IAC-PE-SW-V1

**Upper Tribunal**
**(Immigration and Asylum Chamber)**

Appeal Number: IA/27842/2014
IA/27844/2014
& IA/27847/2014

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
|---|---|
| **On 19th October 2015** | **On 3rd February 2016** |

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE MCCLURE**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**MS, AK & LK**
**(ANONYMITY DIRECTION MADE)**

Claimants

**Representation:**
For the Appellant: Mr Tufan, Senior Home Office Presenting Officer
For the Claimants: Mr S Harding counsel instructed by G Singh Solicitors

**DECISION AND REASONS**

1. The Claimants, the Appellants in the original proceedings before the First-tier Tribunal, are the parents [MS & AK] and a minor child [LK] in a single family unit. All are citizens of India.

2. There is a further member of the family NS, who is an adult, although still living within the family unit. NS is not the subject of the present proceedings as he has been granted leave to remain in the UK, as set out below.

3. I have considered whether any of the parties to the present proceedings require the protection of an anonymity direction. As these proceedings involve the rights and status of a minor child I consider it appropriate to make an anonymity direction.

4. By decisions taken in June 2014 the Secretary of State for the Home Department [SSHD] refused the claimants' applications for leave to remain in the United Kingdom and thereupon made Immigration Decisions to remove each of the claimants from the United Kingdom. The claimants appealed against the decisions.

5. The appeals were heard by First-tier Tribunal Judge Blake on 24 February 2015. By decision promulgated on 25 March 2015 Judge Blake allowed the claimants' appeals on Immigration Rules Grounds and under Article 8 of the ECHR.

6. By Decision promulgated on the 18th September 2015 I found that there was a material error of law and directed that the appeal be heard afresh. Thus the appeal now appears before me to re-determine the appeal afresh.

7. As this continues to be an appeal in the Upper Tribunal to avoid confusion I refer to the MS, AK and LK as the claimants and to the Secretary of State for the Home Department as SSHD.

8. At the resumed hearing there was no interpreter available to deal with the case. Counsel for the claimants did not want the hearing adjourned but preferred that the statements and evidence already given before the First-tier Tribunal should be taken account of and that otherwise the son of the family, NS, should give evidence to deal with a number of issues. I note in the previous hearing that the appeals had similarly been dealt with on the basis of the submissions. The representative for the SSHD agreed to the suggested course.

**Factual Background**

9. In assessing the facts of the case I have taken account of the evidence presented before the previous judge and the summary contained in my decision on the error of law. I also heard evidence from NS. I have taken account of all the evidence submitted.

10. The two adult claimants, MS and AK, came to the UK as visitors. They entered the UK on the 24th November 2003. At the time of entry they were accompanied by their son, NS, who at the time was six years old having been born on the 28th April 1996.

11. According to their joint statement the circumstances of the claimants in India had been extremely dire; they had had financial difficulties; and they were living on the poverty line. They claim that they came to the United Kingdom for economic reasons

and so to ensure that their family could prosper and survive [see paragraph 6 of the statement in the bundle]. Clearly, according to their statement, MS and AK were coming to stay and were coming for economic betterment. They were not visitors and did not intend to return to India. Given that the claimants were allegedly in dire circumstances no explanation was given for how the claimants could afford the costs of visit visas and air travel to the UK. None of the documents relating to the original visit visas have been submitted, which may be understandable given the passage of time.

12. MS and AK were allegedly living with family members in a village some 78 miles outside Jalandhar [Jhalandar] in the Punjab. [Jalandhar appears to be in the Northern 1/3 of Punjab about 75-100 kilometres South-East of Amritsar]. They were living with MS' parents together with a brother [brother A] and his family. Brother A had married the sister of AK. MS' father owned a house in which he and his wife and brother A and his wife with their four children lived.

13. It is alleged that the MS' father has died; that brother A died in 2014; that another elder brother is seeking to claim the land and the house; that the house was damaged by the severe rains last year and the roof collapsed; and the house is not habitable.

14. It is alleged that the wife of brother A is now living with a neighbour with her four children. She, it is alleged, has no means of support and is dependent upon MS and the family in the UK to send her money to support herself and her children. No evidence was given as to any other family members in the UK lawfully save NS. As stated NS has been given leave and has been working but consistent with other evidence it appears that MS and AK have been working at times, albeit unlawfully.

15. The claimants' son, NS in evidence stated that about £100-150 was sent on a monthly basis to support the family, MS' brother A's wife and children of brother A. However it appears that there are other family members in India. There was certainly reference to an elder brother and to at least one brother of AK, the mother of this family. It was suggested that with regard to MS' family there had been a falling out and the claimants would receive no help or assistance from family in India. I note otherwise the details of the family set out in paragraph 12 of the statement.

16. The adult claimants entered on visit visas. On arrival in the UK they were helped by a relative, who took them in and helped MS find a job. According to the evidence given by the son that relative was in the UK illegally. The relative, it is alleged, left the UK in 2007. The circumstances of the relative leaving are not clear. There is no identification of the relative and no substantive details about his situation.

17. Having entered the United Kingdom the family remained here. On 1 April 2005 the minor child of the family, the third claimant LK, was born in the United Kingdom. It appears that the family remained in the UK with MS and AS working illegally. At paragraph 13 of the statement indicates that MS is a builder working as and when he can find work and that AS works to some extent as a caterer at Asian weddings and homes.

18. On 25 April 2012 the claimant family made application for leave to remain in respect of all the family including NS.

19. It appears that originally decisions were made in or about June 2013 refusing the applications without an in-country right of appeal. However after judicial review proceedings there was an agreement that the SSHD would reconsider the applications, make fresh decisions and give an in-country right of appeal.

20. On review of the decisions by the SSHD the son of the family, NS, was granted leave under paragraph 276ADE(v) on 23 June 2014. At the date of decision NS was over 18 and would have spent 12 years or more than half his life in the United Kingdom. In granting the son's application there is reference in the paperwork from the SSHD to the fact that the son has a choice as to whether he wants to return to India with the other family members.

21. The claimants were refused leave to remain in the UK and decisions were made to remove them from the UK on the 23rd June 2014. The claimants appealed against the decisions.

22. The evidence disclosed that all the claimants and NS live together in a single family unit and that they provide each other with mutual emotional and financial support. It is claimed that if the claimants are removed to India NS would be left alone in the UK. The claimants took no steps to regularise their status until 2012 at which point NS would be seeking to go to college to study "A" levels and may not have been able to do so without lawful status. NS whilst being in education also appears to be in employment and was directing his income in part to support the family and assist the running of the household. It is alleged that there was a close relationship between NS and LK.

23. The position of the MS and AK is clear they of themselves have entered illegally and have no basis for remaining in their own right but are dependent upon their relationship with NS and LK. They continue to have family ties in India both in MS and AK's families. They have not lost their ties to India

24. LK is a minor who has been in the UK for 10 years now, although at the time of the application she had been in the UK for just over 7 years. Consideration has to be given to the best interests of the child in accordance with section 55 of the Borders, Citizenship and Immigration Act 2009 and the duty to safeguard and promote the welfare of children that are in the United Kingdom.

25. Clearly LK has never left the United Kingdom and has no experience of the education system in India or experience of life there. LK was attending school and had made friends and was fully integrated into the UK and the UK way of life and its educational system. LK level of achievement in school error pages 57 and 58 of the bundle. I know whilst there are reports as to her progress in school there was no indication as to any specific impact of taking her from the current school setting to a

different one in India. I also note that the family are registered with general practitioners but there is no evidence of any specific medical problems.

26. I note that there is a letter from the local Gurdwara/temple. Again other than suggesting that the family attends the temple there is no indication of specific involvement of the family in the functions of the temple.

27. I note that the evidence as to the impact on LK comes from the MS and AK. There is no comment from the school. There is no comment by school teachers or the medical professionals. There is no evidence to support the assertions made by MS and AK

28. With regard to LK it is asserted that she has now been in the UK for over 10 years and it would be unreasonable to remove her from the UK. Otherwise it is asserted that MS and AK have family life with LK and NS and that it would be a breach of the rights under article 8 to remove MS and AK.

**Law**

29. I draw attention to the skeleton argument of the claimants. It is accepted that the first two claimants cannot succeed under the Immigration Rules in their own right.

30. I would note that the assessment of the law applicable to these cases is made difficult by the many changes to the law and immigration rules made over the last few years. The position has been clarified for decisions made post September 2012 as set out in the case of Singh 2015 EWCA Civ 74.

31. The applications were made in 2012. The original decisions made in 2013. After judicial review fresh decisions were made in 2014. In accordance with Singh the immigration rules as amended in July 2012 are to be considered.

32. The skeleton argument commences by considering the position of LK. Clearly LK is a child and has been in the UK at least 10 years at the time of the hearing before me. First and foremost an assessment has to be made of the best interests of the child in accordance with section 55 of the 2009 Act.

33. In assessing the best interests of the child I draw attention to EV (Philippines) v SSHD [2014] EWCA Civ 874. The judgment in the case of EV (Philippines) & Ors Lord Justice Christopher Clarke at paragraph 33 states:-

> "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. It is the last line that may be considered to be the most material in respect of this appeal. The judgment continues by setting out criteria to assess the best interests of the child. Paragraphs 34 and 35 provide:-

> "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."

35. Lord Justice Lewison puts a gloss on the approach to be adopted in the same case. He states :-

> "58 In my judgment, therefore, the assessment of the best interests of the children must be made on the basis that the facts are as they are in the real world. If one parent has no right to remain, but the other parent does, that is the background against which the assessment is conducted. If neither parent has the right to remain, then that is the background against which the assessment is conducted. Thus the ultimate question will be: is it reasonable to expect the child to follow the parent with no right to remain to the country of origin?
>
> 59 On the facts of ZH it was not reasonable to expect the children to follow their mother to Tanzania, not least because the family would be separated and the children would be deprived of the right to grow up in the country of which they were citizens.
>
> 60 That is a long way from the facts of our case. In our case none of the family is a British citizen. None has the right to remain in this country. If the mother is removed, the father has no independent right to remain. If the parents are removed, then it is entirely reasonable to expect the children to go with them. As the immigration judge found it is obviously in their best interests to remain with their parents. 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."

36. In respect of the immigration rules it is for the Appellants to prove that they meet the requirements of any rule relied upon on the balance of probabilities.

37. In respect of the minor Appellant, LK, consideration has to be given to paragraph 276ADE and the Immigration Directorate Instructions, specifically Family Migration Appendix FM Section 1.0b and Appendix FM family life (as a partner or parent) and private life: 10 year Routes.

38. The relevant provisions of paragraph 276 ADE provide: --

> 'Private life
>
> Requirements to be met by an applicant for leave to remain on the grounds of private life
>
> 276 ADE (1) 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 the 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 …
>
> iv) is under the age of 18 years and has lived continuously in the UK for at least seven years (discounting any period of imprisonment) and it would not be reasonable to expect the applicant to leave the UK.'

39. The provisions stipulate that the relevant date is the date of the application. The second factor, which requires consideration, is whether or not it would be reasonable to expect LK to leave the United Kingdom. In assessing that I have to take account of the Immigration Directorate Instructions.

40. The relevant provisions of the Immigration Directorate Instructions provides as follows:-

> '11 Best Interests of any Child.
>
> …
>
> 11.2.4 that would it be unreasonable to expect a non-British Citizen child to leave the UK?
>
> The requirement that a non-British Citizen child has lived in the UK for a continuous period of at least the 7 years immediately preceding the date of the application, recognises that over time children start to put down roots and integrate into the life in the UK, to the extent that being required to leave the UK may be unreasonable. The longer the child has resided in the UK the more the balance will begin to swing in terms of being unreasonable to expect the child to leave the UK, and stronger reasons will be required in order to refuse the case with continuous UK residence of more than seven years.'

41. Examples thereafter given of issues to be considered. Such factors as

> 'a) Would it be reasonable to expect the child to live in another country?
>
> b) Would there be a significant risk to the child's health?
>
> c) Would the child be leaving with the parents?
>
> d) The extent of wider a family ties in the UK or in the country of return.
>
> e) Was a child be able to reintegrate into the country of destination?'

42. In item c) it is pointed out that the best interests of a child are generally to remain with their parents and that unless there are special factors applying, it would generally be reasonable to expect a child to leave with their parents, particularly if the parents have no right to remain in the UK.

43. I would also note that under section 117A-B of the 2002 Act as amended. The relevant provisions of Section 117B provide:-

> '117B Article 8: public interest considerations applicable in all cases
>
> 1 The maintenance of effective immigration control is in the public interest
>
> 2 ....
>
> 3 ….
>
> 4 Little weight should be given to
>
> a) a private life, or
>
> b) a relationship formed at the 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 lives 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 persons removal of where
>
> a) the person has a genuine and subsisting parental relationship with the qualifying child, and
>
> b) it would not be reasonable to expect the child to leave the United Kingdom.'

44. The claimants', MS and AK, only had leave under a visit visa but even that was open to challenge as MS and AK were never genuinely visitors. LK has never had any leave, although it cannot be said that it is through her will or volition that she has been in the UK. The conduct of the parents should not be held against the child LK. I must be careful not to penalise LK for their conduct. However the position of the

child has to be assessed in light of the fact that the parents would in the normal course of events be returned to India.

45. Subparagraph 6 is material in respect of MS and AK, in that if it is not reasonable for LK to return to India there is no public interest in removing MS and AK.

46. As a final matter in respect of the child I would note that in accordance with the 1981 British Nationality Act the child may now be entitled to be registered as a British citizen having been born in the United Kingdom and having been residence here for 10 years [see section 1(4) 1981 British Nationality Act].

47. The claimants seek to rely upon the Immigration Rules and article 8. In respect of the immigration rules the burden is upon the claimants to prove on the balance of probabilities that they meet all of the requirements of any rule upon which they are seeking to rely.

48. In respect of all the claimants Article 8 is raised. All claim to have established a family and private life in the UK. In respect thereof the burden is on the claimants to establish they have a family and private life in the UK and that the decision sufficiently significantly interferes with the family and/or private life. Thereafter the decision has to be in accordance with the law and for a purpose set out in the article itself, in this case the maintenance of immigration control as an aspect of the economic well-being of the country. Finally the SSHD has to prove that the decision is proportionately justified. In respect of Article 8 I follow the approach set down in the case of Razgar 2004 UKHL27.

**Consideration**

49. I have as a primary consideration to assess the best interests of LK. Such has to be considered in context in accordance with the judgments in EV above.

50. It has been conceded that MS and AK cannot themselves succeed under the rules. They have not been in the UK for periods stipulated under paragraph 276ADE and otherwise continue to have ties to India in the form of family ties, cultural ties and ties with friends. If the claimants are to be believed at the least the person that helped them in the UK, when they initially arrived, has returned to India. I find that they have not lost all ties to India.

51. I also find that whilst, if they were returned as a couple, it may be require them to make adjustments there are no significant obstacles to their reintegration into their home country.

52. In the normal course of events they would be returned to India. Whilst LK has been in the UK a significant amount of time and whilst she has been educated here in the normal course of events the best interests of LK would be to remain with her parents. However consideration has to be given to the circumstances that would face the family were they returned to India.

53. There is in respect of this case a lack of supporting evidence from other sources. In respect of the circumstances, which caused them to leave India, there is no evidence from any source to support any of the claims of the claimants.

54. There are none of the documents used by the claimants to substantiate that they were genuine visitors. There must have been documentation to show that they had commitments in India to which they would return. Equally the claimants say that they were in dire circumstances but they had sufficient funds to pay the costs of the visas and travel and an Entry Clearance Officer must have been satisfied that they could maintain themselves.

55. In order to obtain the visas MS and AK must have lied about their true intentions. Their intention then was to come to the UK for economic betterment and they were willing to lie in order to achieve their purpose. They were then assisted when they were in the UK by individuals already unlawfully here to find work, to obtain accommodation, to stay here without attempting to regularise their status. They knew that they had no right to be here but they worked and lived illegally flouting the laws of the UK.

56. It was only after 9 years in the UK that they sought to regularise their presence in the UK. They have given no reason for seeking to regularise their status at that time.

57. Their current purpose is to remain in the UK. Given the extent to which MS and AK were willing to go to bring about their original purpose, without evidence to support the claims of the claimants I am not satisfied that I can place any reliance upon the evidence of the claimants. Whilst NS may be considered to be in a different position in that his right to remain in the UK has been established, I am also not satisfied that any reliance can be placed on NS, as he is desirous of supporting his parent's attempt to remain in the UK.

58. I would also note that once in the UK they were assisted by people that they knew that were here and here illegally. Yet they suggest that at least one, who has returned to India, and other friends that they would have in India in any event would not be able to assist them. I do not find such claims credible. I am satisfied that MS and AK would have friends and family in India on whom they can rely for help and assistance.

59. In the circumstances I am not satisfied that the claimants have told the truth with regard to the circumstances that caused them to leave India. Whilst I am willing to accept that they came to the UK for economic betterment, I am not satisfied that they were in dire circumstances in India. Further I am not satisfied that the alleged circumstances that would face them on return are as claimed. Whilst again I accept that MS and AK have family in India I am not satisfied the circumstances of the family are as claimed. I am satisfied that there would be family members and friends on whom MS and AK could rely for assistance, help and support.

60. With regard to the circumstances in the UK, whilst there are claims that both MS and AK work, there is again only their claims and there is no evidence as to the level of their income, no evidence of tax being paid. Whether LK can be properly or adequately supported and accommodated by the MS and AK in the UK are highly material factors. There is a lack of evidence as to the circumstances in which they are living and how they are supporting themselves.

61. The evidence otherwise does not identify any medical need of LK that justifies her remaining in the UK. There is no evidence of any medical need in any member of the family.

62. While there is a letter from the Gurdwara such does not identify any significant involvement or religious commitment that could not be satisfied by membership of a Gurdwara in India.

63. There are assertions that LK has friends in the UK; is immersed in the culture of the UK; and is in education in the UK. LK is in primary school. She has had the benefit of five years at school. Whilst clearly she will have friends at school, no evidence has been put forward from such friends. Soon she would be changing to a secondary school and adjusting to a totally different school regime. There is no statements or evidence from the teachers or friends either in the community or from the school or Gurdwara.

64. Whilst it has to be accepted that LK will have friends at school, it has to be acknowledged at her age her main focus of life would be family. In the normal course of events her parents who have entered illegally would be returned to India. It is in that context that the IDI Guidance has to be considered the guidance specifically identifies that where the parents are to be returned a child can be expected to return with them.

65. In respect of NS he is in education. He has leave to remain but the main commitment of LK is to her parents. There is nothing to stop NS returning with his family to India and seeking to take up education there or find employment. There are, as I have found people in India, who would be able to assist the family.

66. I must take care not to penalise the child for the actions of the parents. However LK's parents have no right to be here and in the normal course of events would be returned to India. The best interests of LK are to be considered in light of that in accordance with the case of EV and the judgment of LJ Lewison. The best interests of LK are I find to remain with her parents. In the circumstances I find that even though the child had been in the UK for 7 years at the time of the application and at the date of the hearing 10 years I find that the best interests of this child are to remain with her parents including returning to India with them.

67. I also find taking account of all the circumstances that it would be reasonable for LK and her parents to return to India. I am satisfied that they would have friends and family in India, who would be able to assist the family in finding work,

accommodation and means of support. I find that it would be reasonable for LK to return to India with her parents.

68. In the circumstances I do not find that the claimants succeed under the Immigration Rules.

69. In considering Article 8 clearly the claimants have established family and private lives in the UK and the decision will clearly interfere with such. I am satisfied that the decision is in accordance with the law and for the purpose of maintaining immigration control as an aspect of the economic well-being of the UK. Finally for the reasons set out above and taking account of all the evidence and the best interests of the child, I find that the decision is proportionately justified.

**Notice of Decision**

70. I set the decision of the First-tier Tribunal aside. I substitute a decision dismissing the appeals on grounds.

71. An anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge McClure

**Direction Regarding Anonymity – Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014**

Unless and until a Tribunal or court directs otherwise, the Appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies both to the Appellants and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date

Deputy Upper Tribunal Judge McClure