



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/04817/2018
HU/09148/2018

THE IMMIGRATION ACTS

Heard at Field House
On 8 March and 26 April 2019

Decision & Reasons Promulgated
On 15 May 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

(1) MRS ROSY FANI BAI JAYRAJ
(2) MISS DESARIE REBECCA ANNADURAI
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Ms C. Bayati (08.03.19) and Ms C. Jacquiss (26.04.19), Counsel
instructed by Paul John & Co Solicitors

For the Respondent: Mr L. Tarlow (08.03.19) and Mr T. Lindsay (26.04.19), Senior Home
Office Presenting Officers

DECISION AND REASONS

1. The appellants have been granted permission to appeal from the decision of the First-tier Tribunal (Judge Obhi sitting at Priory Courts, Birmingham on 17 July 2018) dismissing their appeals against the decision of the Secretary of State for the Home Department ("the Department") to refuse to grant them leave to remain on the grounds of family and private life established in the UK. The First-tier Tribunal did not make an anonymity direction, and I do not consider that such a direction is warranted for these proceedings in the Upper Tribunal.

Relevant Background

2. The first appellant, Mrs Jayraj, is a national of India, whose date of birth is 25 December 1965. The second appellant, Miss Desarie Annadurai, is one of her two daughters. She was born in India on 28 August 1996. Her younger sister, Miss Eda Annadurai, was born in India on 9 June 2000. The two children entered the United Kingdom as dependants of their mother on 16 July 2009. In the preceding three years from 2006 they had resided with their mother in Saudi Arabia.
3. The children entered the UK as Tier 4 (General student) migrant dependants. Mrs Jayraj successfully extended her leave to remain as a student on three occasions, and the children were granted leave to remain as dependants in line with her. Their last grant of leave to remain ran until 12 January 2015. On 16 September 2014 their leave was curtailed so as to expire on 18 November 2014. On 6 November 2014 Mrs Jayraj applied for further leave to remain as a Tier 2 migrant, and on 25 November 2014 she was granted leave to remain in this capacity, and the children were granted leave to remain in line with her.
4. Mrs Jayraj was granted leave to work at a specified Nursing Home as a Band 3 Nurse. Her sponsor's licence was subsequently revoked by the Department, and as a consequence the leave of the mother and the children was curtailed on 18 April 2016 so as to expire on 20 June 2016. Mrs Jayraj was unable to find an alternative sponsor, and so on 18 June 2016 she applied on behalf of herself and the two children for leave to remain on family and private life grounds. On 16 January 2017 the second appellant made an application for leave to remain in her own right on private life grounds. The genesis for the separate application by the second appellant was that, in response to the initial application, the Department said that the second appellant could not apply as a dependent child as she was over the age of 18.
5. On 2 April 2018 the Department gave their reasons for refusing the application made by the second appellant. They acknowledged that she had lived in the UK for seven years following her entry to the UK on 16 July 2009. But she was over the age of 18, and so she did not meet the requirements of Rule 276ADE(1)(iv). A decision had been made on whether there were exceptional circumstances in her case which would render a refusal a breach of Article 8 ECHR because it would result in unjustifiably harsh consequences for her, a relevant child or another family member. Based on the information provided, the Department had decided that there were no such exceptional circumstances in her case. She said that she was dependent upon her mother, who she lived with along with her younger sister. However, her

mother's and her younger sister's applications were refused on 30 January 2018. It was considered that she could continue her family life with her mother and younger sister in India.

6. All three family members brought an appeal in the First-tier Tribunal. The younger sister, Eda, was the second appellant in the appeal, whereas Desarie was the third appellant.

The Hearing Before, and the Decision of, the First-tier Tribunal

7. Both parties were legally represented before Judge Obhi. As recorded by Judge Obhi in paragraph [2] of his decision, at the outset of the hearing the Presenting Officer notified him that the Department was withdrawing the refusal decision directed to the younger sister, Eda, with a view to granting her permission to remain to complete her studies. However, the decision in relation to the two other appellants was maintained. The Judge granted the Department permission to withdraw the decision against the younger sister.
8. The Judge received oral evidence from the two remaining appellants. In his closing submissions on behalf of the Department, the Presenting Officer submitted that the family in the UK comprised three individuals. The youngest member of the family would be on her own, but she would be a student and no different from any others who were in the UK. She could apply for a student loan as others did. Emotional support could just as easily be provided from abroad as from Wolverhampton. He referred to the case of **Mohammed Butt -v- SSHD [2017] EWCA Civ 184** as establishing that there was no breach of the Article 8 rights of family members where permission was granted to two of them to remain and complete their studies.
9. In reply, Counsel submitted that there were exceptional circumstances in the second appellant's case. She had only been back to India once to attend a funeral in 2015. She had excelled in her GCSEs and was getting ready to commence an apprenticeship in the UK. She had always lived with her mother and sister, and they formed a family unit. Her father was in India and had been estranged from the family since Christmas 2015. She had excellent links with the UK and her mother had a genuine and subsisting relationship with both her children, and it was in their best interests for the family to remain together. Mrs Jayraj had a Masters qualification which she could use to work in the UK and earn a living.
10. The Judge held that the fact that the younger sister had been granted leave to remain was not a factor which made the case exceptional for the other two family members. Both the girls were now adults. Many 18-year-olds left home to go to university. There was no reason why Mrs Jayraj could not continue to provide her with financial support from India. Alternatively, Eda could apply for a student loan to assist with her education.

The Reasons for the Grant of Permission to Appeal

11. On 24 January 2019 Upper Tribunal Judge Hanson granted the appellants permission to appeal for the following reasons: *“It is arguable that there is an inadequate analysis of the family life that exists between the second appellant [Eda Annadurai] and her mother notwithstanding that the second appellant wishes to go to university. It is not made out that the second appellant has formed an independent life or home of her own and like many students would ordinarily return home during the holidays. The second appellant is not going to be removed from the United Kingdom, but the issue is whether it would be proportionate to remove her mother and sister in light of the situation accepted to exist by the Secretary of State.”*

The Error of Law Hearing on 8 March 2019

12. At the outset of the hearing before me to determine whether an error of law was made out, Ms Bayati informed me that the Department had recently granted Mrs Jayraj leave to remain on private life grounds. After she had outlined her case as to where this left the second appellant, Mr Tarlow requested a short adjournment to discuss the matter with Ms Bayati outside. On resumption, Mr Tarlow said that he was in agreement with Ms Bayati that the second appellant’s human rights claim needed to be re-examined in the light of the changed factual matrix.

Reasons for Finding an Error of Law

13. After further discussion, it became apparent that Mr Tarlow supported Ms Bayati’s case that the First-tier Tribunal Judge had erred in law for the reasons identified by Upper Tribunal Judge Hanson when granting permission.
14. Mr Tarlow’s concession was not determinative of the issue, but I was satisfied that an error of law was made out. The original refusal of the applications of all three family members was predicated on the proposition that all of them would be returning as a family unit to India. The late withdrawal of the decision against the younger sister changed this factual matrix. Although the younger sister was aged 18 at the date of the hearing, she had only celebrated her 18th birthday very recently. So applying the well-recognised no-bright line principle, she was to all intents and purposes still a child who required her mother’s close proximity and support. The Judge did not give adequate reasons for finding that in those circumstances the enforced removal of the mother would not constitute a breach of the right to respect for family life between a child just turned 18 and her mother. In turn, the Judge did not give adequate consideration to the potential knock-on effect on the older sister, who remained a dependant on her mother, and who was an integral part of the family unit.
15. For the above reasons, an error of law is made out, and the decision of the First-tier Tribunal with regard to the second appellant must be set aside and remade.

The Resumed Hearing on 26 April 2019

16. For the purposes of the remaking the decision in respect of the second appellant, reliance was placed upon the same evidence that was before the First-tier Tribunal and the appellant's solicitors filed some additional evidence relating to the second appellant's current situation. Both the second appellant and her mother were tendered for cross-examination.
17. In her witness statement of 11 April 2019, which she adopted as part of her evidence in chief, the second appellant said that she had lived in the UK for nearly 10 years since moving to the UK at the age of 12 in July 2009. She had spent all her teenage years in the UK, which meant that her values and belief systems were formed by the UK society. She attended All Nations Church every week. She had been volunteering and helping the church with various activities, such as hosting events, Sunday school, youth programmes, and through this she had built a good fellowship with members of the church.
18. In June 2018 she had started a Level 2 Apprenticeship in Business Administration with the church. She was in the middle of her apprenticeship. Once she has finished Level 2, she hoped to go on to Level 3. If she was granted leave to remain, she hoped to pursue a career as a Youth Worker.
19. As her qualifications were only up until secondary school level, she would be at a disadvantage when applying for further study or work in India, which would lead to her struggling financially. *"On top of this, I will not [have] the emotional support of my mother and younger sister which will only make matters worse."*
20. In answer to supplementary questions from Counsel, she said that she was paid £593 per month as an apprentice. Her father was living in the family home in India. He was unemployed. It was very hard to find work at his age. He had been unemployed for 3 years now. Her younger sister was about to do her A levels, and was hoping to go to university in September.
21. In cross-examination, the second appellant agreed that she could live with her father in India, while her mother remained here with her younger sister. But she would be restricted as a woman in the areas that she would be allowed to work. Without a degree there would be less opportunity to work in India.
22. In her witness statement, which she adopted as her evidence in chief, Mrs Jayraj said that she had been supporting her daughter Desarie physically, emotionally and financially since she joined her in the UK at the age of 12. Although she was now an adult, she completely relied on her at this stage of her life. She depended on her financially and emotionally. She and her two daughters had always been bound together as a family. Separating Desarie from them would cause them massive distress as they relied on each other for support and they were a close family unit. The money that Desarie was earning from her apprenticeship with the local church helped support *"our family."*

23. In answer to supplementary questions from Counsel, Mrs Jayraj said that she was working as a Health Care Assistant. Together with an agency job as a Kitchen Assistant, she had a total annual income of around £19,000 per annum.
24. In cross-examination, she said that Desarie was still dependent on her father in the same way that Desarie was dependent upon her. She agreed that if Desarie went to India, she could send her money. But the money would not be enough.
25. In re-examination, she said that it would be very difficult for her daughter to lead an independent life in India. In their culture, it was for the mother to be free with their daughters. In contrast to her relationship with her father, *“she is more free with me.”*
26. In his closing submissions on behalf of the Department, Mr Lindsay submitted that this was really a private life case, not a case where there was a prospective interference with family life. If it was true that the second appellant was dependent on her father in the same way that she was dependent on her mother, then requiring her to return to India would not constitute a significant interference with family life. In any event, she could continue to enjoy a free-speaking relationship with her mother at a distance.
27. In reply, Ms Jaquiss submitted that it was not a sustainable proposition that the second appellant enjoyed family life with her father in the same way she did with her mother. Clearly, the emotional ties to her father could not be the same as those which she had with her mother, which were much stronger. She referred me to **Singh -v- SSHD [2015] EWCA Civ 630** where Beatson LJ said at [24]: *“Love and affection between an adult and his parents or siblings will not of itself justify a finding of family life. There has to be something more. A young adult living with his parents or siblings will normally have a family life to be respected under Article 8. The child enjoying family life with his parents has not suddenly ceased to have a family life at midnight as he turns 18 years of age. On the other hand, a young adult living independently of his parents may well not have a family life for the purposes of Article 8.”*
28. She submitted that the second appellant’s earnings from her apprenticeship were not enough to make her financially independent; and that the second appellant remained emotionally dependent upon her mother.

Discussion and Findings on Remaking

29. The evidence does not disclose a viable private life claim under Rule 276ADE. Turning to an Article 8 claim outside the Rules, questions 1 and 2 of the **Razgar** test plainly fall to be answered in the appellant’s favour with regard to the establishment of private life in the UK. Having considered the evidence in the round and the guidance given in **Singh**, I am also persuaded that the second appellant continues to be emotionally dependent upon her mother, and that she continues to enjoy family life for the purposes of Article 8 with both her mother and younger sister. I consider that the evidence given in the witness statements and by Mrs Jayraj in re-examination reflects the reality of the situation, whereas the answer elicited from Mrs Jayraj in cross-examination – see paragraph 24 above – does not. Accordingly,

questions 1 and 2 of the **Razgar** test also fall to be answered in the appellant's favour with regard to the establishment of family life in the UK.

30. Questions 3 and 4 of the **Razgar** test must be answered in favour of the Department. On the issue of proportionality, I must take into account the relevant public interest considerations arising under section 117B of the 2002 Act. It is in the appellant's favour that she is able to speak English and that she is financially independent in the sense of not being reliant on the support of the State for her maintenance and accommodation. Nonetheless, Section 117B(5) provides that little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.
31. However, the considerations identified in section 117B are not exhaustive, and a departure from the generalised normative guidance is justified in certain circumstances, including where a person can be said to have established a private life of a special or compelling character.
32. On the Article 8(1) side of the equation, it is a compelling factor that more than half of her long lawful residence was built up while the second appellant was a child. Added to this, she continues to enjoy family life with her mother and younger sister; and she is mid-way through an apprenticeship. On the Article 8(2) side of the equation, the second appellant is only a few months away from having accrued 10 years' lawful residence in the UK, so as to be eligible to apply for indefinite leave to remain on the grounds of 10 years' continuous lawful residence.
33. Accordingly, I find that the threatened interference with private and family life is not proportionate to the legitimate end sought to be achieved, namely the maintenance of firm and effective immigration controls. So I allow the second appellant's appeal.

Notice of Decision

The first appellant's appeal shall be treated as abandoned pursuant to section 104(4a) of the 2002 Act because, following the grant of permission to appeal to the Upper Tribunal, she was granted leave to remain.

As to the second appellant's appeal, the decision of the First-tier Tribunal contained an error of law, and accordingly the decision of the First-tier Tribunal is set aside and the following decision is substituted: the second appellant's appeal is allowed.

No anonymity direction is made.

Signed

Date 6 May 2019

Deputy Upper Tribunal Judge Monson