Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: IA/08712/2014
IA/08713/2014
IA/08714/2014

THE IMMIGRATION ACTS

Heard at: Field House **Decision & Reasons Promulgated**
On: 1 October 2015 **On: 6 November 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHANA

Between

MR SHAD ISMAIL NAFIR ABDUL RAHMAN
MR MOHAMD BELAL ABDUL RAHMAN
MRS SHENAZ BIBI KHODABUX
(ANONYMITY DIRECTIONS NOT MADE)

Appellant

and

THE SECETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Waithe of Counsel
For the Respondent: Mr E Tufan Senior Presenting Officer

DECISION AND REASONS

1. The appellant before the Upper Tribunal is the Secretary of State for the Home Department and the respondents are citizens of Mauritius citizen born on 10 February 1966, 11 June 1995 and 9 November 1968

respectively. However, for the sake of convenience, I shall continue to refer to the latter as the "appellants" and to the Secretary of the State as the "respondent", which are the designations they had in the proceedings before the First-tier Tribunal.

2. The appellants appeal to the First-tier Tribunal was against the decision of the respondent to remove the appellants pursuant to section 47 of the 2006 Act there after claim on human rights grounds had been refused.

3. The appellants appealed against the respondent's decision dated 29 January 2014. It should be noted that there was a previous decision in respect of each appellant, made on 20 May 2013. Those decisions were not accompanied by a right of appeal. The appellants made a claim for judicial review which resulted in the respondent remaking the decisions, this time with an in country right of appeal. The respondent refused the appellants applications.

4. This appeal arises from a decision of the Upper Tribunal dated 31 December 2014 to remit the appeals of the first and third appellant's having been set them aside and for the appeals of the first and third appellant to be reconsidered only insofar as human rights grounds were concerned.

5. Upon remittal, a Judge of the First-tier Tribunal, Oakley allowed the appellants' appeals in a determination promulgated on 14 May 2015. First-tier Tribunal Judge Coyler in a decision dated 9 July 2015 granted the respondent permission to appeal to the Upper Tribunal, it being found to be arguable that the First-tier Tribunal Judge erred in law in allowing the first and third appellant's appeal pursuant to Article 8 of the European Convention on Human Rights.

6. Thus the appeal came before me.

First-tier Tribunal's Findings

7. The First-tier Tribunal made the following findings which I summarise. Applying the relevant law to the established facts it is clear that neither the first nor the third appellant can succeed under the Immigration Rules because they have not provided any evidence of significant obstacles to them returning to live in Mauritius where they have lived for the majority of their respective lives. Whilst there may have been in the past family rifts, they clearly both have members of their family living in Mauritius when they came to the United Kingdom and they had no specific place to live but have in fact been staying with friends and have been supported by friends in return for work that has been carried out and therefore there would be no significant obstacles to their return.

8. The first question to answer is whether there are any exceptional circumstances so far as the first and third appellant are concerned such that their deportation would result in unjustifiably harsh consequences for

them or their family and that the deportation would not be proportionate. To that extent the case of **MF (Nigeria) [2013] EWCA Civ 1192** which followed in **Kabia (MF: para 398 - "exceptional circumstances") [2013] UKUT 00569 (IAC)** paragraph 298 has been considered. The case of **Gulshan (Article 8 - new rules - correct approach) [2013] UKUT 640 (IAC)** has been considered and the case **Iftikhar Ahmed v Secretary of State for the Home Department [2014] EWHC 300 (Admin)**. There are sufficient exceptional circumstances in the case of the first and third appellant to consider their position outside the Immigration Rules and under Article 8.

9. In the case of **Kugathas v SSHD [2003] EWCA Civ 31**, a case which concerned an adult's relationship with his mother and adult siblings. In **Ghising (family life – adults - Gurkha policy) [2012] UKUT 160** in which it is stated "a review of the jurisprudence discloses that there is no general proposition that Article 8 of the European Convention on Human Rights can never be engaged when the family life is sought to establish is between adult siblings living together. Rather than applying a blanket rule, with regard to adult children, each case should be analysed on its own facts, to decide whether or not family life exists, within the meaning of Article 8. 1". Furthermore, in **Kugathas** Sedley LJ accepted that dependency was not limited to economic dependency.

10. The first and third appellants came to the United Kingdom with a young son in 2004 and have always remained together. The first appellant was let down by a person that can only be described as a rogue and the only criticism that might be made of the first appellant would be as to why he did not report the loss of his passport and try to regulate their immigration status at a much earlier stage. At that juncture, the second appellant had started to receive education in the United Kingdom and the first and third appellant's were being supported by Mrs Ferozo in return for work that they undertook for her. The first and third appellant's account of what occurred to them is a credible one.

11. The first and third appellants have been effectively remunerated both in kind from living at Mrs Ferozo's address but also the first appellant has undertaken gardening and painting jobs and the third appellant has carried out cleaning for Mrs Ferozo and members of her family for which they will have received some monetary consideration. In turn the second appellant has been supported by the first and third appellant and there have been a tight family unit, especially bearing in mind the second appellant is an only child.

12. The second appellant has now received an offer of university education in the United Kingdom and given the circumstances in which the first second and third appellant have lived there is still family life existing between them and clearly all three have established a private life during the time they have lived in the United Kingdom.

13. The consequences of removal of the first and third appellants will be sufficiently grave to engage Article 8 and now would need to be considered is whether the decision is proportionate. Section 117B of the Immigration Act 2014 states that consideration must be the maintenance of effective immigration control in the public interest. “I am aware it is also in the public interest that the interests of the economic well-being of the United Kingdom that person such as the first and third appellant who are seeking to enter or remain unable to speak English because persons will speak English unless of a burden on the taxpayer and better able to integrate into society. Whilst the first and third appellant’s did in the appeal before me use our interpreter I accept that they do have the ability to speak English and I see no reason why they should not be able to integrate into society. The appellants have not shown to be a burden on the taxpayer and have been throughout their time in the United Kingdom financially independent. I am aware that less weight need to be given to their private life and it was established at a time when they were in the United Kingdom lawfully but it is mainly on the basis of their family life of the second appellant that and considering their position.”

14. It has been argued that the first and third appellants could return to Mauritius leaving the second appellant to carry on with his studies and to obtain part-time work during the time that he is studying that he would also be supported by Mrs Ferozo”. This argument is rejected because the first and third appellants are in fact providing services to Mrs Ferozo in return for which they receive a sum of money and a roof over their heads. If they were to return to Mauritius during the time that their son is receiving his university education, there is no evidence to suggest that the second appellant would be supported by Mrs Ferozo and in any event the second appellant, whilst he may have his own friends for some support, would not have the family support and he has enjoyed and has been dependent upon during the time that he has been growing up in the United Kingdom.

15. In conclusion and on the evidence, the second appellant’s position so far as pursuing his university degree that he will need the support initially of his parents, namely the first and third appellant support in terms of financial support in that he would have a roof over his head coupled with the emotional support that he might also need when studying.

16. That support need not go on indefinitely and clearly after completion of his degree, even if he has to go on to consider postgraduate qualifications he would after a period of study of three years and undertaking some part-time employment during that study be in a position to certainly stand on his own two feet whereupon there would be no necessity for his parents to remain in the United Kingdom. Therefore they should be granted leave of a limited nature during the period of the second appellant’s degree only.

The grounds of appeal

17. The respondent in her grounds of appeal states the following which I summarise. The appellants' appeals were allowed under Article 8 and the Secretary of State does not seeking to challenge on the decision to allow the second appellant's appeal. This is a challenge of the decision to allow the first and third appellant's appeal.

18. The Judge has materially misdirected himself in finding that family life exists for the purposes of Article 8 in the appeal. The Judge has incorrectly interpreted the findings of **Kugathas** which states at paragraph 25 "because there is no presumption of family life, in my Judgement of family life is not established between an adult child and his surviving parent or other siblings unless something more exists than normal emotional ties". There is no evidence of dependency or exceptional circumstances evident in this case. The Judge conducted an incorrect consideration of the mandatory public interest considerations outlined in section 117B of the 2002 Act.

19. The Judge misdirected himself when finding that the appellants are financially independent and have an ability to speak English. Working without permission whilst in the United Kingdom illegally is not demonstrative of financial independence. Similarly, speaking Patois at the hearing does not demonstrate and ability to speak English as required by section 117B.

20. The Judge has made perverse or irrational findings on material matters. At paragraph 41 the Judge states that although the first and third appellant spoke in their own language, he accepts that they have the ability to speak English and he sees no reason why they should not be able to integrate into society. The Judge made this finding without any evidence and therefore it is irrational.

The hearing

21. I heard submissions from both parties as to whether there is an error of law in the determination of the First-tier Tribunal.

22. Mr Tufan on behalf of the respondent adopted the grounds of appeal. He stated that it is settled law set out in **SS (Congo)** that for a freestanding Article 8 claim, compelling circumstances are required. The Judge in his determination did not say what the compelling circumstances in the appeal are. In **Singh** and **Nagre** the rationale was upheld. There are no insurmountable obstacles for a 20-year-old man to go back to Mauritius or stay in this country and continue with his education without his parents.

23. For the appellant Mr Waithe submitted that he relies on his response. He also relies on the case of **Quila and another (FC) v Secretary of State for the Home Department [2011] UKSC 45** and the case of **Ghising and others [2013] UKUT 00567 (IAC)** and stated that the law on Article 8 remains the same and that it can be considered in the round. He said what is different from the case of **Kugathas** is that the appellants came to

this country lawfully in 2004. They contacted solicitors who failed to apply to the Home Office. The Judge correctly stated that a family life exists and the second and third appellants have nurtured the appellant and established a family life in this country. In the case of **Quila** paragraphs 38- 43 were referred to me. The second appellant's appeal has been allowed and he has a right to live in this country and I should look at all the factors in the round. It was accepted that the Judge that the appellant spoke English but preferred to speak in their own language. There is no error of law.

Decision on the error of law

24. Having considered the determination as a whole, I find the Judge's consideration of the first and third appellants appeal in respect of Article 8 is materially flawed. There is no appeal in respect of the second appellant who has been granted leave to remain.

25. The Judge accepted that the appellant does not meet the requirements of the Immigration Rules and then went on to consider Article 8 of the European Convention on Human Rights and allowed the appeal on the basis of the appellant's family life, with their son, the second appellant, in the United Kingdom.

26. It was made clear in **Gulshan [2013] UKUT 00640 (IAC)** that the Article 8 assessment shall only be carried out where there are compelling circumstances not recognised by the Immigration Rules. In this case the Tribunal has failed to identify the nature of these compelling circumstances that the first and third appellants should be granted leave to remain outside the Immigration Rules.

27. The Judge misinterpreted the case of **Kugathas** when he found that family life exists between the three appellants for the purposes of Article 8. The Judge did not set out what he considered to be more than normal emotional ties between an adult child and his parents. The judge has obviously been motivated by sympathy for the appellants which is demonstrated by him saying that the first and third appellant should be granted leave to remain until their son has graduated from university after which they can return. The judge fell into material error by misinterpreting the case of **Kugathas**.

28. Also the Judge has erred while conducting an incorrect consideration of the mandatory public interest considerations outlined in section 117B of the 2002 Act. The Judge fell into material error when he placed significant weight on the appellants family life while attaching little weight to the fact that the appellants family life was established whilst the appellants were in the United Kingdom unlawfully. The Judge accepted that the First appellant should have reported his stolen passport earlier but still nevertheless went on to find that the first appellant was not responsible for not regularising the appellants immigration status other than the

appellants own evidence that an immigration adviser misled them. These are not sustainable findings.

29. The Judge also found that there was no element of dependency because they were living with Mrs Ferozo and were working for her illegally. By working illegally in this country does not demonstrate that the appellants were independent financially. The evidence does not support Judge's finding that the first and third appellants are financially independent and the finding is therefore perverse.

30. The Judge also found that the appellants speak English and without setting out the evidence that he considered for making this finding. The Judge placed no reliance on the evidence that the appellant's did not give their evidence at the hearing in English but chose to speak in their mother tongue. The Judge added that he sees no reason why the appellants would be able to integrate into British society. This is not the test that they can integrate into British society but the appellants have to show that they have knowledge of the English language which makes it easier to integrate into British society. This Judge's finding that the appellants speak English is a perverse finding which is not sustainable on the evidence.

31. Having considered the determination as a whole I conclude that the Judge erred in law in his evaluation of the appellants appeal pursuant to Article 8 and I therefore set aside the decision in its entirety. The appellants do not meet the requirements of the Immigration Rules in any event.

32. It therefore follows that the respondent's appeal is allowed.

DECISION

The Secretary of State's appeal is allowed.

Signed by

Mrs S Chana
A Deputy Judge of the Upper Tribunal the 3rd day of November 2015