



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/35051/2014
IA/35520/2014
IA/35528/2014

THE IMMIGRATION ACTS

Heard at Field House
On 25 February 2016

Decision & Reasons Promulgated
On 2 March 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE APPELYARD

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

(1) PM (INDIA)

(2) SM (INDIA)

(3) TM (INDIA)

(ANONYMITY DIRECTION MADE)

Respondents

Representation:

For the Appellant: Mr K Norton, Home Office Presenting Officer
For the Respondents: Ms S Jagarajah, Counsel

DECISION AND REASONS

1. The appellant in this case is the Secretary of State for the Home Department. However, for the sake of clarity, I shall use the titles by which the parties were known before the First-tier Tribunal, with the Secretary of State referred to as “the respondent” and PM (India), SM (India) and TM (India) as the first, second and third appellants respectively.

2. An anonymity order has already been made in these proceedings and I direct that it continues.
3. The appellants are a family from India with the first and second appellants being the parents of the third appellant who is their son born on 8 April 1998. The first appellant entered the United Kingdom on 16 December 2002 with entry clearance as a visitor until 5 May 2002. He applied on 9 July of that year for leave to remain as a work permit holder which was refused without right of appeal on 19 September of that year. The second and third appellants first entered the United Kingdom on 7 February 2006 with entry clearance as visitors until 5 June of the same year. All three appellants made a further application for leave to remain which was refused without a right of appeal on 21 June 2011. However on 28 May 2013 the appellants applied for leave to remain in the United Kingdom on the basis of their Article 8 rights under the European Convention on Human Rights ("ECHR"). This ultimately led to a refusal dated 19 August 2014 which the appellants subsequently appealed at a hearing before Judge of the First-tier Tribunal A M S Green in August 2015. In a decision of 4 September of the same year he allowed all three appellants' appeals on human rights grounds. At the hearing the appellants' Counsel "suggested that the core issue to be determined" was the third appellant's appeal which centres on paragraph 276ADE(iv), Article 8 ECHR and whether the respondent had discharged her duties under Section 55 of the Borders, Citizenship and Immigration Act 2009. This is central to assessing the proportionality of her decision. The core evidence being relied upon was not only the third appellant's own oral testimony but also an independent social worker's report. Counsel conceded at the hearing before the First-tier Tribunal that the first and second appellants could not rely upon Appendix FM as they had joint responsibility for the third appellant's upbringing and because of their poor immigration history. However, the first and second appellants wished to go outside the Immigration Rules. The judge was invited to consider the consequences of upholding the third appellant's appeal and the first and second appellants' Article 8 ECHR rights.
4. Following the hearing the respondent sought permission to appeal which was granted by Judge of the First-tier Tribunal Grant-Hutchinson. This was on 15 January 2016 and the reasons that she gave for so doing were:-
 - "1. The Respondent seeks permission in time to appeal against a decision of First-tier Judge (Judge A. M. S. Green) promulgated on 4 September, 2015 whereby it allowed the Appellants' appeals against the Secretary of State's decision to refuse the Appellants leave to remain inside or outside the Immigration Rules on the basis of their private and family lives.
 2. It is arguable that the Judge erred in law in his approach by misdirecting himself in deciding for the reasons given that under paragraph 276ADE(iv) of the Immigration Rules it would be reasonable for the child to leave the UK with his parents but allowing the appeal outside the Immigration Rules under Article 8 of the ECHR on the basis that it was in

the child's best interests for him to remain in the UK which is a test of reasonableness as set out in the case of EV (Philippines) and Others v SSHD [2014] EWCA Civ 874 which the Judge particularly relied upon in coming to his decision."

5. Thus the appeal came before me today.
6. Mr Norton urged me to re-make the decision in this appeal and to dismiss it. He relied upon the grounds considered by Judge Grant-Hutchinson. In particular that at the First-tier hearing the judge had found that the third appellant could not meet the requirements of Rule 276ADE(iv) of the Immigration Rules in that it would be reasonable to expect him to leave the United Kingdom but then under the heading "Family Life" allowed the appeal outside the Immigration Rules on the basis that it was in the best interests of the third appellant to remain in the United Kingdom. He submitted this amounted to a flawed approach and drew my attention to the authority of EV (Philippines) [2014] EWCA Civ 874 in arguing that the issue of reasonableness was the wider test but the best interest of the child is a consideration albeit a primary one and that in approaching this appeal in the way that he did the judge has accordingly misdirected himself in law.
7. Ms Jagarajah submitted that the judge had carried out a comprehensive analysis of all relevant issues in this appeal which had been set into the context of the ratio of EV (Philippines). The respondent had failed to challenge the independent social worker report that had been in the appellants' bundle. Not only had the judge applied appropriate case law to this appeal but also Section 55 considerations and in all the circumstances had not, as asserted by the respondent, misdirected himself in law.
8. The factual matrix is not in dispute and the judge has taken account not only the evidence of the three appellants but also that of the independent social worker, Mr Simpson whose evidence appears not to have been challenged at the hearing and certainly has not been challenged in the grounds seeking permission to appeal. The judge has considered the relevant case law including EV (Philippines) and has recognised (paragraph 32 of his decision) that it is not the duty of the United Kingdom to "educate the world". However, the judge has analysed the particular circumstances of the third appellant and although in the context of his private life under paragraph 276ADE the judge has found it would be reasonable to expect the third appellant to leave the United Kingdom that does not mean that the third appellant was not entitled to succeed in his appeal outside the Immigration Rules.
9. The judge has carefully balanced the competing issues. For example at paragraph 49 when looking at the welfare and best interests of children he has recognised the starting point is to live with and be brought up by the parents unless there are strong contraindications. The judge has also acknowledged that a 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 reasons to the contrary. The judge has also given consideration to the

issue of “seven years” and whether or not it constitutes a relevant period in terms of assessing “lengthy residence”.

10. The judge acknowledges that the effect of the respondent’s decision here would be to require the appellants to leave the United Kingdom and return to India but that the proportionality of the decision is balanced on the one side by the need to maintain effective immigration controls and on the other to respect the family and private life of the appellants. Beyond that there is also the question of the assessment of proportionality in the best interest of the third appellant which he analyses, quite correctly, under Section 55 of the 2009 Act.
11. Ultimately the judge has concluded that in this appeal the respondent paid no more than “lip service” to the third appellant’s long residence in the United Kingdom and Section 55 of 2009 Act. The judge has taken on board his own assessment of the best interest of the third appellant and cannot be criticised for so doing. He has come to a conclusion that the third appellant’s best interest is to remain in the United Kingdom with his parents. This is notwithstanding the public interest in the maintenance of effective immigration control and the economic wellbeing of the country.
12. Effectively the judge has found that there were arguably compelling circumstances not sufficiently recognised under the Immigration Rules for allowing the appeal at the second stage of the Article 8 consideration.
13. The judge was entitled to accept that removing the appellants would interfere with their rights to respect for family life of such gravity as to potentially engage Article 8. The judge was also entitled to conclude that the interference would be in accordance with the law in the interest of maintaining immigration control but that ultimately the issue of proportionality was core and that even when taking into account the adverse immigration history of the first and second appellants this was an appeal where the decision to allow the third appellant to remain in the United Kingdom with his parents was a justified one taking into account the third appellant’s best interests.
14. The judge has given cogent reasons for coming to the conclusions that he has and the challenge to the decision does not identify a material error of law but is a dispute with reasoning and findings which are legally adequate resulting in the conclusion of the judge to allow that appellants’ appeals.

Notice of Decision

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

I do not set aside the decision.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

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

Signed

Date: 29 February 2016

Deputy Upper Tribunal Judge Appleyard