



**Upper Tribunal
(Immigration and Asylum Chamber)**
IA/39879/2014

Appeal Number:

IA/39868/2014

IA/39871/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 29 February 2016**

**Decision and Reasons Promulgated
On 10 March 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE SAFFER

Between

**JASHBHAI MAHENDRAKUMAR PATEL
NAYANBEN PATEL
PALAKBEN MAHENDRABHAI PATEL**

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Turner of Counsel

For the Respondent: Mr Jarvis a Home Office Presenting Officer

DECISION AND REASONS

Background

1. The Respondent refused the Appellants' applications for leave to remain on 16 October 2014. They are all citizens of India who came to the United Kingdom as visitors and failed to leave when their visas expired in 2001 in the case of the first Appellant and 2008 in the case of the

other Appellants. The third Appellant is the adult daughter of the other Appellants, she being born on 11 February 1989 (now aged 27) and her parents being born on 22 December 1959 and 18 February 1964 (now aged 56 and 52 respectively). They sought leave to remain essentially due to the second Appellant's poor health. They were all required to leave the United Kingdom.

2. Their appeals made pursuant to Articles 3 and 8 of the European Convention on Human Rights 1950 were dismissed by First-tier Tribunal Judge Anthony ("the Judge") following a hearing on 13 August 2015. There was no application for permission to appeal regarding the Article 3 decision which stands.

The grant of permission

3. First-tier Tribunal Judge Adio granted permission to appeal (30 December 2015) on the ground that it is arguable that:

"...the judge omitted to assess the situation of the third Appellant regarding her pregnancy (sic - it should be to) for someone who had indefinite leave to remain...and whether or not it would have an impact on family life with the second Appellant depending on the outcome of that assessment. This is relevant as the judge accepted that the first and third Appellants are joint full time carers to the second Appellant."

Respondent's position

4. Mr Jarvis conceded that there was a material error of law as the Judge noted the presence of the partner who had indefinite leave to remain and the third Appellant's pregnancy. No determination had been made on that or the impact the pregnancy of the third Appellant may have on her ability to give primary care to the second Appellant.

Appellants' position

5. It was a material error of law to exclude from the Article 8 proportionality balancing exercise that the third Appellant was then pregnant to a man who has indefinite leave to remain as she is the predominant day to day carer of the second Appellant.

Judge's Determination

6. It is found that [26/27] the second Appellant has Left Trigeminal Neuralgia for which she receives treatment and that she had received treatment and medication in India. She spends most of the day in bed due to her pain and compromised mobility. The third Appellant cares for her on a full time basis. She had failed to establish that her treatment could not continue in India [35]. Her social care and network of support

would not be disrupted as the other Appellants would be going with her. Other family and friends support is neither material nor significant [36]. There is nothing to suggest that the financial support from family and friends could not continue if they are in India [37] and they could be accommodated there [38].

7. The Judge found that consequences of gravity did engage Article 8 regarding the second Appellant [29] but not regarding the other Appellants [42]. Even if Article 8 had been engaged, [39/48] removal would not be disproportionate for any of them due to their ability to resettle and the need to maintain an effective immigration control. They are familiar with the language and customs in India, lived the majority of their lives there, would have support, and have been here unlawfully for many years.

Discussion

8. It is settled law that very few cases succeed under Article 8 that fail under Article 3 as explained in GS (India) & others v SSHD [2015] EWCA Civ 40 and Akhalu (health claim: ECHR Article 8) [2013] UKUT 00400 (IAC) where we are reminded in the headnote that;

“...The correct approach is not to leave out of account what is, by any view, a material consideration of central importance to the individual concerned but to recognise that the countervailing public interest in removal will outweigh the consequences for the health of the claimant because of a disparity of health care facilities in all but a very few rare cases. The consequences of removal for the health of a claimant who would not be able to access equivalent health care in their country of nationality as was available in this country are plainly relevant to the question of proportionality. But, when weighed against the public interest in ensuring that the limited resources of this country’s health service are used to the best effect for the benefit of those for whom they are intended, those consequences do not weigh heavily in the claimant’s favour but speak cogently in support of the public interests in removal.”

9. I agree with the representatives that there was a material error of law as the Judge left out of the account 2 material factors which may have impacted on the proportionality balancing exercise required by Article 8, namely the third Appellant’s relationship and pregnancy and how they may have impacted on her ability to provide care for the second Appellant here and in India.
10. I agreed with the representatives that it would be most appropriate to remit the matter to the First-tier Tribunal for a de novo hearing on the Article 8 issue in relation to each Appellant to enable these matters to

be explored and determined and their relevance or otherwise weighed against the rest of the evidence.

11. Upon remittal, given the fact that the third Appellant has now given birth, the new Judge will of course have to consider the new child's care needs and what impact that has in relation to both the third Appellant's rights and what impact it will have on her ability to provide primary care for the second Appellant.

Decision:

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law in relation to Article 8 only.

I set aside the Article 8 decision.

There was no Article 3 appeal before me and that decision stands.

I remit the matter to the First-tier Tribunal for a de novo hearing on the Article 8 issue only.

Signed:
Deputy Upper Tribunal Judge Saffer
2 March 2016