**Upper Tribunal**
**(Immigration and Asylum Chamber)**

Appeal Numbers: IA/31773/2015
IA/31776/2015
IA/31778/2015
IA/31781/2015

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
|---|---|
| **On 8th August 2017** | **On 10th August 2017** |

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE GRIMES**

**Between**

**MRS DOUMITTRA LUCKPUTTYA**
**MR KAYLASH LUCKPUTTYA**
**MASTER DHUNROY LUCKPATTYA**
**MS ESHWAREEROY LUCKPATTYA**
**(ANONYMITY DIRECTION NOT MADE)**

Appellants

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**
For the Appellants: Mr D Aihe, of Wisestep Immigration Specialists, London
For the Respondent: Mr P Nath, Home Office Presenting Officer

**DECISION AND REASONS**

1. The Appellants, nationals of Mauritius, appealed to the First-tier Tribunal against decisions of the Secretary of State dated 8th September 2015 to refuse their applications for leave to remain in the UK on the basis of their private and family life under Article 8 of the European Convention on Human Rights. First-tier Tribunal Judge Callow dismissed the appeals in a decision promulgated on 22nd November 2016. The Appellants appeal to this Tribunal with permission granted by First-tier Tribunal Judge Saffer on 29th June 2017.

2. The background to this appeal is that the second Appellant arrived in the UK on 20th January 2007 with a student visa valid until 24th May 2009. His wife and children, the first, third and fourth Appellants, arrived in the UK on 14th September 2007. When they entered the UK the third Appellant was aged 7 and the fourth Appellant was aged 8. They were all granted leave to remain until 25th August 2014 but their leave was curtailed on 13th August 2013 when the second Appellant's college lost its licence. The Appellants applied to vary their leave to remain but their applications were refused and their appeals dismissed by Immigration Judge Vaudin d'Imécourt in a decision promulgated on 31st March 2014. The Appellants applied for permission to appeal against Judge Vaudin d'Imécourt's decision but that application was refused. On 21st May 2014 the Appellants were deemed to have exhausted their rights of appeal.

3. On 17th March 2015 the first Appellant applied, with the other Appellants as her dependants, for leave to remain on private life grounds based on the fact that the children had by then lived continuously in the UK for over seven years and it would not be reasonable to require all of the Appellants to leave the UK.

**The decision of the First-tier Tribunal Judge**

4. Judge Callow noted at paragraph 7 that the children were, at the time of the appeal hearing, A level students who had established friendships in the UK and that the fourth Appellant is actively involved in the Chi combat system of martial arts. The Judge noted that the first Appellant was in full-time employment and the second Appellant was unemployed. The judge recorded that the first Appellant's relationship with her family in Mauritius was fractious and a dispute as to an inheritance was ongoing.

5. Judge Callow considered the guidelines in **Devaseelan [2002] UKAIT 00702** and noted that, apart from the fact that the children had now exceeded the seven year threshold of continuous residence in the UK, the facts in this appeal were not materially different from those before Judge Vaudin d'Imécourt [13]. The judge noted that the Appellants' claims, save for a family rift over an inheritance, are supported by essentially the same evidence as was before Judge Vaudin d'Imécourt. The judge therefore considered that all other issues had been settled by Judge Vaudin d'Imécourt's determination. The judge considered the provisions of paragraph 276ADE(1) (iv) and (vi). The judge considered the relevant case law and addressed the question as to whether it is reasonable to expect the children to leave the UK at

paragraphs 21 to 27. The judge noted that the children had been in the UK for just over seven years and that it was likely that they would suffer some interruption with the completion of their A levels but, based on their ability, there was no reason to differ from the assessment made by Judge Vaudin d'Imécourt that the children were exceptionally talented and doing extremely well at school. The judge noted that the best interests of the children would probably be served by them remaining in the UK but took into account the fact that the Appellants ignored Judge Vaudin d'Imécourt's decision, that the first Appellant worked without any right to do so and the children were educated at public expense. The judge took into account the evidence of potential educational disadvantage in Mauritius [23]. The judge took into account the fact that the family unit would remain intact as the family would be removed together. The judge also considered the parents' 'defiance' of immigration control [25]. He concluded that it would be reasonable to expect the children to live in Mauritius and therefore concluded that the children did not meet the requirements of 276ADE(1)(iv). The judge considered 276ADE(1)(vi) and concluded that it had not been established that there would be very significant obstacles to the family's integration in Mauritius [28]. The judge concluded that the Appellants' appeals failed under the Immigration Rules.

6. The judge went on to consider whether it was appropriate to assess the appeal under Article 8 and concluded that there were no good grounds not already fully addressed in the consideration under the Rules to show that residual Article 8 protection ought to be extended [32]. The judge considered that the Appellants' private lives had been addressed under the Rules where all relevant factors had been considered [33]. In the judge's view, the general public interest in maintaining a consistent and effective policy of immigration control was adverse to the Appellants in this appeal. The judge noted that no evidence of any weight beyond disruption to the education of the children had been given and it had not been shown that it would be unduly harsh to return to Mauritius or that there were any exceptional circumstances [36]. The judge noted that no good grounds for granting leave to remain outside the rules had been established.

**The grounds of appeal to the Upper Tribunal**

7. In the Grounds of Appeal the Appellants contend that the judge's decision is flawed, incorrect in law, unfair and unsustainable. It is contended that the Appellants did meet the requirements of the Immigration Rules unlike the situation before the First-tier Tribunal Judge Vaudin d'Imécourt. It is contended that the judge erred in fact by asserting that the children had only lived in the UK for seven years whereas in fact they had lived in the UK for nine years at the date of the hearing. It is contended that the Immigration Judge applied the wrong test under paragraph 276ADE in that he failed to examine the children's ties and commitments in the UK. It is contended that the judge failed to consider that their established ties and involvement in life in the UK meant that any requirement for the removal of the children was clearly unreasonable. The grounds argue that the judge failed to take proper account of the events and circumstances in the Appellants' home country which show that it is

clearly unreasonable and unsuitable for the children to return. It is contended that the judge failed to take account of the length of time the Appellants had lived in the UK and had failed to take into account that the elder child had nearly passed half of all her life in the UK which is also a qualifying category under paragraph 276ADE. It is argued that the judge erred in failing to consider the application under Article 8.

8. Permission to appeal was granted by First-tier Tribunal Judge Saffer on 29th June 2017 on the grounds that it is arguable that the judge materially erred in assessing the strength of the third and fourth Appellant's case by failing to consider the evidence as at the date of the hearing as by then there had been a one year and eight month gap between the date of the application and the hearing. It was considered arguable that the judge did not give adequate weight to the impact of the additional time spent in the UK.

**Error of Law**

**9.** At the hearing before me Mr Aihe made two main submissions. He submitted that the judge erred in his assessment of the appeal under 276ADE and in relation to his approach to Article 8.

**10.** In relation to the consideration under paragraph 276ADE Mr Aihe firstly contended that the judge relied heavily on the determination of Judge Vaudin d'Imécourt and failed to make his own assessment as to the position at the date of the hearing. I do not accept that submission. The judge set out the findings of Judge Vaudin d'Imécourt at paragraph 3 of the decision. These findings took account of factors such as the languages spoken by the family, the employment prospects for the parents in Mauritius, the education system in Mauritius, the martial art of Chi undertaken by the children, the family ties in Mauritius and the age and education of the children. Judge Callow set out the current circumstances at paragraph 7. The judge properly set out the principles established in the case of **Devaseelan** and other relevant case law at paragraph 11. At paragraph 13 the judge highlighted the main developments since Judge Vaudin d'Imécourt's decision**.** In my view it is clear that the judge took the correct approach to the decision of the previous judge in accordance with the guidelines in **Devaseelan**. It is clear that the judge treated the decision of Judge Vaudin d'Imécourt as an authoritative determination of the issues before him at that time and then took into account the additional factors including the passage of time, the fact that the children had by then exceeded the seven year threshold of residence in the UK and the Appellant's dispute with her family in Mauritius.

**11.** The judge went on to consider whether it is reasonable to expect the children to leave the UK in accordance with paragraph 276ADE(1)(iv) of the Immigration Rules. It is clear that the judge approached this issue afresh on the basis of Judge Vaudin d'Imécourt's findings and the up-to-date evidence and I find no error in the judge's approach to the decision of Judge Vaudin d'Imécourt.

12. Mr Aihe further argued that Judge Callow erred in his consideration of reasonableness under paragraph 276ADE (1)(iv) of the Rules. Paragraph 276ADE(1) sets out the requirements to be met by an applicant at the date of the application. The judge set out the relevant law and considered the issue of reasonableness at paragraphs 21 to 27. In this consideration the judge looked at the interruption the children would face in terms of the completion of their A levels in Mauritius. He took into account the fact that the parents would be removed with the children and that the family would be removed together. The judge also looked at the immigration history of the parents. The judge took into account the findings of Judge Vaudin d'Imécourt as well as the additional factors and concluded that it would be reasonable to expect the children to live in Mauritius. Whilst it is clear that the Appellants disagree with that decision in my view it is clear that the judge did consider all relevant factors in terms of consideration of paragraph 276ADE(1)(iv) and reached a conclusion, open to him on the evidence,that it is reasonable to expect the children to leave the UK.

13. The judge went on to consider 276ADE(1)(vi) and concluded that, based on the findings of Judge Vaudin d'Imécourt and the evidence before him, that it had not been established that there were very significant obstacles to the family's integration in Mauritius [28]. This finding is not challenged.

14. In terms of the findings under the Rules Mr Aihe did not point to any evidence not considered by the judge. I do not agree with that submission that the judge gave insufficient reasoning for his reasonableness assessment. He set out his reasoning at paragraphs 21 to 27 which contains reference to the previous judge's decision and the current situation. I am satisfied that the judge gave sufficient reasons for reaching his conclusions on the Rules which were open to him on the evidence before him.

15. Mr Aihe contended on behalf of the Appellants that the judge erred in his approach to Article 8. At paragraphs 30 to 37 the judge considered whether there were good grounds not already addressed in the consideration under the Rules to show that residual Article 8 protection ought to be extended.

16. Mr Aihe submitted that at the date of the hearing the older child was just 4 months short of qualifying under paragraph 276ADE(1)(v) which provides for a grant of leave to remain where an applicant is aged between 18 and 25 and has spent at least half of his life living continuously in the UK. However it is not clear that this submission was put to the judge. I did not have the Appellants' bundle produced in the First-tier Tribunal before me. Although he had an index for the bundle, Mr Aihe did not have the bundle itself, so he could not point to anything before the judge in relation to this submission. He did not produce any skeleton argument submitted in the First-tier Tribunal nor did he produce any witness statement or other evidence to support his claim that at the time of the hearing the third Appellant was four months short of qualifying under 276ADE(1)(v).

17. In any event, even if it were the case and even if it had been drawn to the attention of the judge, this issue would not have been given weight in the proportionality assessment. Firstly, as pointed out above, the requirements of paragraph 276ADE must be met at the date of application and there is no suggestion that they were in this case. Further, even if the children were close to meeting the requirements of paragraph 276ADE (1)(v) a 'near miss' is not a weighty factor in assessing proportionality. It is not clear how, if put to the judge, this argument would have influenced the outcome of an Article 8 assessment.

18. Turning to the judge's assessment of Article 8 at paragraphs 30 to 37 he considered the issues and concluded that there were no additional factors or good grounds for granting leave to remain outside the Rules. This could indicate that the judge failed to undertake a complete assessment in accordance with the guidance in **Razgar [2004] UKHL 27** taking account of the current circumstances. However on reading this section of the decision as a whole it is sufficiently clear that this is what the judge did do. The judge noted at paragraph 32 that the reasonableness assessment he had already undertaken required a similar approach to that required in the proportionality exercise. The judge therefore considered that he had already addressed the relevant factors in his consideration of the reasonableness question under 276ADE. The judge noted at paragraph 33 that there was no gap between the factors considered under 276ADE and a freestanding Article 8 assessment and that no submissions establishing a gap had been advanced by Mr Aihe in the First-tier Tribunal. The judge took into account the public interest and noted that no compelling circumstances had been identified for the grant of leave outside the Rules [35] and no evidence of any weight beyond disruption to the education of the children had been given that it would be unduly harsh to return to Mauritius or that there had been any exceptional circumstances [36]. The judge assessed further factors at paragraph 37.

19. Mr Aihe complained that at this stage the judge should have considered the fact that the children had at the date of the hearing lived in the UK for nine years. However it is clear from reading the decision as a whole that the judge was aware of the children's length of residence. The judge made reference to the fact that the children had been resident in the UK for seven and a half years at the time of their application [5]. He set out the current circumstances at paragraph 7 noting that the children were, at the time of the hearing, studying for A levels. He was aware of the potential disruption to the children's education [21, 36]. In my view the judge was aware of the further passage of time since the application for leave to remain and it is clear reading the decision as a whole that this was a factor which he did not consider sufficient to outweigh the other factors already considered which were relevant to the assessment under Article 8 in the particular circumstances of this case.

20. The assessment carried out by the judge in relation to free standing Article 8 was to some extent circular in that, in deciding whether there were any other factors to be considered in an assessment outside the Rules, he considered all relevant factors before concluding that there were no good grounds for granting leave to remain

outside the Rules. However in my view this was sufficient to show that the judge had engaged with the wider Article 8 issues and reached a conclusion, open to him on the evidence, that there was nothing significant which would outweigh the weight given to the Rules. Although I did not have the Appellants' bundle before the First-tier Tribunal before me nor it appeared did Mr Aihe, he did not seek an adjournment in order to obtain that bundle and he did not point to any specific evidence addressing current circumstances before the judge which he had failed to take into account.

21. I accept Mr Nath's submission that in this case the judge had already considered the position of the Appellants under the Rules as qualifying children, therefore apart from further advancement of time there was nothing further that the judge could have considered in a freestanding Article 8 assessment. Apart from the additional passage of time between the application and the hearing in the First-tier Tribunal, it is not at all clear from Mr Aihe's submissions what additional factors could have led the judge to a different conclusion in relation to the Article 8 assessment. Mr Aihe was unable to point to any specific evidence in relation to the current circumstances at the date of the hearing which was not considered by the First-tier Tribunal Judge.

22. At the end of the hearing I indicated that I did not accept that there was an error of law in the First-tier Tribunal's decision. After the conclusion of the hearing Mr Aihe requested an opportunity to address the Tribunal again in relation to a fundamental matter. When he returned to court Mr Aihe complained that, when he had been making submissions in relation to paragraph 276ADE (1) (v), Mr Nath had interrupted his submissions to object that the issue had not been raised in the grounds and that I had agreed with Mr Nath. Mr Aihe complained that he had felt intimidated and had been unable to follow through his point in relation to the children being four months short of meeting the requirements of 276ADE(1)(v). He pointed to paragraph 8 of the grounds which he said did in fact raise this issue. However I explained that my concern in relation to this issue was not so much whether it had been raised in the grounds but whether it had been raised before the First-tier Tribunal Judge.

23. I gave Mr Aihe the opportunity to make any submissions which he felt he had been denied the opportunity to raise at an earlier stage. Mr Aihe reiterated his submission that the judge failed to take into account the fact that, at the time of the hearing, the third Appellant was four months short of meeting the requirements of paragraph 276ADE(1)(v). I reminded Mr Aihe that he had made this point during his submissions and that I had noted it and taken it into account. When asked, Mr Aihe was unable to make any further points which he claimed to have been prevented from making at an earlier stage. I remained of the view that it was not clear whether or how this point was put to the judge. In any event I remain of the view that, even had the judge taken this into consideration, a near-miss in relation to the Immigration Rules is not capable of resolving the proportionality assessment in favour of the Appellants.

24. In conclusion, I am satisfied that Judge Callow properly applied the principles in the case of **Devaseelan** in his approach to the decision of Judge Vaudin d'Imécourt. The judge reached conclusions open to him on the evidence in relation to paragraph 276ADE(1)(iv) concerning the reasonableness of expecting the children to leave the UK. The judge reached conclusions open to him on the evidence that there are no insurmountable obstacles to the family's reintegration in Mauritius under paragraph 276ADE (1)(vi). I find that the judge's approach to his assessment under Article 8 was adequate and his conclusions were open to him on the basis of the evidence before him.

**Notice of Decision**

**25.** The decision of the First-tier Tribunal Judge does not contain an error of law.

**26.** The decision of the First-tier Tribunal shall stand.

**27.** No anonymity direction is made.

Signed Date: 9th August 2017

Deputy Upper Tribunal Judge Grimes

**To the Respondent**
**Fee Award**

As the appeals are dismissed there can be no fee award.

Signed Date: 9th August 2017

Deputy Upper Tribunal Judge Grimes