



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Numbers: IA/30184/2014  
IA/30195/2014  
IA/30203/2014

**THE IMMIGRATION ACTS**

Heard at Field House  
On 12 October 2015

Decision and Reasons Promulgated  
On 2 November 2015

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL ARCHER

Between

SHITALKUMAR DASUKHAL GHADIALI  
KAMINIBEN SHITALKUMAR GHADIALI  
MANSI SHITALKUMAR GHADIALI

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellants: Ms S Ali, Counsel, instructed by MA Consultants (London)  
For the Respondent: Mr Tom Wilding, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. This appeal is not subject to an anonymity order by the First-tier Tribunal pursuant to rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. Neither party has invited me to make an anonymity order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) and I have not done so.

2. The appellants appeal against the decision of the First-tier Tribunal dismissing the appellants' appeal against a decision taken on 14 July 2014 to refuse leave to remain.

### **Introduction**

3. The appellants are all citizens of India comprising a family unit. The third appellant was born in 2003. The appellants arrived in the UK on 13 March 2007 with entry clearance as visitors. They overstayed in the UK and on 26 May 2011 they made an application for leave to remain under Article 8. That application was refused with no right of appeal. The appellants twice requested that a formal decision be made to remove them before commencing judicial review proceedings in 2013. Those proceedings resulted in a consent order on 24 January 2014 and the respondent then reconsidered the application for leave to remain.
4. The Secretary of State concluded that the requirements of Appendix FM of the Immigration Rules ("the Rules") were not met and that there were no grounds to grant leave to remain outside the Rules. India has a functional educational system and it was in the best interests of the third appellant to remain with both her parents. Any interference with private life was proportionate. The applications were refused.

### **The Appeal**

5. The appellant appealed to the First-tier Tribunal and attended an oral hearing at Taylor House on 12 March 2015. The First-tier Tribunal found that the first and second appellants were both overstayers and did not meet the requirements of Appendix FM. They had a genuine and subsisting relationship with the third appellant. She had lived in the UK for at least seven years immediately preceding the date of application but it was reasonable to expect her to leave the UK. She had schooled in the UK educational system for approximately seven years and was well integrated. Her return to India would not be an easy transition for her and she would encounter difficulties in adjusting to a new school environment and curriculum. Her teachers took the view that it would be detrimental to her education if she were to leave the UK. However, the educational system in India is not such that she would suffer irreversible harm. The support of her parents and family members in India would be of significant assistance in helping her to adjust. It is not uncommon for young children to change schools and her parents had shown themselves to be resourceful. They had the capacity to minimise the degree of disruption that the third appellant would have to endure.
6. The judge found that the best interests of the children were a primary consideration but not the primary consideration. The interference with the private and family life of the appellants would not have consequences of such severity as to outweigh the compelling public interest considerations in the case. The adult appellants had remained in the UK in deliberate breach of the Rules and their legal action taken to regularise their stay had not been bona fides and lacked merit. Any private life developed in the UK was in the full knowledge that they did not have any legitimate grounds to remain in the UK. The appeals were dismissed.

## **The Appeal to the Upper Tribunal**

7. The appellants sought permission to appeal to the Upper Tribunal on the basis that the First-tier Tribunal had erred in law by failing to give proper consideration to the proportionality test and failed to consider the relevant case law. Further issues were raised in relation to the version of the Rules in force at the date of application but they were not pursued at the oral hearing.
8. Permission to appeal was granted by First-tier Tribunal Judge Simpson on 7 August 2015. It was arguable that the judge failed to properly consider the case law and the decision was silent as to proportionality and the fact that the third appellant was a qualified child under section 117B(6) of the 2002 Act.
9. In a rule 24 response dated 21 August 2015
10. Thus, the appeal came before me

## **Discussion**

11. Ms Ali submitted that the judge has failed to follow the case law and principles. The lengthy residence of the third appellant in the UK was not considered. It would be wrong to disrupt her education. Section 55 was not addressed properly in the decision. It is not reasonable for the child to leave the UK. She is in the middle of her education and her education has been affected by the ongoing proceedings. She would have to learn Hindi and Gujarati if she returns. There is a material error of law. There is new evidence in relation to the third appellant's health and therefore a de novo hearing is appropriate.
12. Mr Wilding submitted that the challenge is no more than a disagreement. It is not an error of law to refer to case law. The appellants cannot succeed under the Rules. Paragraphs 9-12 of the decision set out a holistic history of the evidence. Removal would not involve separating the family. Reasonableness is far more than a best interests assessment. A proper Article 8 assessment considers best interests and then proportionality. The failure to mention section 117B(6) was a matter of form rather than substance. Education is not a determining factor. If there is further evidence then there would have to be a rehearing if a material error of law is identified.
13. Ms Ali submitted in reply that the third appellant has spent her formative years in the UK and the public interest test has not become such a high threshold. There are legal mechanisms for the family to remain but the judge has ignored them.
14. The key legal issues in relation to these appeals are not straightforward. The provisions of paragraph 276ADE of the Rules that was in force at the relevant time are as follows;

**“Requirements to be met by an applicant for leave to remain on the grounds of private life**

276ADE. The requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that at the date of application, the applicant:

- (i) does not fall for refusal under any of the grounds in Section S-LTR 1.2 to S-LTR 2.3. and S-LTR.3.1. in Appendix FM; and
- (ii) has made a valid application for leave to remain on the grounds of private life in the UK; and
- (iii) has lived continuously in the UK for at least 20 years (discounting any period of imprisonment);  
or
- (iv) is under the age of 18 years and has lived continuously in the UK for at least 7 years (discounting any period of imprisonment) and it would not be reasonable to expect the applicant to leave the UK; or
- (v) is aged 18 years or above and under 25 years and has spent at least half of his life living continuously in the UK (discounting any period of imprisonment); or
- (vi) is aged 18 years or above, has lived continuously in the UK for less than 20 years (discounting any period of imprisonment) but has no ties (including social, cultural or family) with the country to which he would have to go if required to leave the UK.”

The relevant provisions of section 117 of the Nationality, Immigration and Asylum Act 2002 are as follows;

*“117A Application of this Part*

- (1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts –
  - (a) breaches a person's right to respect for private and family life under Article 8, and
  - (b) as a result would be unlawful under section 6 of the Human Rights Act 1998.
- (2) In considering the public interest question, the court or tribunal must (in particular) have regard –
  - (a) in all cases, to the considerations listed in section 117B, and
  - (b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.
- (3) In subsection (2), "the public interest question" means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).

*117B Article 8: public interest considerations applicable in all cases*

- (1) The maintenance of effective immigration controls is in the public interest.
- (2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English –
  - (a) are less of a burden on taxpayers, and
  - (b) are better able to integrate into society.
- (3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons –
  - (a) are not a burden on taxpayers, and
  - (b) are better able to integrate into society.
- (4) Little weight should be given to –
  - (a) a private life, or
  - (b) a relationship formed with a qualifying partner, that is established by a person at a time when the person is in the United Kingdom unlawfully.
- (5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.
- (6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where –
  - (a) the person has a genuine and subsisting parental relationship with a qualifying child, and
  - (b) it would not be reasonable to expect the child to leave the United Kingdom.

#### **117D Interpretation of this Part**

- (1) In this Part –

"Article 8" means Article 8 of the European Convention on Human Rights;

"qualifying child" means a person who is under the age of 18 and who –

- (a) is a British citizen, or
- (b) has lived in the United Kingdom for a continuous period of seven years or more;

"qualifying partner" means a partner who –

- (a) is a British citizen, or
- (b) who is settled in the United Kingdom (within the meaning of the Immigration Act 1971 – see section 33(2A) of that Act). “

15. The issue of proportionality involves striking a fair balance between the rights of the appellants and the public interest. In assessing proportionality, the “best interests” of any children must be a primary consideration (see **ZH (Tanzania) v SSHD (2011) UKSC 4** and section 55 of the Borders, Citizenship and Immigration Act 2009). Whilst the best interests of the child are not necessarily determinative, a child’s best interests are a weighty consideration, albeit one that can be outweighed by sufficient weight of public interest concerns (see **ZH (Tanzania)** *per* Lady Hale at [33]).

16. A significant issue in this appeal is the fact that the third appellant is a qualifying child, as defined in section 117D and therefore falls within section 117B(6) of the 2002 Act. The judge had to consider whether it was reasonable to expect her to leave the United Kingdom. The recent case law remains relevant, whilst taking into account that the case law effectively pre-dates the commencement of sections 117A - D (28 July 2014).
17. In Azimi-Moayed and others (decisions affecting children; onward appeals) [2013] UKUT 00197(IAC), Mr Justice Blake held that as a starting point, it is in the best interests of children to be with both their parents and if both parents are being removed from the UK then the starting point suggests that so should dependent children who form part of their household unless there are reasons to the contrary. It is generally in the interests of children to have both stability and continuity of social and educational provision and the benefit of growing up in the cultural norms of the society to which they belong. Lengthy residence in a country other than the state of origin can lead to development of social, cultural and educational ties that it would be inappropriate to disrupt in the absence of compelling reasons to the contrary. What amounts to lengthy residence is not clear cut but past and present policies have identified seven years as a relevant period. Seven years from age four is likely to be more significant to a child than the first seven years of life. Very young children are focussed on their parents rather than their peers and are adaptable.
18. In EV (Philippines) and others v SSHD [2014] EWCA Civ 874, Lord Justice Clarke held that in determining whether the need for immigration control outweighs the best interests of the children, it is necessary to determine the relative strength of the factors which make it in their best interests to remain here and also to take account of any factors that point the other way. A decision will depend on a number of factors such as the children's age, the length of time in the United Kingdom, how long they have been in education, what stage their education has reached, the extent to which they have become distanced from the country to which it is proposed that they return, how renewable their connection may be, to what extent they will have linguistic, medical or other difficulties in adapting to life in that country and the extent to which the course proposed will interfere with their family life or their rights (if they have any) as British citizens.
19. I find that the judge gave some consideration to whether it was reasonable to expect the third appellant to leave the UK under paragraph 276ADE of the Rules but failed to mention section 117B at all. No consideration was given to relevant factors such as ability to speak English and financial independence. The relevant case law was not mentioned and there is nothing to suggest that the judge considered the principles set out in the case law. There is no finding on the best interests of the third appellant and no clear finding on proportionality. Paragraph 27 of the decision appears to import a test of irreversible harm in relation to the third appellant's educational progress. Mr Wilding sought to explain that reference as just a turn of phrase but given the general absence of a legal framework in the decision I find that the judge

was unclear as to the correct legal tests that were applicable to the facts. I therefore find that there are a number of material errors of law.

20. Thus, the First-tier Tribunal's decision to dismiss the appellants' appeals under the Rules and Article 8 involved the making of an error of law and its decision cannot stand.

### **Decision**

21. Both representatives invited me to order a rehearing in the First-tier Tribunal if I set aside the judge's decision. Bearing in mind paragraph 7.2 of the *Senior President's Practice Statements* I consider that an appropriate course of action. I find that the errors of law infect the decision as a whole and therefore the re-hearing will be de novo with all issues to be considered again by the First-tier Tribunal.
22. Consequently, I set aside the decision of the First-tier Tribunal. I order the appeal to be heard again in the First-Tier Tribunal to be determined de novo by a judge other than the previous First-tier judge.

Signed

Date 30 October 2015



Judge Archer  
Deputy Judge of the Upper Tribunal