Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: OA/16091/2012
OA/16093/2012
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THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 12 June 2014	**On 27 June 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE GIBB

Between

SAHISTA MAJID MAHMMAD PATEL (FIRST APPELLANT)
RUHULAMIN MAJID MAHMMAD PATEL (SECOND APPELLANT)
MINHAJ MAJID MAHMMAD PATEL (THIRD APPELLANT)

Appellants

and

ENTRY CLEARANCE OFFICER, MUMBAI (BOMBAY), INDIA

Respondent

Representation:

For the Appellant: Ms M Atcha, Solicitor, of Ebrahim & Co Solicitors
For the Respondent: Mr T Melvin, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appeals of these three appellants were originally linked to that of their mother (appeal number IA/30245/2013). The four appeals were dismissed in 2013. Following a hearing on 11 February 2014 it was agreed that the decision dismissing the appeals was to be set aside following a material error of law. The error of law decision that I produced following this hearing is as follows.

    1. *By coincidence these were appeal in which I granted permission to appeal. This was in the following terms:*

i. *The appellant, a citizen of India, was refused leave under the domestic violence rules on 3.7.2013, and her appeal against removal was dismissed by Judge of the First-tier Tribunal Mitchell (promulgated on 12.12.2013). The other three appellants were refused entry clearance to settle in the UK with their mother. These refusals were all dated July 2012. Their appeals were linked to that of their mother.*

ii. *The grounds, which were in time, complain that the judge erred in: (1) his approach to the evidence that the appellant suffered domestic violence at the hands of her husband, and that she had found this difficult to disclose; (2) his approach to the issue of whether the marriage had been genuine, before the violence, and to whether the appellant and her husband had been living together.*

iii. *The grounds are poorly drafted and lack focus. Having said that, however, the determination is surprisingly brief given the issues involved (under 4 pages), and I am left with a concern that the determination as a whole would not leave an observer with the impression that the appellants had received a full and fair hearing of their appeals.*

iv. *The judge makes no reference to the possibility that the appellant may have been lacking in confidence or vulnerable in any way, and it appears to me to be arguable that a failure to even consider this possibility may have undermined the adverse credibility findings at para 30. In domestic violence cases it will often be the case that injuries are ascribed to accidents, as here with the wrist injury in 2011. In dealing with such an issue it is arguable that the judge was obliged to conduct the hearing in such a way as to obtain the best evidence from a vulnerable witness, and to consider the possibility of such vulnerability in assessing credibility.*

2. *It is arguable that the findings as to the appellant's husband's relationship history in the 2010 determination were not considered. The consideration of the appeals by the appellant's children was very brief, and did not include any consideration of their best interests. Overall further consideration is needed of the issue of whether there were legal errors in the approach taken to the evidence, and to the conduct of the hearing, by the judge; and whether the findings are supported by adequate reasoning.*

3. *Although it did not emerge clearly from the grounds the main submission made at the error of law hearing concerned whether the judge had erred in dealing with the appeals of the children, without informing the parties that he would be doing so. The appellant had been told that the domestic violence appeal would be heard first, and that the entry clearance appeals of the children would be heard only after the outcome of that appeal was clear.*

4. *In connection with this point I examined the file. This confirmed that there had been directions, when the appeals were linked, indicating that the entry clearance appeals would not be determined until after that of the first appellant. The record*

of proceedings confirmed that there had been no submissions made by either side about the children's appeals, which suggested that the parties at the hearing were proceeding on this basis. As a consequence it was agreed between the parties that there had been a material error of law. There was clear unfairness to the appellants in the appeals of the children being dismissed when neither party were aware that they were to be determined. There were other issues, as reflected in the grant of permission, but the agreement between the parties meant that it was not necessary to consider these further. The parties agreed, in addition, that what was required was a rehearing of the appeals, with no findings preserved.

5. Following the agreement of the parties I therefore find that there was a material error of law in the judge's decision, and I set it aside. The parties agreed that the matter should be listed to be remade in the Upper Tribunal. This appeared to me to be sensible, in view of the current shorter delays in listing, the potential vulnerability of the first appellant, and the interests of the children.

2. Following this error of law decision I heard the appellants' mother's appeal at Field House on 13 March 2014. I went on to remake the decision by allowing her appeal under the Immigration Rules. This was on the basis that I accepted that the appellants' mother had established that her marriage was caused to permanently break down as a result of domestic violence. She therefore came within the terms of paragraph 289A of the Immigration Rules, and was entitled to settlement in the UK despite the fact that her marriage to a British citizen had broken down in this way.

3. At the start of the remaking hearing for these three appellants there was a discussion with the representatives about the points at issue. It was agreed that all of the appellants had been minors at the date of application. By the date of decision the first appellant had turned 18, but it was agreed that the relevant date for consideration of her age was the date of application, when she had been 17. Because of the delays in the appeal process, and the passage of time, the appellants are now aged 20, 18, and 15.

4. The applications were made on 4 April 2012. The application for the first appellant was refused on 5 July 2012, and those for the other two appellants on 17 July 2012. The decisions were reviewed on 18 March 2013.

5. It was further agreed that I was concerned, in remaking the decisions, with the circumstances as they were in July 2012, when the decisions were taken. The grounds of refusal were whether the appellants' mother (the sponsor) had sole responsibility for the appellants (paragraph 301(i)(b) of the Immigration Rules); and whether the appellants would have been adequately maintained and accommodated (paragraph 301(vi) and (via)). Although these were the two grounds of refusal there were matters raised in the refusals that could be regarded as sub issues. The first of these was whether the sponsor and her husband had been living together in the UK at the date of decision. The second was the status of Indian court guardianship papers. This related to a guardianship order obtained by the sponsor from the Court of the Additional District Judge, Bharuch, dated 8 March 2010.

6. There was some discussion as to the impact of the passage of time. It was agreed that my decisions could only be focussed on whether the refusals in July 2012 were in accordance with the law and the Immigration Rules. It would be necessary, if the appeals were allowed, for the respondent to consider the current position, but it was agreed that I would do no more than refer in brief terms, in this eventuality, to the various additional documents that had been provided about the sponsor's current circumstances, and her current ability to meet the maintenance and accommodation requirements.

7. The sponsor gave evidence at the hearing, and was cross-examined at length. The sponsor has been in the UK since March 2011, and has not seen the appellants since that date. The questioning was concerned with the nature of her financial and other support for them; where she was living at the date of decision; the extent of her telephone contact; her financial circumstances; why her husband was not on the electoral register at the address; the contact, if any, between the appellants and their father; the reason for the timing of the applications; their educational history and interests; and with their activities outside school.

Decision and Reasons

8. I have decided to remake the appeals by allowing them under the Immigration Rules. The concerns raised in the three refusal notices, and in the review document, have been adequately addressed.

9. The first ground of refusal related to sole responsibility. Mr Melvin, for the respondent, submitted that the court was not being told the truth about the sponsor's first husband. On balance it had not been shown that there had been no contact from 2006 onwards. On this issue it appears to me that the matters raised in the refusals, and at the hearing, cannot be said to amount to more than suspicions, without evidential grounding. In the 2010 appeal, where the sponsor's appeal against the refusal of her spouse visa was allowed, the 2010 court guardianship document was accepted. There is nothing on the face of the document that appears to be suspicious. No evidence has been provided by the respondent to show that the document is false. It was accepted by Mr Melvin, at the hearing before me, that any assertion by the Entry Clearance Officer was not evidenced, and that the burden was on the respondent in this regard. The guardianship document indicates that the appellants' father abandoned any responsibility for the children in 2010, but nothing in that document is inconsistent with the sponsor's evidence that his involvement ended when he abandoned the family before the divorce in 2006. There is nothing in the evidence to indicate that the appellants' father was involved in their lives in any way after 2006. Evidence has been provided to establish that they lived with their grandmother until her death in July 2011, and subsequently continued to live with their aunt. Before travelling to the UK in 2011 their mother obtained the guardianship document. The suggestion that their father remained involved can only be regarded as speculative. There is no evidence to support this position.

10. I therefore find that the appellants' evidence does establish, on balance of probabilities, that the appellants' father had not had any involvement in their lives since 2006.

11. The evidence that the sponsor had continued to provide for the appellants financially, and make all relevant decisions about their lives, was reasonably comprehensive. It was accepted that there was evidence of money transfers. Mr Melvin also accepted that the evidence established that the sponsor was engaged with her children's activities. The only contrary indications were doubts over the costs of the sponsor's frequent claimed telephone calls to India, and limitations in her answers in cross-examination. These matters, however, do not appear to me to be ones that could be regarded as capable of justifying a conclusion that the sponsor had not had sole responsibility for the appellants from 2006 onwards. At most they could be regarded as raising some doubts in relation to peripheral considerations. Nothing in the refusals, the review, or the submissions cast doubt on the core evidence, all of which pointed to the sponsor having maintained sole parental responsibility, despite having been separated from the appellants for so many years.

12. For these reasons I find that it has been established that the sponsor has had sole responsibility for the three appellants from 2006 onwards. It has not been suggested that the involvement of their aunt amounts to shared responsibility.

13. The position in relation to maintenance and accommodation appears to me to be similar. A concern was raised by the Entry Clearance Officer that there were people sharing the same name as the appellants' father living in a street in Bolton. As was acknowledged by Mr Melvin, however, the names were similar but not identical, and there was no evidence that the appellants' father had been living in the UK at the date of decision, or at any time. As was acknowledged this can, at most, be regarded as a matter that might lead to a suspicion justifying further investigation, but it cannot be regarded as more than that.

14. The evidential basis for the assertion in the refusal that the sponsor and her husband were not living together at the date of decision was the electoral register. The sponsor, however, has provided a number of documents to show that the couple were living together at this address at the relevant date, including council tax documents, and utility bills. The fact that a person may not be on the electoral register for a particular address is not conclusive evidence that that person is not living at that address. It may be that a person is registered at a different address, or not registered at all. The various other documents point to the same conclusion that I reached in deciding the sponsor's appeal, namely that the couple had been living together at this time, and it does not appear to me that any solid reasons have been put forward for rejecting that evidence.

15. It was suggested that the lack of a written tenancy agreement or rent book should be regarded as significant. It is the case, however, that many people rent property

without such written agreements. An independent report on the accommodation was provided for the entry clearance application, and there are numerous other documents establishing that the sponsor lived at the property for a considerable period of time. In the circumstances it does not appear to be speculative to conclude that she was paying the rent on a monthly basis, as described in her oral evidence. Despite the lack of a written tenancy agreement or rent book, therefore, I find that it has been established on balance of probabilities that the sponsor and her husband were renting the property put forward in the applications. It was not suggested, at any stage, that the property would not be big enough to accommodate the three appellants without overcrowding.

16. There was no challenge to any of the financial evidence. At the date of decision the sponsor was a part-time production worker for a food company, and also ran her own tailoring business. The various financial documents establish that she was earning an average of £450 per week net. In addition her then husband was, at the date of decision, employed on a full-time basis. The documentary evidence of the sponsor's finances at the date of decision included a bank statement showing savings of around £5,000; a business account showing a balance of around £880; and an Indian bank account showing a balance of Rs1,42,428. There is also reference to the sponsor's ownership of property in India, but it appears that there was no documentary evidence of this. She has said that these were inherited shops from her father, which generate rental income. Even without this last matter, however, the evidence of income and savings was sufficient to show that the maintenance requirements were met at the date of decision. As I have said this aspect was effectively conceded at the hearing, with the exception of a submission that it would have been preferable to see more tax documents for the relevant tax year. Again this appears to me to be a relatively peripheral criticism, and not one that could lead to the conclusion, on a consideration of all of the evidence provided, that the maintenance requirements had not been met at the date of decision.

17. My findings on the points at issue are therefore as follows. The sponsor has established, on balance, that she did have sole responsibility for the appellants at the date of decision. It has been established, on balance, that the appellants' father had no involvement in their lives from 2006 onwards, and that this position was formalised by the guardianship order obtained in 2010. On the second ground of refusal I find that it has been established, on balance, that the appellants would have been adequately maintained and accommodated at the date of decision. On the sub issue as to whether the sponsor and her husband were living together at the date of decision I find that this has been established through other evidence, despite the fact that the sponsor's husband was not on the electoral register at that address. As for the status of the Indian court guardianship document I find that this was accepted in the appeal in 2010. No evidence has been put forward to indicate that it is not genuine.

18. For these reasons I have decided that the evidence does establish that the appellants met the sole responsibility and accommodation and maintenance requirements of the

Rules at the date of decision. It has not been suggested by the respondent that they do not meet any other aspects of the Rules. The decisions were therefore not in accordance with the law and the Immigration Rules.

19. As I have mentioned above it will now be for the respondent to consider the current position. I merely record that the sponsor provided a letter from her landlord, about her current address in Bolton, indicating that the appellants would be able to join her there. She also provided further bank statements showing that the sponsor continues to have a healthy income, and a high level of savings. In addition a letter from a letting agent about a proposed tenancy at a different address in Bolton was provided. This may indicate that her current address in Bolton would not be large enough, or that she intends to move for other reasons, but that is a matter that was not discussed at the hearing, and will now be considered by the respondent.

20. No submissions were made as to fee awards. The decisions allowing the appeals rest on evidence that was provided with the applications. In the circumstances there does not appear to be any reason to depart from the practice of making whole fee awards in such circumstances where appeals are allowed.

Decision

21. The decisions by the judge dismissing the appeals are set aside for the reasons given above.

22. The appeals are remade as follows. The appeals of all three appellants are allowed under the Immigration Rules.

Fee Awards Note: this is **not** part of the determination.

In the light of my decision to re-make the decisions in the appeals by allowing them, I have considered whether to make a fee award (rule 23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007).

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make whole fee awards in the sum of £140 for each of the three appellants.

Signed Date

Deputy Upper Tribunal Judge Gibb