Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/40608/2014
IA/40610/2014
IA/40612/2014
IA/40614/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 14 January 2016	**On 17 February 2016**

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL ARCHER

Between

NS
RS
SS
IS
(ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Arthur Blake, Counsel, instructed by AKL Solicitors
For the Respondent: Ms A Holmes, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) I make an order prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the appellants. Breach of this order can be punished as a contempt of court. I make the

order because the appellants are a family unit with two minor children in full time education.

2. The appellants appeal against the decision of the First-tier Tribunal dismissing the appellant's appeals against a decision taken on 28 September 2014 refusing the appellant's applications for further leave to remain in the UK.

Introduction

3. The appellants are a family unit of Indian citizens. The first appellant was born in 1966. The second appellant is his wife, RS, born in 1979. The third appellant, SS, is the son of the first two appellants and was born in India in 2001. The fourth appellant, IS, is the daughter of the first two appellants and was born in the UK in 2008.

4. The first appellant and SS last entered the UK in March 2004 with entry clearance as visitors until 15 July 2004. RS last entered the UK in May 2003 with entry clearance as a visitor until January 2004. IS has never left the UK and has never had leave to remain. The appellants have remained without valid leave since 2004. The current application for leave to remain was made on 1 August 2012. The appellants claim that removal would breach their protected rights under Article 8 ECHR and would not be in the best interests of the children who were excelling in school. The third appellant met the requirements of paragraph 276ADE(1)(iv) of the Immigration Rules because he had live continuously in the UK for at least 7 years as at the date of application and it was not reasonable to expect him to leave the UK.

5. The respondent accepted length of residence but did not meet the requirements of the Rules and there were no exceptional circumstances such as to merit a grant of leave to remain. Best interests of the children were considered.

The Appeal

6. The appellants appealed to the First-tier Tribunal and the adult appellants attended an oral hearing at Hatton Cross on 15 April 2015. The judge found that the adult appellants would find suitable employment in India and that the child appellants had been attending religious classes in the UK. A return to India would not be a completely new start for them. The judge found that the third appellant spoke some Hindi and Gujarati and it would not be unreasonable to expect him to leave the UK. His appeal under paragraph 276ADE(1)(iv) therefore failed.

7. In relation to Article 8, the children had been brought up and been active within their Ismaili community embracing its values and ways and attending religious education. They were not distanced from India, quite the contrary and a return would not constitute a complete change of

values, beliefs and way of life. They would return with their parents as a unit. There were no medical, educational or other difficulties in the child appellants adapting to life in India. They both spoke Hindi. Schools that teach English exist in India. It was in the children's best interests to return to India. Little weight should be attached to the private life of the adult appellants established when they were in the UK without leave. They had shown a complete disregard for the immigration rules and removal was proportionate.

The Appeal to the Upper Tribunal

8. The appellant sought permission to appeal on the basis that the judge failed to give proper regard to the witness statements and school reports, failed to take into account the exceptional circumstances of the appellant and failed to properly consider the best interests of the children. The judge impermissibly elided the question of whether it was unreasonable for the third and fourth appellants to leave the UK with the question of whether it would be unreasonable for their family as a whole to leave the UK.

9. Permission to appeal was granted by Upper Tribunal Judge Perkins on 14 August 2015 on the basis that it was arguable that the judge failed to make any express findings on best interests and the case concerned the welfare of two young people who had spent most or all of their lives in the UK and were clearly innocent of their parent's apparently irresponsible attitude to immigration control. All grounds were arguable.

10. In a rule 24 response dated 2 September 2015, the respondent sought to uphold the judge's decision on the basis that the judge gave careful consideration to all of the documents and oral evidence and looked at the situation of the children on return in some depth and made clear findings on the best interests of the children.

11. Thus, the appeal came before me.

Discussion

12. Mr Blake submitted that the respondent's decision makes no reference to the section 55 (2007 Act) guidance and consideration of the guidance cannot be implied. The respondent concedes that there would be difficulties on return. Free education stops at the age of 14 in India. Private education would not be within the parent's financial grasp. The children would need to read and write Hindi as well as speak it. The third appellant could not go to school in India and removal from the UK would bring an end to his education. The judge should have considered the third appellant's rights under paragraph 276ADE. The judge speculated about the adult appellant's ability to provide financial support and accommodation to their children if returned to India but the evidence was to the contrary. The finding that the third appellant had adapted to the UK at the age of three and therefore could adapt back to life in India was

irrational. The finding that the third appellant could speak Hindi because the first appellant required a Hindi interpreter was irrational. The evidence before the judge was that the child appellants were wholly integrated into UK society and education. The factual matrix is present and the appeal should be allowed outright.

13. Ms Holmes submitted that the children's best interests were a primary consideration rather than a paramount consideration. The judge was fully aware of the facts and referred to relevant authorities. The judge was not out on a limb in finding that the third and fourth appellant's speak Hindi. The judge considered everything that she needed to consider. Attendance at religious classes must be a relevant factor in re-integration into India. The judge has done everything required and there is nothing wrong in the decision.

14. Mr Blake responded that there is no reference to the section 55 guidance in the respondent's decision or the decision of the judge. Even if that is wrong the reasoning at paragraph 51 is based upon a misunderstanding of the education system in India.

15. I have considered Forman (ss117A-C considerations) [2015] UKUT 00412 (IAC). The public interest in firm immigration control is not diluted by the consideration that a person pursuing a claim under Article 8 ECHR has at no time been a financial burden on the state or is self-sufficient or is likely to remain so indefinitely. The list of considerations in section 117B is not exhaustive and a tribunal is entitled to take into account additional considerations provided that they are relevant in the sense that they properly bear on the public interest question. The judge was not simply required to take account of the statutory provision but was also obliged to have regard to all of the considerations. That required identification and analysis of each of the provisions concerned. In cases where the provisions of section 117B arise the decision of the First-tier Tribunal must demonstrate that they have been given full effect.

16. The judge referred to sections 117A-117D of the 2002 Act at paragraph 52 of the decision. A significant issue in this appeal is the fact that the third appellant is a qualifying child, as defined in section 117D and therefore falls within section 117B(6) of the 2002 Act. The judge had to consider whether it was reasonable to expect him to leave the United Kingdom. The recent case law remains relevant, whilst taking into account that the case law effectively pre-dates the commencement of sections 117A - D (28 July 2014). The judge did consider reasonableness in the context of paragraph 267ADE of the Rules but there are no findings in relation to section 117B(6) of the 2002 Act and that is a material error of law, applying Forman.

17. The issue of proportionality involves striking a fair balance between the rights of the appellants and the public interest. In assessing proportionality, the "best interests" of any children must be a primary

consideration (see **ZH (Tanzania) v SSHD (2011) UKSC 4** and section 55 of the Borders, Citizenship and Immigration Act 2009). Whilst the best interests of the child are not necessarily determinative, a child's best interests are a weighty consideration, albeit one that can be outweighed by sufficient weight of public interest concerns (see **ZH (Tanzania)** *per* Lady Hale at [33]).

18. In Azimi-Moayed and others (decisions affecting children; onward appeals) [2013] UKUT 00197(IAC), Mr Justice Blake held that 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 UK then the starting point suggests that so should dependent children who form part of their household unless there are reasons to the contrary. 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. 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. What amounts to lengthy residence is not clear cut but past and present policies have identified seven years as a relevant period. Seven years from age four is likely to be more significant to a child than the first seven years of life. Very young children are focussed on their parents rather than their peers and are adaptable.

19. In EV (Philippines) and others v SSHD [2014] EWCA Civ 874, Lord Justice Clarke held that in determining whether 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. A decision will depend on a number of factors such as the children's age, the length of time in the United Kingdom, how long they have been in education, what stage their education has reached, the extent to which they have become distanced from the country to which it is proposed that they return, how renewable their connection may be, to what extent they will have linguistic, medical or other difficulties in adapting to life in that country and the extent to which the course proposed will interfere with their family life or their rights (if they have any) as British citizens.

20. The judge sought to address the best interests of the children at paragraphs 49 to 52 the decision and found that they spoke Hindi and that the third appellant spoke Gujarati as well as English. There was no finding as to whether the child appellants could read and write Hindi and/or Gujarati. There is no reference to free education in India ceasing at the age of 14 or whether the adult appellants would be able to fund private education, possibly in a school teaching in English. Thus, the analysis of factors suggesting that leaving the UK might not be in the best interests of the children was incomplete. The finding at paragraph 50 of the decision that there were no educational or other difficulties in the third and fourth

appellants returning to India was therefore based upon an incomplete analysis of the evidence.

21. The judge found that the family were financially independent and that the child appellants spoke English. The child appellants were settled and successful in school. They could read and write in English. If the child appellants remained in the UK they would be able to access free education at least up to the age of 18. I have considered paragraph 50 of the decision and accept the submission that the judge has confused the issue of the child appellants receiving religious education with the question of their ability to integrate into secular society in India.

22. Overall, there is only very limited reference to the case law and no adequate structured analysis of the issues set out above. The fact that the third appellant had reached secondary education in the UK and the uncertainty of educational provision in India were highly relevant factors. The finding at paragraph 51 that it was in the best interests of the children to return to India is not soundly based upon a full analysis of all relevant factors. I find that the judge's consideration of the best interests of the children is inadequate and that is a further material error of law.

23. Thus, the First-tier Tribunal's decision to dismiss the appellant's appeal involved the making of errors of law and its decision cannot stand.

Decision

24. Mr Blake invited me to remake the decision because the factual matrix is present. Bearing in mind paragraph 7.2 of the *Senior President's Practice Statements* I do not consider that an appropriate course of action. The factual matrix is incomplete and further substantial findings of fact are required. A re-hearing is required. I find that the errors of law infect the decision as a whole and therefore the re-hearing will be de novo with all issues to be considered again by the First-tier Tribunal.

25. Consequently, I set aside the decision of the First-tier Tribunal. I order the appeal to be heard again in the First-Tier Tribunal to be determined *de novo* by a judge other than the previous First-tier judge.

Signed  Date 12 February 2016

Judge Archer
Deputy Judge of the Upper Tribunal