



IAC-AH-DP/KRL-V1

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

Appeal Numbers: IA/42677/2014
IA/42684/2014
IA/42689/2014
IA/45398/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 12 January 2016**

**Decision & Reasons Promulgated
On 26 January 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MISS UMME SHIFA KHUZAIMA JANNOO
MRS BIBI SHEHNAZ BEGUM JANNOO
MR MOHAMMAD ALLY JANNOO
MISS BIBI MUMTAHINA JANNOO
(ANONYMITY DIRECTION NOT MADE)**

Respondent/Claimants

Representation:

For the Appellant: Ms E. Savage, Specialist Appeals Team
For the Respondent: Mr W. Rees, Counsel

DECISION AND REASONS

1. The Secretary of State appeals to the Upper Tribunal from the decision of the First-tier Tribunal (Judge Plumptre sitting at Hatton Cross on 13 May 2015) allowing on Article 8 grounds the claimants' appeals against the decision of the Secretary of State to refuse to grant them discretionary leave to remain as a family who had been living in the UK since 2006. The First-tier Tribunal did not make an anonymity direction, and I do not consider that the claimants required to be accorded anonymity for these proceedings in the Upper Tribunal.
2. The background to this case is that the claimants are all nationals of Mauritius. The second and third claimants are husband and wife respectively. The first claimant was born on 15 December 1996, and the fourth claimant was born 4 May 1992. As the first claimant is the principal claimant, for reasons which will become clear in due course, I shall hereafter refer to her simply as the claimant, save where the context otherwise requires.
3. The claimant's father entered the United Kingdom in 2006 as a visitor. On 1 October 2006 he applied for leave to remain as a student. Following his grant of student leave on 27 November 2006, his wife and two children came from Mauritius to join him here. They entered as visitors on or about 1 December 2006, and later obtained limited leave to remain as his dependants. The father's last grant of limited leave to remain as a student ran until 12 July 2014. But on 7 July 2011 his Tier 4 Sponsor licence was revoked, and his leave to remain was curtailed so as to expire on 2 June 2012.
4. On 30 May 2012 the claimant's father applied for leave to remain on the basis of family and private life, naming his wife and youngest daughter (the claimant) as his dependants.
5. The application was refused on 12 July 2013. The claimant and her parents appealed to the First-tier Tribunal, and the appeals were allowed by First-tier Tribunal Judge Raymond on 15 July 2014 "to the limited extent of remitting these three matters for reconsideration under Article 8 outside the Rules because the refusal decisions are otherwise not in accordance with the law for the reasons given".
6. According to Judge Raymond's decision, a copy of which Mr Rees handed up to me, the claimant's older sister was included in the application of 29 May 2012. Having reviewed the Home Office material relating to the older sister, I consider that this is incorrect. At all events, she did not figure in the appeal.
7. The decision was based on a misapprehension of the scope of **Edgehill v Secretary of State for the Home Department [2014] EWCA Civ 402** which the judge followed in preference to **Haleemuden v Secretary of State for the Home Department [2014] EWCA Civ 558**. In fact, as shown by the subsequent Court of Appeal decision in **Singh**, the Secretary of State had lawfully considered the application of 29 May 2012 within the framework of the new Rules.

8. The upshot was that the Secretary of State gave fresh consideration to the application, and on 14 October 2014 gave her reasons for refusing the application on reconsideration. The claimant had arrived in the UK in 2006 aged 9 years (just short of her 10th birthday). She had now lived here for seven years, and was aged 17. Consideration had therefore been given to paragraph EX.1 as to whether it would be reasonable for her to leave the UK. It would be reasonable to expect her to leave the UK as she had lived in Mauritius for nine years, and she would be returning to Mauritius with both of her parents.
9. Reference was made to Section 55. The claimant was cared for in the UK by her parents, and the family was maintained without public funds through her parents' employment. In Mauritius her father would have the legal right to work, and he had not shown that he would be unable to seek employment there, or that he would not be able to maintain himself and his family as he did in the UK. The claimant may have chosen to continue education in the UK but it was clear from the objective information available that Mauritius had a functioning education system which she would be able to enter, should she choose to continue with her studies. She was not at a critical point in her schooling, and so the inconvenience of relocation and any transition period was considered to be proportionate in maintaining effective immigration control. It was in her best interests to remain with both her parents, and it had not been shown that they would be unable to continue to provide for her safety and welfare outside the UK. The main applicant (the father), his spouse and their daughter under the age of 18 would return to Mauritius as a family unit and continue to enjoy their family life together.
10. On 24 October 2014 the Secretary of State gave her reasons for refusing the fourth claimant's separate application for leave to remain on private life grounds. The application had been made on 11 July 2014. It was accepted that she first landed in the United Kingdom on 1 December 2006 and had received leave to enter as a visitor valid until 1 June 2007. She had subsequently been granted an extension to stay in the United Kingdom as a dependent child. On 31 August 2012 she had applied for leave outside the Rules which was refused with no right of appeal on 9 September 2013. While she had lived in the UK for seven years, it was not accepted that she had spent at least half her life living continuously in the UK. In order to meet the requirements of Rule 276ADE(1)(vi), an applicant had to show that there would be very significant obstacles to the integration to the country to which they would have to do if required to leave the UK. This was not accepted in her case. She had lived in Mauritius for twelve years prior to entering the UK. Her parents had spent the majority of their lives in Mauritius, and they would have imparted their knowledge of the social and cultural customs and language of Mauritius to her. If she wished to undertake further studies in the United Kingdom, it was open to her to make an application for entry clearance under Tier 4 of the points based system.

The Hearing Before, and the Decision Of, the First-tier Tribunal

11. The appeal of the older sister was consolidated with the appeal of the other members of the family. The claimants were represented by Counsel, and there was no appearance on behalf of the Secretary of State. The Judge received oral evidence from the first, second and fourth claimants and from Mrs Shaheen Howes, a niece of the third claimant. Twenty six years ago the third claimant and his family had taken into her care in Mauritius following the death of her father when she was 6 years old. She had remained in the care of the third claimant and his family until age 15. When she returned to the UK, they continued to support her and she used to visit them in Mauritius when she could. After the third claimant came to the UK with his family in 2006, this meant she could return to work because they helped with childcare for her two children. She and her husband would like the entire family to be permitted to live in the UK.
12. In her subsequent decision, the Judge set out her findings of fact and credibility from paragraphs [23] onwards. She said she was treating all four claimants as in effect making the same appeals based on the same facts for leave to remain as a family unit under Article 8 “largely outside the Immigration Rules”.
13. She accepted that the claimant met the requirements of Rule 276ADE(1)(iv) since she had lived continuously in the UK for more than seven years and was still under the age of 18 at the time when the decision was remade on 7 October 2014, although she was now aged 19 years at the date of the hearing.
14. She found that it would not be reasonable for the claimant (the Judge in fact referred at this point to “A4”, her older sister, but this must be a mistake) to leave both her immediate family and extended family in the UK and live in Mauritius given that she was aged 9 years when she first came to the United Kingdom in December 2006.
15. The Judge went on to cite the third and fourth principles enunciated by the presidential panel in **Azimi-Moayed and Others** (decision affecting: onward appeals) [2013] UKUT 197 (IAC). She accepted that the claimant had completed her secondary and partially tertiary education in the UK at a significant period in her life, having accrued over seven years’ residence as a child from the age of 4.
16. At paragraph [30] she accepted that both daughters were adults at the date of the hearing and were not British citizens. Hence the reasoning in **ZH (Tanzania)** and Section 55 of the 2009 Act, and a consideration of the best interests of children, was no longer applicable. But she accepted from Counsel’s analysis of the decision in **EV (Philippines) v SSHD** [2014] EWCA Civ 874 that it would be a disproportionate interference with the private lives of both daughters if all the family were removed, and the further studies of the daughters in the UK were interrupted.
17. At paragraph [32] she held that more than emotional ties as per the reasoning in **Kugathas** had been established in the appeal because of the tragic death of Mrs Howes’ father, and the fact that Mrs Howes had returned from the UK to live with

the claimants in Mauritius between the ages of 6 and 15, and that Mrs Howes' parents had supported the claimants when they first arrived in the United Kingdom.

18. She accepted she should take into account the factors set out in paragraph [35] of **EV (Philippines)**. While it was correct that the second to fourth claimants did not have any right to be in the UK, the first claimant did have a right because she met the requirements of Rule 276ADE(1)(iv). Since the younger daughter satisfied the requirements of this Rule, her parents should be allowed to remain with her and hence they qualified for leave under Section R-LTRP of Appendix FM.
19. At paragraph [38] she found that the Secretary of State had not given full consideration to all the factors relevant to Article 8, ECHR, nor of the fact that the claimant met the requirements of Rule 276ADE. She found that the full extent of all the claimants living together as a family unit was not fully considered. Following **SSHD v HK (Turkey) [2010] EWCA Civ 583** and **RP (Zimbabwe) v SSHD [2008] EWCA Civ 825** she found that the fact that both daughters had remained living with their parents into adulthood, and remained financially dependent on them, meant that neither daughter should be separated from their parents.
20. In paragraphs [42] and [43] the judge addressed Section 117B of the 2002 Act. She said it was at least arguable that the parents fell within Section 117B(6) because arguably at the time of refusal their youngest daughter was a qualifying child under Section 117D. So she was willing to accept that both parents had a genuine and subsisting parental relationship with a qualifying child and perhaps more importantly to find it would not be reasonable to expect the claimant to leave the United Kingdom and return to Mauritius given that so many of her family members were all present and living in the United Kingdom and sharing family life as they lived fairly close together or between London E6 and Romford.

The Initial Refusal of Permission to Appeal

21. On 10 August 2015 First-tier Tribunal Judge Juliet Grant-Hutchison refused the Secretary of State permission to appeal. For convenience I set out her reasons for doing so as she helpfully summarises the main thrust of the Secretary of State's grounds of appeal, and Mr Rees adopts her reasoning in opposing the error of law challenge:
 - "2. It is submitted that the judge erred law (a) by failing to give a structured approach to Article 8 required by case law; (b) by placing weight/adopting Counsel's skeleton argument without giving the reader knowledge of what the submissions were or making her own finding of facts; (c) by failing to give cogent reasons why there is dependency beyond normal emotional ties between parents and adult children; (d) by failing to explain why the parents qualify under the Immigration Rules (R-LTRPT); (e) by giving weight to the fact that the family visas were renewed on 3 previous occasions and to the fact that the Respondent was unable to attend the hearing; (f) by failing to consider aspects of family/private life when the family's leave situation was precarious (**AM Malawi**) and (g) by failing to assess the public interest (economic welfare of the

UK as part of immigration control) when both children are studying at tax payers' expense with the family reliant on handouts from friends and family members.

3. The Procedural Rules allow the hearing to proceed in the absence of one party. No unfairness has been raised in the ground for permission to appeal. The judge had the Respondent's Reasons for Refusal Letter and the Respondent's bundle. The judge has used a structured approach in reaching her decision. The judge has set out what Counsel's arguments are and why she accepts them when considering all the evidence before her. The judge has considered the correct Immigration Rules and case law including sections 117 A and B of the Immigration Act 2014 in coming to her decision. The judge has made appropriate findings which were open to her to make. She has given adequate reasons for her decision. It was open to the judge to place what weight she felt was appropriate to place on the evidence before her."

The Eventual Grant of Permission

22. In the renewed application for permission to appeal, Mr Melvin on behalf of the Secretary of State insisted the judge had failed to follow a structured approach. It was incumbent on the judge to reach a decision on proportionality following a "best interests of the children" assessment which would include an assessment of the parents' employment prospects in Mauritius, family accommodation, educational prospects in Mauritius, etc. As posed by Lord Justice Lewison in **EV (Philippines)** at paragraphs [58] to [61], the ultimate question was, "is it reasonable to expect the child to follow the parent with no right to remain to the country of origin?"
23. On 15 September 2015 Upper Tribunal Judge Jonathan Perkins granted permission for the following reasons:
 - "1 I have reflected carefully before giving permission to this case as the Decision may well stand up to scrutiny but I have the advantage of reading counsel's skeleton argument. Arguably I should not need to do that to make sense of the Decision and, arguably, the Decision is not self contained. That said, when the Decision refers to counsel's grounds it may be that the Decision paraphrases the grounds and so no material error has occurred.
 - 2 It may be that the reference to "more than emotional ties" in paragraph 32 is a red herring as the relationship between the appellants and Mrs Howes was not the reason that the appeals were allowed.
 - 3 It may be that the Tribunal has decided lawfully that the first appellant has established a right to remain under the rules and that other appellants are entitled to remain on that account.
 - 4 Nevertheless, the fact that I may be able to make sense of the Decision does not mean that it is not *arguably* wrong. I give permission to appeal on each ground. It may be that the First-tier Tribunal's decision is not explained sufficiently."

The Hearing in the Upper Tribunal

24. At the hearing before me to determine whether an error of law was made out, Ms Savage submitted that the judge had erred in not engaging with the reasons given in the refusal decision as to why it was reasonable for the claimant to return to Mauritius with her parents, and generally the judge had not conducted a rounded best interests assessment, and taken into account wider proportionality considerations, before deciding that it was unreasonable to expect the claimant to return to Mauritius pursuant to Rule 276ADE.
25. On behalf of the claimants, Mr Rees agreed with Judge Perkins that the decision paraphrased Counsel's grounds, and so there was no error on that account; and he agreed that the reference to more than emotional ties in paragraph [32] was a red herring, as the relationship between the claimants and Mrs Howes was not the reason that the appeals were allowed. He submitted that the very experienced First-tier Tribunal Judge had reached, through cogent and faultless reasoning, an unimpeachable decision that the claimant had established a right to remain under the Rules, and that the other claimants were entitled to remain on that account.

Discussion

26. **EV (Philippines) v SSHD [2014] EWCA Civ 874** provides the most recent guidance from the senior courts on the approach to best interests and the question of reasonableness. Clarke LJ said:
 - "34. In determining whether or not, in a case such as the present, 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.
 35. A decision as to what is in the best interests of children will depend on a number of factors such as (a) their age; (b) the length of time that they have been here; (c) how long they have been in education; (c) what stage their education has reached; (d) to what extent they have become distanced from the country to which it is proposed that they return; (e) how renewable their connection with it may be; (f) to what extent they will have linguistic, medical or other difficulties in adapting to life in that country; and (g) the extent to which the course proposed will interfere with their family life or their rights (if they have any) as British citizens.
 36. In a sense the tribunal is concerned with how emphatic an answer falls to be given to the question: is it in the best interests of the child to remain? *The longer the child has been here, the more advanced (or critical) the stage of his education, the looser his ties with the country in question, and the more deleterious the consequences of his return, the greater the weight that falls into one side of the scales* (my emphasis). If it is overwhelmingly in the child's best interests that he should not return, the need to maintain immigration control may well not tip the balance. By contrast if it is in the child's best interests to remain, but only on balance (with some factors pointing the other way), the result may be the opposite.

37. In the balance on the other side there falls to be taken into account the strong weight to be given to the need to maintain immigration control in pursuit of the economic well-being of the country and the fact that, *ex hypothesi*, the applicants have no entitlement to remain. The immigration history of the parents may also be relevant e.g. if they are overstayers, or have acted deceitfully."

27. Lewison LJ said:

- "49. Second, as Christopher Clarke LJ points out, the evaluation of the best interests of children in immigration cases is problematic. In the real world, the appellant is almost always the parent who has no right to remain in the UK. The parent thus relies on the best interests of his or her children in order to piggyback on their rights. In the present case, as there is no doubt in many others, the Immigration Judge made two findings about the children's best interests:

- (a) the best interests of the children are obviously to remain with their parents; [29] and
- (b) it is in the best interests of the children that their education in the UK [is] not to be disrupted [53].

50. What, if any, assumptions are to be made about the immigration status of the parent? If one takes the facts as they are in reality, then the first of the Immigration Judge's findings about the best interests of the children point towards removal. If, on the other hand, one assumes that the parent has the right to remain, then one is assuming the answer to the very question the Tribunal has to decide. Or is there is a middle ground, in which one has to assess the best interests of the children without regard to the immigration status of the parent?"

28. The judge went on to analyse **ZH (Tanzania) v Secretary of State for the Home Department** [2011] UKSC 4 in order to elicit an answer to this question. He reached the following conclusion:

- "58. In my judgment, therefore, the assessment of the best interests of the children must be made on the basis the facts are as they are in the real world. One parent has no right to remain, but the other parent does, that is the background against which the assessment is conducted. If neither parent has the right to remain, then that is the background against which the assessment is conducted. Thus the ultimate question will be is it reasonable to expect the child to follow the parent with no right to remain to the country of origin?"

On the facts of **ZH** it was not reasonable to expect the children to follow their mother to Tanzania, not least because the family would be separated and the children would be deprived of the right to grow up in the country of which they were citizens. That was a long way from the facts of the case before them. No one in the family was a British citizen. None had the right to remain in the country. If the mother was removed, the father had no independent right to remain. With the parents removed, then it was entirely reasonable to expect the children to go with them:

"Although it is, of course a question of fact for the Tribunal, I cannot see that the desirability of being educated at public expense in the UK can outweigh the benefit to

the children of remaining with their parents. Just as we cannot provide medical treatment for the world, so we cannot educate the world.”

Jackson LJ agreed with both judgments.

29. In **Azimi-Moayed & Others (decisions affecting children; onward appeals) [2013] UKUT 197 (IAC)** a Presidential panel held:

“30. It is not the case that the best interests principle means it is automatically in the interests of any child to be permitted to remain in the United Kingdom, irrespective of age, length of stay, family background or other circumstances. The case law of the Upper Tribunal has identified the following principles to assist in the determination of appeals where children are affected by the decisions:

- (i) *As a starting point it is in the best interests of children to be with both their parents* (my emphasis) and if both parents are being removed from the United Kingdom then the starting point suggests that so should dependent children who form part of their household unless there are reasons to the contrary.”

30. Although the First-tier Tribunal Judge is very experienced and well-versed in the relevant authorities, I find that she has fallen into error in two related respects, albeit that the first is not raised in the grounds of appeal.
31. The judge’s first error was to treat the claimant as potentially qualifying for leave to remain under Rule 276ADE(1)(iv). At the beginning of the Rule it is specified that the relevant criteria must be met “at the date of application”. The date of application in this case was 29 May 2012, when the claimant had not accrued seven years’ residence in the UK. The judge clearly overlooked the potential significance of this requirement, as later in her decision she wrongly criticised the Secretary of State for not considering the application of Rule 276ADE(1)(iv) to the claimant when reconsidering the application in October 2014.
32. By that time, the claimant was a qualifying child pursuant to Section 117D of the 2002 Act, which came into force shortly after the appeal hearing before Judge Raymond. Consequentially the Secretary of State rightly considered in the refusal decision whether it was reasonable for the claimant to return with her parents to the country of origin in the light of the fact that she had now accrued over seven years’ residence in the UK, albeit that this exercise was conducted in the context of EX.1, rather than by reference to Section 117B(6).
33. The claimant entered the United Kingdom just before her 10th birthday, which was 15 December 2006. The period for which she was a qualifying child under the statute was a short one, ending on 15 December 2014, when she turned 18. Accordingly, at the date of the hearing before Judge Plumptre the claimant was neither a qualifying child (as she was no longer under the age of 18) and nor did she meet the gateway requirement for consideration under EX.1 and Rule 276ADE, both of which specify that seven years’ residence as a child must have been accrued by the date of

application. While this did not preclude some weight being given to the claimant's previous lengthy residence as a child in an Article 8 assessment outside the Rules, the judge misdirected herself in finding that the claimant qualified for leave to remain under the Rules.

34. The second error is encapsulated in the passage from Lord Justice Lewison's judgment which is relied on in the renewed application for permission to appeal. When addressing the issue whether it is reasonable for the claimant to return to Mauritius, the judge posed the wrong question and set off on the wrong trajectory. What was in contemplation was the removal of the entire family to Mauritius, in circumstances where no member of the family had an independent right to remain here under the Rules. So the starting point was whether it was reasonable to expect the claimant to follow both her parents with no right to remain to their common country of origin. At paragraph [25] the judge posed a different question, which was whether it was reasonable for the claimant to go on her own to Mauritius, leaving behind both her immediate family and her extended family in the UK. There was no question of her immediate family being left behind, as they were simultaneously facing removal to Mauritius. So it was the wrong question to pose.
35. As a result of failing to conduct her analysis in a real world context, the judge completely ignored the best interest considerations which militated in favour of the claimant returning with her parents and older sister to the country of which they were all nationals. Among other things, there was an egregious failure to recognise the first principle in Azimi-Moayed and Others, which underlay the reason given by the Secretary of State in the refusal letter for contending that it was reasonable for the claimant to return with her parents to Mauritius.
36. The judge also failed to bring into the equation wider proportionality considerations before reaching a conclusion on the reasonableness question.
37. As the appeals of the other family members all hinged on the deeply flawed finding that the claimant met the requirements of Rule 276ADE(1)(iv) and/or that it was not reasonable to expect her to return to Mauritius pursuant to Section 117B(6), it follows that the entirety of the decision is vitiated by a material error of law such that the decision should be set aside in its entirety.

Future Disposal

38. One of the error of law challenges raised in the initial application for permission was the judge's alleged failure to give cogent reasons why there was dependency beyond normal emotional ties between parents and adult children. Of greater significance however is the judge's finding that there were more than normal emotional ties between the claimants and Mrs Howes. Although the disruption of family life with Mrs Howes was not in the event relied on by First-tier Tribunal Judge Plumptre as a compelling circumstance outside the Rules which justified the claimants being accorded Article 8 relief outside the Rules, it remains a live and controversial question, as does the proposition that the older daughter is still emotionally

dependent on her parents, bearing in mind that her application for leave to remain was made solely on private life grounds, and not on the grounds of continuing emotional dependency. In the light of the above, I consider that the extent of fact-finding that is likely to be required in remaking the decision is such that this is an appropriate case to be remitted to the First-tier Tribunal for a *de novo* hearing, with none of the findings of fact made by Judge Plumptre being preserved.

Notice of Decision

The decision of the First-tier Tribunal contained an error of law, and accordingly the decision is set aside.

No anonymity direction is made.

Directions

The appeal is remitted to the First-tier Tribunal at Hatton Cross for a *de novo* hearing. None of the findings of fact made by the previous Tribunal shall be preserved.

Signed

Date

Deputy Upper Tribunal Judge Monson