Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/33035/2013
IA/33043/2013
IA/33049/2013
IA/33055/2013

THE IMMIGRATION ACTS

Heard at : Field House
On : 8 July 2015

Determination Promulgated
On 13 July 2015

Before

UPPER TRIBUNAL JUDGE KEBEDE
DEPUTY UPPER TRIBUNAL JUDGE HUTCHINSON

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

BIBI AISSA NAZIR
MOHAMED ALLY NAZIR
MUHAMMAD FAIZAAR-ALLY NAZIR
MUHAMMAD FARHAAN-ALLY NAZIR

Respondents

Representation:
For the Appellant: Mr S Whitwell, Senior Home Office Presenting Officer
For the Respondents: Mr M Harris, instructed by Raj Law Solicitors

DETERMINATION AND REASONS

1. This is an appeal by the Secretary of State for the Home Department against the decision of the First-tier Tribunal allowing the appeals of Ms Nazir

and her family against the respondent's decision to refuse their applications for leave to remain in the United Kingdom.

2. For the purposes of this decision, we shall hereinafter refer to the Secretary of State as the respondent and Ms Nazir and her family as the appellants, reflecting their positions as they were in the appeal before the First-tier Tribunal.

3. The appellants are wife, husband and their two sons and are citizens of Mauritius. They were born on 16 February 1974, 11 March 1965, 18 November 1995 and 4 December 2001 respectively. They came to the United Kingdom in April 2005 as visitors. The first appellant was then granted leave to remain as a student and her husband and children were granted leave as her dependants. Their leave expired on 4 June 2012. The first appellant was unable to complete her studies as her college closed and she and her family made an application for leave to remain outside the immigration rules, on family and private life grounds, on 24 May 2012.

4. The applications were refused by the respondent on 22 July 2013 on the grounds that they did not meet the requirements of Appendix FM or paragraph 276ADE in relation to their family and private life and that there were no exceptional circumstances justifying a grant of leave outside the rules under Article 8 of the ECHR.

5. The appeals came before First-tier Tribunal Judge Trevaskis on 6 March 2014. The judge heard oral evidence from all four appellants. He found that the appellants could not meet the requirements of Appendix FM but allowed the appeals under paragraph 276ADE on the basis that the parents had no ties to Mauritius and that it would be unreasonable to expect the children to leave the United Kingdom.

6. Permission to appeal to the Upper Tribunal was sought by the respondent on the grounds that the judge had misinterpreted the test to assess "no ties" and was wrong to find that the family had no ties to Mauritius; and that the judge had erred by finding that it would not be reasonable to expect the children to relocate to Mauritius.

7. Permission to appeal was granted on 8 April 2014.

8. The respondent's appeal came before the Upper Tribunal on 15 May 2014, where Deputy Upper Tribunal Judge Grimes found that Judge Trevaskis had erred in law in finding that the family had no ties to Mauritius and by considering the cases under the immigration rules rather than under Article 8, contrary to the guidance in Edgehill & Anor v SSHD [2014] EWCA Civ 402. Judge Grimes set aside the decision of the First-tier Tribunal and re-made the decision under Article 8, finding that the decision to refuse the appellants' applications was proportionate and not in breach of their human rights.

9. DUTJ Grimes' decision was, however, quashed by the Court of Appeal, in an Order dated 23 April 2015 whereby the appeals were remitted by consent to the Upper Tribunal to be considered afresh, with no findings preserved. The basis for that order was that, further to the clarification provided in the case of Singh v The Secretary of State for the Home Department [2015] EWCA Civ 74, the respondent had properly applied the new immigration rules and the grounds of appeal in relation to the decision of the First-tier Tribunal had therefore to be considered in that context.

10. Thus the appeals came before us.

Appeal Hearing

11. We heard submissions from both parties on the error of law and found that the First-tier Tribunal Judge had erred in law in his findings under paragraph 276ADE. The judge was not entitled, on the evidence before him, to conclude that the first two appellants had lost ties to Mauritius and indeed Mr Harris accepted that it was difficult to justify such a conclusion. As regards the third and fourth appellants, the judge's findings, as to whether it was reasonable to expect them to leave the United Kingdom, was inextricably linked to his findings in relation to the first two appellants. Accordingly we set aside the decision of Judge Trevaskis.

12. Mr Harris agreed that there was no reason for the decision not to be re-made before us and that the only additional evidence consisted of clarification by the first appellant of an amendment to her witness statement of 12 February 2014. Furthermore, whilst it was pointed out that the respondent's reasons for refusal letters for the third and fourth appellants did not address their private lives or make any explicit reference to their best interests, we noted that consideration was given to exceptional circumstances and that in any event that was a matter that we could consider ourselves without there being any necessity to refer the matter back to the Secretary of State.

13. The first appellant then gave oral evidence and confirmed that she wished the second sentence of paragraph 9 of her statement of 12 February 2014, referring to the inability of her children to speak Creole or French, to be deleted. She said that she and her husband spoke Creole at home. Their boys spoke to each other in English and to her mostly in English but sometimes with a bit of Creole. They understood Creole but could not speak it to so well. When cross-examined, the appellant was asked how her sons communicated with their father if he did not speak English and she replied that her husband spoke a bit of English but otherwise she would translate. If she was not there they would communicate with a bit of Creole and English.

14. We heard submissions from both parties.

15. Mr Whitwell submitted that, contrary to Mr Harris' earlier submission, there was nothing wrong with the position of the parents being considered first and that the family must be considered as a unit. It was not unreasonable for the

children to follow their parents back to Mauritius. The first two appellants could not succeed under paragraph 276ADE(1)(vi) as they had family members in Mauritius and spoke the language. Even considering the children first, they could not succeed under paragraph 276ADE(1)(iv) as they would be able to integrate into life in Mauritius. With regard to the break in their education, Mr Whitwell relied on paragraph 39 of AM (S 117B) Malawi [2015] UKUT 0260. With regard to the question of their best interests, he relied on the guidance in EV (Philippines) & Ors v Secretary of State for the Home Department [2014] EWCA Civ 874.

16. Mr Harris accepted that the first and second appellants could not meet the requirements of paragraph 276ADE of the rules, but he submitted that the children had to be considered first. He relied upon EV (Philippines) and Azimi-Moayed and others (decisions affecting children; onward appeals)[2013] UKUT 00197 in submitting that the disruption to the children's significant private life ties in the United Kingdom was such that it was in their best interests to remain in the United Kingdom and that there were no countervailing factors outweighing those best interests. They therefore met the requirements of paragraph 276ADE(1)(iv) and succeeded in their appeals, as there was no need to look at the public interest separately. There were therefore compelling reasons for their parents to be granted leave outside the immigration rules.

Consideration and Findings

17. Whilst we appreciate the ingenuity in Mr Harris' argument in considering the children's position first, we do not accept that their circumstances can be considered in isolation of their parents. Neither do we agree that the ability to meet the requirements of paragraph 276ADE(1)(iv) involves no specific consideration of the public interest, since that must surely play a part in considering the question of reasonableness. In any event we do not agree with the conclusion that it would be unreasonable to expect the children to leave the United Kingdom. They will be returning to Mauritius with their parents who, as Mr Harris properly accepted, could not meet the requirements of paragraph 276ADE(1)(vi). Whilst the children's links to Mauritius may be more tenuous than that of their parents, having spent a larger proportion of their lives in the United Kingdom than their parents, the family as a whole plainly retains ties to that country.

18. We consider that the first appellant has been less than honest in her evidence as to the family's links to Mauritius and has sought to downplay the ties they have to that country. The tenor of her statement was that there were no remaining ties and she stated initially that her sons could not speak the language. However her husband's evidence in his statement was that they had some family in Mauritius. Their passports show that they returned to Mauritius for two weeks in April 2008 and the second appellant travelled there from December 2008 to January 2009, whereas paragraph 39 of Judge Travaskis' decision records her evidence that they had not been to Mauritius for nine years. The first appellant amended her statement before us to delete the

reference to her sons speaking no Creole and French and indeed her evidence before us was that her sons used some Creole when speaking to her and their father. Given that their father speaks little English they clearly are able to communicate in Creole. We therefore conclude that the family retain ties to Mauritius, in terms of culture, family and language, and we find there to be no evidence before us to suggest that there would be any significant obstacles to them integrating into life in that country.

19. Whilst it is the case that the third and fourth appellants are settled in the United Kingdom in the sense that they have built up a private life through their education, friends and other such ties over their nine years of residence here and are more comfortable speaking in English, it is nevertheless the case that their best interests lie in remaining with their parents, whether that be in Mauritius or in the United Kingdom. Other than their length of residence there is in fact nothing significant about their private lives in the United Kingdom and, with reference to the guidance in EV at paragraphs 35 to 37, it cannot emphatically be said that their best interests lie in remaining in this country. However even if their best interests were to remain here, those interests, albeit paramount, are not determinative and have to be considered in the light of the countervailing factors such as the fact that their leave to remain has always been temporary and that there was never any expectation that they would be able to remain here on a permanent basis. The significance of the disruption to their education is properly addressed by the findings at paragraph 39 of AM, and there is no reason why they would not be able to continue their education in Mauritius. It is also open to the eldest son, who is now over 18 years of age, to apply for leave to enter or remain in the United Kingdom as a student should he wish to continue his education here. There is no reason why their parents cannot find employment in Mauritius and support them there.

20. Mr Harris relied upon the case of Azimi-Moayed in submitting that the disruption to the children's lives in the United Kingdom would be such as to make an enforced return to Mauritius unreasonable, given their length of residence here and in particular considering that they have lived here for more than the significant seven year period. However, for the reasons we have given, and in light of the guidance in EV (Philippines) we do not agree and we consider that it would not be unreasonable to expect the third and fourth appellants to leave the United Kingdom and return with their parents to Mauritius. Accordingly, whether the children or the parents are considered first, we do not accept that any of the appellants are able to meet the requirements of paragraph 276(1)ADE.

21. Having so concluded, there is nothing further to consider by way of a wider Article 8 assessment and we find no evidence of any compelling circumstances justifying a grant of leave outside the immigration rules. We therefore dismiss the appeals on all grounds.

DECISION

22. The making of the decision of the First-tier Tribunal involved an error on a point of law. The Secretary of State's appeal is accordingly allowed and the decision of the First-tier Tribunal is set aside. We re-make the decision by dismissing Ms Nazir's appeal and the appeals of her husband and two sons.

Anonymity

The First-tier Tribunal made an anonymity order but we find no reason to continue that order and therefore lift it, pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008).

Signed: Dated:
Upper Tribunal Judge Kebede