



Upper Tribunal

(Immigration and Asylum Chamber)

Appeal Numbers: IA/24213/2014

IA/24217/2014

IA/24219/2014

IA/24340/2014

THE IMMIGRATION ACTS

Heard at Field House

On 9 November 2015

**Decision and Reasons
Promulgated**

On 4 December 2015

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL ARCHER

Between

Bibi Peerbux
Mamade Tarabally

BT

ZT

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Ms Emma Harris, Counsel, instructed by Barnes Harrild and Dyer

For the Respondent: Mr Chris Avery, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This appeal is not subject to an anonymity order by the First-tier Tribunal pursuant to rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. Neither party has invited

me to make an anonymity order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) and I have not done so.

2. The appellants appeal against the decision of the First-tier Tribunal (Judge Camp) dismissing the appellants' appeals against a decision taken on 19 May 2014 to refuse to grant leave to remain and to remove the appellants from the UK.

Introduction

3. The appellants are citizens of Mauritius and comprise a family unit made up of BP (who was born in 1980 and entered the UK in 2001 with a student visa), MT (who was born in 1969, is the husband of BP, and entered the UK in 2002 with a dependent spouse visa), BT (a daughter of the marriage born in 2001 who entered the UK in 2004) and ZT (a daughter of the marriage born in the UK in 2005 who has always lived in the UK). The appellants had leave to remain in the UK until 16 November 2009 on the basis of BP being a student until 2008 and thereafter joining the Royal Navy until her discharge in 2009. The appellants made a previous application for leave to remain on 13 May 2009 but that was refused on 20 April 2010 and a subsequent human rights appeal was eventually dismissed by the First-tier Tribunal in a determination promulgated on 16 November 2011. There does not appear to have been any subsequent attempt to remove the appellants from the UK and the current application was made on 19 June 2012. That was refused on 20 February 2013 but was then reconsidered and refused again following judicial review proceedings.
4. The Secretary of State decided that the appellants had not complied with conditions attached to their previous grant of leave and that there were no exceptional circumstances which meant that removal was no longer appropriate. The appellants did not meet the requirements of paragraph 276ADE or Appendix FM of the Immigration Rules ("the Rules").

The Appeal

5. The appellants appealed to the First-tier Tribunal and attended an oral hearing at Birmingham on 2 October 2014. They were represented by Ms Dhaliwal, Counsel. The First-tier Tribunal found that Edgehill v SSHD [2014] EWCA Civ 402 applied and the appeals had to be considered in accordance with the law before 19 June 2012 i.e. in accordance with Article 8 as judicially interpreted. The judge found that removal to Mauritius as a family would not constitute an interference with the appellants' right to family life. Article 8 was not a by-pass to the requirements of the Rules. Essentially, the appeals turned on the reasonableness of returning the minor appellants to Mauritius. There was sparse evidence of the private lives of the adult appellants. BT and ZT only spoke English but there was a functioning educational system in Mauritius

although it would undoubtedly represent a disruption to their education to be required to move into it at this stage of their lives.

6. The judge further found that the adult appellants were well aware in 2009 that they were required to return to Mauritius but chose to remain in the UK. Events in the lives of all of the appellants had occurred in that context and the fact that the children were now older had to be seen in that light. It was in the best interests of the children to remain with their parents and that would happen whether they all remained in the UK or were removed together to Mauritius. Removal was proportionate and the public interest outweighed the interests of the children in remaining in their present educational and social setting.

The Appeal to the Upper Tribunal

7. The appellants sought permission to appeal to the Upper Tribunal on the basis that the First-tier Tribunal had erred in law. The judge should have applied Appendix FM and section 117B of the 2002 Act. The judge failed to seize the thrust of the factual matrix in this case which involved two children in the UK who had both achieved 7 years residence in the UK, the youngest having been born here. The judge failed to properly consider the best interests of the children by systematically identifying the relevant factors. There was no broad assessment of the impact of removal on the children's subsequent educational development, progress and opportunities in light of the acknowledged linguistic difficulties. The judge failed to consider the absence of close family in Mauritius, the fact that French is used in education and the presence of other family members in the UK such as grandparents, uncle, aunt and cousins. The judge failed to recognize that the appellants were lawfully resident in the UK until their previous appeal was dismissed on 16 November 2011. There was no assessment of the core factual issues from paragraph 25 of EV Philippines [2014] EWCA Civ 874. There was no consideration of the principles of Zoumbas v SSHD [2013] UKSC 74; in particular the principle that a child must not be blamed for matters for which he or she is not responsible such as the conduct of a parent.
8. Permission to appeal was granted by Upper Tribunal Judge Taylor on 21 April 2015. It was arguable that the judge's reasoning with respect to the best interests of the children was not sufficiently detailed; in particular BT was at secondary school and had been in the UK for 11 years. She would be returning to a country where, on the judge's findings, she did not speak the language. There was no proper consideration of section 117B of the 2002 Act and it was also argued that there were factual errors in the decision.
9. In a rule 24 response dated 29 April 2015 the respondent sought to uphold the decision on the basis that this was a thorough and detailed decision. The judge considered the disruption to the children but also their illegal status and the fact that their parents chose to reside in the UK under those

circumstances. The judge rightly considered that it was in the best interests of the children to remain with their parents and to return as a family. The grounds merely disagreed with the adverse outcome of the appeal.

10. Thus, the appeal came before me

Discussion

11. Ms Harris submitted that Singh v SSHD [2015] EWCA Civ 74 applied and Edgehill was limited to decisions made from 9 July 2012 to 6 September 2012. The revised Rules applied and that was a material error of law because the children had been in the UK for 7 years as at the date of application. There should have been a distinct enquiry as to the best interests of the children and the judge failed to take into account the other factors raised. The judge accepted that the children only spoke English but failed to consider that BT was about to start her GCSE years. There are no close family in Mauritius because they are all in the UK. The previous immigration appeal was not dismissed until 16 November 2011. Illegality was not relevant to the best interests of the children in any event. The decision includes only a passing reference to section 117B. There is no reference to the financial independence of the family or their ability to speak English. There is an outstanding application for the registration of BT as a British citizen, made in July 2015.
12. Mr Avery submitted that there was no material error of law – at paragraph 24 of the decision the judge correctly identified that the key issue was reasonableness and that would be the case under paragraph 276ADE or section 117B of the 2002 Act. The impact on the appellants was considered at paragraph 26 of the decision. The appellants had no immigration status after 2009, merely unsuccessfully pursuing immigration appeals since then. The judge correctly started from the position that the best interests of the children were to remain with the parents. The judge was entitled to take the public interest into account at paragraph 29 and factored best interests into consideration. The appellants could not obtain a positive right to a grant of leave from section 117B whatever their degree of fluency in English or the strength of their financial resources (AM Malawi [2015] UKUT 0260 (IAC)).
13. Ms Harris submitted in response that the judge mentioned disruption in paragraph 26 but there was nothing to say how that influenced the proportionality assessment. The positive section 117B factors could not in themselves justify a grant of leave but can assist the appellants.
14. I have considered paragraph 56 of Singh. The law as it was held to be in Edgehill only obtains to decisions taken in the two month window between 9 July 2012 and 6 September 2012. As from 6 September 2012 the respondent was entitled to take into account the provisions of Appendix

FM and paragraphs 276ADE - 276DH in deciding private or family life applications even if they were made prior to 9 July 2012.

15. In this case, the decision under appeal was made on 19 May 2014 and the respondent considered and applied Appendix FM and paragraph 276ADE. However, the judge then found at paragraph 18 of the decision that "*The original application was made on 19 June 2012. It therefore appears that the appeal has to be considered in accordance with the law before that date, i.e. in accordance with article 8 of the ECHR as judicially interpreted*". I find that is an error of law - the appeal actually fell to be considered under paragraph 276ADE and Appendix FM of the Rules together with Article 8, section 117B - D of the 2002 Act, section 55 of the 2007 Act and the relevant case law. Mr Avery submitted that any error of law is not material because the judge did consider the correct principles i.e. reasonableness and proportionality. However, it is common ground that the appellants could succeed under paragraph 276ADE of the Rules because BT had resided in the UK for 7 years as at the date of the 19 June 2012 application. I find that there is a material error of law because on the face of the decision the judge limited consideration of the appeals to Article 8 when the appellants could potentially succeed under the Rules.
16. The judge referred to an assessment of proportionality at paragraph 19, stated that Article 8 is not a by-pass to the Rules at paragraph 22 and then stated at paragraph 24 that the appeals turned on reasonableness. However, there are no findings on reasonableness and at paragraph 31 the judge decided the appeals on proportionality without reference to reasonableness. I find that the decision is not internally consistent in terms of the test to be applied and that is a further error of law.
17. The judge stated at paragraph 23 of the decision that he bore in mind section 117B of the 2002 Act. A significant issue in this appeal is the fact that BT and ZT are qualifying children, as defined in section 117D and therefore fall within section 117B(6) of the 2002 Act. The judge had to consider whether it was reasonable to expect them to leave the United Kingdom. The recent case law remains relevant, whilst taking into account that the case law effectively pre-dates the commencement of sections 117A - D (28 July 2014). There are no findings in relation to the relevant provisions of section 117B-D. I find that the consideration of section 117B-D is inadequate and that is a further material error of law.
18. The issue of proportionality involves striking a fair balance between the rights of the appellants and the public interest. In assessing proportionality, the "best interests" of any children must be a primary consideration (see **ZH (Tanzania) v SSHD (2011) UKSC 4** and section 55 of the Borders, Citizenship and Immigration Act 2009). Whilst the best interests of the child are not necessarily determinative, a child's best interests are a weighty consideration, albeit one that can be outweighed

by sufficient weight of public interest concerns (see **ZH (Tanzania)** per Lady Hale at [33]).

19. In Azimi-Moayed and others (decisions affecting children; onward appeals) [2013] UKUT 00197(IAC), Mr Justice Blake held that as a starting point, it is in the best interests of children to be with both their parents and if both parents are being removed from the UK then the starting point suggests that so should dependent children who form part of their household unless there are reasons to the contrary. It is generally in the interests of children to have both stability and continuity of social and educational provision and the benefit of growing up in the cultural norms of the society to which they belong. Lengthy residence in a country other than the state of origin can lead to development of social, cultural and educational ties that it would be inappropriate to disrupt in the absence of compelling reasons to the contrary. What amounts to lengthy residence is not clear cut but past and present policies have identified seven years as a relevant period. Seven years from age four is likely to be more significant to a child than the first seven years of life. Very young children are focussed on their parents rather than their peers and are adaptable.
20. In EV (Philippines) and others v SSHD [2014] EWCA Civ 874, Lord Justice Clarke held that in determining whether the need for immigration control outweighs the best interests of the children, it is necessary to determine the relative strength of the factors which make it in their best interests to remain here and also to take account of any factors that point the other way. A decision will depend on a number of factors such as the children's age, the length of time in the United Kingdom, how long they have been in education, what stage their education has reached, the extent to which they have become distanced from the country to which it is proposed that they return, how renewable their connection may be, to what extent they will have linguistic, medical or other difficulties in adapting to life in that country and the extent to which the course proposed will interfere with their family life or their rights (if they have any) as British citizens.
21. The judge sought to address the best interests of the children at paragraphs 25-27 of the decision and found that they spoke only English. However, there is only very limited reference to the case law and no structured analysis of the issues set out above. The fact that BT had reached secondary education in the UK and the presence of extended family members in the UK were highly relevant factors. I find that the judge's consideration of the best interests of BT and ZT is inadequate and that is a further material error of law.
22. Thus, the First-tier Tribunal's decision to dismiss the appellants' appeals involved the making of errors of law and its decision cannot stand.

Decision

23. Both representatives invited me to order a rehearing in the First-tier Tribunal if I set aside the judge's decision. Bearing in mind paragraph 7.2 of the *Senior President's Practice Statements* I consider that an appropriate course of action. I find that the errors of law infect the decision as a whole and therefore the re-hearing will be de novo with all issues to be considered again by the First-tier Tribunal.
24. Consequently, I set aside the decision of the First-tier Tribunal. I order the appeal to be heard again in the First-Tier Tribunal to be determined *de novo* by a judge other than the previous First-tier judge.

Signed 

Date 29 November 2015

Judge Archer
Deputy Judge of the Upper Tribunal