



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

Appeal Numbers: HU/20883/2018
HU/20880/2018
HU/20890/2018
HU/20885/2018

THE IMMIGRATION ACTS

**Heard at Field House
On 19th August 2019**

**Decision & Reasons Promulgated
On 4th September 2019**

Before

UPPER TRIBUNAL JUDGE COKER

Between

**SAFIYA [B]
JOSE [B]
NIYA [B]
[N B]**

Appellants

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms S Iengar, instructed by Aston Brooke Solicitors
For the Respondent: Mr L Tarlow, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. Safiya and Jose [B] are the mother and father respectively of Niya [B] (date of birth 4th July 2000, born in India) and [NB] (date of birth 13th July 2010, born in UK). Safiya [B] entered the UK on 11th June 2006; Jose [B] entered the UK on

29th September 2009 and Niya [B] entered on 5th July 2013. Safiya's application for a further extension of her leave as a Tier 1 general migrant with the other appellants as dependants, was refused on 29th November 2013. Their appeals against those decisions were dismissed and they became appeal rights exhausted on 14th December 2015. On 12 January 2016, Safiya [B] claimed asylum; her claim was refused and certified under s94 Nationality Immigration and Asylum Act 2002 on 25th July 2016. It does not appear that she challenged the certification; her right of appeal against the refusal of asylum is thus exercisable outside the UK only. The family have been overstayers since 14th December 2015.

2. On 6th October 2017 human rights applications were made and refused by the SSHD for reasons set out in a decision dated 28th September 2018. Their appeal against that decision was heard and dismissed by First-tier Tribunal Judge Bart-Stewart for reasons set out in a decision promulgated on 11th June 2019.
3. Permission to appeal was sought and granted by the Upper Tribunal on 3 grounds; ground 1: the First-tier Tribunal judge indicated at the close of the hearing that she would be allowing the appeal whereas the promulgated decision dismissed the appeal; ground 2: in reaching her decision the First-tier Tribunal judge denied the appellants a fair hearing in that although tendered as a witness she was asked no questions yet the First-tier Tribunal judge made adverse findings of fact on matters that were not put; and ground 3: the First-tier Tribunal judge took account of the immigration history of the parents in reaching her conclusions on the proportionality of the decision reusing the children leave to remain.
4. I heard very brief submissions from Mr Tarlow who relied principally on a submission that although there were some errors of fact, these did not materially impact upon the findings made. Ms Iengar made full and clear submissions. She expanded upon the grounds with admirable clarity, referring me to relevant evidence and paragraphs within the decision. I confirmed on conclusion of the hearing that I would not find an error of law as argued in ground 1 but reserved my decision as regards the remaining 2 grounds.

Ground 1

5. The respondent was not represented at the hearing before the First-tier Tribunal. Counsel who had represented the appellants before the First-tier Tribunal had not sworn a witness statement stating that the judge had either allowed the appeal or conditionally allowed the appeal subject to what she found in the papers. The record of proceedings in the Tribunal file did not indicate that the judge had either allowed the appeal or conditionally allowed the appeal and there was no reference to this in the decision.
6. In the absence of witness evidence supportive of the ground raised, this ground of appeal must fail.

Ground 2

7. It is unclear why, as submitted in the grounds, being on the 'float list' as oppose to a substantive list rendered the hearing unfair. This was not pursued but it seems that being on the float list resulted in the respondent being unrepresented. The judge did not ask any questions of the appellants and did not, it seems, identify areas on which she had concerns over the evidence. The grounds go on to submit that the judge should not have reached adverse findings of fact without putting such matters that formed the basis of such findings to the appellant(s). The grounds do not identify what adverse findings of fact were made upon which the appellant could have provided comment/explanation, save as referred to below.
8. The grounds do identify matters that, it is submitted, are clear errors of fact by the judge which, it is submitted, when considered holistically in the context of the evidence as a whole, adversely taint the findings made. In particular the grounds submit the judge:
- stated the 3rd appellant was approaching 18 when she was actually 18.
 - stated the majority of the appellants' time in the UK had been without valid leave to remain whereas they had been lawfully in the UK until 14 December 2015: almost 10 years for the first appellant, 6 years for the second appellant, almost 5 years for the third appellant and the fourth appellant was born in the UK.
 - referred to an earlier determination rejecting the claim of fear of persecution because of inter-caste marriage but there had been no previous determination, and this was not put to the appellants.
 - stated that the family has a poor immigration history, has made 'insincere' applications for asylum and has not had leave to remain since July 2013 whereas they were lawfully in the UK until December 2015, their immigration history is 'run of the mill' and that if the asylum claim was insincere this should have been put to the appellants.
 - the assertion by the judge that the witness statements of the children contained information that was simply untrue was both factually incorrect and should have been put to the appellants.
9. The judge sets out in summary the reasons given by the respondent for refusing the human rights claim and the grounds of appeal relied upon. The judge set out in detail the appellants' evidence; no issue is taken in the grounds that the summary of evidence is incorrect or that significant elements of the evidence are omitted from that summary. The judge set out, in summary, the submissions made on behalf of the appellants; no issue is taken that the summary is inaccurate.
10. The judge makes her findings from paragraphs 22 onwards. It is correct that she states, incorrectly, that the family have not had leave to remain since July

2013 and that she describes the eldest child as 'approaching 18' – although that child was 'approaching 18' when the application was made and was 18 at the date of decision and date of hearing. These errors are insignificant in themselves in the context of the judge's consideration of the proportionality of the decision. She was clearly aware of the dates of birth of the children and was clearly aware that both children were 'qualifying children' for the purpose of her decision.

11. It is also correct that the judge incorrectly refers to the rejection of an asylum claim and dismissal of an appeal, whereas the correct position is that the asylum claim was refused and certified and has not, because the appellants remain in the UK, yet been subjected to an appeal. Nevertheless, the asylum claim has been rejected as clearly unfounded and although the judge incorrectly referred to the dismissal of an appeal, the finding drawn would be the same. The appellants knew the asylum claim had been rejected as clearly unfounded; they did not put evidence in to contradict that conclusion by the respondent and the judge was entitled to conclude there was no merit to the asylum claim. The appeal was not an asylum appeal and, given the unchallenged decision by the respondent that the claim was clearly unfounded the judge was entitled to conclude the application had been 'insincere' and to attach no credence to the submission by the appellants that they had no contact with their respective families and to find that there was no subjective or objective fear of return to India.
12. The submission that the appellants did not have a poor immigration history but had a 'run of the mill' history and this should not have been held against them is extraordinary. It is a fact that the appellants have been unlawfully in the UK since December 2015, that a clearly unfounded asylum claim was made and that there was no expectation that the family would be able to remain in the UK in the context of the previous leave that had been granted. They have a poor immigration history. That other families may have a similar history does not render that which is poor, not poor. The finding that there is a poor history was a finding that was clearly and reasonably open to the judge.
13. In so far as the finding that the witness statements contained evidence that was not true, whilst the judge did say that, it was following several paragraphs where she set out that which was in the witness statements and gave reasons for rejecting it. For example:
 - the eldest child refers to matters that were rejected in the asylum claim; the judge gives her reasons for rejecting that because the asylum claim was certified clearly unfounded, although the judge referred to it as a dismissed appeal;
 - the eldest child had spent her first 10 years in India; the judge did not accept the evidence that she would no longer speak her language of origin because she had previously attended school in Kerala, that her younger sister speaks Malayalam as her main language and she remained in India for a year after her father left;

- that the asylum claim was unfounded;
- it was not plausible that the eldest child would have lost the ability to speak Malayalam in the short period of time she had been in the UK, having spent the first 10 years of her life in India;
- the first two appellants lived, worked, met, married and started a family in India. There was and is no objective or subjective fear of return to India and no obstacles to their return.

14. Although appearing under Ground 3, the appellants submitted that the finding by the judge that the third appellant had obtained only 'modest' exam results was incorrect; the documents relied upon showed that she had obtained distinctions and merits and that this showed, if anything, exceptional results. I note that in her Level 3 Pearson BTEC she obtained 3 distinctions, 2 merits and a pass in 6 exams in July 2018. Her BTEC certificate taken the previous year also showed her obtaining distinctions although her GCSE results for 2016 and 2017 were at Grades C and D save for religious studies for which she obtained an A in June 2016. It is difficult to describe such results, overall, as exceptional but in any event even if they could be correctly classified as 'exceptional' it is unclear how that could impact on the reasonableness of the decision.

15. Ms Iengar submitted that the errors of fact she identified were, when viewed as a whole, such as to cast significant doubt on the sustainability of the finding that there were no obstacles to the return of the family to India or that they had not lost ties with family members and their cultural identity. Whilst I accept there are some errors, they do not and cannot reasonably be said to undermine the findings made that there are no significant obstacles to return. The findings made by the judge were on the basis of the evidence that was relied upon by the appellants. The judge disbelieved the evidence or placed little weight upon it. She was entitled to do so. The fact that the respondent was not represented did not mean that the judge was required to act inquisitorially and take the place of the respondent. That she did not say to the appellants "I do not believe your account, what do you say about that" does not mean that she was not entitled to consider their witness statements in the context of the evidence they were relying upon as a whole.

16. There is no error of law by the First-tier Tribunal judge arising out of the errors set out in the grounds, such as would justify setting aside the decision to be remade.

Ground 3

17. The grounds submit that the First-tier Tribunal judge in considering paragraph 276ADE(1)(iv) and s117B(6) Nationality Immigration and Asylum Act 2002 impermissibly took account of the immigration history of the parents in determining the outcome of the appeal.

18. The grounds also submit:

- it could not rationally be concluded that because the youngest child was working below age related expectations she was not doing well; that the judge failed to consider the head's report that she would excel in year 4 and the judge has failed to factor this into the reasonableness assessment as required;
- that the judge has failed to provide reasons for concluding that the starting point was to find strong/powerful reasons not to leave;
- that the evidence was such that no judge could reasonably and rationally have concluded that it was reasonable for the appellants to leave the UK.

19. The core of this ground arises from the following paragraphs of the First-tier Tribunal Judge's decision:

"37. It is in the best interest of children to have stability and continuity of social and educational provision. However in the case of the 4th appellant¹ this has come to a natural break and her younger sibling would be due to change school also. The 1st and 2nd appellant have poor immigration histories. I accept that they have made an in time application for further leave, but it remains the case that they have not had leave since July 2013 and after their appeal was dismissed and appeal rights exhausted, and insincere application made for asylum.

38. The present application was made 6 months after being served with enforcement notices. Their appeal statements including that of the children contains information which is simply untrue. There are strong reasons for removal. It is not unreasonable to expect the children to return to India with other family members and continue life her [sic] education in the home country. I do not find the circumstances of the appellants are such as to render the decision disproportionate and breach of Article 8(1) ECHR."

20. These paragraphs cannot and should not be read in isolation from the rest of the decision. The judge directed herself to the relevant provisions of the Immigration Rules and to relevant case law including *Azimi-Moayed* [2013] UKUT 197, *MA (Pakistan)* [2016] EWCA Civ 705, s117B(6) Nationality Immigration and Asylum Act 2002, *JG (s117B(6): reasonable to leave UK) Turkey* [2019] UKUT 00072. The judge specifically considered the circumstances of the 3rd appellant. The judge draws from the evidence before her in terms of her education, that she has accepted a place at University, her length of residence in the UK since age 10 and has, earlier in the decision accepted that the child has acquired social and other ties in the UK outside the confines of her family and has spent a significant period of time in the UK and outside her country of nationality. The judge makes no reference in her assessment of the reasonableness of the child returning to India, of the impact on her assessment of the parents' immigration history. The judge acknowledges that it is in the best interests of children to have stability and continuity of social and educational provision.

¹ This is probably a typo and should refer to the 3rd appellant

21. The judge considers the parents immigration situation and their claims. But that consideration is undertaken in the context of the 'real world' scenario; that the appellants are a family unit and that each child has reached a natural break in their education.
22. It is not always easy to separate out in a written determination where the individual child's best interest lie as an individual and those best interest as part of a family unit. That is the so called 'real world test'. In this decision the judge has set out the evidence and reached findings on where the child's interest lie but having assessed the best interests of both children and the extent and nature of their ties and cultural links in the UK outside the confines of the family and within the family, length of residence and ties the judge reached a conclusion that was open to her that it was not unreasonable for the children to return to India with their parents, neither of whom have leave to remain in the UK.
23. The reference by the judge to strong reasons for removal has to be read in the context of the decision and findings as a whole and to relate to the parents. It cannot be said that the findings of the judge on the evidence relied upon do not identify reasons never mind strong reasons in connection with the parents stay/removal. It was open to the judge to find that there were no reasons why this family should remain in the UK and that it was not unreasonable for the children to return with their parents to India. When the decision is read as a whole it cannot be concluded that the judge reached her conclusion on the reasonableness of the children leaving the UK through or in consequence of the parents' immigration status.

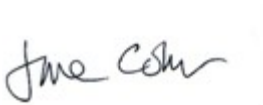
Conclusions:

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

I do not set aside the decision.

The decision of the First-tier Tribunal Judge stands; the appeal is dismissed.

Date 21st August 2019



Upper Tribunal Judge Coker