



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Numbers: IA/27668/2014
IA/27670/2014

IA/27672/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 20th February 2015**

**Determination
Promulgated
On 24th February 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE LINDSLEY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

**And
MRS LB (1)
MR VB (2)
MR PB (3)**

(ANONYMITY DIRECTION MADE)

Respondents

Representation:

For the Appellant: Mr M Shilliday, Home Office Presenting Officer
For the Respondent: Mr C Howells, Counsel instructed by Dent Abrams
Solicitors

DECISION AND REASONS

Introduction

1. Although this is an appeal by the Secretary of State I will refer to the parties as they were before the First-tier Tribunal.
2. The appellants are all citizens of Mauritius. The first appellant was born on 16th July 1971, the second appellant is her husband who was born on 20th July 1967. The third appellant is their son who was born on 29th September

2000. The appellants also have an older daughter HB (date of birth 27th July 1995) who has been granted discretionary leave to remain in the UK for 30 months on the basis of her private life in this country on 20th June 2014. The appellants entered the UK on 11th September 2003 as visitors. The first appellant extended her leave until 29th February 2012 and the second and third appellants until 30th September 2009. They applied for further leave on 11th April 2011. The Secretary of State refused this application on two occasions: firstly on 29th July 2013 and secondly on 19th June 2014. The appellants appealed on 30th June 2014. This appeal was allowed on Article 8 ECHR grounds in a determination of Judge of the First-tier Tribunal CJ Woolley promulgated on 9th November 2014.

3. On 5th January 2015 Judge of the First-tier Tribunal Parkes found that there was an arguable error of law and granted permission to appeal because in accordance with the Court of Appeal decision in Haleemudeen v SSHD [2014] EWCA Civ 558 Article 8 ECHR appeal should have been determined first in accordance with the Immigration Rules.
4. The matter came before me to determine whether the First-tier Tribunal had erred in law.

Submissions

5. It was the common position of both parties that following the case of Singh v SSHD [2015] EWCA Civ 74 that the “new” Immigration Rules relating to Article 8 ECHR were applicable to this appellant’s appeal as the transitional provisions only applied to decision made between 9th July and 6th September 2012. So despite the fact that this application was made on 11th April 2011 as the final decision was made on 19th June 2014 the proper approach was to first consider the applications and appeals under Appendix FM and paragraph 276ADE of the Immigration Rules.
6. Judge Woolley did not have the benefit of the Court of Appeal’s decision in Singh which was only promulgated on 12th February 2015 and made considerable efforts to resolve the issue with the two apparently contradictory authorities of Edgehill v SSHD [2014] EWCA Civ 402 and Haleemudeen, however ultimately he did not reach entirely the correct conclusion. It is accepted by all that he did err in finding at paragraph 27 of his determination that he should not apply paragraph 276ADE of the Immigration Rules to the appellants’ case and in only considering the private life aspect of the appellants’ appeals under the general law relating to Article 8 ECHR.
7. The submissions of the parties were therefore focused on whether this error was material.
8. It was agreed the case turned on whether the third appellant could reasonably be expected to return to Mauritius despite his having been in the UK for more than seven years as a child at the date of decision and in the context of all the other facts of the case. This is the test set out at paragraph 276ADE (iv) of the Immigration Rules.

9. As reasonableness of a qualifying child (such as the third appellant who had spent more than seven years in the UK) leaving the UK was now part of the test at s.117B of the Nationality, Immigration and Asylum Act 2002, which Judge Woolley had considered in his determination of the appeal, the issue in dispute was whether Judge Woolley had properly and lawfully considered reasonableness.
10. Mr Shilliday argued that Judge Woolley had not properly considered reasonableness at paragraph 35 of his determination as he had not set out the real world factors which would be favourable on the third appellant's return to the Mauritius. Further he had not, in accordance with EV (Philippines) v SSHD [2014] EWCA Civ 874, given proper weight to the appellant's parents having no right to be in the UK and to the fact the third appellant had no right to education in the UK. Judge Woolley had only listed factors in favour of the appellant. Mr Shilliday argued strongly against Mr Howells proposition that there was a presumption created in favour of the third appellant due to his seven years residence, and pointed out that the original guidance cited by Mr Howells had accompanied paragraph 276ADE of the Immigration Rules at a time when it made no reference to the appellant having to show that it would not be reasonable to expect the child to leave. This guidance was no longer relevant as it was not required to show that appellant could not reasonably be expected to leave the UK. Mr Shilliday argued that under the Immigration Rules the burden of proof was always on the appellant so it could not be argued that as this was an issue going to proportionality the burden of proof was on the respondent.
11. Mr Howells argued that this case differed from EV (Philippines) in that the children in that case had only been in the UK for four years so that they did not benefit from the presumption that their removal would be unlawful which seven years residence created. He relied upon the Statement of Compatibility which the respondent had issued when the Article 8 ECHR Rules were introduced in July 2012 which itself had said seven years residence would generally establish that it was not in the best interest of a child to have to leave the UK. The third appellant's case was not solely about him arguing he should be allowed to remain for education. Further the respondent had not identified any counter-vailing factors relating to Mauritius which Judge Woolley had not considered. Mr Howells argued that s.117B(6) of the Nationality, Immigration and Asylum Act 2002 had reversed the situation in EV (Philippines) so that parents were now dependent on what was right/ reasonable for the children. He also argued that in relation to proportionality the burden of proof was on the respondent.
12. At the end of submissions I told the parties that I found that Judge Woolley had erred in law in failing to consider the situation in Mauritius on return for the third appellant as part of the consideration as to whether it was reasonable for him to have to leave the UK. I set out my written conclusions on this matter below. I informed the parties that as this aspect of the consideration was missing and might have affecting the outcome of

the appeal I would set aside the decision of Judge Woolley allowing the appeal and hear further submission on the issue of the situation for the third appellant if he were returned to Mauritius. I would then make findings on this issue which would be combined with the findings at paragraph 35 of the determination of Judge Woolley to make a new decision.

Conclusions – Error of Law

13. As set out above Judge Woolley erred in law in failing to apply paragraph 276ADE of the Immigration Rules to the third appellant. This error became material as he then appears to have placed the burden of proof on the respondent in the consideration of proportionality, as it would be in the general law relating to Article 8 ECHR rather than on the appellants as it would be under the Immigration Rules and thus not to have considered the issue of the reasonableness of the third appellant's leaving the UK as widely as he should have done.
14. In a consideration of the reasonableness of expecting the third appellant to leave the UK despite having spent more than seven years in the UK at paragraph 276ADE (iv) of the Immigration Rules there should have been consideration as to the circumstances the third appellant would face on return to Mauritius. This is not considered at all at paragraph 35B of the determination of Judge Woolley.

Evidence & Submissions - Remaking

15. At paragraph 12 of the determination of Judge Woolley information is set out the evidence given by the first appellant about Mauritius. Mr Shilliday cross-examined the first appellant further and she said that she speaks English, French, Creole and some Hindi. The third appellant and his sister speak English. The main languages of instruction in Mauritian schools are Creole and French, although English is also taught as a subject.
16. Mr Shilliday submitted that he thought that English was wider spoken in Mauritius and he wished to rely upon the operational guidance note on this matter. He did not have this document in the Tribunal. I questioned him as to whether such a document existed on Mauritius. He was not entirely certain. I have since ascertained that there is no country of origin information report or operational guidance note on Mauritius on the gov.uk website. Mr Shilliday submitted that he wished to rely upon EV (Philippines) and the fact that the family had some accommodation in Mauritius; the third appellant could access education even if he would have to learn French and that the family would not be destitute on return to Mauritius. Return to Mauritius would be inconvenient to the third appellant but this was not sufficient for him to succeed in his appeal.
17. Mr Howells said that it would not be reasonable to expect the third appellant to have to leave the UK. He would be faced with the disruption of his education with issues of a different curriculum and languages. It would be particularly unreasonable to expect the third appellant to leave the UK as his older sibling (who had been in the UK for exactly the same amount

of time) had been allowed to remain: she had turned 18 years old and had been in the UK for half her life so had qualified under paragraph 276ADE (v) of the Immigration Rules. If the third appellant could not be reasonably expected to leave then there would be no public interest in the removal of the first and second appellants under paragraph 117B(6) of the Nationality, Immigration and Asylum Act 2002.

Conclusions - Remaking

18. It is not disputed that the third appellant is under the age of 18 years and has been in the UK for 11 years and five months, since September 2003 when he entered as a two year old child. To satisfy paragraph 276ADE (iv) of the Immigration Rules he must also show however that it is not reasonable to expect him to leave the UK.
19. As stated above I rely upon what is found by Judge Woolley at paragraph 35B of his determination which in summary states that the third appellant has all of his friends and acquaintances in the UK, and is a British child with only very remote memories of Mauritius. He is close to his older sister HB who has permission to remain in the UK on the basis of her long residence. As a fourteen year old he is moving away from the influence of his parents and forming his own social circle and planning for his future education. In summary it was clearly in the third appellant's best interests to remain in the UK.
20. I find that there is undoubtedly an education system in Mauritius, and as is said in the refusal letter some of the instruction is in English in that country, which the third appellant could join if he were to return. It would however be a different system which would require adjustment on his part and set him back. There is a property in that country which the appellants own and could in the medium term use for accommodation (as it is currently rented out). There is no evidence that they would be destitute on return: the first and second appellants have previously worked there and there are relatives who remain in Mauritius. Clearly the third appellant's parents, the first and second appellants, have no right to remain in this country.
21. Although this is a finely balanced decision I find that it would not be reasonable to expect the third appellant to return to Mauritius. In accordance with EV (Philippines) and the considerations at paragraph 35 I find that the third appellant entered the UK at the age of just two years and has spent his entire memorable life in the UK; he has reached a key stage of his secondary education; and is totally distanced from his country of origin. He lacks linguistic skills in French and Creole which are languages commonly used in Mauritius and his removal would interfere with his family life relationship with his eighteen year old sister with whom he has always lived (and plans to continue to live – see her statement to the Tribunal) and who has permission to remain in the UK lawfully. I find

these matters are ones that go far beyond inconvenience to the third appellant.

22. In coming to my conclusion I have weighed these matters against the fact that return to Mauritius would not lead to his being destitute or without education at all and thus have weighed factors relating to the situation in the country of potential removal as was done at paragraph 44 to 45 of EV (Philippines). However I conclude that the fact that this appellant has very considerably longer residence; the fact that he has formed far greater private life ties due to his longer residence and being older than the appellants in that case; and the fact that unlike them he has family life ties with his 18 year old sister who is lawfully resident in the UK leads me to a different conclusion to that reached by the Court of Appeal in EV (Philippines).
23. There is clearly a family life relationship between the third appellant and his sister HB, and their parents the first and second appellants who all continue to cohabit together as a family. I find that removal would interfere with these family life relationships. This interference would be in accordance with the law as the first and second appellants concede that they cannot meet the requirements of the Immigration Rules. Any interference with the family life rights of the first and second appellants is justified as being in the economic interests of the UK by way of enforcing consistent immigration control. The appellants are all of good character and there is no issue of the protection from crime and disorder.
24. When considering the proportionality of the interference with the first and second appellants' right to respect to family life I pay attention to s. 117 of the Nationality, Immigration and Asylum Act 2002, and particularly that s.117B(6) states that the public interest does not require the removal of persons who have a genuine and subsisting parental relationship with a qualifying child, where it would not be reasonable to expect the child to leave the United Kingdom. I find that this test is met by the appellants, and in addition they clearly speak good English and have qualifications which will enable them to be financially self-supporting. The first appellant has been wholly lawfully present whilst in the UK, and the second appellant largely so. I have not given weight to considerations of the private life of the first and second appellants whilst in the UK precariously or unlawfully. Whilst having regard to the fact that effective immigration control is in the public interest I find that the first and second appellants are also entitled to succeed in their appeals.

Decision

1. The First-tier Tribunal erred in law.
2. The decision of the First-tier Tribunal was set aside.
3. The appeal is remade and I allow the appeal of the third appellant under paragraph 276ADE of the Immigration Rules and the first and second

appellants in accordance with the general law of Article 8 ECHR with reference to s.117 of the Nationality, Immigration and Asylum Act 2002.

Direction Regarding Anonymity

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 their 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 23rd February 2015

Judge Lindsley
Deputy Upper Tribunal Judge

TO THE RESPONDENT
FEE AWARD

No fee is paid or payable and therefore there can be no fee award.

Signed

Date 23rd February 2015

Judge Lindsley
Deputy Upper Tribunal Judge