



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/21958/2016
HU/21961/2016
HU/21952/2016

THE IMMIGRATION ACTS

Heard at Field House
On 18th July 2018

Decision and Reasons Promulgated
On 09th August 2018

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

N B S, SPS and ASS
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms S Mansal, instructed by MT UK Solicitors.
For the Respondent: Ms N Willocks-Briscoe, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant seeks to challenge the determination of First Tier Tribunal Judge Pears, promulgated on 21st April 2018 and which refused the appellant's appeal against the refusal of her human rights claim outside the Immigration Rules and under Article 8 of the European Convention on Human Rights.
2. The judge, having heard the appeal on 12th April 2018, made initial observations and recorded the history as follows:

- (i) The two lead appellants, Indian nationals, are husband and wife aged 31 and 30 years and they entered the United Kingdom in 2009 on student and student dependent visas valid until 2011.
 - (ii) Their son the third appellant was born on 14 November 2011 and was five years old
 - (iii) the Secretary of State's refusal letter dealt with the application on the basis of family life under the Appendix FM and paragraph 276 ADE (1)(iii), (iv) and(vi) of the Immigration Rules (as amended). It was not accepted that there would be very significant obstacles to the family's integration in India because of their ages when they left India and their connections with it. The child was not a 'qualifying child' as he was only 5 years old. The child was very young and could adapt. The family could keep in contact with their friends in the United Kingdom by 'modern means'. The judge records that there was no challenge to that aspect of the decision by counsel representing the appellants.
 - (iv) The judge noted that the refusal letter considered the application under exceptional circumstances, addressed the medical condition of the third appellant and his medical treatment since birth. Doctor Muller's opinion was that there was no indication he could not fly short or long distances and that there was a functioning healthcare system in India and whilst acknowledging that it may not be of the same standard as UK, there was no evidence that he would be any worse off than any other national of India.
 - (v) The judge noted that the basis of the appeal was that the third appellant had complex medical conditions and that he would have the added problem of climate change causing skin rashes and the social stigma of having a disability should he return to India
 - (vi) the immigration status of the first two appellants was precarious
3. Permission to appeal was granted by first-tier Tribunal Judge Canavan on the following grounds
- (i) the judge arguably failed to make findings on where the best interests of the child lay and the conduct an evaluative assessment of whether the child's interests were outweighed by public policy considerations.
 - (ii) the judge focussed on treatment in India and arguably failed to make findings on the additional issues of discrimination and stigma which were relevant to the best interests of the child.

The Hearing

4. At the hearing, Ms Kansal argued that the judge placed too much reliance on the fact there was no evidence of lack of treatment in India. The case was pursued on the basis that it involved a child aged five years with significant health difficulties including cerebral palsy, neurodevelopmental problems affecting his muscular skeletal system and cognitive functioning, severe gastrointestinal complications of being premature and breathing/respiratory difficulties.

5. She submitted that the judge placed too much reliance on **EV Philippines [2014] EWCA 874** and failed to distinguish that child in **EV Philippines** had no medical problems, which was not the case in this instance, and, emphasised the child's claim that it was in his best interests to remain in the United Kingdom. The judge failed to put the child's best interest as the primary consideration and had the judge applied the relevant law to the best interests of the child, the outcome would be that the child's best interests, owing to his medical condition, would be found to be met by staying in the United Kingdom. The judge highlighted the law at paragraph 9 but simply did not apply it.
6. The judge placed undue reliance on the case of **GS (India) and others [2015] EWCA Civ 40** and did not consider that that case did not involve a child. This was a separate line of authority and should not have been considered in this case and reliance should not have been placed on it. The judge did not identify, when applying section 117B, that the parents had always been here with leave to remain and the child's life was conceived at a time when they had lawful leave to remain and this was not weighed into the balance.
7. The judge failed to consider the child was making progress with his numerous health problems because he had consistent and regular healthcare, which would not be available in India, removal to which would exacerbate his health difficulties. The guidance in Every Child Matters 2009, emphasised safeguarding and promoting the welfare of children including preventing of impairment of children's health development. As the judge pointed out the Secretary of State had failed to consider Section 55 at all.
8. The judge failed to consider the social stigma point and take this into the balancing exercise.
9. The judge did not direct himself properly in law and failed to consider **MA (Pakistan) [2016] EWCA 705**. The best interests of the child went integral part of the proportionality assessment under article 8. The judge failed to apply the principles as set out in **Zoumbas v SSHD [2013] UKSC 74**.
10. By contrast Ms Willocks-Briscoe argued that the judge had indeed considered the best interests of the child, addressed the relevant facts and made adequate findings. The judge had also engaged with the point made regarding social stigma and discrimination but the evidence on that was sparse.

Conclusions

11. The principles set out in **Zoumbas** are as follows:
 - (1) The best interests of a child are an integral part of the proportionality assessment under article 8 ECHR;
 - (2) In making that assessment, the best interests of a child must be a primary consideration, although not always the only primary

consideration; and the child's best interests do not of themselves have the status of the paramount consideration;

(3) Although the best interests of a child can be outweighed by the cumulative effect of other considerations, no other consideration can be treated as inherently more significant;

(4) While different judges might approach the question of the best interests of a child in different ways, it is important to ask oneself the right questions in an orderly manner in order to avoid the risk that the best interests of a child might be undervalued when other important considerations were in play;

(5) It is important to have a clear idea of a child's circumstances and of what is in a child's best interests before one asks oneself whether those interests are outweighed by the force of other considerations;

(6) To that end there is no substitute for a careful examination of all relevant factors when the interests of a child are involved in an article 8 assessment; and

(7) A child must not be blamed for matters for which he or she is not responsible, such as the conduct of a parent.

12. The judge referred to a range of case law relevant to his consideration and this included ZH (Tanzania) [2011] UKSC 4, Zoumbas and MA (Pakistan) and on a reading of the decision overall, applied those authorities. Indeed, the judge set out the key elements at paragraph [9] of his decision of Zoumbas and recorded that in EV (Philippines), it would be inappropriate to treat the child as having precarious status merely because that was true of the parents. This did not reflect a slavish nor inappropriate application of EV (Philippines). The judge proceeded at paragraph 11 to extract the principle from Azimi-Moayed [2013] UKUT 00197, that it is the seven years from the age of four which is likely to be more significant to a child than the first seven years life. This child was only three years old when the application was made.
13. The judge also found about the status of the first and second appellant was precarious, which would afford their private life little weight in the article 8 analysis but that this was not a factor in considering the position of the third appellant [14].
14. I do not accept the proposition that it was not open to the judge to consider GS India when considering the health issues bearing in mind that the law relating to health issues was comprehensively considered in that case, and where it was noted that life preserving treatment cannot be relied on as a factor engaging article 8; the receipt of treatment here maybe factored into the proportionality exercise, but is not a determinative one without offending the "no obligation to treat" principle in order to strike the article 8 balance. It is quite clear that there was no family life engaged in this case, the family life was between the parents and the child, and that the appeal was being argued on private life grounds. The judge rightly set out the dicta of Laws and Underhill LLJ in GS to the effect that if the article 3 claim fails article 8 cannot prosper without some separate or additional factual element that brings the case within the article 8 paradigm. It was noted that that approach was applied in MM (Zimbabwe) [2012] EWCA Civ 279. The judge, in this instance, rightly noted that the courts of the

United Kingdom have declined to say that article 8 can never be engaged by health consequences of removal from the United Kingdom but it has been emphasised how exceptional circumstances would have to be before a breach were established. The judge was well aware of these principles and set them out very clearly and evidently had them in mind, together with the best interests of the child, and applied them to the facts.

15. The judge made a series of findings throughout the determination. The judge paid careful attention to the medical evidence. The judge set out in full that the first appellant argued that there was an inadequacy of medical care in India and that the third appellant had a strong private life in this country and that the family had integrated in the United Kingdom. The judge carefully considered the evidence of the first appellant, the mother, whereby she claimed in her statements that she had no ties with India and no property or employment there. Her evidence, however, was found, for sound reasons, to be contradictory because in her oral evidence she stated that her parents and two sisters remained in India.
16. There is no doubt that the judge had a full understanding of the extent of the medical difficulties of the third appellant, the child, and these are set out at length in paragraph 26. The third appellant had cerebral palsy which affected his legs more than his arms, gastrointestinal problems and speech and language delay. When the judge clarified 'GMFCS1' he was told that stood for 'gross motor function classification system' with the scale of between one and five, with one being the least serious, and the third appellant had a classification of one. The judge also noted that the appellant maintained that the family would become untouchable such as social stigma and that the appellant would lose all his treatments. This is not something he ignored.
17. The judge paid particular attention to the medical reports including report from Dr Muller dated 15 August 2016 which included the difficulties with cognitive functions such as speech development. The judge also identified the report of Dr Sepali Wijesinghe, Consultant Paediatrician, dated July 2016. The judge at paragraph 32 specifically noted that the report indicated that the third appellant was to start in the reception class in a *mainstream* school in September 2016 which seemed to the judge quote to be significant as an "indicator of his condition". There was no reference to an Educational Health Care Plan. The judge also noted that this medical report identified that the child was "generally a healthy child" and the medical expert did not have "any concerns regarding his dietary intake" and does not suffer from constipation. The judge went on to record that the report

*"looks at his developmental assessment from page 26 and **in all categories** save locomotor skills **he is age-appropriate**. However his weight and height are at or below centile. His skin showed no abnormalities although his mother reported he got a rash when he is hot"*

18. The judge added at paragraph 33

"the summary is that "A is a four year and nine-month-old boy with cerebral palsy GMFCS1. He is having ongoing input from the Orthopaedic Team at the Royal National Orthopaedic

Hospital with regards to spasticity in both lower limbs. He has generally been well since his last review and has age-appropriate development on assessment today". It then sets out a seven-point plan including a referral to an early years support worker that he be reviewed in six months in a child development clinic".

19. The judge reviewed the medical evidence including the medical evidence served at the hearing but concluded at paragraph 38 with regards the mother's (first appellant's) evidence

'However, I record in part what she said in that her emphasis seem to me to be at odds with the tenor of the reports and indeed at times with what she has told clinicians. She said he had pain when he put his feet on the floor, he cannot breathe properly at times, he cannot eat properly and had bowel problems. She said he had a lot of eye issues and he may or may not become blind and he may have to have an operation. She seemed to be painting a more negative picture than the experts, but I accept however the appellant has complex medical issues'.

20. In sum, although the judge accepted that there were indeed medical issues he found on the evidence, for adequate reasons, that the third appellant had age-appropriate development in the assessment of Dr Wijiesinghe, attended mainstream school, and was expecting a review in six months time from a child development clinic. Indeed the report of Dr Chu dated 10 October 2016 confirmed that the third appellant

"has been walking normally most of the time. He does occasionally walk on his tiptoe but with reminder he walked normally... He is otherwise doing well in himself. His walking, running and going up and down stair cases... He is attending S primary school and there is no concern from the school regarding his academic performances... On examination a appeared to be happy and well... His lower limb tone and power were normal... There was no muscle wasting seen. He has good speech and he was interacting appropriately"

21. The judge found on the evidence, particularly the medical evidence, that the third appellant presented as a child able to attend mainstream school with a string of age appropriate assessments.

22. In the light of these findings, it was open to the judge to focus on the evidence of what was available in India and he was entitled to find at paragraph 39, that although the case was well prepared, there was nothing to suggest any research had been done in relation to the treatment in India. The judge clearly found at paragraph 39 that the first appellant had contact with her family in India and that the first appellant gave oral evidence that they had contacted a doctor in India who said no treatment was available and that she would have to go privately. There was no reference to any of this information in a statement from the appellant and no statement from any medical expert in India or doctor.

23. The judge clearly found, with sound reasoning, that the first appellant's evidence was at odds with the most recent developmental report and that finding is set out at paragraph 40. The judge also made a very clear finding that the main reason given by the first appellant that she could not return to India was because of the medical condition of the third appellant. The judge made careful, detailed and reasoned

findings on the child's health conditions, as I have outlined above and therefore rightly placed emphasis on finding

"She [the first appellant] maintained that she was not in contact with anyone in India other than her sister because of her love marriage but she accepted that the main reason she could not return to India was because of the child's medical problems and "we are not sure that he would receive the same level of medical care that he gets here". That answers seem to me to be important".

24. The judge also found that the first appellant gave oral evidence that her husband's family supported them from the USA and had sent them £9000 at the end of last year.
25. In the article 8 analysis, the judge took into account the back-ground material at pages 51 to 53 of the bundle relating to the difficulties that children with disabilities face India and that there was reference to the social stigma attached to children with disabilities. He weighed this into the balance.
26. It is against the background of these findings that the judge proceeded to make further observations findings and conclusions from paragraph 47 onwards. As set out in **MA (Pakistan)** when considering the best interests of children in the context of article 8 there is no obligation for a court to approach the matter in any set way when assessing those interests as long as they are assessed. Read carefully, the whole decision is predicated on an assessment of the child's interests. The judge noted that he had an overriding obligation to have regard to the welfare of the child and it is a given in the decision that the best interests of the child would be to remain within the family unit, that the first and second appellants were committed to the needs of their son, and that they would wish to care and protect him but wished to remain in the UK 'at all costs'. Although acknowledging the medical problems of their son, the judge clearly found at paragraph 48 that the appellants had exaggerated the problems that their child had specifically *"claiming a deteriorating situation when the expert evidence shows some improvement"*. The judge was entitled to place reliance on the fact that there was no expert's report on care in India and clearly the reality was that the appellants had set their minds and remain the UK as reflected at paragraph 49. The judge did make a finding specifically at paragraph 52

"there is no doubt that the third appellant would benefit from remaining in the UK, but his condition based on the medical evidence is not life threatening".

27. The judge did not seek to underestimate the difficulties but remarked upon the absence of the material relating to the medical care in India and was entitled to find *"there is no evidence that he could not receive treatment in India although it would not be as good and certainly would not be free but there is no obligation to treat or make up for the deficiencies in the Indian care system"*. This was a not a child who had remained in the United Kingdom for seven years, and the analysis adopted by the judge was open to the judge on these facts. The judge specifically identified at paragraph 54 that the child's interests were a primary consideration but noted that he had only just commenced at school and further that it was a mainstream school and *"given his age*

his focus is on his family rather than elsewhere”; the judge accepted that his family were a family unit and that they would stay together whether the in the UK or in India. The best interests are a primary consideration but not paramount. The judge then proceeded rightly to consider Section 117B and the public interest issues.

28. The decision letter of the respondent had specifically identified that there was a functioning healthcare system in India and against the findings of the judge in relation to the child’s actual development, and the desire on the part of the parents to achieve the same level of medical care is in the UK, it cannot be argued that the judge failed to take into account relevant factors or the best interests of the child or focus too heavily on the fact that there was no evidence of treatment in India. The best interests of the child were clearly to remain with his parents. It was not a case as in **MA (Pakistan)** where there needed to be powerful reasons for removing the parents and I note that their initial application was made in 2014 and the child was three years old. At no point have the parents made any contribution to the healthcare system and the judge was entitled to apply the issues set out in section 117B and to consider the economic well-being of the country.
29. Against the context that the judge specifically found that family life was amongst themselves and thus not engaged as the family would be returning to India together, and without more, even though this was a child, it is difficult to see in the light of case law properly explained by the judge, and against the particular and individual facts of this case, how the decision could be said to be disproportionate when applying the test under **Huang**. Simply there were no very significant obstacles to the family’s integration into India where they had family, there is a functioning healthcare system, and as the judge noted the family were being financed from abroad which could be redirected to assisting with healthcare in India. Even without that last consideration nothing, including the consideration of social stigma and discrimination concerning which there was a two-page general description in the evidence, which was addressed by the judge (and opinion of the mother, whose evidence was not entirely accepted), could realistically undermine his decision in terms of article 8.
30. The appellants did not challenge the refusal under the Rules, such that there were no significant obstacles to their integration in India, and the judge was bound to take that into account as an expression of the Secretary of State regarding public interest. The judge was clearly not persuaded that the public interest was reduced see paragraph 56. The judge applied the correct test of proportionality. The weight given to the evidence was a matter for the judge and its treatment or reference to **EV (Philippines)**, which remains good law, does not disclose a material error of law.
31. The analysis of the judge on a careful reading of this decision shows that the best interests of the child, which were centred on his health condition, did form an integral part of the proportionality assessment and the judge noted that it had to be a primary consideration. Nothing in the decision undermines that approach taken by the judge. He did not treat any other factor as more significant. It was relevant for the judge to assess the medical evidence with comparison with the mother’s evidence and to comment on the lack of specific information from India. The judge did not arguably

over focus on the latter. It cannot be argued that the best interests of the child, who was only five years old, were underestimated. The focus of the decision was on the child and his circumstances. The judge did not visit on the child the fact that the immigration status of the parents was simply precarious. With the care of the parents the judge noted that the problems with social alienation appeared to be issues with the lower and less educated classes. Bearing in mind the observations on health issues in MM (Zimbabwe), I am not persuaded particularly in the context of this case, that social discrimination can play a significant factor. Overall the judge wrote a careful, detailed and well-reasoned determination in line with the principles set out in **ZH (Tanzania)** and **Zoumbas** and the decision will stand.

32. I find no error in the determination of First-tier Tribunal Judge Pears and the decision will stand.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date 18th July 2018

Helen Rimington

Upper Tribunal Judge Rimington