upper Tribunal Judge Chalkley

Dated 07 March 2019