Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: HU/12971/2018 (A)
HU/12966/2018 (A)

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 8th September 2020	**On 14th September 2020**

Before

UPPER TRIBUNAL JUDGE LINDSLEY

Between

KULWINDER [S] (1)
SURINDER [K] (2)
(ANONYMITY ORDER NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr E Nicholson of Counsel, instructed by JJ Law Chambers Solicitors
For the Respondent: Ms S Cunha, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellants are citizens of India who are a married couple. They have a daughter, L, born on 8th December 1998 who is also an Indian citizen, and who currently has leave to remain in the UK until 17th February 2022. The appellants arrived in the UK as visitors in 2006, and L arrived as a visitor in 2007. Their leave to remain expired after the six month visit periods, and they then all overstayed. They then made various applications to regularise their stay.

2. Latterly the appellants' daughter L's application was dealt with separately, and she was successful in a human rights appeal to the First-tier Tribunal in a determination dated 7th October 2016, and as a result she was granted leave to remain, firstly until May 2019, and then this was extended to February 2022.

3. This appeal is against the refusal decision of 5th June 2018 refusing the appellants' human rights application. The appeal was dismissed in a decision of the First-tier Tribunal dated 6th February 2019, but that decision was set aside by Deputy Upper Tribunal Judge Shaerf, and so the matter was remade by First-tier Tribunal Judge Behan in a determination dismissing the appeal promulgated on the 27th November 2019.

4. Permission to appeal was granted by Judge of the First-tier Tribunal Foudy on the 13th April 2020 on the basis that it was arguable that the First-tier Judge Behan had erred in law in misdirecting himself as to the respondent's policy on parental leave to remain where a child reaches the age of majority; wrongly interpreting paragraph E-LTRPT 2.2 of Appendix FM; and in finding the second appellant had a poor immigration history when arguably she did not. Ultimately it was found to be arguable that the First-tier Tribunal failed to understand that the appellants had a potential right to remain under the Immigration Rules as the parents of their adult child in the context where she had not formed an independent life.

5. Directions were sent out by Upper Tribunal Judge Blundell dated the 5th May 2020 with a view to potentially determining the issue of whether the First-tier Tribunal had erred in law on the papers. Submissions were received from Mr Nicolson on behalf of the appellants dated 9th June, 16th June and 23rd June 2020; and from Mr S Kotas for the respondent dated 10th June 2020. The appellants objected to the question as to whether the First-tier Tribunal had erred in law being dealt with on the papers as it was argued that this was a complex appeal and so it would be appropriate for there to be oral argument. As a result the matter was listed for a remote Skype for Business hearing so oral argument could be heard.

6. The matter came before me to determine whether the First-tier Tribunal had erred in law. The hearing was held via Skype for Business in light of the need to reduce the transmission of the Covid-19 virus, and in light of this being found to be acceptable by both parties and to be a just and fair way to determine the issues. Unfortunately there was a delay in commencing the hearing due to the fact that the link to join the hearing was initially not found by Mr Nicolson as it had gone into his junk email folder; and due to the Upper Tribunal and Ms Cunha not having amongst their file papers the submissions received as a result of Judge Blundell's directions. These were kindly forwarded to myself and Ms Cunha by Mr Nicolson. However once the hearing commenced there were no issues with connectivity or other practical problems with the hearing.

Submissions – Error of Law

7. In grounds of appeal and submissions of 9th and 23rd June 2020 drafted by Mr Nicolson for the appellants and oral submissions it is argued, in summary, as follows.

8. The following relevant background information is set out in the grounds. The appellants daughter, L, succeeded in her appeal before the First-tier Tribunal on 12th October 2016 because it was found she had lived in the UK for more than 7 years as a child and it was found that it was not reasonable to expect her to leave the UK. As a result, on 31st November 2016, she was granted leave to remain in the UK until 13th May 2019. The appellants made an application on 1st December 2016, 7 days prior to L's eighteenth birthday, for leave to remain as the parents of a child who had lived in the UK for more than 7 years and who could not reasonably be expected to leave. The application was refused on the basis that by the time of the decision, namely 5th June 2018, L was 19 years old and so EX1 (a) of the Immigration Rules did not apply. L was granted a further extension of her leave under the Immigration Rules, paragraph 276ADE(1)(v) because she was aged between 18 years and 25 years and had lived more than half of her life in the UK.

9. It is argued firstly that the First-tier Tribunal erred in the determination of this appeal because it was found by the First-tier Tribunal at paragraphs 31 to 33 that the appellants have family life protected by Article 8 ECHR with their daughter L but that the Immigration Rules and the respondent's policy do not permit the appellants to remain as the parents of a child once that child has reached the age of 18 years. However this is incorrect, as paragraph E-LTRPT 2.2 (a) states that the child applicant must be under the age of 18 years at the date of application, or where the child has turned 18 years since the applicant was first granted leave to remain as a parent the child must not have formed an independent family unit or be leading an independent life. It is argued therefore that the policy of the respondent, as set out in the Immigration Rules, is not to refuse to grant parents of a child over the age of 18 years permission to remain if they remain dependent, and

that the First-tier Tribunal fell into a material error by finding this. It is also argued that an independent life is defined in the Immigration Rules at Gen 1.2 of Appendix FM in a way which means that L is clearly not leading this as she is not financially independent, lives with her parents as part of their household and is mainly emotionally dependent on them.

10. It is argued secondly that the First-tier Tribunal erred in failing to take into account the fact that if the respondent had not denied L a right of appeal in her initial decision refusing her human rights claim, which then had to be challenged by way of a judicial review, and that if the respondent had not refused her application she could have been granted leave as a child who had lived in the UK for more than 7 years and who it would not be reasonable to expect to leave at the age of 15 years, and her parents would clearly have qualified under s.117B(6) of the 2002 Act. It is argued therefore that the delays and errors by the respondent in 2014 to 2016 caused the appellants to overstay from this time so it was wrong to find that the appellants had a bad immigration history and been responsible for overstaying for a decade, and that this was a factor which should have diminished the public interest in the appellants' removal when considering the proportionality of the interference with her family life given that it is acknowledged by the First-tier Tribunal to be a very painful rupture if the appellants are removed. It is also relied upon that there was clearly a period of time from the 12th October 2016 when the First-tier Tribunal found that the appellant qualified to remain until her 18th birthday on 8th December 2016 when the appellants did qualify to remain under s.117B(6) of the Nationality, Immigration and Asylum Act 2002 and that weight should have been given to that fact in the appellants' favour.

11. It is further argued that there was failure to apply GEN 3.2(2) of the Immigration Rules when looking at this appeal outside of the Immigration Rules as there was a failure to explicitly look for "unjustifiably harsh consequences" when assessing the proportionality of the interference with family life, and that it is argued that this proportionality exercise was also skewed by the failure to consider that the respondent did indeed permit over 18 year olds to remain under their policy as encapsulated in the Immigration Rules and the above points regarding the respondent's delay and the period of qualification under s.117B(6) of the 2002 Act.

12. The respondent argues in written submissions from Mr Kotas and oral ones from Ms Cunha that the appellant conceded that this appeal could not succeed under the Immigration Rules as set out at paragraph 10 of the decision, and this is unarguably correct. In so far as the Immigration Rules permit parents of children over the age of 18 years to remain it is only in the case of where a parent was "first granted entry clearance or leave to remain as a parent under the Appendix" and this is not the case for these appellants. It is argued that there is no wider policy of the respondent, for instance in Family Policy Family Life Version 8.0 2nd June

2020, not to break up family units which goes beyond the provisions of the parent/child Immigration Rules beyond the duty to act proportionately to Article 8 ECHR in cases where there would be unjustifiably harsh consequences.

13. It is also not arguable that the respondent has delayed in a way which ought to have been balanced in the appellants' favour or that there is any element of a historic injustice in this case. An 18 month delay in decision-making is nowhere near exceptional enough to make this a material matter. The First-tier Tribunal had unarguably shown itself to be fair in not considering the first appellant's minor convictions as matters which weighed against him. As a result the conclusion that the interference with family life would not result in unjustifiably harsh consequences was unarguably lawfully reasoned and open to the First-tier Tribunal.

Conclusions – Error of Law

14. The First-tier Tribunal accepted that there was Article 8 ECHR family life between the appellants and their daughter, L, at paragraph 25 of the decision, and that removal of them from the UK would interfere with that family life.

15. It is recorded by the First-tier Tribunal, at paragraph 10 of the decision, as being accepted by the appellants representative, Mr Nicholson, that the appellants could <u>not</u> meet the requirements of the Immigration Rules and that they argued the case on the basis of family life outside of the Rules alone. Although my attention is drawn in the submissions to GEN 3.2(2) and the decision of the Supreme Court in <u>Agyarko</u>, and the test of "unjustifiably harsh consequences" and the fact that this test is not cited explicitly in the decision, I find that the First-tier Tribunal did not apply a more onerous test in the conduct of the proportionality exercise. The decision considers the proportionality of the interference with family life which the appellants removal would represent at paragraphs 28 to 46 of the decision. The First-tier Tribunal conducted a nuanced fact sensitive consideration of the impact of the appellant's removal on their daughter L, and weighed this against the public interest in an entirely lawful and proper balancing exercise for the reasons I set out below.

16. There is no evidence that any material matter was not included in this exercise. It is not the case that there is a matter of significant delay in this case which ought to have been balanced in the appellants' favour. The appellants' daughter, L, won her appeal in October 2016 due to the particular proximity of her appeal to her A level examinations, as set out at paragraph 45 of the decision, and on the submissions before me I have no reason to believe it would have succeeded if it had been heard at an earlier time if she had not had to conduct a judicial review etc. There was no excessive delay between the application made by the appellants in December 2016 and the decision which gave rise to this

appeal made 18 months later in June 2018. It is of no relevance whatsoever that for a period of 7 days from the making of their application on 1st December 2016 that the appellants fulfilled all of the requirements of s.117B(6) of the 2002 Act. The respondent and First-tier Tribunal must make their Article 8 ECHR decision on the facts at the time of those decision, and not on the basis of facts that had existed 18 months or more prior to that time.

17. I do not therefore find that the First-tier Tribunal erred in finding and balancing the fact that the appellants have a poor immigration record at paragraph 37: it is undoubtedly the case that they remained in the UK after their visit visas expired; that they made asylum claims when served with removal papers; that they have overstayed for more than a decade and supported themselves through illegal work. None of these matters is inaccurately recorded. I find that it was lawfully open to the First-tier Tribunal to find that their poor immigration history weighed against them.

18. Mr Nicolson argues that a provision of the Immigration Rules at E-LTRPT which permits an extension of leave to remain as a parent when granted initially when a child is a minor in the circumstances when the child becomes an 18 year old, so long as the child has not formed an independent life or family ought to have been seen as an indicator that the policy of the respondent was to keep families together even when children ceased to be minors. There are two problems arising when trying to apply this provision of the Immigration Rules by analogy to this appeal as an indicator of the respondent's policy. The appellants were not granted permission to remain as parents whilst L was a child, and she had not turned 18 years at the time of decision, but was 19 years old. I do not find therefore that this provision of the Immigration Rules, or indeed any other policy of the respondent, supports these appellants in showing that there is no or a lesser public interest in their removal.

19. I accept that at paragraph 41 of the decision that the First-tier Tribunal states that all of the Immigration Rules which Mr Nicolson had highlighted related to minor children, which is not entirely accurate, however at paragraph 43 of the decision it is clear that the wider picture of the Rules is understood as it said that "provision is made in guidance for children who turn 18 between the date of the application and the date of the decision". Thus, I find that the First-tier Tribunal acknowledges that there is a possibility of a grant of leave to a parent for reason of being a parent to a child who is 18 years old in the provisions of the Immigration Rules that Mr Nicolson had cited. For the reasons in paragraph 18 of this decision any minor misstatement of the Immigration Rules at paragraph 41 of the decision of the First-tier Tribunal is in any case entirely immaterial.

20. Ultimately I find that the First-tier Tribunal conducted an entirely lawful proportionality exercise in which L's abilities to be independent, as set out at paragraphs 33 - 35 of the decision, which include findings that

she is capable of independence in the way of travel, friendships, part-time work and doing university studies and the fact that there would be other ways for her to remain in touch with her parents if they were not to live together, were considered alongside acknowledging that there would be at least short term pain in rupturing the current close physical family unit; and then considering this in the context of the appellants' poor immigration history and lack of any right to remain in the UK and factoring in their inability to meet any of the provision of the Immigration Rules and thus applying s.117B of the Nationality, Immigration and Asylum Act 2002 that their removal must be considered in the public interest as the maintenance of immigration control, and removing those who do not meet the requirements of the Immigration Rules, is in the public interest.

Decision:

1. The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

2. I uphold the decision of the First-tier Tribunal dismissed the appeal on human rights grounds.

Signed: Fiona Lindsley Date: 10th September 2020
Upper Tribunal Judge Lindsley