IAC-HW-MP-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/40829/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 18 December 2015	**On 15 January 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

MRS BIBI BENAZIR JAUFARAULLY
(ANONYMITY DIRECTION NOT MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M. Biggs of Counsel
For the Respondent: Mr S. Whitwell, Home Office Presenting Officer

DECISION AND REASONS

The Appellant

1. The Appellant is a national of Mauritius. She appealed against a decision of the Respondent dated 29th September 2014 to refuse to vary leave to remain and to remove her by way of directions under Section 47 of the Immigration, Asylum and Nationality Act 2006. Her appeal was allowed at first instance by First-tier Tribunal Judge Monro sitting at Hatton Cross on 6th May 2015. The Respondent appeals with

leave against that decision. For the reasons which I set out below at paragraphs 15 and 16 I have set that decision aside and remade it. Thus although this matter came before me as an appeal by the Respondent, for the sake of convenience I will continue to refer to the parties as they were known at first instance. With the Appellant as second Appellant in the proceedings below was her son M and his appeal too was allowed (case number IA/40652/2014). The Respondent also appealed that decision but M has since been granted British citizenship and the proceedings in his case therefore fall away as he is no longer subject to immigration control.

2. The Appellant's husband Mr Jaufaraully states that he entered the United Kingdom in February 2004. On 9th March 2004 he applied for limited leave to remain as a student which was granted and then further extended until 31st March 2007. On 27th January 2007 the Appellant entered the United Kingdom and together the couple applied for further leave to remain with the Appellant as the dependant upon her husband's application. This too was granted and extended until 30th April 2009. On 7th August 2008 M, was born in the United Kingdom. On 27th July 2009 Mr Jaufaraully was granted further leave to remain as a student with the Appellant and M as his dependants. On 30th May 2012 the Appellant applied for leave to remain under Article 8 of the European Convention on Human Rights (right to private and family life), this time naming Mr Jaufaraully and M as her dependants. This was refused on 12th July 2013 as the Respondent considered it was reasonable for all three to return to Mauritius as a family unit. All three appealed that decision and on 4th July 2014 an Immigration Judge found that the decision to refuse was not in accordance with the law and remained outstanding before the Respondent to take. On 29th September 2014 the Respondent made a fresh decision to refuse to vary leave to remain in the United Kingdom and to remove all three members of the family.

3. On 6th January 2015 Mr Jaufaraully was granted indefinite leave to remain in the United Kingdom and in consequence did not pursue his appeal against the Respondent's decision any further as that too fell away. The effect of granting Mr Jaufaraully indefinite leave to remain was that M became eligible to apply for British citizenship which would then mean that the only person who could be removed would be the Appellant.

The Determination at First Instance

4. On 14th January 2014 Mr and Mrs Jaufaraully had a second child, A. By the time of the hearing they were able to show that they earned in excess of £24,800 gross annually and thus met the financial requirements under Appendix FM of the Immigration Rules. M attended school and only spoke English.

5. At paragraph 24 of her decision the Judge gave her reasons for allowing the two appeals (the Appellant and M) that were before her:

> "Removal of the mother [the Appellant] would fracture her family; her husband cannot be required to leave the country; her two children are entitled to register as British and their futures should not be placed in jeopardy by [the Respondent's] decision which has failed to address the immigration status of the family members as a whole and

> defies logic. I find that the right of the [Respondent] to operate a firm, fair and consistent immigration policy has been outweighed in this case by the particular circumstances of this family and there are compelling circumstances not sufficiently recognised under the Rules for granting leave to remain. I find that the decisions are not proportionate."

The Onward Appeal

6. The Respondent appealed against the first instance decision arguing that the Judge had erred at paragraph 13 of her determination when she wrote that the Respondent had wrongly made her decisions under the Immigration Rules in force from 12th July 2012. As the family's applications were made on 30th May 2012 the Judge held that pursuant to the decision in **Edgehill** the July 2012 Rules were not the applicable ones. The grounds pointed out that this was wrong, the Court of Appeal had clarified the matter in the case of **Singh [2015] EWCA Civ 74**. That case held that apart from a short window between 9th July and 6th September 2012 the Respondent was entitled to take into account the July 2012 Rules in deciding applications even if they were made prior to 9th July 2012.

7. In the course of her determination the Judge had referred to Mr Jaufaraully as a British citizen. This was incorrect because he had only been granted indefinite leave to remain. This mistake had materially affected the outcome given what the First-tier Tribunal had considered regarding the best interests of the children. Ground 3 argued that even if the couple's two children were able to register as British citizens that process had not yet happened. To base a decision under Article 8 on a supposition that the children would become British citizens was speculative and premature. Further although the Judge had found that the financial requirements were met she had made no findings on what evidence had been adduced to support that finding. The issue of the children's potential nationality had infected the assessment of the reasonableness of them leaving the United Kingdom with their mother, the Appellant. The possibility of being registered as British should not have played any part in the consideration of the appeal. Finally the Judge had failed to give adequate reasons for finding that the Respondent's decision to remove was disproportionate. The analysis was restricted to a solitary paragraph 24 and the Judge had failed to carry out any balancing exercise at all.

8. The application for permission to appeal came on the papers before Judge of the First-tier Tribunal Hollingworth on 20th August 2015. In granting permission to the Respondent to appeal he wrote:

> "An arguable error of law has taken place in relation to the Judge's description of [Mr Jaufaraully] being British. The Respondent maintains this is simply wrong. It is arguable that this has affected the weight attached in applying Section 55. A further arguable error of law has taken place in relation to the anticipation of registration [of the children] as British citizens. A further arguable error of law is disclosed in the context of the applicable Rules".

9. The Appellant replied to the grant of permission by way of a response under Rule 24 arguing that the First-tier Tribunal's decision was fully reasoned and contained no

material errors of law. It was immaterial that the Judge had referred to Mr Jaufaraully as being British, the important point was that at the time of the hearing he was present and settled in the United Kingdom. The Judge was right to have regard to the entitlement of the children to be registered as British citizens pursuant to Section 1(3) of the Nationality Act 1981 as at the date of the hearing such applications had already been made on behalf of the children. The Judge had implicitly considered the July 2012 Rules in making her finding as to the income level the Judge had in mind Appendix FM and implicitly had considered the documentary requirements in Appendix FM-SE. As the children had made an application to be registered as British citizens at the date of hearing it was right for the Judge to take that into account. The Judge had observed that the Respondent's decision had failed to address the immigration status of the family members as a whole.

The Hearing Before Me

10. In submissions Counsel for the Appellant indicated that the children had now been granted British citizenship. The complaint made in the grounds of onward appeal that the Judge had wrongly applied the pre-9th July 2012 law lost its force because the Judge had considered the matter in the alternative. For example at paragraph 16 she referred to Appendix FM and at paragraph 17 referred to the requirements of Section R-LTRP.1.1(a), (b) and (d) together with EX.1(a) of the July 2012 Rules.

11. For the Respondent it was argued that the grounds of onward appeal were factually correct when they pointed out the mistake made by the Judge referring to Mr Jaufaraully as being British. That was relevant because it affected the ability of Mr Jaufaraully to relocate back to Mauritius. The question of the children's status was in similar vein. Even if the children were now British one still had to consider their best interests in a holistic assessment, see **EV Philippines** and the ability of the children to reintegrate into life in Mauritius.

12. In conclusion Counsel for the Appellants argued that there had been no challenge by the Respondent that Appendix FM and FM-SE were met at the date of hearing, merely that the Judge had not referred to the evidence required by Appendix FM-SE. In fact there was very clear evidence before the Judge to which she referred in her determination including evidence of the income of the couple. Whatever errors there might be in the determination could have made no material difference to the outcome. Referring on one occasion to Mr Jaufaraully as being British was an error of composition not substance. The Judge had also referred to Mr Jaufaraully as having indefinite leave to remain (correctly). Because of that status the children's applications to become British citizens had been granted. At the conclusion of the hearing I indicated that I would allow the Appellant's appeal and would give written reasons in due course which I now do.

Findings

13. The family composition in this case is that Mr Jaufaraully has indefinite leave to remain, the Appellant has Section 3C leave and the couple's two children are both British citizens. The only person who could be removed is the Appellant. Her

removal would leave two young British children without their mother or (if they went with her) would deprive the two children of the benefits of their recently acquired status. It would negate the consequences of granting Mr Jaufaraully indefinite leave to remain as the family would have to return to Mauritius. If all four members of the family were Mauritian citizens and none had indefinite leave to remain there are arguably good grounds for finding that the Judge's assessment of proportionality under Article 8 erred in law. That however is not the position.

14. In fact the present position is similar to the position as it was at the hearing in May 2015 as the Judge understood it. In deciding on the question of an error of law and if so on a disposition thereafter there are two issues in the case to be considered. The first is whether the Appellant can succeed under the Immigration Rules and the second is if she cannot whether she should be able to succeed outside the Immigration Rules. The Judge found that the appeals succeeded under the Rules as a result of which the appeals stopped there. The Appellant was said to have met the requirements of Section R-LTRP.1.1(a), (b) and (d) since under EX.1(a) she had a genuine and subsisting parental relationship with her children who in May were eligible to be registered as British citizens and who now are British citizens.

15. The Judge did not consider it reasonable to expect the children to leave the United Kingdom. Strictly speaking as the grounds of onward appeal point out the children were not qualifying children under Section 117C Nationality, Immigration and Asylum Act 2002 at the date of hearing but they are now. The test of whether there is a material error of law in this case is whether the Judge's treatment of the children as being qualifying children was wrong in law. I find that to be so although it is fair to point out that M is now a qualifying child on two grounds. Firstly he is a British citizen and secondly he has been in the United Kingdom for more than seven years, turning 7 on 7th August 2015. However at the time of the hearing the children were not qualifying children and it was an error of law to treat them as if they were.

16. The effect of finding an error of law and setting aside the decision of Judge Monro and proceeding to re-make the decision is nevertheless to arrive at the same conclusion that she reached. Both children are now qualifying children and the position remains, as the Judge found, it is not reasonable to expect either or both of them to travel to Mauritius. That being the case, even if it can be argued that the Judge "jumped the gun" the position now is that the Appellant does meet the Immigration Rules for the reasons given by Judge Monro: it would not be reasonable to expect the children to leave the United Kingdom and this brings the Appellant within the parameters of Section EX.1.

17. There was no error in the Judge's treatment of the Immigration Rules since although she was wrong to consider that **Edgehill** applied outside the particular window between July and September 2012, she nevertheless went on to consider the July 2012 Rules in any event. As was submitted there was no serious challenge to the evidence which supported the claim to meet the financial criteria. Further it is not quite accurate for the grounds of onward appeal to describe the First-tier Tribunal Judge referring to Mr Jaufaraully as being British "throughout the determination". In fact

the Judge only referred to Mr Jaufaraully as being British on one occasion. At paragraph 7 she referred to Mr Jaufaraully as being granted indefinite leave to remain, at paragraph 12 in her consideration she referred to his grant of indefinite leave to remain and I accept that the one reference to Mr Jaufaraully as being British was a slip of the pen and did not materially interfere with the Judge's conclusions.

18. The argument that the Judge failed to give adequate reasons as to why the family could succeed under Article 8 was also arguably in error because the Judge had found that the Appellant succeeded under the Rules. The Article 8 assessment would only apply if she could not succeed under the Rules and the Article 8 assessment would then have to be carried out on the basis that due weight would have to be given to the fact that this was an appeal outside the Rules. I have quoted paragraph 24 of the determination above and it is plain from reading that paragraph that the Judge has not carried out the proportionality exercise based on the premise that the Appellant was unable to meet the Rules. That error however is immaterial since I have found that the Appellant (now) meets the Rules in any event.

19. The only party to this onward appeal is the Appellant since as a result of being granted British citizenship M ceases to be a party to the case just as his father Mr Jaufaraully had ceased to be a party before the first instance hearing. At that date neither of the two children were qualifying children under Section 117D(1). I accept that the Judge's treatment of both children as qualifying children may arguably be said to have interfered with her assessment under the reasonableness test of whether it was reasonable to expect the children to leave the United Kingdom. However since then both children have become qualifying children, M on both bases. When applying that factual matrix to the Appellant's appeal it becomes clear that she can now satisfy the requirements of Section EX.1 even if she could not at first instance. Her appeal thus falls to be allowed.

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 have re-made the decision by allowing the appeal of the Appellant against the decision of the Respondent.

Appellant's appeal allowed.

I make no anonymity order as there is no public policy reason for so doing.

Signed this 14th day of January 2016

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Deputy Upper Tribunal Judge Woodcraft

TO THE RESPONDENT
FEE AWARD

As I have set aside the decision of the First-tier Tribunal as it involved the making of an error of law, I set aside the fee awards made in this case such that no fee award is payable.

Signed this 14th day of January 2016

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Deputy Upper Tribunal Judge Woodcraft