IAC-HWAM-V1

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/21269/2015
IA/21414/2015
IA/21415/2015
IA/21417/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 14th March 2016	**On 27th April 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

MR DILIP KUMAR NATVERLAL PATEL (FIRST APPELLANT)
MRS RAGINBEN DILIP KUMAR PATEL (SECOND APPELLANT)
D (THIRD APPELLANT)
K (FOURTH APPELLANT)
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr L. Lourdes of Counsel
For the Respondent: Mr E. Tufan, Home Office Presenting Officer

DECISION AND REASONS

The Appellants

1. The Appellants are all citizens of India. The First Appellant to whom I shall refer as the Appellant was born on 31st August 1971. The Second Appellant his wife, who I shall refer to as Mrs Patel, was born on 11th August 1973. The Third and Fourth

Appellants are the couple's children. D was born on 5th October 2000 and K was born on 14th November 2003. The Appellants appeal against a decision of Judge of the First-tier Tribunal Sangha promulgated on 20th August 2015 in which he dismissed their appeal against decisions of the Respondent dated 18th May 2015. Those decisions were to refuse the Appellants' applications for leave to remain in the United Kingdom made on the basis that refusal would be a breach of this country's obligations under Article 8 (right to respect for private and family life) of the Human Rights Convention and to remove the Appellants by way of directions under Section 10 of the Immigration and Asylum Act 1999.

2. The Appellant entered the United Kingdom with a Tier 4 Student visa on 14th May 2010 valid until 30th January 2012. He was granted leave to remain in this capacity for a further period from 6th September 2012 to 28th June 2014 but his leave to remain was curtailed on 30th January 2014. He was then granted further leave to remain as a Tier 4 Student for the period 19th May 2014 to 24th June 2015. Subsequently that leave to remain was curtailed to 6th February 2015. Mrs Patel, D and K are all dependants on his appeal.

The Application for Leave

3. On 4th February 2015 the Appellant applied for leave to remain in the United Kingdom under Article 8 on the basis of the family life of the Appellant and Mrs Patel under the ten year lawful residence route and their private life pursuant to paragraph 276ADE of the Immigration Rules. The reason why the Appellant's leave had been curtailed so as to expire on 6th February 2015 was because the licence of his college had been revoked. The Appellants were all living together as a single family unit and the children of the family had lived in the United Kingdom continuously for at least five years preceding the date of the application. The Appellant and Mrs Patel had a genuine and subsisting parental relationship with the children who had completely forgotten what it was like to live in India. They had grown accustomed to living in the United Kingdom. They could only speak broken Gujarati and they had established a network of friends in the United Kingdom which they considered to be their home. It would be unreasonable to expect the children to leave the United Kingdom and it would be a breach of both the Immigration Rules as well as Article 8.

The Explanation for Refusal

4. The Respondent considered that the Appellants did not meet the requirements of Appendix FM of the Immigration Rules. Mrs Patel was in the United Kingdom with only limited leave to remain and the Appellant could not therefore succeed under the partner route. Whilst the Appellant and Mrs Patel had a genuine and subsisting relationship the application fell for refusal under the eligibility requirements of the Rules which were mandatory and thus they could not succeed under Section EX1 of Appendix FM.

5. The children were citizens of India but had not been in the United Kingdom for at least seven years. Whilst the Appellant and Mrs Patel were in a genuine and

subsisting parental relationship with their children their application under this section too fell for refusal under the eligibility requirements of the Rules which were mandatory.

6. The Respondent considered the applications under Article 8. At the date of application the Appellant had lived in the United Kingdom for four years and thus could not succeed under paragraph 276ADE of the Rules as he had not lived continuously in this country for at least twenty years. There would not be very significant obstacles to the Appellants' integration into India if they were required to leave the United Kingdom. The Appellant had spent 38 years of his life there and it was not accepted that he would have since lost all social and cultural ties. There were no exceptional circumstances to warrant a grant of leave to remain outside the Rules.

7. The Respondent considered her duty under Section 55 of the Borders, Citizenship and Immigration Act 2009. The children had been living in the United Kingdom for three years but the adults would be returning to India with their children and would be able to support them there. Whilst the children were currently enrolled in education it was clear from the objective information available that India had a functioning education system which the children would be able to enter. The Appellants would be able to maintain their children in India. It was reasonable to expect the family to return as a unit and continue to enjoy their family life together in India. Whilst that may involve a degree of disruption it was proportionate to the legitimate aim pursued in this instance.

8. The Appellants appealed against the Respondent's decision on form IAFT-1 which was received by the Tribunal on 2nd June 2015. No fee was submitted with the application. The Appellant had ticked the box on page 4 to indicate that he wished to have his appeal decided on the papers. The Tribunal wrote to each Appellant on form IA201 on 10th June 2015 stating that each Appellant must pay £80 in order for the appeal to proceed. The Appellant duly paid for each of the Appellants to have a paper hearing and the Tribunal sent out a notice on 9th July 2015 to indicate that he must send any written evidence and submissions to the Tribunal and the Respondent by 13th August 2015.

9. The Appellant states that he sent a letter by fax to the Tribunal on 7th August 2015 seeking an oral hearing and offering to pay the additional fee. He has produced a copy of his letter which appears to show that it was faxed on that date to the First-tier Tribunal at Birmingham. The Tribunal has no record of having received such a letter.

10. The matter was listed before Judge Sangha at Birmingham on 20th August 2015 as a paper case. The Judge had evidently not seen any correspondence from the Appellant requesting an oral hearing or otherwise. At paragraphs 13 to 21 the Judge gave his reasons why he dismissed the appeal. The Appellants could not succeed under the Rules and the Judge accepted the reasons given by the Respondent as to why the application failed. It was reasonable to expect the adult Appellants and

their children to return to India as a family unit and continue to enjoy their family life together there.

The Onward Appeal

11. The Appellants appealed against that decision arguing that the Appellant had requested an oral hearing so that he could make oral submissions and raise human rights arguments as to why his appeal should be allowed. The Tribunal had ignored his fax and had not passed that request on to the Judge leading the Judge to conclude the hearing without oral submissions.

12. The application for permission to appeal came on the papers before Judge of the First-tier Tribunal Adio on 30th December 2015. In refusing permission to appeal he wrote that the Judge had dealt with the matter on the evidence before him. The Judge would have needed compelling circumstances to justify an assessment of Article 8 outside the Rules but the Appellant had shown no such compelling circumstances at the time the matter was decided. The Judge's decision was sound and supported by evidence.

13. Judge Adio rejected the Appellant's complaint that the proceedings had been unfair stating that the Appellant had the option of making further submissions in writing. The Judge could not have proceeded in any other way than deciding the matter on the papers. That the Appellant had changed his mind and made a late request for an oral hearing did not make the Judge's decision contrary to Article 6 of the Human Rights Convention. At the time of Judge Sangha's decision the Appellant had only paid for a paper hearing.

14. The Appellant renewed his onward appeal to the Upper Tribunal where it came before Upper Tribunal Judge Macleman on 25th January 2016. In granting permission to appeal he found it arguable that there may have been an administrative failure to link the request from the Appellant for an oral hearing to the file before the Judge. Such a procedural mishap may amount constructively to an error of law. He concluded:

> "The rest of the applicant's grounds seek to show rather vaguely that they had some case for leave to remain based on Article 8 of the ECHR, outside the requirements of the Immigration Rules. They should be aware that this grant of permission is on grounds of possible procedural breakdown not on their having shown any substantial merit in their case".

The Error of Law Hearing before Me

15. After hearing brief submissions I indicated to the parties that there was an error of law in Judge Sangha's determination such that it fell to be set aside. The Appellant had made an application to change his appeal from being decided on the papers to being decided orally. That application should have been in front of the trial Judge. Through no fault of his own the Judge proceeded to deal with the matter without

dealing with that application. It would have been open to the Judge all other things being equal, to have found that there was no justification in the Appellant's request for an oral hearing. As Judge Adio pointed out the application for an oral hearing was made very late in the day and the Appellant had the opportunity to submit documentation. However the application was not considered by the Judge because he was not aware of it and in consequence I found that there was a procedural error such that the decision at first instance fell to be set aside and the appeal reheard.

16. I considered where the appeal should be reheard. I bore in mind the Senior President's guidance but did not consider that this was an appropriate case to remit back to the First-tier since the issues were relatively straightforward and there would not be a need for substantial findings of fact. I therefore indicated that the matter should proceed as a rehearing. The Appellant indicated that he would need the services of a court appointed Gujarati interpreter and there was a short delay whilst a suitable interpreter was found and attended court to interpret. The matter thereafter proceeded.

The Substantive Rehearing

17. The Appellant attended and gave oral testimony adopting his witness statement dated 25th February 2016 in which he gave an account of his immigration history. His daughter D was now 16 years of age and K his son was 13 years of age. They were being educated in the United Kingdom. It would be unreasonable to expect either child to return to India as they had strong ties within the community here. D was under medical treatment for grommet surgery and an adenoidectomy. This would cause her some pain and discomfort after the surgery when it took place. Both children were doing well with their studies. Mrs Patel had had to have ankle surgery. The family had lived without any recourse to public funds. As a result of living in the United Kingdom for a continuous period of five years the Appellant had lost all contact and ties with India and it would be very difficult for him to adjust to life in India after so many years. At paragraph 20 the statement rather curiously referred to only one child being brought up by the Appellant and Mrs Patel and stated that if the Appellant was returned to India on his own his absence would deeply affect "my wife and our child". The statement continued that the Respondent's decision was not in accordance with the law as the Respondent had failed to apply its published policy. The statement did not elucidate on what this policy was. The Appellant also produced a largely unpaginated bundle which contained documents common to the Respondent's file as well as utility bills, a tenancy agreement, medical documentation, educational documents and a P60 for the tax year to 5th April 2015 for Mrs Patel showing that she earned £12,695.78 for that year.

18. In oral evidence he said that it would take up to a year or two years for his daughter's ear problems to resolve. She had appointments for check-ups. It would be a big problem if the family returned to India because his daughter had had the same doctor for the last year and a half. She would have a permanent problem

throughout her life with her hearing. D was at Stratford Academy in Year 10 doing the first year of her GCSE exams which would be in September 2018. It was a two year course. Removal to India would impact upon those studies. He and his wife placed great importance on their daughter's studies. The Indian educational system was quite different to the UK system. Their academic year started at a different time of the year in May as opposed to September. If the family were sent back his daughter would lose another academic year. Teaching methods were very different.

19. When his son K came to this country he was in Year 3 and had a lot of trouble but now his English is very good. If he went back it would be difficult to start all over again educationally. Mrs Patel had a problem in both legs with walking and a lot of pain around the ankle. She had had x-rays. She had undergone an operation on 22nd February when a small plate had been inserted in her ankle. The plaster had now been removed. If she went back to India she would have to be diagnosed all over again. His wife worked for Unique Personal Care as a personal carer. She had been working about three and a half years. He would not be able to readjust to life in India. He had been self-employed there as a businessman for fifteen years. After winding up his business he came to the United Kingdom and since then had been here for the last five to six years. It would be very difficult to start all over again.

20. In cross-examination he accepted that his wife and children had arrived in the United Kingdom on 30th July 2011. When he came to this country he was intending to study for his MBA and then apply for a work visa but after finishing his degree he was not able to do either so he applied again as a student. After that application he decided he did not want to stay in the United Kingdom illegally as by that time the children had enrolled in the educational system. It had originally been his intention to return to India but because of how well the children were doing in their education he had decided to stay here.

21. Once he had come to the United Kingdom he did not keep in touch with anyone in India. Now it was difficult to keep in touch. He had been quite busy when he first arrived in the United Kingdom. When he left India there were some family issues which meant it was not possible to keep contact. He had been living in a joint family with his brother and their parents and there had been family arguments especially between the women in the household. It was affecting his children and their education so they decided to come here.

Closing Submissions

22. For the Respondent it was submitted that the Appellants could not satisfy the Immigration Rules. EX1 of Appendix FM could not be satisfied as neither of the children had been here for at least seven years or were British citizens not even by the date of the hearing today. For the Appellants to succeed in a freestanding Article 8 application there must be compelling circumstances but there were none in this case. The wife's and daughter's medical conditions had resulted in their being treated at public expense. The Appellant's daughter had only been excused from

going to school for ten days following her treatment. Mrs Patel might or might not require further surgery but there were no complicating circumstances. There was no evidence that medical facilities were unavailable in India. The private life of the parties was entered into when the Appellant's leave was precarious. Financial independence did not count in favour of the Appellants. The Appellant's wife was working but the Appellant himself had no right to work and it was not at all clear how Mrs Patel was entitled to work. Mrs Patel had worked up until her operation on 22nd February. The Appellant had only been here for five years so it could not be right that he had lost all ties to India. There had to be significant obstacles to reintegration. The Appellant had lived in India for little short of 40 years so there were no such obstacles.

23. In conclusion for the Appellant it was argued that the refusal letter was defective because the Respondent had not addressed a number of documents which the Appellant had submitted with his application. They related to the children's education. This was a freestanding Article 8 application but there were compelling reasons. The children were studying here and had medical issues. The Respondent had not properly considered the daughter's medical position. If asked the Appellant would have provided further documents. It would be harsh and disproportionate to remove D before her treatment was completed. The Appellant's bundle contained documents about the children's education. D was doing well with her GCSEs due to be completed in 2018. It would be difficult for the children to readjust. The documents had shown that the Appellant's son was also doing very well at school. Mrs Patel had problems with both of her ankles. She had had one operation on one ankle and she would need another operation on the other leg. She would be deprived of this treatment if the family were removed.

24. The treatment by the Respondent in the refusal letter of her duty under Section 55 was inadequate. The Appellant had properly informed the Respondent of the facts but there was no mention of for example, the children's schools. The duty was not fully explored or scrutinised in the decision making process. There was still residual discretion to grant leave outside the Immigration Rules, one had to look at the medical conditions in particular.

Findings

25. It is not argued on the part of the Appellants that they can meet the Immigration Rules in this case. Mrs Patel is the breadwinner in the family but she is not earning anywhere near the amount required under Appendix FM. Although the Appellant and Mrs Patel were in a genuine and subsisting relationship neither was a British citizen nor a person present and settled in the United Kingdom and thus neither of the two adult Appellants could rely on the status of the other to qualify for leave by virtue of Section E-LTRP.1.2. Similarly as neither adult was a British citizen or settled in this country neither could rely on Section EX1(b) to succeed under the Rules.

26. In relation to the children, again it was accepted that the Appellant and Mrs Patel had a genuine and subsisting parental relationship with their children who were both under the age of 18 years and were in the United Kingdom. However neither child was a qualifying child that is to say neither was a British citizen nor had lived in the United Kingdom continuously for at least seven years immediately preceding the date of application. The Appellant could not rely on Section EX1(a) which as the Respondent pointed out, were mandatory requirements.

27. In relation to any claim for private life under paragraph 276ADE(1) of the Immigration Rules as the Appellant had not lived continuously in the United Kingdom for at least twenty years, was over the age of 18, indeed was over the age of 25, he could not bring himself within the provisions of that paragraph either.

28. This meant that the application fell for consideration outside the Immigration Rules. Undoubtedly the Appellant, his wife and children had established a family life in this country and that family life would be interfered with by requiring all four Appellants to return to India. It was not intended that only the Appellant would be returned, the Respondent made clear that return would be of all four together. That interference would be in accordance with the legitimate aim of immigration control since the Appellant's leave to remain had been curtailed on 6th February 2015 due to difficulties with his college. The issue therefore is whether the interference with the Appellant's private and family lives is proportionate to the legitimate aim pursued.

29. The first point to note is that none of the Appellants in this case have been in the United Kingdom for a long period of time. The Appellant himself has only been in this country for six years, his dependants for approximately five years. In considering the proportionality of the Respondent's decision I must consider what is in the best interests of the children as their interests are a primary concern of the Tribunal and must be considered first. Undoubtedly it is in the best interests of the children that they should be continued to be looked after by both their parents. Furthermore it is argued on their behalf that the children's medical and educational requirements are such that their best interests mean that they should remain in this country.

30. D has had recourse to medical intervention in this country but no evidence beyond the assertion of the Appellant was provided to me to indicate that such medical care as D might require would be unavailable in India. Whilst I appreciate that any operation on a child will concern a parent, in this case D only needed to take ten days off school for what appears to have been a fairly routine operation. D's condition cannot be said to be life-threatening and will presumably respond to appropriate treatment for which I have not been given any independent evidence that it is unavailable in India. The Appellant may have some concerns as a parent but there is no evidence to support his fears that D's treatment might in some way be adversely affected.

31. Both children are being educated in this country and have been since they entered the United Kingdom approximately five years ago. In the Court of Appeal decision of **EV Philippines [2014] EWCA Civ 874** the Court of Appeal considered the argument which would arise where the best interests of the children were that their education in the United Kingdom should not be disrupted. The children in the instant case before me have settled well into their schools and have made progress as is clear from the school reports. In a situation where as here neither parent has the right to remain in this country that is the background against which the assessment of the best interests of the children is to be conducted. The ultimate question is whether it is reasonable to expect the children to follow their parents to their country of origin.

32. As in the case of **EV Philippines** none of the Appellants in this case have the right to remain in this country. It is entirely reasonable to expect the children to go with their parents. As Lord Justice Lewison put it at paragraph 60 of **EV Philippines**:

> "Although it is, of course a question of fact for the Tribunal, I cannot see that the desirability of being educated at public expense in the UK can outweigh the benefit to the children of remaining with their parents. Just as we cannot provide medical treatment for the world, so we cannot educate the world".

He went on at paragraph 61 to say that it would be appropriate to consider the cost to the public purse in providing education to children who had otherwise no right to remain in this country.

33. In this case the Appellants cannot succeed under the Immigration Rules and due weight has to be given to that conclusion. The children can return with their parents to India, a country where they were both born and lived in the case of D for the first eleven years of her life and in the case of K for the first eight years of his life. There may need to be some adjustments to the Indian educational system but the children were able to adapt to what the Appellant claims is a very different educational system in this country and I see no reason why they should not be able to similarly adapt to the educational system in India. The weight to be placed on the legitimate aim being pursued in this case significantly outweighs the interests of the children to continue their education at public expense in this country. Both children could receive any medical treatment they may require in India.

34. As to the adults, Mrs Patel has had some medical treatment in this country but again I have seen no evidence to suggest that such medical treatment is unavailable in India and I see no reason why she would not be able to access such treatment as she needed there. The Appellant himself is fit and healthy.

35. In relation to the claim to a private life, I do not accept the Appellant's evidence that there are any insurmountable obstacles to him relocating to his country of origin where he has spent the vast majority of his life. He may or may not wish to live with other members of his extended family, that is a matter for him, but there is no reason why he cannot make an independent life for himself in India as he has sought to do

in this country. Similarly Mrs Patel has been able to find employment in this country and I see no reason why she would be unable to seek employment in India if she so wished. The private life of the Appellants in this case has been built up whilst their status here has been precarious the Appellant having only had status as a student. As such, little weight is to be ascribed to their private lives in the balancing exercise. Against that the Appellants have only been in the United Kingdom a short time and none can meet the requirements of the Immigration Rules. It is proportionate to the legitimate aim being pursued that they should be removed together as a family to India. There will be no breach of this country's obligations under Article 8 in that eventuality. There are no compelling circumstances in this case such that the appeals should be allowed outside the Rules for the reasons which I have given above.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law and I have set it aside. I remake the decision in this case by dismissing the Appellants' appeals against the Respondent's decisions.

Appellants' appeals dismissed.

I make no anonymity order in respect of the adults as there is no public policy reason for so doing.

Signed this 25th day of April 2016

…….
Deputy Upper Tribunal Judge Woodcraft

TO THE RESPONDENT
FEE AWARD

As the appeals have been dismissed there can be no fee awards.

Signed this 25th day of April 2016

…….
Deputy Upper Tribunal Judge Woodcraft