Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/11552/2014
IA/13036/2014
IA/13031/2014
IA/13028/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 23rd June 2015	**On 7th July 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE LEVER

Between

H S (FIRST APPELLANT)
A S G (SECOND APPELLANT)
H S G (THIRD APPELLANT)
M K (FOURTH APPELLANT)
(ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr Turner of Counsel
For the Respondent: Mr Kandala

DECISION AND REASONS

Introduction

1. The Appellants born on 31st December 1974, 11th June 2001, 8th November 2002 and 1st April 1968 respectively are all citizens of India. The First and Fourth Appellants

are husband and wife and the Second and Third Appellants are their two sons. The Appellants had made application for leave to remain in the United Kingdom under Article 8 of the ECHR. The Respondent had refused that application on 14th February 2014. The Appellants had appealed that decision and their appeal was heard by First-tier Tribunal Judge Pygott sitting at Richmond on 5th September and 7th November 2014. He dismissed their appeals.

2. Application for permission to appeal was lodged on 17th February 2015. Permission to appeal was granted by First-tier Tribunal Judge Cox on 2nd April 2015. It was said that the grounds disclosed an arguable error of law. The Respondent opposed the granting of the application by a letter dated 13th April 2015. Directions were issued for the Upper Tribunal firstly to consider whether an error of law had been made by the First-tier Tribunal and the matter comes before me in accordance with those directions.

Submissions on behalf of the Appellants

3. Mr Turner referred to the lengthy Grounds of Appeal that he had drafted and relied upon them. He helpfully summarised those by submitting as follows:

   (a) The judge had found that the best interests of the children were to remain in the United Kingdom but found against their remaining here by "visiting the sins of the parents upon the children".

   (b) The judge had not dealt properly with Section 55 of the Borders Act 2009.

   (c) The judge had failed to look at Dr Halari's report properly.

4. Essentially Mr Turner submitted that the judge had not dealt properly with Dr Halari's report in particular the aspects of the report where the children expressed their own wishes and desires. Notwithstanding that if the judge, as he had indicated, found the best interests of the children lay in remaining within the United Kingdom the only factor outweighing that was the maintenance of immigration control and that was contrary to a point raised in the case of **Zoumbas**.

Submissions on behalf of the Respondent

5. Mr Kandala relied upon the Respondent's letter and said that the judge had looked at this matter properly and whilst looking at the best interests of the children that was only part of the assessment of the case and that essentially the Grounds of Appeal amounted to no more than a disagreement with the findings reached.

6. At the conclusion of the hearing I reserved my decision to consider the documents and submissions raised. I now provide that decision with my reasons.

Decision and Reasons

7. The judge at paragraph 2 had set out the lengthy history in this case. The Appellants, on separate occasions had all entered the United Kingdom as visitors between 2005 and 2007 and had remained unlawfully at the conclusion of their valid visa stay. By 21st December 2007 all were unlawfully in the UK. The Appellants made no effort to return or regularise their stay until 24th December 2012 where they made application to remain under Article 8 of the ECHR, in particular relying upon the position of the youngest child. Those applications were refused by the Respondent on 3rd October 2013 with no right of appeal. Since that date there has been protracted appeal proceedings which have now lasted for 21 months.

8. The judge had set out in detail at paragraphs 3 to 11, the basis of the Respondent's refusal in respect of all Appellants, and at paragraph 12 the Grounds of Appeal submitted on behalf of the Appellants. She had noted the documentary evidence submitted for the hearing on 5th September 2014 and had thereafter set out in considerable detail the evidence of the Appellants. The Appellants' representative raised the prospect that, having taken instructions, there may be a claim under Article 2/3 of the EHCR or humanitarian protection, particularly in respect of the wife. Perhaps generously, given the length of time and legal advice already provided to the Appellants to raise any issues, the judge granted an adjournment with directions that the Appellants serve any fresh evidence in relation to this matter and commenced the part-heard hearing again on 7th November 2014.

9. Again the judge set out in detail documentary evidence and oral evidence presented. It is noteworthy that at paragraph 25 the judge noted the Appellants' representative asked her to "weed out" pages 7 to 237 of the Appellants' bundle as being evidence not relied upon. That raises the question why such a volume of material was placed within the bundle in the first instance.

10. The judge had noted at paragraph 37 that she had set out a full Record of Proceedings and had taken account of all material and submissions presented. It is clear from the detailed and logical decision that the judge was fully appraised of the evidence in this case. This was despite this being one of those cases where through exertions of either the Appellants and/or representatives the amount of material, changes and pleadings had the effect to cloud a relatively simple issue that did not necessarily require twenty months within the Appellate system.

11. The judge had within her Section of applicable law, dealt properly with the relevant law in an area that is not without some confusion and constant change. She clearly had in mind for example **Razgar**, Section 55 of the Borders Act 2009 and indeed earlier at paragraph 12 her refer to Article 3(1) of the UN Convention on the rights of a child.

12. In terms of matter under consideration the judge had noted at paragraph 28 that despite the representative's request and the granting of an adjournment to look at Articles 2/3 and humanitarian protection the Appellants did not rely upon those matters nor indeed did they rely upon Appendix FM of the Immigration Rules. It was also acknowledged by the representative that under paragraph 276ADE(1)(iv) and (vi) being relied upon under the Immigration Rules, the parents had a weak case without the children.

13. Essentially the questions to be dealt with by the judge were:

    (a) under paragraph 276ADE of the Immigration Rules was it reasonable to expect the children to return to India; and

    (b) under Article 8 of the ECHR did the children's best interests if found to be in the UK outweigh all other factors when looking at the proportionality exercise in the final test of **Razgar**.

14. At paragraphs 49 to 88 the judge dealt with a consideration of the evidence and submissions. She clearly had considered Dr Halari's report and referred to such specifically at paragraphs 70 to 73. There is nothing to support the assertions within the Grounds of Appeal or submissions that the judge failed to read or take account or be aware of parts of Dr Halari's report. The fact that certain paragraphs referred to within the Grounds of Appeal in Dr Halari's report, are not specifically referenced within the decision is no basis for such assertions. Indeed while Mr Turner seems to place much upon the report within the Grounds of Appeal and his submissions, he overstates that matter. Dr Halari as she acknowledged at paragraph 5 of her report did not know the Appellants. She had never met them before being commissioned to prepare a report by their legal representatives and providing that report in June 2014 two months prior to the hearing. She therefore had no history of knowledge or involvement with the family.

15. Her report was based on one interview with the Appellants rather than any series of meetings over time. She had access to school reports but no indication of access to any other documentation. She was reliant as she indicated at paragraph 4 on the self-reported history and the perceptions of the Appellants. That is understandable and no criticism is made of her. It was not her role to assess the credibility of the Appellants' claims or to place findings of fact and credibility in context with the evidence as a whole. That was the judge's function and in that respect Dr Halari's evidence was only a part of the evidential picture. The judge understood that and dealt with the expert report properly. She had properly noted that some of Dr Halari's conclusions as to "best interests" were based on evidence that the judge had found not to be credible or evidence that had been exaggerated. Whilst the matter not noted by the judge it could also be said that the wishes and desires as expressed by minors does not necessarily or always translate into their best interests.

16. The judge had concluded at paragraph 73 that it was "probably in the best interests of the children to remain in the UK". However the judge had concluded that in respect of the relevant child to which paragraph 276ADE(1)(iv) applied it was not unreasonable to expect that child to return to India. That is a finding open to the judge. It is entirely open to find on an examination of evidence that the best interests of a child may lie within the UK rather than returning to a home country. However if the difference in terms of best interests between staying and returning is marginal it would not be necessarily unreasonable to expect a return. If the difference between the two options was not marginal but significant it may become unreasonable to demand a return. It is a question of judgment for the judge who dealt with the evidence and was best placed to make such a decision and the judge did that properly and based on a detailed knowledge of the case and evidence. It could also be said, if the argument is raised, that there must be a difference in legal terms between "the best interests of a child" and the question under the Immigration Rules of whether returning a child would be unreasonable. If the test was identical then those who drafted the changes to the Immigration Rules in July 2012 and have had them under review thereafter would simply have used the same terminology within paragraph 276ADE as that found either within Section 55 of the Borders Act or Article 3(1) of the UN document. Accordingly if the test was meant to be identical it would be inherently foolish for the Rules not to have been drafted using identical terminology.

17. Thereafter in her examination of Article 8 of the ECHR outside of the Rules, she dealt with those factors that needed to be examined within the proportionality test of **Razgar**. That included an examination of Section 117B of the 2002 Act and Section 55 of the Borders Act 2009. She had clearly in earlier parts of her decision already substantially examined all the relevant evidence and factual decisions reached and indeed made reference to such within the decision. She made it clear at paragraph 81 that their private lives had been developed whilst they were unlawfully in the UK and their status precarious. She specifically referred to the poor immigration history weighing heavily against the adult Appellants but did not weigh that against the children (paragraph 81). In terms of removal of the children she referred at paragraph 82 to the factors she had already mentioned in a lengthy paragraph 75. Those were significant features of the family's links, including the children, and family situation generally that mitigated against any significant or indeed unreasonable problems if the children or family as a whole were returned to India. Those factors referred to in paragraph 75 were important features the judge was entitled to take into account and were factors arrived at after her detailed examination of the evidence. In summary at paragraph 83 she found that the maintenance of immigration control in the interests of the Respondent on one side of the balancing act outweighed in terms of proportionality the specific interests of the individual family and specifically with reference to "the best interests of the children" taken into account when examining their specific position. That decision upon the proportionality question was a decision that she was entitled to reach, a

decision that was clearly reasonably open to her and was based upon a detailed and proper grasp of the case law, statute and the evidence in this case.

Notice of Decision

18. There was no material error of law made by the judge and I uphold the decision of the First-tier Tribunal.

19. Anonymity direction made.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies both to the Appellants and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date

Deputy Upper Tribunal Judge Lever

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed Date

Deputy Upper Tribunal Judge Lever