



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/04734/2016
HU/04736/2016
HU/04738/2016

THE IMMIGRATION ACTS

Heard at Field House
On 23 July 2018

Decision & Reasons Promulgated
On 01 August 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE MCGEACHY

Between

HITESH [P]
PRIYANKABEN [P]
[R P]
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr G Lee, of Counsel instructed by Messrs Wilson Barca LLP
For the Respondent: Ms A Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellants appeal, with permission, against a decision of Judge of the First-tier Tribunal Walters who, in a determination promulgated on 19 April 2017, dismissed the appellants' appeals against the refusal of an application for leave to remain on human rights grounds.
2. The first appellant, the father, was issued with a visit visa on 6 January 2005 valid until 6 July 2005. He asserts that he entered Britain in January 2005 but has given no evidence that his entry was legal. He was encountered in 2012 and arrested for working illegally. The second appellant asserts that she entered Britain in September 2007 but has provided no evidence of lawful entry. They stated that neither of them have been married before, merely saying that they went through a religious ceremony in Britain. The respondent noted, however, that in his visit Visa Application Form the first appellant had said that he was married to someone other than the second appellant. Similarly, the Visa Application Form submitted by the second appellant showed that she was married to someone other than the first appellant and her sponsor in Britain was a third man.
3. The third appellant was born in 2008 in Britain. It was asserted that since starting nursery school he has only spoken English and could only understand a little Gujarati although that language is the first language of both the first and second appellant - they gave evidence through an interpreter at appeal.
4. The judge noted the background of the appellants' immigration history and that in the letter of refusal the respondent had pointed out that the first and second appellants failed to meet the suitability requirements of paragraph R-LTRP.1.1.(d)(i) with reference to paragraphs S-LTR.1.6 and 2.2.(b) of the Immigration Rules and that the respondent contended that false information given or false representations or documents had been submitted in relation to the visa application forms. He concluded that the names of the first and second appellants' respective spouses had been falsified in their Visa Application Forms. He noted moreover that the respondent contended that there would not be very significant obstacles to their reintegration into India. He noted that both were obviously still fluent in their native tongue and, noting that they had demonstrated their ability to gain employment in Britain, albeit unlawfully, concluded that they would have a similar ability to gain employment in India. He noted that the first appellant said that he had developed many close ties in Britain and that he developed close relationships and he and his family had also been supported in Britain. However, there was no evidence produced of the persons with whom he had close ties. It appeared that the first appellant's mother lived in India. He noted and that Newham University Hospital had charged the second appellant for the birth of the third appellant although there was only a receipt for a proportion of the £2,180 charged.

5. The judge made the finding that it was probable that Gujarati was spoken in the home and that it was understood by the third appellant. He also noted that the third appellant was doing well in all subjects in his curriculum. He said that he found that returning to India would be disruptive to the education and private life of the third appellant. However, he found that there was evidence that the third appellant appeared to be extremely adaptable and intelligent and concluded that with the help of his parents he would be able to adjust to life in India.
6. The judge considered Section 55 of the Borders, Citizenship and Immigration Act 2009 and noted his duty to have regard to the best interests of the third appellant as a primary consideration. He found that the third appellant's best interests would be to remain with his parents in any country in which they might lawfully reside but that did not include Britain. He also found that it was in the best interests of the third appellant to be brought up in a country where his parents could lawfully work. He pointed out that that again could not be in Britain where his parents were reduced to doing odd jobs and working for "cash in hand".
7. The judge stated that when considering proportionality he should apply the provisions of Section 117A-D of the Nationality, Immigration and Asylum Act 2002. He found that the first two appellants could not meet the requirements of Section 117B(3) and placed weight on the terms of sub-Section (5). When considering the position of Section 117B(6) he stated that he had no doubt that the first and second appellants have a genuine and subsisting parental relationship with the third appellant whom he said was a qualifying child as he had been born in Britain and was aged 8 at the date of hearing. However, he found that it would be reasonable to expect the third appellant to leave the United Kingdom with his parents. He therefore found that the interference in the private and family lives of all three appellants was proportionate in the context of the public interest in immigration control.
8. The grounds of appeal referred to the judgement of the European Court of Human Rights in **Uner October 2006 application 46410/99** and the determination of the Tribunal in **EA (Article 8 - best interests of child) Nigeria [2011] UKUT 315 (IAC)** which referred to the increasing importance to be placed on the child's private life as the child gets older. They also referred to the judgment in **EV (Philippines) [2014] EWCA Civ 874** and the requirement in determining whether or not the need for immigration control outweighs the best interests of children.
9. It was asserted that the judge had erred in his consideration of proportionality in that while it was accepted that the residence of the applicants had been precarious the judge had not applied the terms of the judgment in **MA (Pakistan) [2016] EWCA Civ 702** which states when a child has lived in Britain for more than seven years there needs to be good cogent reasons for removal. It was asserted that the judge should have found that there were compelling circumstances militating against removal.

10. Permission was granted by Upper Tribunal Judge McWilliam who stated it was arguable that the decision under Section 117B(6) of the 2002 Act was inadequately reasoned.
11. At the hearing of the appeal before me Mr Lee first referred to the possible allegation of illegal entry which the judge had dealt with at paragraphs 14 and 17 of the determination arguing that the judge appeared to find that the first appellant had not proved that he had entered lawfully. He argued that that showed a reversal of the burden of proof. He also relied on the ratio of the judgment in **MA (Pakistan) & Others [2016] EWCA Civ 705**. and, in particular, to paragraph 49 where Elias LJ states:

“...The fact that a child has been in the UK for seven years would need to be given significant weight in the proportionality exercise for two related reasons: first, because of its relevance to determine the nature and strength of the child’s best interests; and second, because it establishes as a starting point that leave 2
12. Mr Lee also claimed that the facts in this case were similar to the facts in the decision of the Tribunal in **MT & ET (child’s best interests; extempore pilot) Nigeria [2018] UKUT 00088 (IAC)** where minor appellant, who had come to Britain at the age of 4, was by the date of decision of the Tribunal approximately 10 years old. That determination indicated that notwithstanding a poor immigration history by the child’s mother, the child was a qualifying child and it would not be reasonable to expect her to leave the country.
13. In reply Ms Everett accepted that, when considering the allegation that the first appellant was an illegal entrant, there had been a reversal of the burden of proof but stated that that was an issue of form rather than content. She suggested that that was merely a comment made in passing. She argued moreover, that the judge had looked at all relevant matters including the fact that the first two appellants had worked unlawfully and had entered unlawfully. He had taken into account all relevant evidence. There was nothing to indicate that the welfare of the third appellant would be harmed by his having to return to India with his parents.
14. I asked both representatives whether or not, should I find an error of law in the determination of the Immigration Judge I should remake the decision. Mr Lee referred to the passage of time as changing the situation of the appellants.

Discussion

15. The judge, when finding that the first appellant was an illegal entrant did not state in terms that he considered that the respondent had discharged the burden of proof upon her, but the reality is that the judge did not then state that that was the basis for his decision to dismiss the appeal. I do not consider that that is a material error.

16. The reality is that he had evidence before him which was not refuted and could have been denied by the appellants: they did nothing to explain the fact that they had claimed in their Visa Application Forms that they were married to other people. The Visa Application Forms are in the bundle and there is therefore a clear contradiction between the claim now made by the appellants that they have not been divorced but they are married to each other. I consider therefore that the judge would be entitled to find that the appellants had not told the truth on their application forms when applying for visit visas. That is a relevant factor when dealing with the issue of proportionality in this case.
17. The judge properly considered the range of factors set out in Section 117B. He was entitled to note that the first two appellants speak Gujarati and appeared to have little English and that they are not self-sufficient. Moreover, their private life in Britain has been built up when their immigration has always been precarious. He was entitled to conclude that the removal of the first two appellants would be entirely appropriate.
18. With regard to the third appellant, the judge did properly consider his circumstances. The findings he made were fully open to him. He was clearly correct to note that the child was doing well at school but also that the child spoke Gujarati. He was also entitled to place weight on the fact that the child would be returning to India with his parents. He found that it was reasonable to expect this child, who had been living in Britain for more than seven years to return to Pakistan. While I note that under the provisions of paragraph 276ADE the "seven year provision" only arise when a child has lived in Britain for seven years up to the date of application and in this case the relevant seven year period is the period from date of birth - 9 October 2008 until the date of application - 27 July 2015 and therefore the child had not lived in Britain for the relevant seven years period under the rules, the position is different under the provisions of Section 117B(6) where the relevant date is the date of hearing. It is clear that the judge was fully aware of this.
19. Whilst I note the terms of the determination in **MT & ET** the reality is that that is not binding on me on the facts and, indeed, it is not clear from that decision where the child's father was. I do not consider that, on the facts of this case that that decision assists me. I note the judgment of Christopher Clarke LJ in **EV (Philippines)** at paragraph 37 where, when considering the terms of Section 117 B (6) he said:

"In the balance on the other side there falls to be taken into account the strong weight to be given to the need to maintain immigration control in pursuit of the economic well-being of the country and the fact that, *ex hypothesi*, the applicants have no entitlement to remain. The immigration history of the parents may also be relevant e.g. if they are overstayers, or have acted deceitfully."

That conclusions is endorsed in the judgment in **MA** (Pakistan) where, at paragraph 49, Elias LJ emphasises that where a child has lived in Britain for 7 years significant weight must be given to the length of time the child has been in Britain because that impacts on the issue of the child's best interests and that that is a starting point when considering whether or not leave should be granted, unless there are powerful reasons to the contrary.

20. The reality is that in considering the best interests of the child whether or not it is reasonable under the terms of Section 117B(6) for the child to be expected to return to India with his parents it is necessary to take into account a range of factors. This is what the judge did. He took into account the fact that the child was progressing at school and that he had been born here. He also took into account that the child spoke Gujarati and that he would be going to India with his parents. He was clearly aware of the fact that the child had lived in Britain and for over 7 years. However, he was fully entitled to take into account the fact that the child's parents had used deception as is evident from the documentary evidence when applying for visas but that even if that fact is ignored they have lived in Britain without authority, worked without authority and have no basis of stay here and can reintegrate into India. These are very strong factors indeed and I consider that they show powerful reasons why this appeal should be dismissed. I therefore find that there is no material error of law in the determination of the First-tier judge.
21. I would add that even if I were incorrect in that conclusion and that the judge's lack of analysis was such that his determination could not stand, on the findings that he made which have not been challenged I could only conclude, following the terms of the judgment in **EV (Philippines)** that for the same reasons it would be appropriate to expect this child to return to India with his parents.
22. I have not considered it appropriate to consider adjourning the appeal for a further hearing – Mr Lee referred to the effluxion of time, but the facts today are not such that that, in itself would lead to the appeal being granted. The reality, of course, is that the child will shortly have been in Britain for ten years and a further application may well be made at that stage.

Notice of Decision

The appeal is dismissed.

No anonymity direction is made.

Signed



Date: 25 July 2018

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Deputy Upper Tribunal Judge McGeachy