Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/50779/2013
IA/50780/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 11th December 2014	**On 4th February 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE BAIRD

Between

SOONEETA EMRITH (FIRST APPELLANT)
RAJ KUMAR EMRITH (SECOND APPELLANT)
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr S Gokhool – Solicitor of Siddick Gokhool Solicitors
For the Respondent: Mr E Tufan - Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellants are Sooneeta Emrith and Raj Kumar Emrith, husband and wife and citizens of Mauritius. The First Appellant was born on 13th July 1965 and her husband on 8th May 1965. They appeal against the decision of the Secretary of State made on 8th November 2013 to refuse to vary leave in the United Kingdom and to

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remove them by way of directions under Section 47 of the Immigration, Asylum and Nationality Act 2006. Mrs Emrith is the principal Appellant and her husband is dependent on her appeal. Initially the Appellants' son, Avishay Emrith, (appeal reference IA/50781/2013), born on 21st November 1995 was also dependant on his mother's appeal. At the hearing on 11th December 2014 I was advised that Avishay Emrith had been granted Italian citizenship and had therefore withdrawn his appeal.

2. Following a hearing on 1st April 2014 a First-tier Tribunal Judge allowed all three appeals under the Immigration Rules. Permission to appeal was granted and on 9th September 2014 having heard submissions I found that there was a material error of law in the determination of the First-tier Tribunal and I set that decision aside with no preserved findings of fact.

3. Briefly the facts of this case are that the first Appellant arrived in the UK on 26th October 2005 as a visitor together with her husband and son. They were granted six months' leave to enter. She then applied in time on 30th November 2005 for leave as a student and this was granted and then extended to 31st May 2011. Leave was given to her husband and son as her dependents. Her leave was curtailed because the college that she was attending had its licence revoked and she made the application for Indefinite Leave to Remain, the refusal of which is the subject of this appeal. The Secretary of State took the view that there were no insurmountable obstacles to the family returning to Mauritius. At the time of the hearing before the First-tier Tribunal, Avishay Emrith had just finished school and was awaiting confirmation of a place at Loughborough University. He had received a conditional offer of a place on a Bachelor of Engineering course. He was born in Italy. At the time of that hearing he did not have Italian citizenship but remained a Mauritian citizen. The first Appellant has brothers in Italy. Her parents are dead. She has a married sister in Mauritius. She said that she had leave to be in Italy and was granted permanent residence. She was supposed to submit all her documents to the Italian authorities but came here instead so could not return to Italy. Her husband works as a porter at a hospital in Croydon. He has never been in receipt of public funds and has no criminal record. They have a private life in the UK.

4. Prior to the hearing I was given a bundle of documents which includes ID documents apparently issued in Italy with translations of them. I have to say the translation is very poor. What it seems to say is that a residence permit for long term residence has a deadline after five years and it then has to be updated. It seems that the permits issued to the Appellants were dated 3rd January 2008 and 21st December 2007 respectively so they would have expired in the absence of the appropriate action by the Appellants.

5. Mr Gokhool pointed out that evidence of earnings by the parties had been provided. Mr Emrith earns £17,500 per annum and his wife earns around £10,000 per annum. They therefore meet the financial requirements of Appendix FM. He also pointed out that since the Appellant's son is still financially dependent on them he will not be able to go to university without their financial support which they will not be able to give if they have to give up their jobs in the UK. The Appellants have been here for over nine years. There has been no reliance on public funds. There are no negative

issues in respect of Article 8. Their removal would be disproportionate. If they left this country they would have no right to go to Italy and they would have to go to Mauritius

6. Mr Tufan pointed out that paragraph 276ADE(vi) has changed. He accepted that there is a financial dependency between the Appellants and their son. He is financially dependent on them. He relied on the decision in **AAO v Entry Clearance Officer [2011] EWCA Civ 840.** He referred me to paragraph 117B(3) and pointed out that the Appellants spent their formative years in Mauritius and it could hardly be said to be prejudicial to their wellbeing to send them back there.

7. Mr Gokhool submitted that they had not been there for 25 years. They have no ties there. He relied on the decision in **Ogundimu (Article 8 – new rules) Nigeria [2013] UKUT 60 (IAC).** The Appellants' family are all in Italy or the UK. They would have no home or jobs in Mauritius. In written submissions he said that the Appellants' son was only 10 years old when he came here. He completed his primary and secondary education here. He was born in Italy where he attended an English school.

My Findings

8. I have given very careful consideration to all the evidence before me in this case.

9. I accept that the Appellants' son is studying in the UK and that he needs their financial assistance. He is now an EEA citizen and it was suggested at the hearing that it may be possible for an application under European law to be made by the Appellants in order to enable them to stay in the UK with their son. I make no comment on the possibility of that. It is not a matter for me.

10. The Appellants cannot succeed under any of the provisions of Paragraph 276 ADE except perhaps sub-paragraph (vi). At the time the decision was made by the Respondent Paragraph 276ADE (vi) provided for an applicant who, at the date of application,

> '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.'

11. Paragraph 276ADE was amended with effect from 10th July 2014 and the amendment replaces the words in parenthesis in paragraph 10 above with,

> 'there would be very significant obstacles to the applicant's integration into'.

12. Mr Tufan submitted that this new version applies to this appeal. According to Statement of Changes HC532 this change came into effect on 28th July 2014 and applies to all *applications* to which paragraph 276ADE and Appendix FM apply and to any other ECHR Article 8 claims which are 'decided' on or after that date. I

assume this to mean 'decided by the Secretary of State' since the wording of section 19 of the Immigration Act 2014 is different, being said to apply 'where a court or tribunal is required to determine whether a decision made under the Immigration Acts', in summary, breaches a person's human rights. The application in this case was decided on 8th November 2013 so the original version of 276ADE applies. The decision **Ogundimu** is therefore also relevant**.** This was a decision pertaining to paragraph 399 of the Immigration . Rules but the Tribunal noted that the same wording was used in paragraph 276ADE (vi). The Tribunal said,

> 'The natural and ordinary meaning of the word 'ties' in paragraph 399A of the Immigration Rules imports a concept involving something more than merely remote or abstract links to the country of proposed deportation or removal. It involves there being a connection to life in that country. Consideration of whether a person has 'no ties' to such a country must involve a rounded assessment of all of the relevant circumstances and is not to be limited to 'social, cultural and family' circumstances.'

13. It is 25 years since the Appellants left Mauritius and I accept that there will have been many changes there in that time. I accept that they are now accustomed to European culture. Both Appellants have however worked in the UK and the First Appellant has studied here. They are only 50 years old. I see no reason to suppose that they would not be able to obtain work in Mauritius. The Appellants have each other and the first Appellant has a sister there. Having considered all the evidence in the round I must conclude that they do not meet the criteria set out in Paragraph 276ADE (vi).

14. I now deal with Article 8 ECHR.

15. In **Razgar, R (on the Application of) v. Secretary of State for the Home Department [2004] UKHL 27 (17 June 2004)** the court said that there are 5 questions that must be asked in considering the question of a breach of Article 8,

(1) Is there an interference with the right to respect for private life (which includes the right to respect for physical and moral integrity) and family life?

(2) If so, will such interference have consequences of such gravity as potentially to engage the operation of Article 8?

(3) Is that interference in accordance with the law?

(4) Does that interference have a legitimate aim?

(5) Is the interference proportionate in a democratic society to the legitimate aim to be achieved.

16. I must also take account of paragraph 117B of the of the Nationality Immigration and Asylum Act 2002 which sets out the following considerations of the public interest to be taken into account in considering whether to grant leave to remain under Article 8. These considerations are,

(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

17. None of the above factors prejudice the Appellants' case. They have not remained in the UK without leave. They have both worked and supported themselves and have not been reliant on public funds. Neither has committed a criminal offence. These factors are not however determinative but factors to be taken into account in assessing proportionality.

18. I accept that the Appellants have over nine years developed a meaningful private life in the UK and indeed a family life with their son who is now 19 years old and has recently embarked on a degree course at Loughborough University. I take into account that their son is financially dependant on them. They are meeting the costs of his education but as I have found above, there is no evidence before me to suggest

that a couple who have worked throughout the last 25 years will not be able to obtain work in Mauritius. Clearly they left Mauritius to work and make a better life and left Italy for the same reason. Their leave to remain in the UK did however expire. Their son has started a new phase of his life and apart from the financial dependency, I am not satisfied that it has been established that the relationship between the Appellants and their son goes beyond the usual family ties between a young adult at university and his parents. I take into account that their son now has Italian citizenship. I have given weight to the fact that the Appellants have been in Europe for 25 years having lived for many years in Italy. I have found this a difficult decision but must conclude that the removal of the Appellants from the UK will in all the circumstances not be disproportionate to the need for effective immigration control in the UK.

Notice of Decision

The appeal is dismissed under the Immigration Rules and on Human rights grounds.

No anonymity direction is made.

Signed Date: 2nd February 2015

N A Baird
Deputy Judge of the Upper Tribunal