Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/02662/2014
IA/02668/2014
IA/02673/2014
IA/02681/2014
IA/02687/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 17th September 2014	**On 13th October 2014**
Prepared on 25th September 2014	

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

MRS URMILAH BHEEKARRY (FIRST APPELLANT)
MR MANISH RAI CALLEECHURN (SECOND APPELLANT)
MISS VARSHINI DEVI CALLEECHURN (THIRD APPELLANT)
MISS DEEPTI RAI CALLEECHURN (FOURTH APPELLANT)
MASTER HIMANISH RAI CALLEECHURN (FIFTH APPELLANT)
(ANONYMITY DIRECTIONS NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Ms J E Norman of Counsel
For the Respondent: Ms S Vidhyadharan, Home Office Presenting Officer

DETERMINATION AND REASONS

The Appellants

1. The Appellants are all citizens of Mauritius. The first Appellant who I shall refer to as the Appellant is married to the second Appellant who I shall refer to as Mr Calleechurn. The third, fourth and fifth Appellants are the couple's children. The Appellant's date of birth is 12th July 1982, Mr Calleechurn's date of birth is 22nd March 1979 and the children's dates of

birth are 29th December 2004, 6th October 2006 and 17th July 2008 respectively. The Appellants appealed against a decision of the Respondent dated 18th December 2013 to refuse their application for leave to remain outside the Immigration Rules on the basis of Article 8 (right to respect for private and family life) of the Human Rights Convention. Their appeals were allowed by Judge of the First-tier Tribunal Thanki sitting at Hatton Cross on 10th June 2014. The Respondent appeals with permission against the first instance decision. For the sake of convenience however I will continue to refer to the parties as they were referred to at first instance.

2. The Appellant entered the United Kingdom with a student visa on 4th January 2003. She was granted leave to remain as a student from 21st December 2003 until 31st January 2005 which was duly extended on a number of occasions (despite a refusal in 2009) until 9th March 2012. The other Appellants were granted leave to remain in line with the Appellant's leave.

The Explanation for Refusal

3. On 8th March 2012 a day before that last leave was due to expire the Appellants made their present application for leave to remain the refusal of which has given rise to these proceedings. The Respondent considered the Appellants' applications for leave to remain under Appendix FM and paragraph 276ADE of the Immigration Rules. The Appellant could not succeed under the partner route as Mr Calleechurn was not a British citizen and the Appellant did not have sole parental responsibility for the third, fourth and fifth Appellants. It was not accepted that the Appellant had lost her ties to Mauritius and she could not therefore succeed under paragraph 276ADE. The Respondent considered the best interests of the children pursuant to Section 55 of the Borders, Citizenship and Immigration Act 2009. The family would be returning to Mauritius as a unit. Whilst the third and fourth Appellants had both been in the United Kingdom for more than seven years it was reasonable to expect them to leave the United Kingdom with their parents and there would be no breach of their private life rights. The fifth Appellant whilst born in the United Kingdom had lived here for less than seven years.

The Proceedings at First Instance

4. The Judge found that the Appellant worked at a care home and Mr Calleechurn was a care assistant. The children attended school and were well-settled there. It was unreasonable to require the third and fourth Appellants to leave the United Kingdom and relocate to Mauritius which would be a foreign county to them. They had never visited that country. They had deep roots through education and friendships. The children spoke English at all times and had friends and cousins and other relatives

outside education. It would not be reasonable to expect them to leave the United Kingdom and it followed that the fifth Appellant who was under the age of 7 could not be expected to go to Mauritius without his two older siblings the third and fourth Appellants. The parents should be allowed to remain in the United Kingdom with their children. He allowed the appeal.

5. The Respondent appealed against that decision arguing that the Judge had erred in law by failing to consider the parents' immigration status as a relevant consideration when assessing whether it was reasonable for the third and fourth Appellants to leave the United Kingdom. The child's best interests were not determinative of an immigration appeal. The Appellants had come to the United Kingdom for a temporary purpose with no expectation of being able to remain in the United Kingdom. The expectation was that they would all return once the Appellant's studies were completed.

6. The application for permission to appeal came on the papers before First-Tribunal Judge Grimmett on 30th July 2014. In granting permission to appeal she wrote that:-

> "The grounds assert that the Judge erred in allowing the appeals without giving any consideration to the status of the parents who had no right to remain save as the parents of minor children. **EV Philippines [2014] EWCA Civ 874** is relied on. It is arguable that the Judge failed to have regard to the public interest in maintaining immigration control. All grounds may be argued."

The Hearing Before Me

7. At the outset of the hearing Counsel raised as a preliminary issue whether the Respondent's appeal against the first instance decision was in or out of time. The Judge's decision was promulgated on 7th July 2014 but the Respondent did not lodge her appeal against that decision until 21st July 2014 that is to day more than five working days after the date on which the Respondent would have been deemed to have been served with the decision. The Respondent contended that she received the determination on 15th July 2014 and thus the appeal was lodged within time on 21st July.

8. Perusing the Tribunal file I observed that there was a date stamp of 15th July 2014 on the IA 212 form which enclosed a copy of the Tribunal's decision. This tended to indicate that that was the date on which the Respondent received the decision. As time would not start to run until the date when the Respondent received the decision her onward appeal was in time. Whilst it was arguably an error for Judge Grimmett not to deal with the out of time issue which had been flagged up on form IA 65 on the Tribunal file, I was in a position to deal with the out of time issue. I decided that the Respondent's appeal was in time and the appeal could therefore proceed.

9. In her submissions the Presenting Officer indicated that the grounds of onward appeal were detailed and clear as to what the issues were. The Judge had concentrated on the two children who had been in the United Kingdom for seven years or more but the parents had been here on a temporary basis and they could return to Mauritius and continue their life there. The Judge had sidestepped the issue of effective immigration control by concentrating on the children. There was a factual error in the determination where a reference appeared referring to the children as British citizens. That misunderstanding may have influenced him in his assessment of proportionality.

10. In reply Counsel indicated that as a result of the coming into force of Section 19 of the Immigration Act 2014 the Nationality, Immigration and Asylum Act 2002 had been amended by the insertion of Sections 117A, B, C and D. By reason of Section 117B(6) the public interest did not require a person's removal where they had a genuine and subsisting parental relationship with a qualifying child and it would not be reasonable to expect that child to leave the United Kingdom.

11. I indicated to the parties that although the Respondent had relied on Appendix FM and paragraph 276ADE of the Immigration Rules and the Judge had referred to those provisions in his determination, this was an application made in March 2012 that is to say before Appendix FM and paragraph 276ADE came into force in July 2012. Following the Court of Appeal decision in the case of **Edgehill[2014] EWCA Civ 402** the provisions of Appendix FM and paragraph 276ADE were not to be taken into account in deciding whether the appeal should or should not be allowed under Article 8. It would also follow that the jurisprudence under those provisions such as **Gulshan** which stressed the weight to be given in the proportionality exercise to the fact that an Appellant could not satisfy Appendix FM and paragraph 276ADE would not apply. In consequence the Respondent's arguments in the onward grounds of appeal, that the Judge had erred in law because he had not carried out the proportionality exercise correctly, lost much of their force.

12. Counsel further argued that the Judge had done what he should have done in his assessment of the proportionality of the interference with family life. It was one that was open to him. Although **EV Philippines** had been raised by the Respondent in the grounds of appeal one still had to look at the best interests of the children. At the close of submissions I indicated that I would dismiss the Respondent's onward appeal against the decision of the Fist-tier Tribunal and now give my reasons.

Findings

13. The Judge erred in law when he stated at paragraph 34 of his determination that the Appellants fell to be considered under Appendix

FM. For the reasons I have given above they did not. If I find there was an error of law in the Judge's determination such that it fell to be set aside I would then have to remake the decision applying the current law as stated in the 2002 Act. If I find the Judge did not make an error of law the case does not reach that far and his decision stands.

14. The Judge did not accord significant weight to the fact that the Appellants could not succeed under Appendix FM and paragraph 276ADE. However since those provisions did not apply that in itself was not a material error of law. The question is whether the Judge conducted the proportionality exercise correctly on the basis of the pre-July 2012 case law. The Judge considered the best interests of the children as a primary consideration that is to say he considered them first. He found it would not be in their best interests to require them to return to Mauritius a country which none of them it appears had any knowledge of. Two of the children had lived continuously in the United Kingdom for at least seven years. It was not in the children's best interests to be removed. It was not reasonable to expect the youngest child who was born in the United Kingdom to be returned to Mauritius without his two siblings.

15. In those circumstances it was unreasonable to expect the parents to return to Mauritius leaving the children behind. That is now specifically spelled out in the provision of the 2002 Act which I have quoted above. The Judge noted at paragraph 37 that it would be unreasonable to exclude the Appellant and Mr Calleechurn from Article 8 considerations just because they were husband and wife and had joint responsibility for the three children.

16. Had the applications for leave to remain been made after July 2012 and had the Respondent's onward appeal come before me before July 2014 the outcome of this case might have been different. On the facts of this case, I find that what the Judge was required to do in this case was to consider the Article 8 rights of the Appellants bearing in mind the best interests of the three children. On that basis the Judge's analysis of Article 8 albeit brief was not so significantly wrong as to be overturned and the matter to be reheard. Had I found an error of law and I overturned the Judge's decision I would have had to have gone on to remake the decision in the light of Section 117B(6). Preserving the Judge's findings of fact, I would not have found it reasonable to have expected the two qualifying children the third and fourth Appellants to leave the United Kingdom and thus the Appellant and Mr Calleechurn would have succeeded because they have a parental relation with the qualifying children. It would not in those circumstances have been reasonable to have removed the fifth child born in the United Kingdom on his own. The public interest would not have required the removal of the Appellants in those circumstances. Thus whether or not I had found an error of law in the Judge's determination the

overall result would still have been the same namely that the Appellants' appeals against the Respondent's decision fell to be allowed.

Fee Award

17. The Judge made a fee award against the Respondent on the basis that all the relevant material was before the Respondent at the time of the decision. I would have put matters slightly differently. The Respondent had erred in assessing the Appellants' applications by reference to Appendix FM and paragraph 276ADE when case law has shown those provisions did not apply. Arguably in those circumstances the appeals fell to be allowed on the basis that the decisions were not in accordance with the law. That would also have resulted in a fee award in the Appellants' favour. In this case the Judge heard the matter but either way a fee award was appropriately. I therefore do not disturb the Judge's fee award.

Decision

The decision of the First-tier Tribunal did not involve the making of a material error of law and I uphold the decision to allow the Appellants' appeals against the Respondent's decision to refuse leave.

The Respondent's appeal against the decision of the First-tier Tribunal is dismissed.

I make no anonymity direction as there is no public policy reason for so doing.

Signed this 10th day of October 2014

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Deputy Upper Tribunal Judge Woodcraft