Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/02579/2013
IA/02580/2013
IA/02581/2013
IA/02582/2013

THE IMMIGRATION ACTS

Heard at : Field House
On : 14th August 2013

Determination Promulgated
On : 20th August 2013

Before

Upper Tribunal Judge McKee

Between

MANISH GANGARAMBHAI SUTHAR + 3

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Zane Malik, instructed by Malik Law Chambers
For the Respondent: Mr Ian Jarvis of the Specialist Appeals Team

DETERMINATION AND REASONS

1. These four linked appeals raise an interesting legal conundrum which has not been the subject of any 'reported' determination of the Upper Tribunal or, it would seem, of any judgment of the superior courts. Not for the first time, Mr Malik has ploughed a course for his clients, through hitherto unexplored territory.

2. The appellants are a family of four, comprising the parents and two children. All are nationals of India, and have been residing in the United Kingdom since 15th April 2005, when the head of the household, Manish Suthar, was given leave to enter for five years as a work permit holder, with the other three being admitted for the same period as his dependants. The children were born in India in December 1999 and April 2003, and are now 13 and 10 years old respectively.

3. In March 2010 Mr Suthar applied for indefinite leave to remain, but this was refused (presumably because he did not meet all the requirements of paragraph 134 of HC 395) and an appeal against that decision was unsuccessful. By March 2011 the appellants were, in Home Office jargon, 'appeal rights exhausted', and their leave to enter also having expired, they were notified in October 2011 of their liability to removal as overstayers. On 19th April 2012, four days after the seventh anniversary of their arrival in the United Kingdom, the family applied again for indefinite leave to remain, relying on the children's continuous residence in the United Kingdom for over seven years as giving the family a strong Article 8 claim to remain here. It was acknowledged that the former 'seven-year concession' had been withdrawn on 9th December 2008, but *LD (Zimbabwe)* [2010] UKUT 278 (IAC) was cited for the continuing relevance of seven years' residence to the assessment of the best interests of the children, as part of the Article 8 balancing exercise.

4. On 2nd November 2012 the applications were refused, first under paragraph 322(1) of HC 395 because leave to remain was being sought for a purpose not covered by the Immigration Rules, and then (rather confusingly) under paragraph 276ADE and Appendix FM, because the purpose <u>was</u> covered by those Rules, but the applicants did not meet their requirements. A separate notice of decision (i.e. removal under section 10(1) of the Immigration and Asylum Act 1999) was issued for each member of the family, but it seems that only one 'Reasons for Refusal Letter' was prepared, and that was for the head of the household. Mr Suthar was told that, not satisfying the requirements for leave to remain as a partner or as a parent, he was considered under section EX.1 of Appendix FM, but could not satisfy that section either. While the children fulfilled the condition at EX.1(a)(i)(cc) of having "*lived in the UK continuously for at least the 7 years immediately preceding the date of application*", they did not meet the condition at EX.1(a)(ii) that "*it would not be reasonable to expect the child to leave the UK*." It was acknowledged that the children's "material quality of life in India may not be to the same standard as it would be in the UK", but family life between parents and children could reasonably be expected to continue in India.

5. The refusal letter of 2nd November 2012 also made the point that the children, being nationals of India, "do not have any basis of stay in this country in their own right." Mr Malik, as we shall see below, disputes this assertion. The letter goes on to

consider whether Mr Suthar, not meeting the family life requirements of Appendix FM, can meet the private life requirements of rule 276ADE. It is considered that he cannot.

6. Appeals against the decisions to remove the family were lodged with the First-tier Tribunal, but at a Case Management Review Hearing on 20th December 2012 the respondent withdrew her decisions, in order to make fresh decisions in the light of the amendments to the Immigration Rules introduced by HC 760 with effect from 13th December 2012. Fresh removal decisions were issued for each member of the family on 4th January 2013, but again only one 'Reasons for Refusal Letter' was prepared, in respect of the head of the household. It was virtually identical to the previous refusal letter, save that consideration was now given to whether Mrs Suthar and the children could benefit from the private life provisions of paragraph 276ADE. It was said to be reasonable to expect the children to return to India with their parents.

7. Why fresh decisions were taken can be surmised from the reason given for rejecting the children's application. When paragraph 276ADE was first introduced into the Immigration Rules by HC 194 from 9th July 2012, subparagraph (iv) laid down as one of the ways of getting leave to remain on the grounds of private life that the applicant "*is under the age of 18 years and has lived continuously in the UK for at least 7 years (discounting any period of imprisonment)*." Mr Suthar's children certainly met that requirement. But from 13th December 2012, HC 760 added the requirement that "*it would not be reasonable to expect the applicant to leave the UK*." Hence the reliance on that new requirement in the refusal letter of 4th January 2013.

8. Appeals against the fresh decisions came before the First-tier Tribunal on 8th April 2013, and were dismissed on 7th May. Permission to appeal to the Upper Tribunal was then granted by Judge Brunnen on the application of Malik Law Chambers, and thus the matter has come before me. I shall begin by summarising the First-tier determination.

9. Judge Cooper considered the appeals first under the Immigration Rules, holding that the only one which could avail the appellants was 276ADE and its provision that the children should not be expected to leave the United Kingdom after seven years' continuous residence, unless it was reasonable to do so. The judge considered various factors for and against this proposition, and concluded that it <u>would</u> be reasonable to expect the children to return to India.

10. Judge Cooper went on to consider whether the appellants could succeed under Article 8 outside the Immigration Rules, and soon reached the question whether removal to India would be a disproportionate interference with their private lives (their family life together not being interfered with by the return of all of them to India). He decided that the appellants had no legitimate expectation of being able to stay beyond the five years initially granted to them, and were "only still here because of their persistent litigation". It would, he thought, send the wrong message to other temporary migrants if permanent residence could be achieved by "persistent applications and appeals", in the manner of these appellants. He therefore concluded that the decisions under appeal were not a disproportionate interference with the appellants' private lives.

11. Finally, the judge turned "for completeness" to section 55 of the 2009 Act. Acknowledging that the best interests of the children had to be "*a primary consideration*" in his determination, Judge Cooper observed that it would nearly always be in a child's best interests to be with his parents, and in the instant case this would be achieved by the children accompanying their parents to India. They were young and adaptable enough to be able to return to Indian culture and education without their welfare being compromised.

12. One might have thought that the judge had left himself open to challenge for having considered the best interests of the children only after concluding that their removal would not be disproportionate. But this was not one of the grounds on which leave was sought to appeal to the Upper Tribunal. Instead, attention was drawn to *Azimi-Moayed & ors (decisions affecting children; onward appeals)* [2013] UKUT 197 (IAC), in which a Presidential panel lists five principles which will be of assistance in determining appeals where children are affected by the decisions under appeal. The grounds highlight paragraph (1)(iii) and (iv) of the head note, in which "*lengthy residence*" in another country is said to lead to the establishment of ties which it might be inappropriate to disrupt, residence of seven years having featured in past and present policies and rules as a relevant period. In respect of that seven-year period, the panel observe that seven years from the age of 4 are likely to be more significant to a child that the first seven years of life. The grounds note that in the present case, the elder child has resided in the United Kingdom since the age of 5, and that both children have resided here for over seven years.

13. The grounds do not ~ as Mr Jarvis pointed out today ~ mention paragraph (1)(i) of the head note, which takes as a starting point that it is in the best interests of the children to be with both their parents, and that if the parents are to be removed, then the children should be too, unless there are reasons to the contrary. Mr Malik's retort was that the panel in *Azimi-Moayed* were not thinking of children who had their own freestanding right to remain under the Immigration Rules. Mr Jarvis then handed up *MK (best interests of child) India* [2011] UKUT 475 (IAC), in which guidance was given on the best interests of the child as part of the overall assessment of an Article 8 appeal. The outcome was negative for the particular family whose appeal it was, but the elder child of that family had not yet been living in the United Kingdom for seven years when the appeal came before the First-tier Tribunal, and as Mr Malik observed, the case was reported before HC 194 introduced new rules which were intended to make HC 395 compliant with Article 8.

14. In my view, it is certainly arguable that Judge Cooper was wrong to put all the blame on the children's parents for letting them accumulate seven years' residence in the United Kingdom. The family were 'appeal rights exhausted' by March 2011, but the Secretary of State waited nearly eight months before notifying them of their liability to removal, and even then she took no steps to remove them, but granted them temporary admission instead. The family then waited a few more months, until the seventh anniversary of their arrival had passed, whereupon Malik Law Chambers immediately put in fresh applications on their behalf. So the Secretary of State must share some of the blame for letting this family clock up the necessary period of residence for a strong claim to be established.

15. On the other hand, Judge Cooper was no doubt right to be sceptical of their father's assertion that the children were ignorant of Indian culture and their parents' native language, and was right too to suppose that children of that age can readily adapt to new surroundings. It was also a relevant point to take, that Mr Suthar did not qualify for indefinite leave after his five years as a work permit holder, and could have had no legitimate expectation of being able to settle in the United Kingdom if that was the case. Judge Cooper did allude specifically to the fact that the children were now well integrated into British society, particularly through their education, and as I remarked at today's hearing, it is hard to overset a first-instance assessment of Article 8 if it has taken account of the relevant factors, and is not irrational or perverse. With one proviso, Judge Cooper did take into account the relevant factors for and against the appellants in the instant case, and that he considered the proportionality scales to come down on one side rather than the other could not ~ absent that proviso ~ be said to be erroneous in law.

16. I shall come to that proviso in due course. Without it, the challenge to the First-tier decision on Article 8 outside the Rules would not, in my judgment, succeed. But that was not the main focus of Mr Malik's submissions. He contends that the appeals succeed under the Immigration Rules, which was the other ground of appeal to the Upper Tribunal. He draws attention to the transitional provisions of HC 760, which added the words "*and it would not be reasonable to expect the applicant to leave the United Kingdom*" to paragraph 276ADE(iv). This amendment was not one of the ones which applied to all applications decided on or after 13th December 2012. Instead, it falls within this passage from the 'Implementation' preamble to the Statement of Changes :

> "In respect of the other changes set out in this Statement, if an applicant has made an application for entry clearance or leave to remain before 13 December 2012 and the application has not been decided before that date, it will be decided in accordance with the Rules in force on 12 December 2012."

17. The Reasons for Refusal Letter of 4th January 2013 gives the impression that the amended version of rule 276ADE(iv) is being used, although the rule itself is not set out, and Judge Cooper too appears to be using the amended version of the rule, although he does not set it out, when he concludes that the appeals cannot succeed under the Rules because it would be reasonable to expect the children to leave the United Kingdom. To apply the wrong rule would *prima facie* be an error of law, but Mr Jarvis argues that it is not a material error, since rule 276ADE(iv) must be looked at in tandem with EX.1 of Appendix FM. This section of the 'family life' part of the Rules would enable the two older appellants to succeed on the basis of "*a genuine and subsisting parental relationship with a child who … is a British citizen or has lived in the UK continuously for at least the 7 years immediately preceding the date of application; and it would not be reasonable to expect the child to leave the UK*." If the two older appellants can only succeed under the Rules if it would not be reasonable to expect the two younger appellants to leave the UK, and it would be reasonable to expect them to leave the UK, then the expectation must be, says Mr Jarvis, that parents and children would leave the United Kingdom together.

18. Mr Jarvis acknowledged that if children who had lived here for seven years were being looked after by people, whether related or not, who were not facing removal,

then rule 276ADE(iv) would give them a freestanding right to remain in the United Kingdom. But I do not see how such a freestanding right could be conditional upon whether or not there is somebody who wishes to, but cannot, take advantage of EX.1(a) of Appendix FM. Mr Malik insists, and I agree, that the words of rule 276ADE(iv), as it stood on 12th December 2012, must be given their plain and ordinary meaning, which is that children under the age of 18 who have lived in the United Kingdom for at least seven years are entitled to "*leave to remain on the grounds of private life in the UK*", as set out at rule 276BE. There is a condition to be met, as specified at rule 276ADE(i), namely that "*the applicant does not fall for refusal under any of the grounds in Section S-LTR 1.2 to S-LTR 2.3 and S-LTR 3.1 in Appendix FM.*" These grounds of unsuitability for leave to remain are all to do with criminality and other forms of turpitude. None of them apply to the children in the instant case.

19. That rule 276ADE(iv) was intended to give effect to the Secretary of State's duty to consult the best interests of children in the United Kingdom can be seen, says Mr Malik, at paragraph 7.6 of the Explanatory Memorandum to HC 194. The unqualified wording of rule 276ADE under HC 194 was greeted with some surprise when the new rules were published on 13th June 2012, and it was thought by some that it was an oversight on the part of the drafters that no reference was made to the reasonableness of the child leaving the United Kingdom. But no such reference can be read into rule 276ADE(iv) in its unamended form. That it does, in this form, have the wide ambit contended for by Mr Malik can, it seems to me, be seen from the Explanatory Memorandum to HC 760, paragraph 7.45 of which says this :

> "An amendment to the private life rules will narrow the circumstances in which a child under the age of 18 can apply for leave to remain on the grounds of private life to those circumstances in which it would not be reasonable to expect the child to leave the UK."

20. This carries the clear implication that, before the amendment, a child under 18 did not have to show that it would be unreasonable to expect him to leave the United Kingdom. It was enough that he was under 18 and had been living here for seven years. The First-tier Tribunal was therefore wrong to suppose that the two younger appellants could not succeed under the Rules. They do succeed.

21. Can the two older appellants also succeed under the Rules? Mr Malik argues that, in order for the children to enjoy their right to remain under Part 7 of the Immigration Rules, their parents must also be allowed to stay. There is nothing to that effect in paragraph 276ADE, so the parents must rely on EX.1 for any entitlement under the Rules. But under Appendix FM, the children must not only have lived here for at least seven years, as required by EX.1(a)(i)(cc), but it must also not be reasonable to expect them to leave the UK, as laid down by EX.1(a)(ii). The First-tier Tribunal did not make an error of law in finding that it would be reasonable to expect the children to leave the United Kingdom with their parents. The fact that the children do not have to leave the UK, because of their entitlement to remain under Part 7 of the Rules, does not mean that the parents acquire a 'derivative' right to remain, analogous to the right enjoyed under regulation 15A of the EEA Regulations 2006 by the primary carer of an EEA national child who has a right to reside in the UK under European law. Under EX.1(a), a child may be a British citizen, yet it may still be

reasonable to expect him to leave the United Kingdom if his parents are to be removed.

22. The upshot is that the First-tier Tribunal did not err in dismissing the appeals of the two older appellants under the Immigration Rules. The inconsistency between paragraph 276ADE(iv) and EX.1(a) has thus produced the bizarre result that, in theory, the children could be left behind by their parents and would have to be cared for in the United Kingdom at public expense. That unlikely scenario is a consequence of the Rules themselves. But the outcome of the parents' appeals could, in theory, be different under Article 8 outside the Rules. I remarked above that Judge Cooper's decision on Article 8 would be sustainable in the absence of one proviso. What casts his decision into doubt is that he assumed that the children had no freestanding right under the Immigration Rules to remain in the United Kingdom. If he had not proceeded under that misapprehension, the Article 8 balancing exercise could in theory have produced a different result.

23. In the circumstances, the decision of the First-tier Tribunal on the Article 8 aspect of the parents' appeals must be set aside, and re-made by the Upper Tribunal after a further hearing. On the other hand, the appeals of the children are allowed outright, under the Rules.

DECISION

The appeal is allowed.

Richard McKee
Judge of the Upper Tribunal

15th August 2013