Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/29709/2014
IA/29701/2014
IA/29712/2014
IA/29713/2014

THE IMMIGRATION ACTS

Heard at: Manchester
On 2nd June 2015

Decision Promulgated
On 13th July 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE BRUCE

Between

Mr Ali Mukarram
Mrs Fatima Parveen
Miss Syeda Mariyam Mukarram
Master Furqaan Ali Mukarram
(no anonymity direction made)

Appellant

and

Secretary of State for the Home Department

Respondents

Representation:
For the Appellant: Mr Khan, Bukhari Chambers Solicitors
For the Respondent: Mr McVeety, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellants are all nationals of India. They are respectively a husband, wife and their two minor children. They appeal with permission[1] the decision of the First-tier Tribunal (Judge Lloyd-Smith)[2] to dismiss their linked appeals against a decision to remove them from the United Kingdom pursuant to s10 of the Immigration and Asylum Act 1999.

2. This family came to be in the UK because Mrs Parveen came to work here, as a nurse. Her husband followed, and then their children. They were all given leave to enter as work permit holders/dependents. Mrs Parveen arrived in 2003, Mr Mukarram in 2004, Ali in February 2005 and Syeda was brought here by Mrs Parveen in March 2006. Before returning to the UK with her daughter in 2006 Mrs Parveen lost her job, and having been notified of that, the Respondent curtailed her leave as a work permit holder. A further application was refused so that by the 18th November 2007 the whole family were served with notices confirming their liability to be removed from the UK[3]. Having unsuccessfully appealed that decision[4] they were asked to report to their local immigration enforcement office but failed to do so. They did not leave the country. On the 4th July 2012 they made applications 'outside of the Rules' to be permitted to remain in the UK on Article 8 grounds.

3. The chronology is not entirely clear but it would appear that the Respondent simply refused to grant any leave. The family, having had no valid leave at the point that their applications were made, had no right of appeal. Judicial review proceedings were launched with the result that on the 8th April 2014 the Respondent agreed a consent order to the effect that the applications would be considered afresh under the 'new rules', ie those introduced on the 9th July 2012, just a few days after these applications were made. The result was a decision to remove under s10, giving rise to these appeals. The reasons for refusal letter is dated the 5th July 2014. Therein the Respondent considered, and refused, leave under Appendix FM of the Rules: this decision has never been challenged. The letter goes on to consider paragraph 276ADE, the provision concerning private life.

4. The Respondent found that neither adult could qualify for leave under this Rule. Neither had been here long enough, nor lost their ties to India. Again, that decision is not challenged. The Respondent then turned to the position of the children. The letter concedes that there are no known grounds for refusal on 'suitability' grounds, but since neither child had, at the date of application,

[1] Permission to appeal was refused on the 26th November 2014 by First-tier Tribunal Judge Osbourne but granted upon renewed application by Upper Tribunal Judge McWilliam on the 13th March 2015

[2] Promulgated 16th October 2014

[3] IS151A

[4] Ms Parveen appealed against the decision to curtail her leave. This appeal was dismissed by First-tier Tribunal Judge Brookfield on the 13th December 2007, a decision upheld by Upper Tribunal Judge Gill on the 4th January 2008

lived in the UK for a continuous period of seven years, their applications too were dismissed. The letter goes on to address s55 of the Borders, Citizenship and Immigration Act 2009. The Respondent considers it reasonable for the children to return to India. They can speak, or become re-acquainted, with the language. They will have the support of their parents. They will be able to receive an education. Weighed against the children's position is the fact that they have been here without leave since 2007, and that their parents have worked illegally following curtailment of that leave.

5. When the matter came before the First-tier Tribunal then, the only live issue was whether the children could defeat the decisions to remove with reference to their private lives in the UK. Judge Lloyd-Smith had regard to the decision in the 2007 appeal (against curtailment). The First-tier Tribunal on that occasion had found that Mrs Parveen had understood the requirements of the work permit scheme and that in 2006 she had come back from a trip to India well aware that she had no job to come back to. She had given inconsistent evidence about whether the family had a home in India to go back to. Judge Lloyd-Smith adopted these findings, which accorded with her own assessment of the witnesses. She found that the adult Appellants had not told the truth about their lack of financial, social and family ties to India. She found that it had been their intention to settle in the UK. Their decision in 2008 to overstay after their appeal rights were exhausted showed a "blatant disregard for immigration control". Judge Lloyd-Smith found that the parents had deliberately overstayed until the children had lived here seven years, in order to make these applications: "the family buried their head in the sand, avoided removal so as to get an education for their children and strengthen the argument that it would be unfair to remove them". She agreed that neither child had been in the UK for seven years at the date of application and went on to consider the matter under Article 8 ECHR. In doing so she considered the relevant authorities: Zoumbas[5], EV (Philippines)[6] , ZH (Tanzania)[7] and Azimi-Moeyed[8]. She took into account that the children are in education in the UK, and that this would inevitably be disrupted by their departure, although any adverse consequences were mitigated by the fact that neither were at a crucial stage of their education. The determination also considers the impact that moving would have on the children's private lives, noting that they had both moved to the UK from India without any apparent difficulty. Finally it is recognised that even if the children's best interests can be said to lie in remaining in the UK, these must be balanced against the public interest in maintaining immigration control; these parents have deliberately sought to remain in the UK without any leave long enough to rely on their children's private lives. They were aware in 2007, or at

[5] Zoumbas v SSHD [2013] UKSC 74
[6] EV (Philippines) [2014] EWCA Civ 874
[7] ZH (Tanzania) (FC) (Appellant) v SSHD (Respondent) [2011] UKSC 4
[8] Azimi-Moeyed (decisions affecting children: onward appeals) [2013] UKUT 197 (IAC)

the very latest January 2008 when they became 'appeal rights exhausted' that it was time to leave, but they did not. Any adverse consequences for their children arise from that decision.

Submissions

6. The grounds of appeal are that the First-tier Tribunal erred in the following material respects:

   i) Unclear and contradictory findings in respect of Syeda's education. At paragraph 22 the determination notes that she is at a "critical point" in her studies, yet goes on to find that there are no obstacles in her carrying on her education in India. It is submitted that the determination fails to make clear findings on whether interference with her education (Syeda was about to take her 'A' levels at the date of the appeal) would be contrary to her best interests.

   ii) Failure to consider material facts, in that Furqaan had been here since he was 3 and knew no other education system. It is submitted that the determination is flawed for failing to consider how Furqaan would deal with a move to India and a new system.

   iii) Misdirection in law. The Judge proceeded to consider Article 8 'outside of the rules' on the basis that neither child could meet the 'seven-year' requirement of 276ADE(1)(iv) at the date of application. It is submitted that she should have considered whether the children in this in-country appeal met the requirement of the Rule. Even if the appeal could not have been allowed outright under the Rules, whether they were met was relevant to Article 8.

   iv) Placing undue weight on the negative factors, and failing to give appropriate weight to the positives, namely the fact that this is a family who have worked hard to integrate, by for instance speaking fluent English and being financially independent.

7. Mr McVeety submitted that all of the findings made by the First-tier Tribunal were open to it. The grounds focus on the "right to education" of the younger Appellants but fail to recognise that the education these children have been getting was at tax-payers expense; since at the latest January 2008 it is an education that they were not entitled to. Furthermore the Judge made clear findings that India had a functioning education system and there was therefore no unduly adverse consequence for the children of returning there.

My Findings

8. Ground (iii) is made out. At paragraph 19 of the determination it is noted that the child must have been living continuously in the UK for at least seven years

prior to the application being made; although there in the context of E-LTRP.2.2 this is the same wording as sub-paragraph (i) of 276ADE. The First-tier Tribunal appears to conclude that this basic qualifying length of residence has not been reached. Before me the parties agreed that in fact it had. Although these cases with their refusals, judicial reviews and consent orders can sometimes obscure the date of application, in this case Furqaan had already passed the seven year mark at the point his parents made the applications in July 2012. By the time of the hearing Syeda had been in the UK some 8½ years and Furqaan 9½ years. On appeal they both relied on 276ADE and were entitled to do so. See GEN.1.9 of Appendix FM and indeed paragraph 276A0 (iii):

> '276A0. For the purposes of paragraph 276ADE(1) the requirement to make a valid application will not apply when the Article 8 claim is raised:
>
> (i) as part of an asylum claim, or as part of a further submission in person after an asylum claim has been refused;
>
> (ii) where a migrant is in immigration detention. A migrant in immigration detention or their representative must submit any application or claim raising Article 8 to a prison officer, a prisoner custody officer, a detainee custody officer or a member of Home Office staff at the migrant's place of detention; or
>
> (iii) in an appeal (subject to the consent of the Secretary of State where applicable).'

The starting point for consideration of their private lives should therefore have been the Rule rather than Article 8 'outside of the Rules'. The question is whether, had the Tribunal used this framework, it would have made any difference to the outcome of this case.

9. In considering whether it is "reasonable" for a child to leave the UK the decision-maker must canvass exactly the same factual considerations as she would when considering classic Article 8. The only distinction between the two exercises is the starting point. In applying Article 8 the decision-maker must already have in her mind that the applicant has failed under the Rules; she is looking for particular factors that would render removal unjustifiably harsh or disproportionate[9]. In the vast majority of cases the simple fact that they do not qualify for leave to remain under the law is sufficient for the Secretary of State to show the decision to remove proportionate: that is what 'exceptional' means.

10. Paragraph 276ADE(1)(iv) does not however use the language of "compelling" or "exceptional" nor indeed "proportionate". The background to this rule is the long-standing recognition by government that once a child has spent seven years in the UK he will have integrated to a degree that it will not normally be reasonable to remove him. Originally formulated in the concession known as DP5/96 that policy, and those which followed, created a general, but rebuttable,

[9] See for instance EV (Philippines) [2014] EWCA Civ 874.

presumption that enforcement action would generally not proceed in cases where a child had accumulated seven years of residence[10]. This position was affirmed in the policy statement[11] which accompanied the introduction of paragraph 276ADE (1)(iv): "a period of 7 continuous years spent in the UK as a child will generally establish a sufficient level of integration for family and private life to exist such that removal *would normally not* be in the best interests of the child" [my emphasis]. The current guidance, issued after the introduction of the word "reasonable" into the Rule, underlines that this remains the starting point. The Immigration Directorate Instruction 'Family Migration: Appendix FM Section 1.0b *Family Life (as a Partner or Parent) and Private Life: 10-Year Routes'* ("the IDI") states as follows:

> '11.2.4. Would it be unreasonable to expect a non-British Citizen child to leave the UK?
>
> The requirement that a non-British Citizen child has lived in the UK for a continuous period of at least the 7 years immediately preceding the date of application, recognises that over time children start to put down roots and integrate into life in the UK, to the extent that being required to leave the UK may be unreasonable. The longer the child has resided in the UK, the more the balance will begin to swing in terms of it being unreasonable to expect the child to leave the UK, and *strong reasons will be required in order to refuse a case with continuous UK residence of more than 7 years.*
>
> The decision maker must consider whether, in the specific circumstances of the case, it would be reasonable to expect the child to live in another country.
>
> The decision maker must consider the facts relating to each child in the UK in the family individually, and also consider all the facts relating to the family as a whole. The decision maker should also engage with any specific issues explicitly raised by the family, by each child or on behalf of each child.'

11. This then, is the starting point for consideration under the Rule. Where a child has lived in the UK for seven years or more "strong reasons" will be required to refuse him leave to remain. That is quite different from the starting point under classic Article 8.

12. Could the outcome in this case have been different had the First-tier Tribunal applied this framework rather than simply moving on to Article 8? For the reasons very clearly and carefully set out by Judge Lloyd-Smith, the answer must be no. She found there to be very strong reasons why these children should be refused leave to remain notwithstanding their long residence. Those strong countervailing reasons were, in short, the cynical and unlawful behaviour of their parents. In 2006 they brought Syeda to the UK and kept Furqaan here knowing that Mrs Parveen had lost her job and that her status as a

[10] For a detailed history of the rule and its development see Dyson LH in Munir v SSHD [2012] UKSC 32 paras 9-13
[11] The Grounds of Compatibility with Article 8 of the ECHR: Statement by the Home Office (13 June 2012) at 27.

work-permit holder was precarious. From that point on they understood that they had no right to remain in the UK under the Rules and yet they did not leave. They enrolled the children in school and, as Judge Lloyd-Smith puts it, "buried their heads in the sand". When Mrs Parveen finally lost her appeal in January 2008 they could have returned to India with the children then, causing minimal disruption to their educations and private lives (I note that these were children who had moved countries before, having lived in Saudi Arabia). The adult Appellants evidently believed that by overstaying until Furqaan had reached the seven year mark they could secure leave to remain for the whole family. Judge Lloyd-Smith was right to characterise that behaviour as cynical, and contrary to the best interests of their children. On the findings that she made, the appeal would have failed under 276ADE(1)(iv) just as it failed under Article 8.

13. It perhaps follows that I find no merit in the remaining grounds. The core complaint is that the Tribunal failed to give appropriate weight to the education of the children, and the disruption that would be caused to them by removal. Contrary to what is said in the determination I am told that Syeda is at a crucial stage of her education, being in the middle of her 'A' levels. It is true that the Tribunal has not recognised that feature of the evidence. That said the author of the grounds completely overlooks the fact that these children were not, at any point since late 2007, entitled to the education that they have now received courtesy of the tax-payer. Disruption to an education will always be *a* relevant factor in an assessment such as this, but it is extremely unlikely to be determinative. I find that Judge Lloyd-Smith conducted a fair and measured balancing exercise. She has recognised that the children's predicament is not their fault and that there will inevitably be some disruption to their lives if they are removed. There were however strong countervailing factors in this case which displaced the presumption that these long-residents be permitted to stay. Those were her findings and she was entitled to reach them on the evidence that was before her.

Decisions

14. The determination of the First-tier Tribunal does not contain an error of law and it is upheld.

15. I was not asked to make a direction for anonymity.

Deputy Upper Tribunal Judge Bruce

30th June 2015