Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/35661/2014
IA/35666/2014
IA/35669/2014
IA/35670/2014
IA/35672/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 10th November 2015	**On 12th January 2016**

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

SRP
RKP
VRP (A MINOR)
PRP (A MINOR)
HRP (A MINOR)
(ANONYMITY ORDER MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr R Sharma, Counsel
For the Respondent: Ms J Anderson, Counsel instructed by the Government Legal Department

DECISION AND REASONS

1. This is the appeal of a husband and wife and their three minor children, born between 2005 and 2011 against the decision of the First-tier Tribunal dismissing their appeals against the respondent's decision to refuse them

leave to remain in the United Kingdom on family and private life grounds pursuant to Article 8 ECHR, either within or outwith the Immigration Rules HC 395 (as amended). All members of the family are Indian citizens with no other citizenship, but the three children were born in the United Kingdom.

Background

2. The parents came to the United Kingdom as visitors on 5 October 2004 at which point the wife must have been about six months pregnant with the first of their children: the eldest, H, is now 10. The younger children are 7 and 4 years old. The eldest child, H, was therefore due to be born during the parents' 6 month visitors' leave, and was so born.

3. The parents did not embark for India when their visit visa expired. They overstayed and after six years they applied for leave to remain on Article 8 grounds which was refused on 23 August 2010. On 6 September 2010 the husband and wife were served with a form IS.151A and on 28 March 2012 the family, having not embarked, made a further application under Article 8 which was refused under the new Rules on 5 September 2014 following a judicial review, a consent order and agreement to provide an appealable decision. This appeal is the appeal against that decision.

4. After the decision to refuse leave to remain under Article 8, but before the hearing, the child H made an application under Section 14 of the British Nationality Act for British citizenship, on the basis that she had attained the age of 10 years and had not been absent from the United Kingdom for more than 90 days in her 10 years. That application was subsequently successful, but that is not, for the reasons that I will explain, relevant to this error of law decision.

First-tier Tribunal decision

5. The First-tier Judge dismissed the appeals both under the Immigration Rules and on human rights grounds. The judge found on a preliminary issue that the version of the Rules applicable to the analysis of the position of H, and by inference the rest of the family, was the version which applied after 13 December 2012. At paragraph 9 of her decision she recorded that the only one of the appellants who contended that she could succeed under the Rules was the eldest child and that "the other appellants could not succeed under the Rules unless they could show that it was not reasonable for [H] to leave the UK".

6. The children's links to the United Kingdom are summarised at paragraphs 32 - 34 of the First-tier Tribunal decision:

> "32. Following Azimi-Moayed, as a starting point, I find that it is in H's best interests to remain with her parents and if they are to be removed, she should also be removed unless there are reasons to the

> contrary. I find that it is in H's best interests to continue her education in the UK. She is doing very well at school and is in year 5. She plays the clarinet and is a valued member of the orchestra. She has developed social, cultural and educational ties and has lived in the UK all the 10 years of her life.
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> 33. However, there are compelling reasons why it is appropriate to disrupt those ties. I accept that children are not to be blamed for the errors of their parents, but H is still of an age where her focus is primarily with the family unit. She has been at school for six years, but has not yet completed her primary education. Her schooling would be disrupted, but she understands Gujarati even though she chooses to speak English, and would be able to adapt to life in India with the support of her parents who spent the majority of their lives there. H is not at a critical stage of her education and she could continue her education in India.
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> 34. H's application for British citizenship is still outstanding. I find on the evidence before me that the Fifth Appellant has failed to show that it would not be unreasonable for her to leave the UK."

7. The First-tier Tribunal Judge went on to consider the family's circumstances in the United Kingdom, the length of time that the children had spent in the United Kingdom, and the parents' poor immigration history. She had regard to Section 117B of the Nationality, Immigration and Asylum Act 2002. She dismissed the appeals on all grounds.

Permission to appeal

8. The appellants appeal with permission and their challenges are as follows:

(1) **Failure to consider the correct Rule.** There is an error of law in paragraphs 22 - 25 of the decision, because neither party drew the judge's attention to HC 820, but since all that did was to remove the transitional provision relied upon, such error of law is not material and I make no more of it than that. I have heard extensive submissions from both parties but that is simply a bad point.

(2) **The best interests of H.** In her decision the First-tier Judge recognised that educationally it was in the best interests of H to remain in the United Kingdom but considered that it would not be unreasonable to expect her to leave the United Kingdom and live in India with her parents and family and that she could not bring herself within paragraph 276ADE for that reason. At the date of decision H still had only one nationality: she was an Indian citizen.

9. Permission to appeal was granted on the basis that the First-tier Tribunal erred in applying *Singh v The Secretary of State for the Home Department* [2015] EWCA Civ 74, because the rule change in question post-dated the application made by these appellants; and in addition, that arguably the First-tier Tribunal had erred in its application of section 117B and the

application for British citizenship made on behalf of the 10 year old child, B.

Discussion

Section 3(2) of the Immigration Act 1971

10. Section 3(2) provides as follows:

> "(2) The Secretary of State shall from time to time (and as soon as may be) lay before Parliament statements of the rules, or of any changes in the rules, laid down by him as to the practice to be followed in the administration of this Act for regulating the entry into and stay in the United Kingdom of persons required by this Act to have leave to enter, including any rules as to the period for which leave is to be given and the conditions to be attached in different circumstances; ...
>
> If a statement laid before either House of Parliament under this subsection is disapproved by a resolution of that House passed within the period of forty days beginning with the date of laying (and exclusive of any period during which Parliament is dissolved or prorogued or during which both Houses are adjourned for more than four days), then the Secretary of State shall as soon as may be make such changes or further changes in the rules as appear to him to be required in the circumstances, so that the statement of those changes be laid before Parliament at latest by the end of the period of forty days beginning with the date of the resolution (but exclusive as aforesaid)."

11. Mr Sharma sought to persuade me that during the negative resolution period, 40 days from the date when a Statement of Changes to the Immigration Rules was laid before Parliament under Section 3(2) of the Immigration Act 1971, the proposed changes were of no effect. That argument cannot succeed: it is clear from the language of the statute that the effect of the negative resolution procedure is to provide for the making of further changes in the Rules where either House of Parliament passes a negative resolution within the period of 40 days beginning with the date of laying. The original Statement of Changes is not invalidated by such a resolution, or the section would have said that it was.

12. A Statement of Changes laid before the House for negative resolution remains valid unless and until it is replaced by the respondent, the amendments to be laid before the House within the period of 40 days from the first laying of the Statement of Changes. Accordingly the argument which Mr Sharma sought to advance under *Pankina* and *Alvi* cannot succeed because the passages relied upon in that decision do not, in fact, support the argument, and because it is contrary to the plain language of the statute.

Reasonableness of H's removal

13. The child H is a qualifying child because she has lived in the United Kingdom for more than 7 years and section 117D(1)(b) applies. Applying section 117B(6), if it is not reasonable to expect H to leave the United Kingdom, then the public interest does not require the removal of her parents, and by implication, her younger siblings also. The presence in the United Kingdom of this family will turn on the reasonableness of the respondent's decision to remove H.

14. The appellants assert that the First-tier Tribunal failed to consider the evidence of H's links to the United Kingdom. That evidence is before me: it is sparse, consisting of Year 2 school reports showing that the child is doing quite well at school, which have been taken into account in the finding that it is in her best interests to continue to be educated in the United Kingdom, and also a number of formulaic letters from members of the family and friends which state that the children have no knowledge of India and that the children "are all well-settled in the United Kingdom having been born and educated here. They know nothing of India and have no contact with anyone as they do not know anyone back in India". On the basis of that evidence, the summary at paragraph 32-33 deals adequately with the links which H has to the United Kingdom, particularly as she was not here lawfully, such that section 117B(4) requires me to give little weight to her private life in the United Kingdom.

15. The appellants argued that "beyond their parents having overstayed there are no real further aggravating factors (e.g. no criminal activity)". It does appear that the parents have been working illegally and the overstaying in this case is for a very significant period. Both overstaying and working without leave are criminal offences and the appellants have a poor immigration history on that basis.

H's future British citizenship

16. The main argument relied upon by the appellants relates to H's future British citizenship, the application for which was pending at the date of hearing but had not even been submitted at the date of decision or date of application. It is difficult to see how an application which had not been made when the respondent made her decision could constitute an error in the respondent's decision but even if that were possible the First-tier Judge clearly had the citizenship position in mind. I have been guided by the decision of the Court of Appeal in in *Odelola v Secretary of State for the Home Department* [2008] EWCA Civ 308 which held that an application should be determined on the basis of the law and facts as they stood at the date of decision.

17. I do not consider that the First-Tier Tribunal gave inappropriate weight to the future citizenship element of the factual matrix. It did not and could not form part of the respondent's decision, because the application had not then been made. Even if it had, until citizenship was granted, there could be no certainty that H would become a British citizen at any future

date, or indeed, how long that might take. The question of the weight to be given to an individual factor is primarily one for the fact-finding judge at first instance and I am not satisfied, despite Mr Sharma's arguments that inappropriate weight was given to the pending citizenship application. It is right that H now is a British citizen and it remains open to her to make a further application for leave to remain on that basis.

Irrationality in First-tier Tribunal reasoning

18. The final challenge is one of rationality. The appellants relied upon the length of time that H had spent in the United Kingdom, having regard to the Upper Tribunal's decision in *Azimi-Moayed and others* (decisions affecting children; onward appeals) [2013] UKUT 00197 (IAC). They further contended that the second child's length of residence would soon be such that she also fell within the 7-year period: however, that was not the case at the date of decision or the date of hearing and is not relevant for the purposes of this decision. The guidance given by the Upper Tribunal in *Azimi-Moayed* was as follows:

> "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.
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> 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.
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> 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.
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> 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.
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> 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."

In this case, the eldest child has been in the United Kingdom for less than 7 years after age 4. She had no leave and no reasonable expectation of leave to enter or remain. The respondent and the First-tier Tribunal were

entitled to conclude that it was not disproportionate to expect her to return and live in the country of her nationality.

19. For the appellants, Mr Sharma accepted that paragraph 35 of *EV (Philippines) & Ors v Secretary of State for the Home Department* [2014] EWCA Civ 874 governs their case:

> "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.
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> 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.
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> 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."

He contended that the appellants' circumstances should be distinguished on the facts.

20. I am not satisfied on the basis of the argument before me that the judge misapplied the guidance in *EV* (Philippines), nor that in her decision, she was not entitled to make and rely on findings of fact as at the date of hearing, concerning the reasonableness of these children relocating to the country of their nationality with their parents. A challenge to a finding of fact must meet the standard set in *R (Iran) & Ors v Secretary of State for the Home* Department [2005] EWCA Civ 982 at paragraph 90(2), that is, that no reasonable judge on the evidence before them could have reached that decision, or that there is no evidence to support the decision made, or that the reviewing Tribunal cannot understand the reasoning of the fact-finding Tribunal. None of those considerations applies here. I am satisfied that the First-tier Tribunal Judge's reasons for reaching the conclusions she did were proper, intelligible, and adequate to support her conclusions.

***Zoumbas* argument**

21. Finally the appellants seek to distinguish the decision in *Zoumbas v Secretary of State for the Home Department* [2013] UKSC 74 that:

> "24. There is no irrationality in the conclusion that it was in the children's best interests to go with their parents to the Republic of Congo. No doubt it would have been possible to have stated that, other things being equal, it was in the best interests of the children that they and their parents stayed in the United Kingdom so that they could obtain such benefits as health care and education which the decision-maker recognised might be of a higher standard than would be available in the Congo. But other things were not equal. They were not British citizens. They had no right to future education and health care in this country. They were part of a close-knit family with highly educated parents and were of an age when their emotional needs could only be fully met within the immediate family unit. Such integration as had occurred into United Kingdom society would have been predominantly in the context of that family unit. Most significantly, the decision-maker concluded that they could be removed to the Republic of Congo in the care of their parents without serious detriment to their well-being. We agree with Lady Dorrian's succinct summary of the position in para 18 of the Inner House's opinion.
>
> 25. Finally, we see no substance in the criticism that the assessment of the children's best interests was flawed because it assumed that their parents would be removed to the Republic of Congo. It must be recalled that the decision-maker began by stating the conclusion and then set out the reasoning. It was legitimate for the decision-maker to ask herself first whether it would have been proportionate to remove the parents if they had no children and then, in considering the best interests of the children in the proportionality exercise, ask whether their well-being altered that provisional balance. When one has regard to the age of the children, the nature and extent of their integration into United Kingdom society, the close family unit in which they lived and their Congolese citizenship, the matters on which Mr Lindsay relied did not create such a strong case for the children that their interest in remaining in the United Kingdom could have outweighed the considerations on which the decision-maker relied in striking the balance in the proportionality exercise (paras 17 and 18 above). The assessment of the children's best interests must be read in the context of the decision letter as a whole."

22. The *Zoumbas* decision is binding upon this Tribunal. At the date of decision, the evidence of links between this family and the United Kingdom was thin. The parents' immigration history is unedifying and the links between the child H and the United Kingdom in particular are no more than the usual schooling links. There is no evidence of friendship or other strong connections outside the family circle. I am satisfied that there are no *Nagre* exceptional circumstances in this case. It may be that a further application can be made in due course in reliance on the line of authorities beginning with *ZH* (Tanzania) and the new citizenship acquired by the eldest child but that was not the case at the date of hearing in the

First-tier Tribunal and the decision which the First-tier Judge made was unarguably open to her.

23. This is a decision which it was open to the First-tier Judge to make. There is nothing in either the nationality point or the point as to the Rules.

Decision

24. There is no material error of law in the First-tier decision and I dismiss these appeals. The decision of the First-tier Tribunal shall stand.

Date: 8 January 2016 Signed: Judith AJC Gleeson

Upper Tribunal Judge Gleeson