Upper Tribunal
(Immigration and Asylum Chamber)

Appeals: HU/26445/2016
HU/26447/2016
HU/26448/2016

THE IMMIGRATION ACTS

Heard at Glasgow	**Decisions & Reasons Promulgated**
On 9 November 2017	**On 13 November 2017**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

PEMA [C] + 2

Appellants

and

ENTRY CLEARANCE OFFICER, New Delhi

Respondent

For the Appellant: Mr R Gibb, of D Duheric & Co, Solicitors
For the Respondent: Mrs M O'Brien, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellants are mother and two children, born on 11 November 1973, [ ] 2000, and [ ] 2002. They all reside in India, apparently since around 2003, with identity certificates permitting them to do so (and to travel abroad).

2. The appellants are not citizens of Nepal, as erroneously stated at ¶1 of the decision by FtT Judge Mays. They and the sponsor all originate from Tibet. Their representative has no information on whether all or any of the four family members are citizens of China, rather than being stateless, as rather vaguely asserted. It has also been said (and appears likely, but is not confirmed by documentation) that the three appellants are recognised as refugees in India. The sponsor came to the UK in 2003. He was not recognised as a refugee in the UK but obtained indefinite leave to remain (perhaps under a "legacy exercise") in 2010. At some later date, he became a UK citizen. It was asserted in the FtT, but not established, that he could not go to live permanently with the appellants in India. These are obvious points on which clarity might have been expected; however, nothing ultimately turns on any of them.

3. The sponsor lived apart from the rest of the family until 2013. By the time of the FtT hearing he had made 3 visits, each of 3 – 4 months, to his family in India. (At the time of the UT hearing, he was in India on his fourth such visit.)

4. The appellants applied to join the sponsor in 2013. Those applications were refused and not appealed. Further applications were made under cover of a letter from solicitors dated 3 October 2016. The ECO refused those applications for reasons given in notices dated 3 November 2016.

5. Judge May dismissed the appellants' appeals for reasons given in her decision promulgated on 15 March 2017.

6. The appellant's grounds of appeal are stated in the application for permission to appeal dated 7 April 2017 (which in terms of the TP (UT) Rules 2008, rule 23 (1A), now stands as the notice of appeal to the UT):

> The appellants … rely on ECHR article 8 outside the rules (the sponsor cannot meet the financial requirements) … The issue… was one of proportionality. The judge found that the exclusion of the appellants from the UK was proportionate … in so doing, she erred in law.
>
> The judge's findings on proportionality are summed up at ¶50 … :
>
> > *"Family life will however be able to continue as it has in the past with the sponsor visiting India for a long holiday each year and through contact using modern means of communication".*
>
> This finding is in stark contrast to that of the UT in *LD* (article 8 – best interests of child) [2010] UKUT 278 where President Blake J opined as follows:
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> > *"We therefore turn to consider the judge's reasoning on… proportionality… we find it is wholly absent… We find his reference to maintain contact with his family "in the normal manner" is extraordinary. Families normally live together. Family life consists of the inter-dependent bonds between spouses or stable partners and between parents and children with particular strength been placed upon the interests and welfare of minor children. It is not normal for family life to be enjoyed by correspondence and occasional visits…"*
>
> … The judge misdirected herself in law by failing to follow this guidance… These errors go to the core of the judge's findings on proportionality … and vitiate her findings…

7. FtT Judge Scott-Baker granted permission on 25 September 2017, observing:

> The judge reminded herself at ¶35 … quoting from *MM* (Lebanon) [2017] UKSC 10 that the immigration rules were unlawful in that the s.55 duty relating to children had not been fully incorporated in the rules and that as a result the statutory duty had not been properly taken into account. Having found that there were no further findings on this defect in the assessment of proportionality and as a result, the decision arguably discloses a material error of law in that the interests of the children have been inadequately assessed.

8. In a rule 24 response to the grant of permission, the SSHD (on behalf of the ECO) says:

> The judge has given a careful and considered judgement, and has come to findings open on the evidence before her.
>
> The grounds are merely disagreements with lawful findings, seeking to reargue the matter before the UT.
>
> *LD* has no application to the facts of this case, and whilst *MM* has possibly altered the evidential requirements in relation to cases with children, it has not struck down the relevant threshold, nor has it resulted in the situation where a failure to meet the rules does not weigh heavily in the proportionality balance.

9. On 26 October 2016, the UT issued notice of the hearing on 9 November 2017. In an email of 3 November 2017, the appellants' representatives sought an adjournment. They were represented by Mr Gibb, as they had been in the FtT, but he had changed firm. The reason advanced was that files had not been received from previous representatives and that not having had sight of the evidential bundles, they would be significantly disadvantaged.

10. Unfortunately, due to an administrative slip, the application for adjournment was not placed before a UT Judge in advance of the hearing.

11. When the case was called on at 10:00, Mr Gibb applied for adjournment on the foregoing grounds. However, he was unable to show, based on the decision, the grounds, and the grant of permission (all of which representatives had) that preparation (on error of law, at least) required further investigation of the evidence which had been before the FtT. There was no ground suggesting that the judge went wrong on the primary facts regarding the children. Mr Gibb was unable to explain the alleged difficulty other than by way of what appeared to be a proposed "fishing expedition". However, I provided Mr Gibb with the bundles which were on the file, and agreed at that stage at least to put the case back until later in the day.

12. At about 12:15, Mr Gibb indicated that he was ready, and that he was not renewing his application to adjourn. The hearing proceeded.

13. (There was a second point in the grounds, which is not quoted above. Mr Gibb said that it was based on a typographical error, and was of no significance, and withdrew it.)

14. There was then some elucidation of what is known of the citizenship and other status of the parties, as summarised above at ¶1 - 2.

15. The main points I noted from the oral submissions by Mr Gibb were these:

    (i) *LD* was cited to the FtT. It is authority that family life cannot be constituted by visits and modern communications.

    (ii) Reference to visits and modern communications did not constitute an assessment of the best interests of the children.

    (iii) That erroneous approach was the core of the proportionality assessment.

    (iv) It was an error to found on family life continuing as it has been carried on, when the nature of that family life was not the fault of the children.

    (v) While the sponsor had not established himself to be a refugee, it would be erroneous to take it that he came to the UK only as a matter of choice or simply to seek a better life. In any event, that again would not be the children's fault.

    (vi) Although the appellants failed to show that the sponsor could not live with them in India (¶42 – 43), it should not be taken that the parties have that choice.

    (vii) There had been evidence from the first appellant, in written communication to her representatives, of the harmful effect of the separation on the children, and orally from the sponsor, who was found credible.

    (viii) It was to be presumed that the children's best interests would be served by living with both parents.

    (ix) The judge was wrong to find at ¶40 that it might be an upheaval or a wrench for the children to leave India. There had been no evidence at all entitling her to make such findings. The only evidence was to the contrary, that their private and family life was undermined by the refusal of entry clearance.

    (x) Alternatively, findings that there might be any upheaval through leaving India were inadequately reasoned.

    (xi) The judge was wrong at the end of ¶40 to contemplate that the children might visit their father in the UK. Any such applications were bound to be refused.

    (xii) The judge was wrong to say at the end of ¶41 that the welfare of the children "would not be compromised should they continue to live in India with the first appellant". There had been no evidence by which that might be justified. Again, all the evidence was to the contrary.

(xiii) The grounds, or the grant, were wide enough to cover the submissions on ¶40-41.

(xiv) It might be factually correct to say there could be visits and communication, but to give that any weight was an error of law.

(xv) The case had been a finely balanced one. The judge might not have come to the same conclusion if the errors were excised. The decision should be set aside.

(xvi) The appellants have not yet applied to introduce further evidence, as required by rules and directions. However, their representatives have been handicapped in preparing for the possibility of a further hearing. If the decision was set aside, then a further hearing should be fixed, either in the FtT or in the UT, to give them the opportunity to make such an application.

16. The main points I noted from the submissions by Mrs O'Brien were these:

(i) The rule 24 response was succinct and accurate. This was a classic instance of mere disagreement with the fact-sensitive assessment reached by the judge.

(ii) The single sentence excerpted in the grounds might be read in isolation as an error along *LD* lines, but that was not a fair reading of the entire decision, which was based on close inspection of the facts and the overall reality of the case.

(iii) "Normal" family life for this family was based on the sponsor living separately from them from 2003 to 2013, and on yearly visits of several months thereafter. There was nothing to show that was other than a matter of choice. Throughout the separation, there was nothing to prevent the sponsor going to live with his family in India.

(iv) The judge had not based the decision solely on visits and communications, and had not ignored the difficulties and the emotional impact of separation. Those aspects were clearly and sympathetically considered: ¶41, read more fully, *"While I accept the children miss the sponsor and would like to spend more time with him and that the sponsor loves and misses his children, I do not find that the welfare of [the children] would be compromised … "*, and ¶50, *"I understand the desire to live together in the UK as a family unit and the sadness their separation causes them"*.

(v) The grounds made no challenge to the findings at ¶40 - 41, and those arguments should not be entertained at this late stage.

(vi) The judge at ¶40 - 41 made an assessment not in absence of evidence, but firmly grounded in obvious facts. The children have spent their lives and have been educated in India and must have roots there. There was no factual or legal error in the conclusion that their welfare would not be compromised by continuing to live with their mother in India. Contrary to the submission for the appellants that the evidence pointed in one direction only, there was no evidence that they would suffer any serious detriment.

(vii) There was nothing to indicate that the judge found this to be a finely balanced case. Rather, she seemed to have found that the facts pointed quite clearly to the conclusion that the respondent's decisions did not disproportionately interfere with family life.

(viii) There was no legal error in the decision.

17. Mr Gibb in response said:

(i) A description of the life of the parties to date as "normal family life" could not mitigate any error, because that could not make it any less disproportionate to allow interference to continue.

(ii) The judge was bound to treat visits and communications as of no weight, yet those matters had been made central to the outcome.

18. I indicated in course of submissions that I saw no merit in the point (whether or not it could be brought within the grounds) that there was no evidence from which to find that departure from India would cause any upheaval in the lives of the children.

19. Beyond that, I reserved my decision.

20. The principal argument for the appellants takes the dictum in *LD* out of context; gives it a wider meaning than it bears; and misrepresents the decision of the FtT as a whole.

21. Mr Gibb said that *LD* was cited to the FtT. That appears to have been no more than a passing oral reference. The first written citation is by attachment of a copy to the grounds of appeal to the UT. (References to reports have not been provided; these may be found at [2011] Imm. A.R. 99 and at [2011] I.N.L.R. 347.) Mr Gibb made no direct reference to *LD* in his submissions in the UT.

22. All article 8 cases turn ultimately on their own facts; and the facts of *LD* were very different from this case. A Zimbabwean national had family life in the UK for over 11 years; his wife and children were granted leave; it was unreasonable to expect them to depart from the UK; and his application was refused for non-disclosure of spent driving convictions. That is the context in which the observations of the UT are to be read.

23. *LD* has often been cited. One example is *HH v SSHD* [2015] CSIH. Lord Brodie, giving the judgement of the Court, said at ¶32–33:

> 32. The petitioner's argument that the FTT, and therefore the UT and the Lord Ordinary, made an error in law in this particular respect depends on an interpretation of what was said by Blake J in giving the decision of the UT in LD v Secretary of State for the Home Department (article 8 best interests of child) *Zimbabwe [2011] Imm AR 99* at para 26. What he said was this:
>
> > "Very weighty reasons are needed to justify separating a parent from a minor child or from the community in which he or she has grown up and lived for most of her life."

> 33. There is no question of separating a parent from a minor child in the present case. As for the proposition that very weighty reasons are needed to justify separating a child from the community in which she has grown up and lived for most of her life, one might quite readily agree with that if what is being put forward is a generalisation about what is reasonable or proportionate. It is a different matter if the proposition is being put forward as a rule of law. We note that Blake J described it as a "principle" but we doubt whether he was intending to enunciate a legal rule. We would accept that a child's residence in the United Kingdom for most or all of her life is a relevant circumstance pointing away from the proportionality of her removal, which circumstance may gain strength from the length of the residence, degree of integration in the community, extent of participation in education and precise immigration status. That the children and one of their parents all have indefinite leave to remain, as was the case in LD, may be a very powerful circumstance. However, that is as far as it goes. Simply because the FTT in this case did not articulate its decision on proportionality in terms of "very weighty reasons" does not mean that it erred in law.

24. That is based on a different passage of *LD*, but it illustrates that *LD* generalises about what is reasonable or proportionate, rather than laying down rules of law.

25. What is to be drawn from *LD,* for present purposes, is that occasional visits and communications at a distance do not equate to normal family life, but it lays down no doctrine that in all cases visits (of whatever duration) and communications must be left entirely out of the balance - as if it were to be presumed that unless living together in the UK, parties are prohibited from maintaining any links.

26. What the judge said was factually accurate, and did not equate visits and modern communications with the family living permanently together. The decision, as Mrs O'Brien pointed out, is clear in the passages cited on the emotional impact of their separation.

27. The basis in the grounds for the criticisms raised of ¶40-41 is rather faint, but it is preferable to dispose of the challenge on its lack of merit.

28. Far from having no basis, the judge's comments are based on plain and sensible reading of the evidence before her. The children moved to India at an age when they will have scant recollection of living elsewhere. They are now aged 15 and almost 17. Their departure would mean leaving the community in which they have grown up, been educated, and lived for most of their lives. That is upheaval which the parties are prepared to bear, but it is absurd to say the evidence excludes its existence.

29. Any further applications the children make to enter the UK as visitors or in any other capacity will fall to be assessed on their merits; but Mr Gibb may be right to say that, as matters stand, refusal seems likely. However, the judge was not wrong to say that visiting *"may be possible"*; and that was an incidental observation, not repeated in the summing up.

30. The essence of the decision is that taking the best interests of the children as a primary but not paramount consideration, the appellants did not show compelling circumstances, such that they have a right to settle in the UK, other than in compliance with the rules. That conclusion was firmly based on a realistic assessment of the overall facts, not on any misapprehension about the quality of family life restricted to visits and communications.

31. The grounds and submissions for the appellants have not shown that the making of the decision involved the making of any error on a point of law.

32. I observe, incidentally, that on unchallenged findings by the FtT, it is doubtful whether the ultimate issue lay between the family being kept apart by the operation of the rules and being reunited in the UK; rather, it turned on the proportionality of the family being put to the choice of continuing as they are, or living together in India. The appellants had the benefit of the judge deciding on the former basis, more advantageous from their point of view, rather than the latter.

33. The decision of the First-tier Tribunal shall stand.

34. No anonymity direction has been requested or made.

10 November 2017
Upper Tribunal Judge Macleman