Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/10034/2017
HU/10037/2017
HU/10041/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 25 October 2018	**On 22 November 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE JORDAN

Between

RITESH [P]
ARPITABEN [P]
D
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr S A Canter, Counsel instructed by Richmond Chambers LLP
For the Respondent: Mr L Tarlow, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal made by the parents of a child whom I shall refer to as D against the determination of First-tier Tribunal Judge Widdup following a hearing that took place on 6 December 2017 and whose determination was promulgated on 18 December 2017.

2. I refer to D as being the principal actor in this case because she is a child who was born on 19 November 2009. She was aged 8 at the date of hearing on 6 December 201, and is aged 8 still, although will shortly be aged 9. She was born in the United Kingdom. However, her parents are citizens of India and their effective leave was curtailed in April 2011. Had the family left in 2011, D would necessarily have left with them and would have then been 15 months old.

3. The case was first determined by First-tier Tribunal Judge Troup who made a decision on 1 December 2014. It was a decision which was similar to the decision that was made by the judge in the appeal before me. Judge Troup determined that the interests of D did not outweigh the public interest in removing her. At that stage I can properly say, how could those interests have outweighed the public interest in removing her? D was then just 5 years old. She had been at school since I think May 2012. Inevitably Judge Troup took into account that, during the first four years of her life or so at least, her world was centred upon her parents' domestic life, albeit not exclusively because of the interactions that she had with other children at her nursery school. Consequently, when the same application was made and heard by the judge in December 2017 he properly used as his starting point what had been found by Judge Troup and which was not appealed and which could not reasonably have been appealed. Judge Widdup was clearly focussing on the fact that time had passed and circumstances had changed in the intervening three years since the matter last came before the Tribunal.

4. In his determination the judge set out the immigration history. He referred to the evidence that had been provided by the parents. The father had given evidence. He said that, whilst his leave had expired in April 2011, he had been running a business and had no other means of support. His daughter was then at a state school. Formerly, she had been in a private school which had cost between £8,000 and £9,000 per annum. He expressed the view that there were no good schools in India and she would have to go to a city. He had said that they would find it very hard to establish themselves in India. They had no connections there. It is true he accepted that his parents live in India but there is no other family there. He was asked about the business that he ran. He does delivery work to courier companies. He has got five vans and his drivers are all self-employed. The business was set up in 2012 at a time of course when he had no leave to remain. I accept, as the judge appears to have accepted, that the business was doing well. It was put to him why he could not use that same resourcefulness in India. He responded that he had lost his contacts and he would find it very hard. However, the judge noted that he had a chemistry degree and was clearly a man of some education. He talked about his parents living in Gujarat in a small town and the fact that, although there is a private school, the nearest city is some 60 kilometres away. D's father reiterated that he would lose his future and that he had nothing to go back to.

5. D's mother also gave evidence relying upon her witness statement. There was an issue as to whether or not the family spoke Gujarati in the home. D's mother is a bookkeeper in her husband's business. In India she had worked as a laboratory

assistant. Necessarily, she was asked whether she could work in India. She said that, when she worked, she was paid just a very small amount of money. She had no experience in the Indian workplace and did not know if her credentials would get her a job. She herself explained that she had a degree in food and nutrition but she could not, she said, use that qualification to get her a job in India. She said that the family speak English at home and they do not use Gujarati because their daughter did not understand it. However, that was contrasted with what Judge Troup had found in 2014 where he said at paragraph 44 that D had been brought up in a household in which Gujarati was the first language and she could understand it, although she could only speak a few words of it. As a result of that, the mother was recalled by her Counsel and gave evidence with reference to the language ability of the daughter D.

6. It is clear that the most significant factor in the mind of the judge was that the circumstances had principally changed in that the daughter had lived in the UK for more than seven years. This of course is a reference to the factors that have to be taken into account in paragraph 276ADE(1) and also s. 117B of the 2002 Act; in particular, sub-s. (6). So it was clear that the judge had been referred to the most significant legal factors that he was required to take into account. He was of course dealing with a human rights appeal and was concerned with the interaction that exists between proportionality (in relation to which he was required to strike a balance) and the overlap of the statutory provisions to which I have earlier referred. That is clear from paragraphs 40 and 41 of his determination.

7. It is also clear from paragraph 42 of the determination that the judge correctly advised himself that the daughter's interests were a primary consideration but added that they were not determinative, as indeed is the legal position. The judge then went on to consider the daughter's best interests and did so by reference to the evidence of an independent social worker, Mr Musendo. Mr Musendo's report was considered at some length and no specific criticism was made of the judge's approach to it, encapsulated in paragraph 50 of his determination in which he decided that only limited weight could be attached to it. It was obviously a matter to which weight had to be attached and it was a matter for the judge to determine *what* weight should be attached to it.

8. But when considering the evidence of the parents the judge in paragraph 43 approached his task by finding that the evidence of the parents had to assessed with a considerable degree of caution. He sets out his reasons why he needed to do so and then spoke about the deficiencies in the evidence. It is submitted that the deficiencies were such that the judge should have required an adjournment. I note that the appellant was represented by solicitors, Malik Law, and that firm was the subject of an intervention by the Solicitors Regulation Authority which resulted in their being forced to close down on 18 April 2018. That was of course some three or so months after the hearing before the judge, but importantly I note that the appellant was represented by Ms Heybroek of Counsel of whom I have some experience and who is an experienced practitioner in these matters. No application

was made by her for an adjournment, no refusal was made, and the material that was before the Tribunal was material which included an expert report. It also included a report from Gower House, thereby acknowledging that there should be some evidence from her school but there was no evidence from the school which the daughter was currently attending. Justifiably the judge considered this was something that should have been available if it was to be suggested that the child would be harmed, that the interference would be such that she should not reasonably be required to leave her schooling in the United Kingdom.

9. I therefore reject the suggestion made on behalf of the appellant by Mr Canter that this was a case where it was so obvious that the evidence was lacking that the judge should have adjourned the matter of his own motion and required better evidence. There was evidence from the school, there was evidence from the parents, there was evidence from a privately paid social worker in the form of Mr Musendo's report. It cannot therefore be said that it was a *Wednesbury* unreasonable decision to refuse to adjourn the matter of his own motion.

10. When one therefore looks at the criticisms which are made in relation to the evidence the judge rightly points out that, for example, there was no evidence from friends or from a teacher; that was factually correct. As there was no such evidence, the judge was factually correct in referring to the paucity of evidence. Thus, in paragraph 45 for example, he referred to the fact that there was no evidence from anyone outside the family. The only evidence from the daughter's school consists of two reports and a series of certificates. That, too, was factually correct. Ms Heybroek, it was said, did not refer to them in her submissions but cannot be criticised for not doing so. Accordingly, in paragraph 46, the failure to produce evidence relating to the daughter's friends and education in London and in relation to their home area in India and other matters entitled him to draw an adverse inference from the fact there was no evidence that would support the family's case that it would be unreasonable, unlawful and disproportionate to remove the child at the age of 8. Paragraph 46 therefore is accepted as being factually correct.

11. The judge then went on to deal with the inconsistencies in the mother's evidence. This is dealt with at paragraphs 47 to 49. The material before the judge is referred to in paragraphs 58 and 59: the report from Gower House School of July 2016. It stated, as one would hope to see, that D had worked hard and produced excellent work. The judge accepted that Mr Musendo quoted from the daughter's year 3 report and found that those reports were impressive, although he would have preferred to have seen the reports themselves. It is clear that he took into account the fact that the child was doing well at school, as one would expect in relation to a child who has spent some two years or more in the United Kingdom's education system, in addition to the period of time spent at nursery school.

12. The judge then referred to the decision in *MA* and considered whether or not the stage at which D had reached in her education was a stage which could properly be called critical. He said in paragraph 67 that she is not at a critical stage; she was not,

for example, about to take examinations; she was at an age when her education could resume elsewhere; she appears to be intelligent enough to adapt as one would expect her to be able to adapt to a new educational system, were she to be required to move, as many children *do* move as the requirements of their parents' work commitments require them to travel from one place to another. It cannot therefore be said that, as a general rule, a child cannot be expected to leave the school at which she is settled.

13. The judge then went on to say that he was satisfied that the child was familiar with Gujarati cultural norms. There may be some linguistic difficulties but the daughter had some knowledge of Gujarati; there were no health issues and D was not a British citizen. The judge repeated that he had taken into account the public interest provisions of the 2014 Act, that is of course a reference to the insertion of Part 5A into the 2002 Act, and found that D's parents were both well qualified and intelligent. Although criticism is made as the judge's reliance upon the child's immigration situation being precarious, I am satisfied that paragraph 73 of the determination is a reference to the parents' immigration status being precarious, as indeed it was and has been since April 2011 when the father's work permit was curtailed.

14. Finally, the judge concluded in paragraph 74, and I quote:

> "Each case involving the best interests of a child is highly fact sensitive and dependent on the evidence presented and the findings of fact made. The evidential omissions in this case are substantial and have been caused by the failure of the parents to present the Tribunal with a full and informed picture of the daughter's present circumstances and of her likely future in India".

15. Mr Tarlow submits that that is a proper proportionality assessment and in my judgment what the judge was saying was that the parents' evidence about some important and significant elements of their case was lacking in frankness and that he was not prepared to accept the entirety of their evidence as to the difficulties they would face in India were they to be returned there with their child. However, paragraph 75 makes it crystal clear that the judge was attaching significant weight to the fact that the child had been in the United Kingdom for a further three years since First-tier Tribunal Judge Troup decided on 1 December 2014 that it was not unlawful to remove her. The judge encapsulated the changes that had been made by saying:

> "Taking all the evidence in the round, I find that the other factors, and particularly the family connections in India, the daughter's Indian citizenship and the familiarity with cultural norms, her age and the fact that her education is not at a critical stage, do amount to strong reasons for saying that, notwithstanding the significant weight to be attached to the seven years plus that she has spent in the United Kingdom".

For those reasons he concluded it not be unreasonable to expect her to leave the United Kingdom.

16. The criticism that is made by Mr Canter is that the judge has stymied himself, to use his expression, by reaching a conclusion that there was no substantial evidence about her best interests and that meant that the judge was forced to adjourn the matter to

find that additional evidence. I do not consider that the judge stymied himself. The judge had to deal with the material that was before him. That included school reports albeit school reports out of date; it included the evidence of the parents which was critically examined by the judge; it also included the report of Mr Musendo which was also critically examined by the judge and to which he attached an appropriate degree of weight but not a determinative amount of weight. In those circumstances I do not find that the judge was either under an obligation to adjourn the matter nor did he stymie himself in the way that is suggested by his commenting upon the paucity of evidence upon which he had to make his decision that the best interests of the child outweighed the fact that the parents were able to make a life for themselves and their daughter were they to be returned to India. It is said that there was not a best interests assessment nor was there a proper proportionality assessment but that is simply incorrect. The judge considered all of the material that was before him, material that went both to the position as far as the child was concerned as well as the matters which were acting in favour of the family's removal, namely that the parents were well able to make a home for their daughter and themselves on return to India.

17. Finally, I should properly refer to the case of *MT and ET (child's best interests; ex tempore pilot) Nigeria* [2018] UKUT 00088 (IAC). This was a decision made by the President, Lane J, and Upper Tribunal Judge Lindsley. It records in many respects the obvious that there had to be powerful reasons to remove a child who had spent seven years where the child had reached a stage in her development where there would be significant interference, (I would describe it as harm) , if the child were removed to a different country. However, the gravamen of the decision is that a very young child who has not started school or who has only recently done so will have difficulty in establishing that her Article 8 private and family life has a material element which lies outside her need to live with her parent or parents wherever they may be. Necessarily that situation changes over time, as the judge was well aware of when comparing Judge Troup's decision with the one that he had to make, with the result that an assessment of the best interests of a child must change as a child develops. In the case before the presidential panel in *MT and ET* one of the relevant children, was a child who was commencing GCSE examinations, had been in the United Kingdom for ten years. Accordingly, the seven years that was the material consideration in her case fell at a very different stage in her development than it does in the present case. The focus necessarily was then upon the fact-sensitive assessment that has to be made in these cases. There can be no blanket consideration that seven years is sufficient to outweigh any public interest. Each case is fact-sensitive and, indeed, as Mr Canter suggested, no 8-year-old is going to be the same. I entirely agree with that. That is, if I may say so, the beauty of an asylum and immigration system which does not look at generalities but looks at the individual circumstances of a case and in particular the specific evidence that is placed before the judge upon which he makes his assessment. That is exactly what First-tier Tribunal Judge Widdup did in the determination that is under examination this morning. I am quite satisfied that the judge reached not only a sustainable decision but a decision from which no other judge could reasonably have differed on the

material that was before him. In such circumstances I do not find that there was a material error of law.

DECISION

18. Accordingly, I dismiss the appellants' appeal and direct that the determination of the First-tier Tribunal shall stand.

No anonymity direction is made.

ANDREW JORDAN
DEPUTY JUDGE OF THE UPPER TRIBUNAL