Upper Tribunal
(Immigration and Asylum Chamber)
IA/24635/2013

IA/24636/2013

Appeal Number:

THE IMMIGRATION ACTS

Heard at Field House, London	**Decision & Reasons Promulgated**
On 16th July 2015	**On 19th August 2015**

Before

UPPER TRIBUNAL JUDGE ROBERTS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MS SIRINE PARWEEN – FIRST RESPONDENT
MISS SALMANA NADEEM – SECOND RESPONDENT
(ANONYMITY DIRECTION NOT MADE**)**

Respondents

Representation:

For the Appellant: Mr S Walker, Home Office Presenting Officer
For the Respondent: Mr Corben of Counsel, instructed by Kolia Solicitors

DECISION AND REASONS

1. This is an appeal by the Secretary of State for the Home Department against the decision of the First-tier Tribunal which in a decision promulgated on 8th January 2015, allowed the Respondents' appeals against the Secretary of State's decision to remove them from the UK.

2. For the purposes of this decision, I shall hereafter refer to the Secretary of State as "the Respondent" and Ms Parween and Miss Nadeem as "the Appellants", reflecting their positions as they were before the First-tier Tribunal.

3. The Appellants are citizens of India born respectively on 25th July 1975 and 20th November 2001. They are mother and daughter. The first Appellant Ms Parween entered the UK as a student in October 2006 and was joined a year later by her daughter as her dependent. Leave for both Appellants was subsequently extended to cease on 30th March 2013. On 11th March 2013 both applied for leave to remain in the UK under Article 8 ECHR.

4. Those applications were refused by the Respondent on 31st May 2013 on the grounds that neither Appellant could meet the requirements of Appendix FM or paragraph 276ADE in relation to their family/private life and that there were no exceptional circumstances justifying a grant of leave outside the Rules under Article 8 ECHR.

5. Their appeals came before FtT Judge Scott on 11th September 2014 promulgated on 8th January 2015. The Judge heard oral evidence. He found the Appellants could not meet the requirements of the Immigration Rules but went on to allow the appeals under Article 8, on the basis that it would be unreasonable to expect the second Appellant to leave the UK. She is now 13 years of age and had been here since the age of 5.

6. Permission to appeal to the UT was sought by the Respondent on two grounds.

   - The Judge erred in his Article 8 assessment because he misconstrued the meaning of the word "precarious" within the context of the Immigration Rules.

   - The Judge's approach to the 'best interests' of the child was equally misconstrued, because he treated those 'best interests' as determinative rather than relevant.

   Permission was granted on 3rd February 2015.

7. The grounds granting permission neatly encapsulate the issues before me and are reproduced here below.

> *"The grounds assert that the Judge erred in his assessment of the meaning of "precarious". The Appellants were not settled or permanent and therefore their private life should be afforded little weight. Secondly it is argued that the Judge's approach to the best interests of the child was misconstrued. The accrual of 7 years was relevant but not determinative. The Judge should have considered if they could not reasonably establish themselves in India and the public interest should have been taken into account. The grounds say that the fact that the appellants cannot meet the Rules is deeply pertinent and the Judge's findings about the situation in India are speculative.*
>
> *It is arguable that be* (sic) *equating "precarious" with "unlawful" the Judge erred in law. It is also arguable that he erred in embarking of a freestanding consideration of Article 8 without an assessment of whether it was appropriate in this case given the failure to meet the requirements of the Rules. However the period of 7 years was not "determinative" as claimed by the Respondent and it is apparent from paragraphs 25, 26 and 35 that the*

Judge did have the public interest in mind. His findings regarding the situation in India may have been open to him on the evidence. However I am disinclined to reject those grounds. Permission is therefore granted."

The FtT Hearing

8. In coming to its decision the Judge took into account the following:

- The first Appellant had qualified as a lawyer in India and had worked briefly for a law firm there. She and the second Appellant's father divorced in March 2006. It was decided by the family elders that the second Appellant would stay with her mother until she reached the age of 18 years.

- The first Appellant was awarded a grant to further her studies in the UK. She arrived here on 31st October 2006 leaving her daughter in the care of her parents. It was said they had difficulty caring for her so a decision was made that the second Appellant would join her mother in the UK, as her dependent. The first Appellant subsequently completed an MSc in Human Resource Management.

- The First Appellant has many friends in the UK and is settled in her community. She has undertaken voluntary work there and now works as a sales assistant at Poundland. She has a relationship with a partner but this is described as 'on and off.'

- The second Appellant came to the United Kingdom aged 5 years and is now 13 years of age. She has spent well over half her life here. She has completed her primary education and now progressed to secondary school. She speaks only English and has adapted to the environment, culture and society in the UK. It is said she would not be able to adapt to life in India.

- The first Appellant also says that if she and the second Appellant were to return to India her ex-husband would try to take her daughter away from her through the courts. He is financially much better off than her.

9. In coming to its decision to allow the Appellant's appeal the Judge said the following at [21] and [22],

> "The appellants clearly share family life together and, if removed, they will be removed together. There is no suggestion that they have an established family life with any other person in the United Kingdom. As noted, the first appellant's relationship with her partner is described as "on and off". I find, therefore, that it has not been shown that the appellants have any family life in the United Kingdom with which their removal would interfere.
>
> I am satisfied, however, that both appellants have established private lives since coming to this country, the first appellant in 2006 and the second appellant in 2007. The first appellant studied successfully for the degree of MSc. and has worked for a community law centre and the Citizens' Advice Bureau as well as in a shop, having been granted leave to remain as a Tier 1

> post-study worker. The second appellant has completed her primary education and has progresses to secondary school. She has made friends and has been assimilated into United Kingdom cultures. I accept therefore that both appellants have significant private lives in this country and approach their Article 8 claims on that basis."

The Judge then noted at [27],

> "…(4) and (5) The appellants' private lives have not been established while their immigration status was unlawful. They both had leave to remain until 30th March 2013 and made their present applications before the expiry of that leave. Their status has only (my emphasis) become precarious since that date with the refusal of their applications and pending the outcome of this appeal."

10. He went on to consider the best interests of the child and summed this up at [29] and [34],

> "It has already been noted that the second appellant will remain in the care of the first appellant and that, if removed, they will be removed together. There is no question of separation.
>
> I attach greater significance to the situation which would await the appellants in India if they were to return there. They would have no accommodation and the first appellant would have no employment. She has qualifications but no work experience relevant to those qualifications, so her employment prospects are at best uncertain. Her parents would be unable to assist as they are both elderly and in poor health. All of those matters would also impact upon the best interests of the second Appellant."

The UT Hearing/Error of Law

11. Mr Walker submitted that the FtT erred as follows:

- The Judge had misdirected himself as to the weight that should be given to the Appellants' private life, as such private life was developed during a period or periods when their immigration status was "precarious" pursuant to Section 117B(5) of the Nationality Immigration and Asylum Act 2002.
- The accrual of seven years residence in the UK by the second Appellant has been treated as if it were a determinative factor when assessing her best interests.
- The Judge adopted an incorrect approach to the proportionality assessment in that the public interest in maintaining an effective immigration control was either not considered or not given appropriate weight.

12. Mr Corben in responding emphasised that the Appellants' position is this:

- There was no error of law in the FtT's decision; alternatively,

- If there was it was not material to the outcome of the decision. There were several strands to his submissions.

13. He went into some detail, seeking to persuade me that the Judge had not misdirected itself on his interpretation of whether the Appellants' leave could be categorised as 'precarious'. He drew attention to *AM (S 117B) Malawi* [2015] UKUT 0260 (IAC) and submitted that the interpretation and construction of what constitutes precarious leave as set out in *AM (Malawi)* is incorrect and should not be followed.

14. His submission followed this line. There is no definition of the word 'precarious' within Section 117D of the Statute. (This was noted in *AM*). The word precarious is defined in dictionaries as meaning *dependent on chance or uncertain circumstances; or doubtful or unstable*. A person who has a period of limited leave does not have an immigration status which is dependent on chance or uncertain circumstance nor an immigration status which is doubtful. During the currency of the leave granted the immigration status is clear and defined.

15. I find I am un-persuaded by this reasoning. Mr Corben seeks to define precarious by reference to an Appellants' current status. That in my judgment is an incorrect approach. What is precarious is the prospect of any future leave to remain beyond that which is "limited" I reference this finding and draw support for this from [27] of *AM Malawi* which says…

> "In our judgement all those who have been granted by the Respondent a defined period of leave to enter the UK, or, to remain in the UK (which includes both those with a period of limited leave to remain, and those with a period of discretionary leave to remain), hold during the currency of that leave, an immigration status that is lawful, albeit "precarious". Even if the individual genuinely holds a legitimate expectation that their leave will ultimately be extended further by the Respondent, they have no absolute right to insist that this will occur, whether or not they meet the requirements of the Immigration Rules at the date of their application; HSMP Forum UK Limited [2008] EWHC 664. Still less will those who merely hold a genuine, and well founded belief, that they will at some future date be able to meet the requirements of the Immigration Rules and thus be able to obtain an extension; E-A (Article 8 - best interests of a child) Nigeria [2011] UKUT 00315 (IAC)."

16. In any event, whether the Appellants' leave in the present case is precarious or not it seems to me that the central issue in these appeals concerns Section 117B (6). It is upon this point that I find the Judge errs, such that the decision requires to be set aside and remade.

17. I accept that Mr Corben did say, even if I was against him on the 'precarious' point, nevertheless there was no material error in the judgment on this basis. The Judge noted the provisions of Section 117B(6) which affects the weight to be given to the public interest and correctly concluded, that the issue before him came down to whether it would be reasonable to expect the second Appellant to leave the UK. The Judge found that it would not. The judge had properly taken all relevant matters into account. The

Respondent's submission amounted to no more than a disagreement with those findings.

18. I disagree. In coming to the conclusions he did, I find there was nothing in the Judge's decision to show that he had properly considered any countervailing factors or given any thought to the more recent case law regarding the best interests of the child, such as that contained in the guidance in *EV (Philippines) & Ors v SSHD* [2014] EWCA Civ 874.

19. Reading the decision as a whole it is clear that this renders the Judge's approach flawed; there was little regard by him to the factors referred to in *EV (Philippines)* when carrying out the assessment of what is in the best interests of the second Appellant. For this reason, the decision of the FtT must be set aside and re-made.

Remaking the Decision

20. Both representatives were in agreement that should I find that the decision of the FtT needs to be remade, then there was no further evidence to call and therefore I would be in a position to remake the decision on the evidence which had been put before the FtT.

21. That evidence shows me that the first Appellant qualified as a lawyer in India. She worked briefly but did not earn enough to support herself and her daughter. She was however awarded a grant to further her studies; came to the UK and indeed has now gained further qualifications including an MSc in HR Management. Whilst the first Appellant has been in the UK since October 2006 she could not have during that time entertained any legitimate expectation that she would be allowed to remain here permanently.

22. With the qualifications she has gained in the UK, it is hard to see how the FtT Judge arrived at the conclusion that on return to India there would be no accommodation for the Appellants and no employment for the first Appellant. The reason for the first Appellant entering the UK was to gain qualifications so that her employment prospects in India would be increased. She has her parents there. There was evidence that her parents are elderly and frail, but nothing to show that they would not accommodate the Appellants.

23. The FtT Judge found at [29],

> "It has already been noted that the second appellant will remain in the care of the first appellant and that, if removed, they will be removed together. There is no question of separation."

24. Whilst I accept that it is the case that the second Appellant has built up a private life on account of her education and is more comfortable speaking English, it is nevertheless also the case that her best interests must lie in remaining with the first Appellant, who is her mother. However even if her best interests were to remain here those interests are not determinative and have to be considered in the light of countervailing factors, such as the fact

that the Appellants' leave to remain has always been temporary and that there could never have been any expectation of being able to remain in the UK on a permanent basis.

25. The significance of the disruption to the second Appellant is one which is similarly set out at [39] of *AM Malawi.*

26. In conclusion having made the findings that I have, there is nothing further for me to consider by way of a wider Article 8 assessment. I find on the evidence before me there is nothing in that evidence to warrant a finding that there were any compelling circumstances in these appeals justifying a grant of leave outside the Rules.

Decision

27. The appeal of the Secretary of State is allowed. The decision of the FtT is set aside. I remake the decision dismissing the appeals of Ms Sirine Parween and Miss Salmana Nadeem against the Respondent's decision of 31st May 2013 refusing to vary their leave to remain and giving directions for their removal.

No anonymity direction is made. None was sought and as both Appellants were represented before me I am satisfied that such an application would have been made if it were deemed appropriate.

Signature **Dated**
Judge of the Upper Tribunal

Fee Award

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

Signature **Dated**