Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/30735/2013; IA/30737/2013; IA/30740/2013; IA/36568/2013

THE IMMIGRATION ACTS

Heard at Field House
On 20th March 2014

Determination Promulgated
On 25th March 2014

Before

UPPER TRIBUNAL JUDGE COKER

Between

ALPHONSA VADAKUMCHER VAREEDKUTTY + 3

Appellants

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: In person
For the Respondent: Mr S Walker, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appeal was dismissed by the First-tier Tribunal judge on the grounds that the appellants did not meet the requirements of the Immigration rules – Mrs Vareekutty had applied for further leave to remain as a Tier 4 student with her husband and two children as her dependants – and on human rights grounds.

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2. Evidence had not been provided of adequate funds and thus the application and the appeal failed under the Rules. Permission to appeal was however granted on the grounds that the First-tier Tribunal had arguable erred in law in finding that Article 8 was not engaged and that the First-tier Tribunal judge had failed to consider the best interests of the children.

3. The first appellant entered the UK 30th January 2010 as a student. Her husband and the oldest child (born 13th January 2001) entered on 17th August 2010 and the youngest child was born in the UK on 2nd January 2012.

4. The application for variation was refused in a decision dated 4th July 2013; at the same time a decision was made pursuant to s47 Immigration Asylum and Nationality Act 2006 to remove them from the UK.

5. In a determination promulgated on 15th January 2014 the First-tier Tribunal judge found that the appellants did not meet the requirements of the Rules as regards maintenance and the appeal must thus fail. The judge went on to consider their appeal on human rights grounds. He surveyed the evidence before him namely that although the first appellant had been in the UK since 2010 she had yet to embark on a course of study; there was no evidence of the family's hobbies or interests or friends or community involvement or the degree of permanency of their home. Both the appellant and her husband had been working prior to coming to the UK.

6. He balanced the public interests of the respondent and the evidence before him and found that Article 8 was not engaged.

7. This turn of phrase is unfortunate. The judge had earlier correctly identified the steps to consider but appears to have conflated them. It is however clear, when the determination is read as a whole, that his overall finding was that on the basis of the evidence before him the appellants' removal was not disproportionate.

8. It is clear that the judge did not give separate and specific consideration to s55. However a failure to refer to s55 of the UK Borders, Citizenship and Immigration Act 2009 specifically does not in itself render the decision not in accordance with the law. The relevant consideration is the substance of the decision not its form and the obligation to act in a way that promotes the welfare of the child and treated its interest as a primary consideration had to be viewed in this context. (Mime [2011] EWHC 2337 (Admin); AJ, SP, EJ [2011] EWCA Civ 1191).

9. Short periods of residence and/or the presence of very young children are unlikely to give rise to private life deserving of respect in the absence of exceptional factors (Azimi – Moayed [2013] UKUT 197 (IAC))

10. The respondent in her decision clearly considered the impact of s55. The First-tier Tribunal judge had evidently read the documents before him which included the consideration by the Secretary of State of the impact on the children and he specifically drew attention to the lack of evidence as to the impact on the children. The judge cannot be expected to reach a decision on the basis of evidence that is not produced before him.

11. Although the first appellant before me spoke of the difficulties her oldest child would have returning to India and of her fears for the health of the baby, particularly given her oldest

daughter's previous health problems in India (Dengue fever); these matters were not before the judge.

12. In conclusion although the judge did not specifically refer to s55, the evidence before him was not such as to call into question anything other than that the best interests of the children were served by the two children remaining living with their parents; that the whole family had only been in the UK for four years, that there was no basis upon which the family could legitimately be said to have a private life such that it would be unduly harsh to remove them. There were no identified special circumstances that would render removal disproportionate. It is inconceivable that another judge faced with the same evidence would not have reached the same conclusion.

Conclusion

13. I am satisfied that there is no error of law in the decision of the First-tier Tribunal such that the decision be set aside to be remade.

14. I dismiss the appeal.

15. The decision of the First-tier Tribunal stands, namely the appeal against the decision to refuse to vary the leave of the appellants and the decision to remove them is dismissed.

Date 20th March 2014

Judge of the Upper Tribunal Coker