Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: IA/49761/2014 and IA/49762/2014

THE IMMIGRATION ACTS

Heard at Field House, London
On the 1st April 2016

Decision & Reasons Promulgated
On the 19th April 2016

Before:

DEPUTY UPPER TRIBUNAL JUDGE MCGINTY

Between:

(1) MR HARJEET SINGH DHILLON
(2) MISS DIPREET KAUR DHILLON
(Anonymity Direction not made)

Claimants

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant in the Upper Tribunal

Representation:
For the Claimants: Mr Makor (Counsel)
For the Secretary of State: Ms Everett (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. This is the Secretary of State's appeal against the decision of First-tier Tribunal Judge Wylie, promulgated on the 18th September 2015, in which she allowed the Claimants' appeal against the Secretary of State's decision to refuse them Leave to Remain in the United Kingdom as dependents of a Points-Based System Migrant and to issue removal directions against them under Section 47 of the Immigration, Asylum and

Nationality Act 2006, on the grounds that the decision that was reached was in breach of the Claimants' human rights under Article 8.

2. Within the Grounds of Appeal it is argued by the Secretary of State that the First-tier Tribunal Judge failed to consider whether or not there were any compelling reasons as to why the Article 8 claim ought to have been considered outside of the Immigration Rules. It is argued that the Judge failed to properly consider Sections 117A and B of the Immigration Act 2014 and that the Judge failed to properly weigh the fact that the Claimants' and their Sponsor's leave was precarious and that little weight ought to have been given to a private life that was established at a time when a person's Immigration Status was precarious. It is argued further that the Judge failed to adequately consider Section 117B(6) and as to whether it was unreasonable to expect the child to leave the United Kingdom. It is argued that the finding that it would be disruptive for the child to resume education in India was irrational given that neither parent had Indefinite Leave to Remain and neither were British Citizens and the Sponsor was only in the UK on a temporary basis. It is further argued that the Judge failed to properly consider that the Sponsor's course was not provided by a Higher Education Institute and that therefore she was not entitled to have her dependents with her in the UK and that this was a matter of choice by the Sponsor and that the Judge failed to consider that the Sponsor and her dependents could return to India and make the appropriate entry clearance application. It is said that the Judge failed to have proper regard to the public interest.

3. Within the Grant of Permission to Appeal, First-tier Tribunal Judge Frankish, on the 8th February 2016, summarised the Grounds of Appeal and found that "with no reference to compelling circumstances before embarking on a freestanding Article 8 assessment and very brief reference to public interest presumptions including precarious circumstances in Section 117 [32-33], it is arguable that an error of law has arisen".

4. The Claimants' solicitors sought to produce a bundle for the Upper Tribunal attached to a letter dated the 30th March 2016, which in effect formed the Claimants' Rule 24 reply, although not formally entitled as

such. However, I have clearly considered the contents of that letter in full, in reaching my decision in this case and the attached case of R (on the Application of Zhang) v Secretary of State for the Home Department [2013] EWHC 891 (Admin). However, I have not considered the further documentation sought to be adduced in respect of the Sponsor's status, which was not before the First-tier Tribunal Judge and in respect of which there was no nation given as to why such information was not provided to the First-tier Tribunal Judge, white should be taken into account at the appeal hearing before the Upper Tribunal when it amounted to "fresh evidence."Nor have I considered the unreported cases of the First-tier Tribunal which Mr Makor sought to rely upon, as these are unreported cases and reference to them should not be made in such circumstances as they are not either binding or persuasive authority in respect of the issues before the Upper Tribunal.

5. In her oral submissions before the Upper Tribunal Ms Everett relied upon the Grounds of Appeal. She agreed that the Sponsor did in fact have limited status, as at the date of the decision before First-tier Tribunal Judge Wylie. She also conceded that following the clarification of the law by the Court of Appeal in the case of Singh & Khalid v The Secretary of State for the Home Department [2015] EWCA Civ 74, that the Tribunal should not be considering an intermediate test as to whether or not there were compelling circumstances before considering a claim outside of the Immigration Rules for the purposes of Article 8, but that there would have to be "compelling circumstances" not dealt with under the Immigration Rules, for a human rights claim to be found to be disproportionate outside of the Immigration Rules, which had not succeeded under the Immigration Rules. She therefore conceded that there was no merit to the first ground of appeal that the Judge had failed to consider the question of "compelling circumstances" before going on to consider Article 8 outside of the Rules, but she still argued that there did need to be compelling circumstances, although she conceded that the Judge did not need to specifically use the phrase "compelling circumstances" when considering proportionality, if there were such compelling circumstances which were not recognised under the Immigration Rules.

6. Ms Everett further conceded that the Judge had referred specifically to the fact that the Claimants' status was precarious and conceded that the consideration of the Claimants' family life was not affected by their status as being "precarious" for the purposes of Section 117B. She further submitted that the argument raised within the Grounds of Appeal in respect of the Judge's failure to consider Section 117B(6) in terms of whether it was unreasonable to expect the child to leave the UK, was in her words "a neutral point", and will not be determinative of the appeal. She did, however, argue that Article 8 should not be used as a means of avoiding compliance with the Immigration Rules and argued that the Rules had been found to be proportionate for the purpose of Article 8. She argued that the fact that the Claimants would not succeed if they went back to India, and applied under the Rules, was determinative of the case.

7. In his submissions on behalf of the Claimants, Mr Makor referred me to the arguments raised within his solicitor's letter dated the 30th March 2016, which in effect constituted the Claimants' Rule 24 reply. He sought to rely upon the same. He further argued that the Judge's findings at [15] of the decision were important in that these Claimants always had Leave to Remain in the United Kingdom as dependents of the Sponsor, concurrent with her leave, and he argued that it was important that the Sponsor, Mrs Dhillon had Leave to Remain in the UK until the 16th April 2017, as a Tier IV (General) Student. She argued that the Judge had properly considered the question as to whether or not the Claimants met the requirements of the Immigration Rules, before going on to consider Article 8, and that the Judge had properly considered Section 117 of the Nationality, Immigration and Asylum Act 2002, as inserted by the Immigration Act 2014, and the fact that the Claimants' status was precarious and that they were able to speak English and were financially independent.

8. He argued that there were compelling circumstances not recognised by the Immigration Rules, and that the findings made by the Judge were open to her, and that the Grounds of Appeal simply amounted to disagreement with the decision on the part of the Secretary of State. He sought to rely upon the case of R (Zhang) v Secretary of State for the Home Department

[2013] EWHC 891 (Admin), which he argued was a very similar factual situation to that encountered by the Claimants.

My Findings on Error of Law and Materiality

9. Although Mr Makor sought to place reliance upon the decision of Mr Justice Turner in the case of R (on the Application of Zhang) v Secretary of State for the Home Department [2013] EWHC 891 (Admin), I do not consider that I am assisted by that case in the circumstances of this appeal. The case of Zhang was decided by Mr Justice Turner on the basis of the old wording of Rule 319C(h)(i) which stated that "an Applicant who is applying for Leave to Remain must have, or have last been granted, leave (i) as the partner of a relevant Points-Based System Migrant". In that case the Claimant's previous grant of leave had been as a Tier 2 (General) Migrant rather than as a partner, and thereby under the old wording of the Rules she was precluded from applying from within the UK and had to return to China to apply for entry clearance. However, as a result of the Zhang case, the Immigration Rules were changed in 2013, to enable dependents in the points-based system to apply for Leave to Remain in the country from within the UK providing the requirements of the newly amended wording of the Rule under Rule 319(c) were complied with. However, the decisions made by the Secretary of State in this case in respect of the two Claimants, related to the new wording of paragraph 319 and the fact that the Sponsor, Mrs Dhillon was not a government sponsored student and that she was studying on a Level 7 course where the course was not being provided by a Higher Education Institute, such that the Secretary of State found that the requirements of the Rules to be granted Leave to Remain as the dependents of a Points-Based System Migrant were not met.

10. In respect of the first ground of appeal, namely that the Judge had failed to consider whether or not there were any compelling reasons as to why Article 8 ought to be considered outside of the Rules, before engaging with the assessment of Article 8 outside the Immigration Rules, as was quite properly considered by Ms Everett on behalf of the Secretary of State, following the clarification of the law by the Court of Appeal in the case of Singh & Khalid v Secretary of State for the Home Department [2015]

EWCA Civ 74, the Tribunal does not need to conduct an intermediate test as to whether or not there are "compelling circumstances" before conducting the Article 8 assessment outside of the Immigration Rules, and the Court is entitled to go on to consider the claim outside of the Immigration Rules, if the case has not fully been dealt with under the Immigration Rules, but there do have to be compelling circumstances not recognised under the Rules for the human rights claim to be considered disproportionate to the legitimate public aim sought to be achieved. The ground of appeal thereby seeking to argue that the Judge had not carried out such an intermediate test, as properly conceded by Ms Everett, therefore lacks merit.

11. In respect of the second ground of appeal that the Judge failed to properly consider Section 117A and B of the Immigration Act 2014 and failed to properly weigh the fact that the Claimants' and their Sponsor's leave was precarious and that little weight should be given to a private life that is established at a time when a person's immigration status is precarious, First-tier Tribunal Judge Wylie at [33] specifically noted that "the First Claimant has always had leave to be in the United Kingdom and the Second Claimant has had leave since January 2011. Their Leave to Remain in the United Kingdom has always been limited, and to that extent their Immigration Status is precarious; however they have always complied with Immigration Rules".

12. The Judge has therefore properly noted that they only had limited leave and their status was precarious, and taken this into account in the balancing exercise. He has thereby properly complied with his duty in taking this into account however, in any event, under the provisions of Section 117B(5) it is stated that "little weight should be given to a private life established by a person at a time when the person's Immigration Status is precarious". Not only has the Judge taken this into account, but the Judge was considering not only the Claimants' private lives, but also their family lives, and under Section 117B(4) little weight is only to be given to a relationship formed with a qualifying partner for the purposes of family life, if that relationship is established at a time when the person is in the UK unlawfully. The fact that the status of the Claimants was

therefore precarious did not affect the weight to be given to their family life within the UK, but in any event, the Judge has taken account of the precarious nature of their status, given the Claimants' limited leave. There is no material error in this regard.

13. In respect of the argument that the Judge failed to adequately consider Section 117B(6) as to whether it would be unreasonable to expect the child to leave the UK, the Judge did not find that the public interests did not require the Claimants' removal because of their being a genuine and subsisting relationship with a qualifying child and because it would not be reasonable to expect their child to leave the UK for the purposes of Section 117B(6). That was not the basis upon which the Judge made findings. Nor, is that a requirement in circumstances when there is not a "qualifying child" in determining whether or not removal would be disproportionate. The Second Claimant was born on the 18th August 2010, and therefore was only aged four years old as at the date of the decision on the 1st December 2014. She was not a British citizen, nor had she lived in the UK for a continuous period of seven years or more, and therefore the Judge properly did not consider the Article 8 case outside of the Immigration Rules on the basis of Section 117B(6). That was not the basis of his findings. Section 117B(6) does not preclude the consideration of the question as to whether or not a person's removal would be disproportionate to the legitimate public aim sought to be achieved, if the child is under the age of seven years old, it is simply the fact that under Section 117B(6):

"In the case of a person who is not liable to deportation, the public interest does not require the person's removal 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.".

14. As that scenario did not apply in this case, the Judge properly did not make his findings on that basis. That ground of appeal therefore has no relevance.

15. In respect of the ground of appeal that the Judge failed to properly consider that the Sponsor's course was not provided by a Higher Education Institute and that therefore she was not entitled to have her dependents with her in the UK, and that this was a matter of choice by the Sponsor, the First-tier Tribunal Judge at [2] properly noted the Claimant's immigration history and the fact that the First Claimant had entered the United Kingdom on the 11th August 2009 as the dependent partner of Baljinder Kaur Dhillon and initially been granted valid leave until 30th November 2010, and that thereafter been granted Leave to Remain as a Tier 4 (General) Dependent until the 31st May 2011 and thereafter granted Further Leave to Remain as a Tier 4 (General) Dependent until the 30th January 2012 and that on the 29th August 2012 he had been granted Leave to Remain as a Tier 1 Dependent partner until the 29th August 2014, and at [4] noted he had found that the Second Claimant had been born in the United Kingdom and that she too had been granted Leave to Remain initially as a Tier 4 (General) Dependent and thereafter on the 29th August 2012, she had been granted Leave to Remain as a Tier 1 Dependent child until the 29th August 2014.

16. The Judge therefore properly bore in mind that this was not a case where the Claimants were presently seeking to come into the UK from abroad, but had lawfully been in the UK with the Sponsor concurrent with her leave, and that the Second Claimant had spent all of her life in the UK. The Judge properly noted and found at [22] that the provisions of paragraph 319C(1) could not be met by the First Claimant because the Sponsor was not a Government sponsored student and that her course was not provided by a Higher Education Institute and that identical conditions had to be met in terms of the Second Claimant under Section 319H, and that therefore the provisions of the Immigration Rules were not met. The Judge has therefore properly taken into account the fact that the Sponsor's course was not provided by a Higher Education Institute and that as a result the requirements of the Immigration Rules were not met

and the Judge clearly bore that in mind when considering the Article 8 assessment outside of the Immigration Rules as he was required to do.

17. The argument that the First-tier Tribunal Judge failed to consider that the Sponsor and her dependents could return to India and make the appropriate entry clearance application, again misses the point that as a result of the Claimants not satisfying the Immigration Rules as a result of the Sponsor's course not being provided by a Higher Education Institute, they would not have met the requirements of the Immigration Rules, were they to return to India and make an application from abroad. The argument the Judge failed to take into account the possibility of them returning to India to make such an application, therefore has no merit, in that had the Claimants sought to return to India to make an application, that application would have failed. The Judge therefore did have to consider whether or not the Claimants' family and private life in the UK would be adversely affected as a result of the decision to remove and as to whether or not there were compelling circumstances outside of the Immigration Rules that would make removal disproportionate to the legitimate public aim sought to be achieved.

18. The Judge when considering the Article 8 claim outside of the Immigration Rules has clearly taken into account all of the requirements of Section 117A and B, and has found that the Claimants can speak English at [33] and that the maintenance of an effective immigration control is in the public interest and that the family had been able to support themselves financially throughout the entire time they had been in the UK. He was also entitled in the circumstances of this case to find that there were circumstances which would amount to compelling circumstances not recognised by the Immigration Rules, given the fact that the Claimants enjoyed family life in the UK with their Sponsor and that the First Claimant had been here for six years and that the Sponsor was engaged in a course of study and had Leave to Remain until 2007; that the Second Claimant was at school and the family were emotionally reliant upon each other and that the Claimants had been in the UK previously throughout with leave concurrent with that of the Sponsor.

19. The Judge was also entitled to conclude that it would be disproportionate to the legitimate public aim sought to be achieved in the circumstances of this case, given the background, for the Sponsor either to be forced to give up her studies to return to India with the Claimants, or for the Claimants to be separated from the Sponsor, if she were to choose to continue her course, in circumstances where the Sponsor had been granted leave to continue study in the UK until 2017.

20. The Judge had clearly taken into account the best interests of the child at [36] and the fact that it was in her best interests to be living in the care of both parents and that it would be disruptive to her were she to be separated from her mother and required to transfer to a different education system in India [36]. The Judge has however taken account of the fact that they only had limited leave, but has considered the individual circumstances of this case and found at [37] that it would not be proportionate to remove the Claimants from the United Kingdom while Mrs Dhillon remains here continuing her course of professional study. The findings of the Judge were not irrational as claimed within the Grounds of Appeal, and these findings were perfectly open to the Judge on the evidence before him in the particular circumstances of this case.

21. The decision of First-tier Tribunal Judge Wylie therefore does not reveal any material error of law and the decision is maintained.

Notice of Decision

The decision of First-tier Tribunal Judge Wylie does not contain any material error of law and is maintained. The Secretary of State's appeal is dismissed.

Signed

Rob McGinty

Deputy Judge of the Upper Tribunal McGinty Dated 3rd April 2016