
**UPPER TRIBUNAL**
**ASYLUM AND IMMIGRATION CHAMBER**

**THE IMMIGRATION ACTS**

Heard at: Birmingham
On: 10 January 2014

Decision Promulgated
On: 15 January 2014

Before

**Upper Tribunal Judge Pitt**

Between

**JS**
**HK**
**SS**
**AS**
**ARS**

**(ANONYMITY ORDER MADE)**

Appellants

and

**Secretary of State for the Home Department**

Respondent

Representation:

For the Appellants: Mr Sharma instructed by Charles Simmons Immigration Solicitors
For the Respondent: Mr Mills, Senior Home Office Presenting Officer

**DETERMINATION AND REASONS**

1. The appellants are all nationals of India. The first two appellants are married and the third, fourth and fifth appellants are their minor children. Anonymity was granted by the First-tier Tribunal and I continue that order under Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 given that three of the appellants are minors and serious harm could arise to them were their identities or information leading to their identification made known in public.

2. This is an appeal by the appellants against the decision of First-tier Tribunal Judge Pirotta and Dr O J de Barros dated 17 October 2013 which dismissed the appeals against the respondent's deportation decision dated 2 July 2013.

3. The background to this case is that in October 2004 the first and second appellants came illegally to the UK with the third and fourth appellants who were then aged 8 and 5 respectively. The first appellant used a false identity document to obtain work and also drove without insurance. He was convicted of those offences in December 2008, sentenced to 12 months imprisonment and the sentencing judge recommended deportation. The respondent made a deportation order under s. 32(5) of the UK Borders Act 2007 against the first appellant on 24 June 2013 and made decisions to deport the family on 2 July 2013.

4. There were three grounds of appeal which can be summarised as follows:

   a. failure to apply the *Razgar* questions, that failure leading to material confusion in the determination and to the application of incorrect legal tests
   b. failure to identify or identify correctly in law the best interests of the two older children
   c. error in refusing an adjournment for a social work report on the children's best interests

5. Mr Mills described the structure of the decision and lack of reference to well-rehearsed principles in deportation cases concerning families as "not ideal". That must be so. Very careful reading is required to establish that the panel did accept that family and private life was engaged and that the real issue for consideration was proportionality. Mr Sharma argued that the wrong legal tests were applied to the second *Razgar* question of whether Article 8 was engaged and that references to "compelling circumstances" "exceptional circumstances" and "unduly harsh" showed that incorrect legal test

had been applied to that question and also in the proportionality assessment. It was my view that a fair (if more than usually patient) reading of the determination is that the first four *Razgar* questions were met and that the issue that really had to be considered was proportionality. The panel cannot be said to have applied the wrong test in the second *Razgar* question, therefore. Following the guidance of the Court of Appeal in *MF (Nigeria) v SSHD [2013] EWCA Civ 1192* at, for example, [40] to [43], it did not appear to me that referring to the high test that must be met for a deportation appeal to succeed in the terms used by this panel, similar to those used by the Court of Appeal, could be said to be erroneous.

6. It was also my judgement that the First-tier Tribunal was entitled to refuse an adjournment. No mention was made for the need for a social work report at the Case Management Review on 12 August 2013. The parties were informed in a notice dated 19 August 2013 of the hearing on 15 October 2013. No reference was made to a social work report until an adjournment request dated 10 October 2013, renewed at the hearing on 15 October 2013. As identified by the First-tier Tribunal at [8] – [10], more than adequate time had been afforded to provide such a report. It cannot be the case that s.55 of the UK Borders, Citizens and Immigration Act 2009 always makes it necessary for the Tribunal to adjourn to obtain such a report. Here, set out by the panel at [11], no particular features that might create an essential need for such a report were identified and that was a relevant factor the First-tier Tribunal was entitled to take into account when refusing to adjourn. Nothing material can arise from the date for the hearing being fixed earlier than indicated at the CMR and on a date when Mr Sharma could not attend when nearly 2 months notice was given.

7. The statement at [11] that the panel might be in a “better position” than a social worker to asses the impact of deportation on the children is somewhat unfortunately expressed but it remained the case that the panel were in a position to make an assessment on the evidence before them, including the oral evidence of the oldest child, rather than only a social worker being able to do so.

8. I did find merit in the second ground concerning the approach taken to the best interests of the two older children, however.

9. Firstly, there is no clear and independent assessment of those best interests as a primary factor to be weighed in the proportionality assessment. At [50] the panel states that “[the children] must not be

punished for the decisions made by their parents", a reference to the parents having brought the family to the UK illegally. That is a correct self-direction, in line with the guidance of the Supreme Court in ZH (Tanzania) (FC) the Secretary of State for the Home Department [2011] UKSC 4 at [44]. However, the panel do not follow their own direction. The same paragraph of the determination specifically sets the length of residence of the children against "the context of illegality, brought about by the decision of their parents". The recording of the length of residence of the two older children at [47] is immediately followed by the statement that "[t]heir parents had no reservations about removing them from a familiar environment where they lived legally to a four foreign countries where they were illegal". That paragraph goes on to refer to the first appellant knowing that the family's position was precarious and again mentions the parents' knowledge of the illegality of the family's residence. These paragraphs would appear to be part of the assessment of the best interests of the two older children but are tainted by the inclusion of a number of references to the conduct of the parents as in some way reducing the weight to be placed on the long residence of the children. The best interests of the children were not correctly assessed therefore, materially so.

10. Further, at the time of the hearing both of the older children had been in the UK for 9 years and for over half of their lives. That period of residence was during particularly formative years of their childhoods; *Azimi-Moayed and others (decisions affecting children; onward appeals) Iran [2013] UKUT 197 (IAC)* applied. It was not disputed that the importance of the principle of long residence at such an age was put to the First-tier Tribunal or that it is indeed a highly relevant although not determinative factor even in deportation cases, indicated by the respondent's inclusion of it in the Immigration Rules at paragraph 399(a). The panel set out the fact of the older children's length of residence but do not indicate that they regarded it as an important aspect of their best interests. As above, if anything, they appeared to consider it to be of less value as a result of the parents' illegal actions. Also, the panel's comment at [54] that "[the children's] stay in the United Kingdom is not the most important feature of their upbringing, rather the context of their family life was having a home with their parents" appears to take an incorrect approach to the long residence at formative ages, particularly where the oldest child was 17 at the date of the hearing and at an age where increasing independence from his parents would be the norm. Indeed, he gave oral evidence that he was thinking about going to university.

11. I was satisfied that these errors of approach to a core aspect of the appeal amounted to a legal error such that the decision had to be set aside and remade. The parties were in agreement that the lack of structure in the determination and the nature of these errors of law made preservation of any of the determination problematic so that the matter should be remade *de novo* and that it was appropriate to remit the appeal to be decided by the First-tier Tribunal following paragraph 7.2 (b) of Part 3 of the Senior President's Practice Statement dated 25 September 2012.

DECISION

12. The Immigration Judge made an error on a point of law and the decision is set aside to be re-made by the First-tier Tribunal.

Signed:  Date: 10 January 2014
Upper Tribunal Judge Pitt