



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

Appeal Number: HU/13852/2016
HU/13857/2016
HU/13867/2016

THE IMMIGRATION ACTS

**Heard at Field House
On 5 November 2019**

**Decision & Reasons
Promulgated
On 7 November 2019**

Before

UPPER TRIBUNAL JUDGE LANE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**CM1
CM2
CM3**

(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr Avery, Senior Home Office Presenting Officer
For the Respondent: Mr Coleman

DECISION AND REASONS

1. I shall refer to the appellant as the 'respondent' and the respondents as the 'appellants', as they appeared respectively before the First-tier Tribunal.

2. The appellants are citizens of India born respectively in 1976, 1970 and 2012. They appealed to the First-tier Tribunal against decisions of the respondent dated 20 May 2016 to refuse applications for leave to remain in the United Kingdom. The First-tier Tribunal, in a decision promulgated on 26 April 2019, allowed the appeal on Article 8 grounds. The Secretary of State now appeals, with permission, to the Upper Tribunal.
3. The parties agree that the appeal turns on the circumstances of the third appellant, the daughter of the first and second appellants. The third appellant is autistic and suffers also from breathing difficulties, global development delay and sensory difficulties. But the past two years, she has been a student at a special school. The judge found [29], that the appeal should succeed 'because of the specific needs of the third appellant and the difficulty, even if available, of accessing the appropriate services for her care in India.' The third appellant was born in the United Kingdom and will have completed seven years' continuous residence here in December 2019. At that point, she will become a 'qualifying child' for the purposes of section 117 of the 2002 Act. The judge took that fact into account in reaching his decision.
4. The problem with the judge's reasoning is, in part, its brevity but more fundamentally the fact that he has made findings and reached a conclusion on very limited evidence indeed. Although he noted that the burden of proof rested on the appellants, there was virtually no evidence which was up-to-date and concerned the third appellant's medical condition or which dealt with the availability of relevant services to help and treat the third appellant in India. At [28], the judge recorded that first appellant stated in her evidence that the links set out in the respondent's COI request were not available whilst the first appellant had also been unable to complete her own enquiries into the availability of services in India. Notwithstanding the paucity of evidence, the judge considered that he was able to make a firm finding [27] that the third appellant has 'special medical and educational needs.' I fully appreciate that the judge had to reach a decision on the basis of the evidence before him but I consider that he has paid too little attention to the requirement on the appellants to discharge the burden of proving their case. I acknowledge that the judge found the first appellant's evidence to be truthful as he was entitled to do but the fact remains that the first appellant had, for whatever reason, produced little, if any, relevant evidence; simply asserting that the respondent's evidence was inadequate did little to help the appellants to prove their case.
5. In addition, the judge has not sought to apply the relevant statutory provisions. Instead, no doubt motivated by sympathy for these appellants, he has based his conclusion upon a very generalised reference to 'all the evidence.' Clearly, given the absence of evidence to support the appellant's case, it would have been open to the judge to have dismissed the appeals; in order to allow the appeals, the judge should have explained properly and in detail why he considered it appropriate to do so.

6. I set aside the decision. There needs to be further significant fact-finding. Mr Coleman, who appeared for the appellants, submitted that up-to-date medical and education evidence relating to third appellant needs to be obtained. I agree. It is also inevitable that, by the time the appeal returns for a hearing in the First-tier Tribunal, the third appellant will have become a 'qualifying child.' Mr Avery, who appeared for the Secretary of State, helpfully submitted that it would be appropriate for the appellants, having obtained up-to-date evidence, to submit this directly to the Secretary of State and to request a reconsideration of the applications for leave to remain. That seems to be an eminently sensible course of action. In any event, this appeal will be returned to the First-tier Tribunal for that Tribunal to remake the decision at or following a hearing. Both parties may adduce fresh evidence provided copies of any documentary evidence is sent to the First-tier Tribunal and to the other party no later than 10 days before the next hearing.

Notice of Decision

The decision of the First-tier Tribunal is set aside. None of the findings of fact shall stand. The appeal is returned to the First-tier Tribunal (not Judge Sweet) for that Tribunal to remake the decision at or following a hearing.

Signed

Date 5 November 2019

Upper Tribunal Judge Lane

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

Unless and until a Tribunal or court directs otherwise, the appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies both to the appellants and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.