Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/18606/2015
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THE IMMIGRATION ACTS

Heard at Field House
On 20 April 2017

Decision & Reasons Promulgated
On 15 May 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE SHAERF

Between

BIBI PARWEEN BUSAWON (FIRST APPELLANT)
MD. FAWZI BUSAWON (SECOND APPELLANT)
BIBI SAADIYA BUSAWON (THIRD APPELLANT)
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Ms S Pascoe of Counsel instructed by Lawland Solicitors
For the Respondent: Mr P Nath of the Specialist Appeals Team

DECISION AND REASONS

The Appellants

1. The Appellants are husband and wife and their daughter born respectively in 1967, 1977 and 1998. They are all citizens of Mauritius and entered the United Kingdom as visitors on 1 December 2007. They overstayed and on 23 January 2015 applied for leave to remain in the United Kingdom based on the private and family life which each of them had established here.

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The Secretary of State's Decision

2. On 7 May 2015 the Respondent to whom I shall refer as the SSHD, refused the application of each of the Appellants. The applications had been made at a time when they were unlawfully in the United Kingdom. The husband and wife did not meet the requirements of Appendix FM to the Immigration Rules either as partners or as parents and could not benefit from the provisions of Appendix FM Section EX.

3. The parents did not meet the time requirements of paragraph 276ADE(1) of the Immigration Rules and there were no very significant obstacles to their integration into Mauritius on their return.

4. The daughter did not meet the requirements of Appendix FM as a child. Although she met the age and time requirements of paragraph 276ADE(1)(iv) of the Immigration Rules, that SSHD considered it would be reasonable to expect the daughter to return to Mauritius with her parents as a family unit.

5. In the case of all three Appellants the SSHD did not consider there were any exceptional circumstances which warranted a grant of leave under Article 8 of the European Convention outside the Immigration Rules.

6. On 15 May 2015 each of the Appellants lodged notice of appeal under Section 82 of the Nationality, Immigration and Asylum Act 2002 as amended (the 2002 Act). The grounds are entirely generic to a family and indeed ground 8 refers to two children studying for public examinations which is clearly in error.

The First-tier Tribunal Proceedings

7. By a decision promulgated on 19 August 2016 Judge of the First-tier Tribunal Samimi allowed the daughter's appeal under the Immigration Rules by reference to Section EX.1 of Appendix FM and the appeals of the parents under Article 8 of the European Convention outside the Rules. She found the daughter had passed her Level 2 Certificate in Health and Social Care in 2015 and that this was the route she had chosen towards her fulfilling her aspiration to become a nurse. At the time she was studying for her Level 3 Certificate. She found the daughter satisfied the requirements of paragraph 276ADE(1)(iv) of the Rules and additionally fell within the scope of Section EX.1. The parents had a genuine and subsisting relationship with their daughter who was a qualifying child for the purpose of paragraph 276ADE(1)(iv). The Judge then went on to the proportionality of the decision to the appeal under Article 8 outside the Immigration Rules by way of a brief reference to Section 117B(6) of the 2002 Act and reciting the headnote to the judgment in *EV (Philippines) and Others v SSHD [2014] EWCA Civ 874* and quoting paragraph 1 of the headnote to *Azimi-Moayed and Others (decision affecting children; onwards appeals) [2013] UKUT 00197 (IAC)*. She then concluded (on the

totality of the circumstances) "... there are factors that accumulatively do render the ... decision a disproportionate interference with the Appellants".

8. The SSHD sought permission to appeal on three grounds. First that at the date of the hearing the daughter was over the age of 18 and so fell outside the scope of paragraph 276ADE(1)(iv). Second, the Judge had adopted a child-centred approach in her assessment of the reasonableness of return to Mauritius. Third, she had not considered the circumstances of the parents or the wider public interest as recognised in the judgment in *MM (Uganda) v SSHD [2016] EWCA Civ 450*.

Error of Law Decision

9. By a decision promulgated on 25 January 2016 I found that there was a material error of law in the decision of the First-tier Tribunal and while preserving the findings of fact, set the rest of the decision aside. A copy of that error of law decision is annexed to this decision.

10. The substantive appeal came before me on 20 April 2017. Neither party had seen the error of law decision and copies were made and handed to them. Ms Pascoe wished to introduce additional evidence to show the progress of the third Appellant in her studies. This showed that she was on a two year course due to be completed in the summer of 2018 and that she was due to sit examinations in the coming weeks. Ms Pascoe stated there was no other evidence to submit and the re-hearing should proceed by way of submissions only. The Appellants were present and I explained the purpose of the hearing and the procedure to be adopted. By agreement between the parties Mr Nath for the SSHD made the first submissions.

Submissions for the SSHD

11. Mr Nath submitted that the Reasons for Refusal Letter had fully addressed the issues of the private and family life of the Appellants and matters referred to in Section EX.1 of Appendix FM to the Immigration Rules. At the date of the application leading to the decision under appeal the Appellants did not meet the time requirements of the relevant provisions of paragraph 276ADE(1)(iv) of the Rules. It was therefore appropriate only to have regard to paragraph 276ADE(1)(iv).

12. The whole family had arrived together on 1 December 2007. They claim to have sold all their assets in Mauritius but there was no evidence to show this. They had claimed to fear violence from moneylenders in Mauritius to whom they were indebted but had not made an asylum claim and had not provided evidence of such indebtedness or of any of the claimed threats from moneylenders. There was little evidence of any strong ties in the United Kingdom save for the continued presence of the Appellants as a family unit and the daughter's education.

13. He continued that the provisions of Section 117B(6) were no longer applicable because the daughter was now an adult. In any event, it was not unreasonable for the Appellants to return as a family unit to Mauritius where they could continue family life. Their status in the United Kingdom had been precarious since 2008. They had arrived as visitors and overstayed. He referred to paragraph 60 of *R (Agyarko) v SSHD [2017] UKSC 11* and submitted there were no exceptional circumstances which would result in unjustifiably harsh consequences to the Appellants as a family unit or each of them such as to make the removal disproportionate. The appeals should be dismissed.

Submissions for the Appellants

14. Ms Pascoe noted there was no challenge to the facts found by the First-tier Tribunal Judge. At paragraph 5 of her decision she had referred to oral evidence of threats and had made no adverse credibility finding.

15. The daughter's application had been made as a child although by the time of the First-tier Tribunal hearing she was an adult. She had spent more than seven years in the United Kingdom as a child, all of which had been in education.

16. She accepted there was a public interest in the proper maintenance of effective immigration control. In assessing the proportionality of the decision it was necessary to have regard to the matters referred to in Section 117B of the 2002 Act. All three Appellants spoke English. The daughter had said at paragraph 12(i) of her statement that she spoke only a few words of Creole. The family would be self-sufficient in the United Kingdom. The consequences for the daughter if she had to leave the United Kingdom would be unduly harsh. She would move into an education system which was very different. She did not understand or speak Creole and would be forced to abandon her entire social life and her education.

17. Section 117B(5) of the 2002 Act provided that little weight should be given to a private life established when a person's immigration status is precarious. There was no case law on the meaning of "little weight". The Appellant was in a close-knit family and on return to Mauritius she would have access to a limited network.

18. The test was whether there were exceptional circumstances weighing against the public interest or very significant difficulties would be faced by the Appellants on return. Ms Pascoe submitted the daughter's circumstances were exceptional and on return she would face very significant difficulties in re-integrating. Further, the Appellants should be treated as a family unit. The decision needed to be considered in the round and while the reintegration to life in Mauritius might be easier for the parents, their daughter was even now a very young adult and she

could not fairly be treated separately from her parents outside the family unit.

19. Ms Pascoe accepted there was no documentary evidence to support the claims about lack of accommodation being available or about the disposal of the family's accommodation or the loans which they had previously contracted. The First-tier Tribunal had heard oral testimony and coupled with the documentary evidence had reached the right decision and the appeal should be allowed.

Further Submissions for the Secretary of State

20. Mr Nath emphasised the importance of the public interest and that the daughter could not be used as a trump card. The burden was on the Appellants to show the extent of the difficulties which the daughter would face if she had to re-enter the education system in Mauritius and whether it would be possible or not for her to obtain an equivalent qualification in Mauritius to the one towards which she was now working. The Appellants had failed to discharge that burden of proof. Ms Pascoe interjected that the daughter had been in the United Kingdom since the age of 9 and in education throughout.

Findings and consideration

21. The facts as found by the First-tier Tribunal have been preserved. The only evidence before the Upper Tribunal was to confirm the daughter's continued attendance on her course and satisfactory progress to date, although she still has her end of first year exams to sit. Additionally, there is the fact that the daughter is now a young adult.

22. I have had regard to the learning in *EV (Philippines) and Others v SSHD [2014] EWCA Civ 874* and *PD and Others (Article 8 – conjoined family claims) Sri Lanka [2016] UKUT 00108 (IAC).*

23. The Appellants were granted leave to enter for six months as visitors on 1 December 2007 and did not bring themselves to the attention of the Respondent until 23 January 2015 when they made the applications leading to the decisions currently under appeal. They are overstayers: their immigration status has been of the most precarious nature throughout. The First-tier Tribunal Judge made no positive credibility findings about matters which the parent Appellants claimed had happened in Mauritius and focussed very much on the daughter's position. The daughter was brought to the United Kingdom as a child and no blame or opprobium can be attached to her on account of her overstaying and being in breach of immigration control.

24. The parents have not established they would face very significant difficulties in re-integrating into Mauritius. I accept that given their long

absence from Mauritius they will doubtless face difficulties in re-establishing themselves but I do not consider that such difficulties which are of their own making are so significant that their removal would be contrary to the provisions of paragraph 276ADE(vi) of the Immigration Rules.

25. There was no documentary evidence to show the family has been self-sufficient but I accept it has been in receipt of some income from work done by one or other or both the parents. There was no documentary evidence of the facility of each of the parents in the English language. At the two hearings before me, it appeared as if the wife had a considerably better understanding of English than the husband who hardly spoke at all.

26. The daughter has been in education since her arrival in the United Kingdom and is currently approaching the halfway mark of a two-year course which she hopes on successful completion will enable her to commence studies in nursing. There was no documentary evidence to show that the completion of the course without further study or qualification would enable her to meet the academic qualification requirements to commence nursing studies.

27. The First-tier Tribunal found the daughter had little or no facility in "the language". I take it that this refers to either or both of French and Creole. No differential mention of French is to be found in the documentation Tribunal file. There was no evidence of a private and social life beyond that assertion by the Appellants but in the circumstances I am satisfied that she enjoys a social life which is based around her schooling and education and to that extent she is fully integrated into British society. There was no suggestion she does not enjoy good health or would not seek to work in her chosen profession upon qualification.

28. Adopting the approach to appeals on grounds of Article 8 summarised at paragraphs 7–12 of *EB (Kosovo) v SSHD [2008] UKHL 41*, the parents have established a private and family life in the United Kingdom and their proposed removal would be an interference of such gravity to engage the State's obligations under Article 8 of the European Convention. There was no suggestion that the interference would be otherwise than in accordance with the law and for the legitimate public end of the economic well-being of the State which includes the maintenance of proper and effective immigration control. The assessment of the proportionality of removal must depend on the particular circumstances of each case.

29. The parents have no right to remain in the United Kingdom. They have had little regard to the State's immigration laws. Leaving aside the position of their daughter which has come about as a consequence of their failure to comply with the terms of their 2007 leaves to enter which expired in mid-2008, their return to Mauritius would not be unduly harsh or disproportionate to the need to maintain effective immigration control.

30. Their daughter has a family life, which on the evidence is limited to her parents. They were described as a close-knit family. She has been almost entirely educated here, has now spent more than half her life here and is fully integrated into society. She was a child at the date of the application and by the date of the First-tier Tribunal hearing was just over a month past her 18th birthday.

31. She is in the middle of a course which is said will give her access to training to become a nurse which is her ambition. She is not responsible for her parents' failure to comply with the terms of their leave to enter.

32. She is now almost 19 years of age and notwithstanding the claimed close-knit relationship with her parents, having been educated in the United Kingdom she should now be able to look after herself. Given her personal history and present circumstances I find she would face sufficient difficulties on return to Mauritius with her parents as to make the decision to refuse her further leave disproportionate to the State's need to maintain proper immigration control. The Respondent might consider limiting her leave to such time as she needs to finish the second year of the course she is now pursuing.

33. Taking account of the comments of Lady Hale in *Makhlouf v SSHD [2016] UKSC 59* that children (and the daughter was a child at the date of application and of the Respondent's decision), must be recognised as rights-holders in their own right and not just as adjuncts to other people's rights but that does not mean that their rights are inevitably a passport to another person's rights.

34. The consequence is that the appeals of the parents, the first two named Appellants, must fail and the appeal of the daughter succeed.

Anonymity

35. There was no request for an anonymity order and for the reasons given in my error of law decision, no order is made.

NOTICE OF DECISION

The appeals of the first two Appellants are dismissed on human rights grounds.

The appeal of the third named Appellant is allowed on human rights grounds.

Anonymity order not made

Signed/Official Crest   Date 11. v. 2017

Designated Judge Shaerf
A Deputy Judge of the Upper Tribunal

TO THE RESPONDENT: FEE AWARD

The appeals of the first two named Appellant have been dismissed so no fee award may be made in relation to them.
The appeal of the third named Appellant has been allowed and I have considered whether to make a fee award and have decided that having regard to the circumstances it is not appropriate to make a fee award.

Signed/Official Crest Date 11. v. 2017

Designated Judge Shaerf
A Deputy Judge of the Upper Tribunal