



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal nos: IA 23412, 13, 16-13

THE IMMIGRATION ACTS

At **Field House**
on **10.03.2014**

Decision signed: **17.03.2014**
sent out: **24.03.2014**

Before:

Upper Tribunal Judge
John FREEMAN

Between:

Sunitha Melvin ALPHONSE & 2 others

appellants

and

Secretary of State for the Home Department

respondent

Representation:

For the appellant: *Dilruba Qureshi* (counsel instructed by Ve Pillai & Co)

For the respondent: Mr Ian Jarvis

DETERMINATION AND REASONS

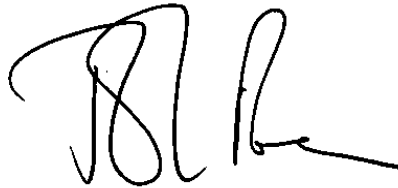
This is an appeal, by the respondent to the original appeal, against the decision of the First-tier Tribunal (Judge Nicholas Paul), sitting at Hatton Cross on 8 November 2013, to dismiss article 8 appeals by a citizen of India, born 1 August 1979, and her two sons Patrick (born 12 March 2007) and Joel (born 12 March 2010) by her husband Melvin Peter (the sponsor, born 20 July 1973, and also a citizen of India).

2. The sponsor arrived in this country with leave to enter in 2002, staying here lawfully till he was given indefinite leave to remain on that basis in April 2013: he has now applied for British citizenship, which it is common ground he is likely to be granted, if he passes the necessary tests, within the next six months. The (main) appellant married him in India in December 2004, and arrived here with leave to enter on 2 August 2005, staying here with leave till 22 June 2013, and meanwhile giving birth to their sons.

3. On 13 May 2013 the appellant and her sons applied for further leave to remain, which was refused on 3 June, on the basis that they did not satisfy the 'new Rules', in particular appendix FM EX 1, because the boys, though both born in this country, had not of course been here for the required seven years. It is common ground that they cannot succeed under the 'new Rules' on any other basis; so, following the various decisions, such as *Shahzad* (Art 8: legitimate aim) Pakistan [2014] UKUT 85 (IAC), which have made it clear that the principles set out in *MF (Nigeria)* [2013] EWCA Civ 1192 also apply in cases not involving deportation, they need to show circumstances 'exceptional' or 'compelling' enough for the Tribunal to go outside them and apply general article 8 principles.
4. This was not spelt out by the first-tier judge, as it should have been, and permission to appeal was granted on that point, and the facts of the case. The Home Office's case on the facts was that the appellant and the boys could have gone back to India, not just to make applications for entry clearance, but because it was unfair to other prospective immigrants from there to let them "jump the queue"; and that the result of the sponsor's eventual application for British citizenship was a matter of "pure conjecture".
5. If the facts of the case themselves raise the necessary 'exceptional' or 'compelling' circumstances, then the judge's failure to point out the need for those is neither here nor there. As for the "queue-jumping" point, it would have had a great deal of force, despite *Chikwamba* [2008] UKHL 40, if the appellant and the boys had been here without leave; but they were properly authorized to stay by the Home Office till the decision now under appeal. Nor is the result of the sponsor's application a matter of "pure conjecture" at all: as Mr Jarvis helpfully confirmed, it is likely to be granted within a short time, so long as he passes the tests.
6. As with most other considerations in article 8 cases, there are two sides to the question of whether circumstances are 'exceptional' or 'compelling': while it is more common for that to be argued on the family life side of the case, there can be no doubt that it also applies to the question of what the public interest requires. In this case, the sponsor has been here with leave, now indefinite, for the last 12 years: he has an MBA and a suitable job, and his family have been here with him, also with leave, for the last 8½ years, in the appellant's case, or since they were born, in the boys'.
7. It is more likely than not that the sponsor will soon become a British citizen, with a corresponding right, subject to the ordinary Rules on dependants, to have his family here with him. Meanwhile the boys are in school, and they are all enjoying a normal family life here together. In my judgment, there is no significant public interest, indeed the reverse, in disrupting that state of affairs for the sake of compliance with the requirements of FM

EX 1, and so the circumstances are 'exceptional' or 'compelling' enough for me to say that the balancing exercise must result in the appellant and the boys' expulsion being considered overwhelmingly disproportionate to the legitimate purpose of immigration control.

Home Office appeal dismissed: first-tier decision stands

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(a judge of the Upper Tribunal)