Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/42874/2014
IA/42883/2014
IA/42885/2014

THE IMMIGRATION ACTS

Heard at Field House
On 9th November 2015

Decision & Reasons Promulgated
On 11th November 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE MANDALIA

Between

MR. MAHENDRAKUMAR PRAVINBHAI MACHHI (1)
MRS. DHARMISHTA MAHENDRAKUMAR MACHHI (2)
MISS JILL MAHENDRAKUMAR MACHHI (3)
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondents

Representation:

For the Appellant: Mr. D Sellwood of Counsel instructed by Rashid & Rashid Solicitors
For the Respondent: Ms. A Fijiwala: Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against a decision and reasons by First-tier Tribunal Judge Amin promulgated on 13th May 2015 in which she dismissed the appeals against the decisions made by the Secretary of State on 13th October 2014 to refuse to vary leave to remain in the UK on human rights grounds.

Background

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2. The immigration history of the appellants is uncontroversial. They are all Indian nationals. Mr Mahendrakumar Machhi arrived in the UK on 29th September 2007 with leave to enter as a student valid until 31st October 2008. He was subsequently granted extensions of stay in the UK until 30th August 2014. His wife, the second appellant arrived in the UK on 31st March 2008 with leave to enter as a student dependant until 31st October 2008. In line with the first appellant, her leave to remain in the UK was extended until 30th August 2014. On 14th August 2014, the first and second appellants applied for leave to remain in the UK on account of their family and private life with their child, the third appellant, who was born in the UK on 13th August 2012.

The decision of First-tier Tribunal Judge Fox

3. First-tier Tribunal Judge Amin heard evidence from the first appellant. The evidence is set out at paragraphs [8] to [16] of the decision and it serves no purpose to recite that evidence in full, in this decision. Suffice it to say, as noted in paragraph [10] of the decision, Mr Machhi relied on his family's serious medical conditions as the backdrop for his claim that there are exceptional circumstances and insurmountable obstacles, such that the removal of the family from the UK would be a disproportionate interference with their Article 8 rights.

4. The findings of First-tier Tribunal Judge Amin are to be found between paragraphs [22] to [51] of the decision.

The Grounds of Appeal

5. The appellants' sought permission to appeal on five grounds that are set out in the 'Grounds of Application for Permission to Appeal' that was attached to the First Tier Tribunal Application for Permission to Appeal to the Upper Tribunal (*Form IAFT-4).*

6. In considering the application for permission to appeal, First-tier Tribunal Judge Brunnen, correctly in my view, considered the first and third grounds to be unarguable, described the second ground as incomprehensible and the fifth ground, as entirely misconceived. Permission to appeal was however granted in respect of the fourth ground. In so doing, he noted;

> "6. Ground 4 submits that the Judge failed properly to consider the best interests of the Third Appellant. The Judge directed himself correctly as to ZH (Tanzania) but it is arguable that he then failed to consider where the best interests of the Third Appellant lay and to treat her best interests as a primary consideration."

7. The matter comes before me to consider whether or not the decision of the Tribunal involved the making of a material error of law, and if the decision is set aside, to re-make the decision.

The hearing before me on 11th November 2015

8. It was agreed by the parties that the sole ground upon which permission to appeal has been granted, is the fourth ground relied upon by the appellants. That is, the Judge failed to properly consider the principle that a child's best interests shall be 'a primary consideration' in making decisions concerning children.

9. On behalf of the respondent, Ms Fijiwala handed to me copies of the decisions of the Upper Tribunal in **Azimi-Moayed –v- SSHD [2013] UKUT 00197** and the Court of Appeal in **EV (Philippinnes) –v- SSHD [2014] EWCA Civ 874**.

10. On behalf of the appellants', Mr Sellwood points to paragraph [23] of the decision and submits that the Judge accepted that the threshold for engaging Article 8 is a low one and that the "..Appellant has established a private and family life in the UK having been in the UK since 2001." In fact, the first appellant arrived in the UK in September 2007. Mr Sellwood submits that the failure to give anxious scrutiny to the best interests of the third appellant in particular, is partly demonstrated by the last sentence at paragraph [23]:

> "He has seven children (all British Citizens) that he claims he has a close relationship with all of them."

The first and second appellants have only one child who is now aged three, who lives with them, and who is not a British Citizen.

11. Mr Sellwood submits that at paragraph [25] the Judge refers to the leading decision of **ZH (Tanzania) –v- SSHD [2011] UKSC 4** and notes that she is required to consider the best interests of the *children* here as a primary consideration. She notes at paragraph [26] that "the correct approach is to treat *the [sic]* bests interests of the child as a starting point and then to go on to assess whether those interests *are* outweighed by the strength of other considerations." Mr Sellwood submits that although the Judge appears to have correctly directed herself, what is then set out at paragraphs [27] to [32] of the decision, focuses upon the first and second appellants rather than the best interests of the third appellant and the Judge fails to make any findings as to what is in the best interests of the third appellant. Furthermore, he submits, there is no reference to the best interests of the third appellant in the proportionality assessment at paragraphs [42] to [49] of the decision.

12. Mr Sellwood submits that the Judge has failed to have any regard to the decisions of the Upper Tribunal in **Azimi-Moayed –v- SSHD [2013] UKUT 00197** and the Court of Appeal in **EV (Philippinnes) –v- SSHD [2014] EWCA Civ 874**, and has failed to apply the guidance provided in those decisions.

13. Mr Sellwood submits that I should find that the decision of First-tier Tribunal Judge Amin discloses a material error of law, and that I should adjourn the remaking of the decision to another day. Mr Sellwood submits that since the hearing before the First-tier Tribunal, the third appellant has

been seen (on 16th September 2015) in the neonatal clinic at St George's University Hospital and has been referred to the 'Bayley Screening Clinic' for consideration of a 'Bayley assessment'. Most recently on 3rd November 2015, the third appellant has undergone examination by the Paediatric Audiology Services of St George's Healthcare NHS Trust and a hearing assessment found that the third appellant has normal hearing sensitivity in both ears. She does not require any further audiology appointments.

14. In reply, Ms Fijiwala relied upon the Rule 24 response dated 5th August 2015, filed by the respondent. She submits that it is plain from the matters set out at paragraphs [24] to [26] of the decision that the Judge directed herself correctly to the need to consider the best interests of the child as a primary consideration. She submits that at paragraph [27] of the decision, the Judge noted that the first and second appellants have one child, who was under three years old and lived with her parents. The Judge noted that the third appellant is not a British Citizen and the Judge accepted that the third appellant has in the past, suffered from health problems when she was born. Ms Fijiwala submits that at paragraph [28] the Judge noted that the third appellant's current medical condition is very stable and has improved significantly. The reasons for that finding are set out at paragraph [28].

15. Ms Fijiwala submits that although the Judge does not expressly refer to the decisions of the Upper Tribunal in **Azimi-Moayed –v- SSHD [2013] UKUT 00197** and the Court of Appeal in **EV (Philippinnes) –v- SSHD [2014] EWCA Civ 874**, the principles set out in those decisions have been applied.

Decision as to 'Error of Law'

16. The issue in this appeal is confined to the application of s55 of the Borders, Citizenship and Immigration Act 2009 and whether it is reasonable to expect the third appellant to return to India with her parents.

17. It is as well at this stage to set out the relevant legal framework. **s55 of the Borders, Citizenship and Immigration Act 2009** requires the respondent to make arrangements for ensuring that her functions in relation to immigration, asylum or nationality are discharged having regard to the need to safeguard and promote the welfare of children who are in the UK.

18. In **Azimi-Moayed & Others (decisions affecting children; onward appeals) [2013] UKUT 197 (IAC)**, the Upper Tribunal in considering the case law in relation to decisions affecting children stated;

> "13. It is not the case that the best interests principle means that it is automatically in the interests of any child to be permitted to remain in the United Kingdom, irrespective of age, length of stay, family background or other circumstances. The case law of the Upper Tribunal has identified the following principles to assist in the determination of appeals where children are affected by the decisions:

i) 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 United Kingdom then the starting point suggests that so should dependent children who form part of their household unless there are reasons to the contrary.

ii) 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.

iii) 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 reason 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.

iv) Apart from the terms of published policies and rules, the Tribunal notes that seven years from age four is likely to be more significant to a child that the first seven years of life. Very young children are focussed on their parents rather than their peers and are adaptable.

v) Short periods of residence, particularly ones without leave or the reasonable expectation of leave to enter or remain, while claims are promptly considered, are unlikely to give rise to private life deserving of respect in the absence of exceptional factors. In any event, protection of the economic well being of society amply justifies removal in such cases."

19. In **EV (Philippines) and Others v SSHD [2014] EWCA Civ 874,** the appellants were a family from the Philippines whose application for indefinite leave to remain in the United Kingdom had been rejected. The First-tier Tribunal found that, although it was in the children's best interests to continue their education in the UK, removal would be proportionate to the legitimate aim of immigration control. The Upper Tribunal upheld that decision. The Court of Appeal, in dismissing the family's appeal, issued guidance on how tribunals were to approach the proportionality exercise where it had concluded that continuing education in the UK would be in the best interests of the children:

"32. There is a danger in this field of moving from looseness of terms to semantics. At the same time there could be said to be a tension between (a) treating the best interests of the child as a primary consideration which could be outweighed by others provided that no other consideration was treated as inherently more significant; and (b) treating the child's best interests as a consideration which must rank higher than any other which could nevertheless be outweighed by others. It is material, however, to note that Lord Kerr, as he made clear, was dealing with a case of children who were British citizens and where there were very powerful other factors - see [41] below -in favour of not removing them ('the best interests of the child clearly favour a certain course'/ 'the outcome of cases such as the present'). He also agreed with the judgment of Lady Hale. In those circumstance we should, in my judgment, be guided by the formulation which she adopted.

33. More important for present purposes is to know how the tribunal should approach the proportionality exercise if it has determined that the best interests of the child or children are that they should continue with

their education in England. Whether or not it is in the interests of a child to continue his or her education in England may depend on what assumptions one makes as to what happens to the parents. There can be cases where it is in the child's best interests to remain in education in the UK, even though one or both parents did not remain here. In the present case, however, I take the FTT's finding to be that it was in the best interests of the children to continue their education in England with both parents living here. That assumes that both parents are here. But the best interests of the child are to be determined by reference to the child alone without reference to the immigration history or status of either parent.

34. In determining whether or not, in a case such as the present, 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.

35. A decision as to what is in the best interests of children will depend on a number of factors such as (a) their age; (b) the length of time that they have been here; (c) how long they have been in education; (c) what stage their education has reached; (d) to what extent they have become distanced from the country to which it is proposed that they return; (e) how renewable their connection with it may be; (f) to what extent they will have linguistic, medical or other difficulties in adapting to life in that country; and (g) the extent to which the course proposed will interfere with their family life or their rights (if they have any) as British citizens.

36. In a sense the tribunal is concerned with how emphatic an answer falls to be given to the question: is it in the best interests of the child to remain? The longer the child has been here, the more advanced (or critical) the stage of his education, the looser his ties with the country in question, and the more deleterious the consequences of his return, the greater the weight that falls into one side of the scales. If it is overwhelmingly in the child's best interests that he should not return, the need to maintain immigration control may well not tip the balance. By contrast if it is in the child's best interests to remain, but only on balance (with some factors pointing the other way), the result may be the opposite.

37. In the balance on the other side there falls to be taken into account the strong weight to be given to the need to maintain immigration control in pursuit of the economic well-being of the country and the fact that, *ex hypothesi*, the applicants have no entitlement to remain. The immigration history of the parents may also be relevant e.g. if they are overstayers, or have acted deceitfully."

20. Having set out the legal framework, I consider the decision of the Judge and whether the appellant has established that the decision discloses a material error of law, such that the decision should be set aside.

21. It is plainly unfortunate that at paragraph [23] of her decision, the Judge states that the first appellant has established a private and family life in the UK since 2001 and that the appellant "… has seven children (all British Citizens) …". I have carefully read through the decision and the Judge identifies the appellants' and their immigration history correctly at paragraphs [2] to [3 *(there are two)*] of the decision. At paragraphs [8] to

[17] the judge sets out the evidence that she heard about the family and their health. I find that in reaching her decision, it is plain from paragraphs [27] to [48] that the judge reached her decision based upon a consideration of the correct factual matrix recognising that the family unit consists of the first and second appellants as husband and wife, and their young daughter, the third appellant.

22. I reject the submission made by Mr Sellwood that having directed herself correctly at paragraphs [25] and [26] that she was required to consider the best interests of the child as a primary consideration, the Judge then failed to do so. At paragraphs [27] and [28], the Judge was expressly considering the evidence regarding the third appellants health and made findings in relation that evidence;

> "27. It is the Appellant's case that the entire family suffers from serious medical conditions. The adult Appellants have one daughter Jill Machii born on 30 August 2012. She is under three years old and currently lives with her parents. She is not a British citizen, I accept that she has, in the past, suffered from health problems when she was born. These health difficulties are well set out in Counsel's skeleton argument at paragraph 3.
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> 28. However, I find that Jill's current medical condition is very stable and has improved significantly. Her most recent appointments relate to speech and language therapy (AI, p.273) and an audiology appointment (AI, p.274). There is a report of from the speech and language therapy department (At, p.278) and the follow up actions are noted in the report. The latest health summary provided specifically for the purposes of this appeal (AI, p.280) provides a past history of the child's medical difficulties but goes on to state that the MRI scan and EEG investigations have been normal with a caveat that this not to say that she would not have problems in the future. Her speech and behaviour referral therapy has started and in that respect it was difficult to provide a clear prognosis as this treatment had just commenced.

23. Unsurprisingly given her age, the evidence before the Judge about the third appellant was limited. The Judge correctly notes that the Appellants have one daughter Jill Machii born on 30 August 2012, who was at the time under three years old living with her parents. The Judge noted that she is not a British citizen, and accept that whilst the third appellant has, in the past, suffered from health problems when she was born her medical condition is very stable and has improved significantly.

24. The factors identified by their Lordships at paragraph 35 of the judgment in **<u>EV (Philippines)</u>** are simply a non-exhaustive range of factors that might be relevant in a particular case. Depending on the factual matrix, some of the factors identified will have no relevance at all. In my judgment, a careful reading of paragraphs [27] and [28] of the decision makes it plain that the relevant matters considered by the Judge are precisely the types of factors that their Lordships in **<u>EV (Philippines)</u>** identified as being relevant. The judge considered the age of the third appellant, the fact that she is living with her parents, she is not a British Citizen and that her health is stable and has improved significantly. The third appellant is not in education and so unsurprisingly, the Judge did not

need to consider how long she had been in education or what stage her education has reached.

25. As the Upper Tribunal held in **Azimi-Moayed & others**, 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 United Kingdom then the starting point suggests that so should dependent children who form part of their household unless there are reasons to the contrary. Furthermore, 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. In my judgment, whilst the Judge does not expressly make a finding that it is in the best interests of the third appellant to remain living with her parents, that can properly be inferred from the findings and conclusions set out in the decision. In fact, there never appears to have been any question of the family being separated in any way.

26. At to the proportionality assessment at paragraphs [42] to [49] of her decision, where, as here, it is in the best interest of a child to live with and be brought up by his or her parents, then the child's removal with his or her parents does not involve any separation of family life. The authorities establish that absent other factors, a period of substantial residence as a child may become a weighty consideration in the balance of competing considerations. In the course of such time roots are put down, personal identities are developed, friendships are formed and links are made with the community outside the family unit. The degree to which these elements of private life are forged and therefore the weight to be given to the passage of time will depend upon the facts in each case. Beyond the health of the third appellant, the first and second appellants did not rely upon other factors to establish that it would be disproportionate to expect the third appellant to return to India with them.

27. It is clear that neither parent in this appeal has the right to remain in the UK independently of the third appellant and it is against that background that the Judge’s Article 8 assessment is conducted. None of the family is a British citizen. None of the family has the right to remain in this country. If either one of the parents is removed, the other has no independent right to remain. There is no question of separating either parent from the third appellant.

28. In my judgment it was open to the Judge, having considered the best interests of the third appellant as a primary consideration to dismiss the appeal under Article 8 for the reasons set out in the decision and there is no material error of law.

DECISION

29. The appeal is dismissed.

30. No anonymity direction is made. No application was made for anonymity before me and the First-tier Tribunal made no anonymity direction.

Signed Date

Deputy Upper Tribunal Judge Mandalia

TO THE RESPONDENT
FEE AWARD

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

Signed Date

Deputy Upper Tribunal Judge Mandalia