Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/02694/2015

THE IMMIGRATION ACTS

Heard at: Field House	**Decision and Reasons Promulgated**
On: 19 June 2017	**On: 12 July 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHANA

Between

MRS MK PATEL
(ANONYMITY DIRECTIONS NOT MADE)

Appellants

and

THE SECETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Janjua of Counsel
For the Respondent: Ms Z Ahmad, Senior Presenting Officer

DECISION AND REASONS

1. The appellant, a citizen of India, appeals against the decision of the respondent to refuse to grant her leave to remain in the United Kingdom pursuant to paragraph 276 ADE of the Immigration Rules. First-tier Tribunal Judge Hussain in a decision dated 2016 dismissed the appellant's appeal under the Immigration Rules.

2. Permission to appeal was granted by First-Tribunal Judge Astle on 8 May 2017 saying that it is arguable that the Judge's assessment of

reasonableness under paragraph 276 ADE and his failure to make adequate findings and conduct the evaluation exercise needed. The permission Judge further noted that the First-tier Tribunal Judge does not refer to section 117B (6) in his assessment of the appeal outside the Immigration Rules.

3. The grounds of appeal argue the following which I summarise. The Judge has made an irrational finding because the key issue before the Judge in respect of the Immigration Rules was the reasonableness test under paragraph 276 ADE (1) (iv). The Judge fell into error when he said that it has been held that children after the age of 10 years are mostly focused on their parents. In other words, until that age they are capable of adapting to their environment. The jurisprudence of the Tribunal has recognised that children form ties outside the home from the age of four which is the age that a child enters compulsory education. The Judge has failed to make adequate findings.

4. The Judge has failed to conduct the evaluation exercise or it is inadequate which is required in **PD and others (article 8 conjoined family claims) Sri Lanka [2016] UKUT 108 (IAC)**. The Judge made a material misdirection of law by failing to give proper consideration to the private life ties built up by the appellant's daughter during her now eight years, although it was seven years at the date of the hearing. The Judge has failed to appreciate that eight years residence in and of itself points towards it being *prima facie* unreasonable to remove the child. The Judge has failed to make adequate findings and has failed to assess where the appellant's daughter's best interests actually lie.

5. The Judge failed to consider material evidence in respect of the child. The child in a letter expressed her wishes to live in this country and his omission to consider vitiates the Judge's assessment of her best interests and reasonableness.

6. The Judge made a material misdirection of law when he refused to consider Article 8 outside the Immigration Rules stating that exceptional circumstances are needed to consider the appellant's case outside the Immigration Rules. The Judge misdirected himself and imposed an unlawful gateway threshold. The Judge has failed to consider the Article 8 statutory considerations set out in paragraph 117B of the 2002 Act, which is a complete answer to the public interest question and was relevant in respect of the appellant and her husband.

Findings as to whether there is an error of law in the decision

7. The Judge found that the appellant does not satisfy paragraph 276 ADE and Appendix FM of the Immigration Rules. The Judge found that the appellant and her husband cannot succeed under Appendix FM because neither of them are British citizens, settled in this country or persons who have leave as a refugee or humanitarian protection. There

is no error of law in his finding that the appellant and her husband are not captured by EX 1. This is a sustainable finding and not subject to appeal.

8. After having found that both the appellant and her husband can relocate to India, the Judge considered their child's circumstances and considered whether her circumstances changes anything for the appellant and her husband. The Judge referred to the case of **PD and others** which was also referred to in the grounds of appeal. The Judge correctly directed himself and said that he must consider at the totality of the evidence, including all the appellant's family members. This was a proper direction that the Judge gave himself.

9. At paragraph 20, the Judge stated that the fact that the appellant's child has lived in this country for seven years, there is nothing remarkable about the child's life. He stated that like most children in this country of that age, she lives with her parents and attends school. The Judge stated, "it has been held that children up to the age of 10 years are mostly focused on their parents". The Judge did not specifically identify that the appellant's child as a qualifying child under section 117B, however I find that the Judge has considered all the relevant criteria in that section.

10. The test in paragraph 117B, is reasonableness of return which is the test that the Judge applied. If a child is a qualifying child for the purposes of section 117B of the 2002 Act, the issue will generally be whether it is not reasonable for that child to return. The Judge clearly found that it is not unreasonable for the appellant, her husband and the child to return to India as a family unit. As stated in **EV Philippines** that the child's best interests are to be with her parents wherever they live.

11. In the case of **R (on the application of Osanwemwenze) v SSHD 2014 EWHC 1563** which was not specifically concerned with section 117B it has some relevance in terms of the reasonableness of a child leaving the UK. In this case, the claimant's 14-year-old stepson from Nigeria had been in the United Kingdom for more than 7 years and had leave to remain in his own right. It was held that this was an important but not an overriding consideration and it was reasonable to expect the claimant's family including the stepson to relocate to Nigeria. The parents had experienced life there into adulthood and would be able to provide for the children and help them to reintegrate. In **AM (S 117B) Malawi [2015] UKUT 260 (IAC)** the Tribunal held that when the question posed by s117B(6) is the same question posed in relation to children by paragraph 276ADE(1)(iv), it must be posed and answered in the proper context of whether it was reasonable to expect the child to follow its parents to their country of origin.

12. In the case of **Azmi-Moyed and others [2013] UKUT 00197** it was stated that seven years from the age of four is likely to be more significant to a child in the first seven years of life.

13. The Judge found that the appellant's daughter was seven years old and young enough to adapt to life in India, which is the country of her parent's heritage. I do not find this is a perverse finding considering the jurisprudence on the issue of children accompanying their parents to the country from which they come and where they lived before they came to the United Kingdom.

14. The Judge considered the appellant's child's welfare at paragraph 21 of the decision and found that there is nothing in the evidence before him which suggests that the child's welfare would suffer such a degree of harm as to adversely affect her overall welfare.

15. The grounds of appeal do not refer to any evidence that the Judge did not consider, other than the letter from the child which stated that she wants to live in this country. There is no indication that the Judge did not consider this evidence. The Judge is not required to set out in his decision every piece of evidence before him. It is obvious from the decision that the Judge was aware that the child wanted to continue to live in this country when he stated, "whilst life in India may not be comfortable for the appellant and the facilities available to her may not be as rich and varied as it is in this country, there is nothing on the evidence before me, to suggest that the child's welfare would suffer such degree of harm as to adversely affect her overall welfare". This demonstrates that the Judge did consider the child's welfare on her return to India. The child's views are one consideration but ultimately the test is the reasonableness of return.

16. The Judge found that none of the appellant's family could satisfy the Immigration Rules and there is no material error for failing to consider the appellant, her husband or her child's rights under Article 8. It has been held that Article 8 does not allow a person to choose the country in which they wish to live. The Judge said that there are no exceptional circumstances where the appellant would be granted leave to remain under Article 8 when she could not satisfy the requirements of the Immigration Rules, which are Article 8 compliant. There is no material error of law in the Judge's finding that there are no exceptional circumstances in the appellant's case which warrants consideration outside the Immigration Rules and under Article 8.

17. Furthermore, the evidence before the Judge was that the first and second appellant's right to remain in this country was on a temporary basis as the first appellant and her husband came to this country as visitors on 19 December 2004. He also considered that on 25 May 2008, she gave birth to her daughter while she was in this country unlawfully. Her applications for leave to remain in this country were

refused and her appeal was dismissed on 30 October 2012. The appellant's application for permission to appeal the decision was refused. This immigration history demonstrated to the Judge that the appellant must have known that she would have to return to India with her family when she no longer had a right to live in this country. The Supreme Court commented on this aspect in **Patel and ors UK SC 72 [2013]** at page 55 to 56, noting the limited utility of temporary leave in considering Article 8 issues.

18. In the case of **R (on the application of MA (Pakistan) and Others) v Upper Tribunal (Immigration and Asylum Chamber) and Another [2016] EWCA Civ 705** it was held (notwithstanding reservations) that when considering whether it was reasonable to remove a child from the UK under rule 276ADE(1)(iv) of the Immigration Rules and section 117B(6) of the Nationality, Immigration and Asylum Act 2002, a court or tribunal should not simply focus on the child but should have regard to the wider public interest considerations, including the conduct and immigration history of the parents. It was also confirmed however that if section 117B (6) applies then "there can be no doubt that section 117B(6) must be read as a self-contained provision in the sense that Parliament has stipulated that where the conditions specified in the sub-section are satisfied, the public interest will not justify removal." It was additionally held, however, that the fact that a child had been in the UK for seven years should be given significant weight in the proportionality exercise because of its relevant to determining the nature and strength of the child's best interests and as it established as a starting point that leave should be granted unless there were powerful reasons to the contrary.

19. The Judge was entitled in the circumstances to find that there are powerful reasons for why the appellant her husband and the appellant's child should not be granted leave to remain in this country, considering all the evidence in the appeal.

20. I find that there is no material error in the decision of the First-tier Tribunal Judge. The Judge gave legally sustainable reasons for his finding that the family unit can return to India and continue their family and private life. I find that no differently constituted Tribunal would come to different conclusion on the facts of this case and considering the jurisprudence on the issue.

Decision

Appeal dismissed

Signed by

Deputy Judge of the Upper Tribunal

Mrs S Chana

This 29th day of June 2017