



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Numbers: HU/07952/2016  
HU/08291/2016

**THE IMMIGRATION ACTS**

Heard at Field House  
On 5 September 2018

Decision & Reasons Promulgated  
On 11 September 2018

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

SK AND BK  
(ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellants: Mr M Jaufurally, Callistes Solicitors

For the Respondent: Ms A Fijiwala, Home Office Presenting Officer

**Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/291)**

I make an anonymity order. Unless the Upper Tribunal or a court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the appellants. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.

**DECISION AND REASONS**

1. The Appellants are the parents of a child, EK, who was an Appellant before the First-tier Tribunal. She is now a British citizen and no longer an Appellant in these proceedings. Her father's (SK) date of birth is 3<sup>rd</sup> December 1980. Her mother's (BK) date of birth is 7<sup>th</sup> March 1989. They are citizens of Mauritius. EK was born in the UK on 18<sup>th</sup> July 2007.
2. SK came to the UK on 18 October 2003 as a visitor. He has been without leave since 2008. BK came here in 2006 as a visitor. She has been without leave since 2008. They applied for indefinite leave to remain on 18<sup>th</sup> December 2015. The Secretary of State refused the application on 5<sup>th</sup> March 2016.
3. The Appellants appealed against the decision of the Secretary of State. Their appeal was dismissed by Judge of the First-tier Tribunal Cohen in a decision that was promulgated on 11<sup>th</sup> August 2017, following a hearing at Taylor House on 8<sup>th</sup> August 2017. Permission was granted by Upper Tribunal Judge Frances on 18<sup>th</sup> May 2018. The salient part of Judge Frances decision is as follows:
  - “2. It is arguable that the Judge failed to properly consider whether it was reasonable for the Appellant's ten year old daughter to leave the UK where she has lived all her life. The Judge properly dealt with her pending application for British Citizenship. The Appellant's daughter was granted British Citizenship on 27<sup>th</sup> November 2017. The grounds are arguable.”

#### **The Decision of the First-Tier Tribunal**

4. Judge Cohen heard evidence from the Appellants. He had before him their witness statements. At paragraph six of his decision he set out the documentary evidence that was before him and he summarises the evidence. It reads as follows:-

“Amongst documentation submitted in support of the appeal are witness statements from the appellant, the 2<sup>nd</sup> appellant and letters and reports from the appellant's daughter's school indicating her good progression in the UK educational system. I have additionally been provided with case law and objective evidence. In their witness statements, the appellants set out details of their immigration history, studied, worked and strong links with the UK. It is indicated that only the 1<sup>st</sup> appellant had returned to Mauritius once in 2006 since arriving. The appellant had always established very strong links in the UK. The first appellant worked as a handyman and the second appellant as a cleaner and leaflet distributor. The third appellant was born in the UK and has not left the country. She has only known the UK education system. English is first language and she only speaks and understands Creole to a limited extent. The educational system in Mauritius is very competitive and French is mostly spoken at School. The combined salary of the appellant would be expected to be about £800.00 per month in Mauritius, food rent and bills would cost about £700.00 per month and school fees are likely to be about £350.00 per month. The educational system in that country would be alien to the appellant's daughter. The appellants do not have accommodation to go back to in Mauritius. Relatives in that country could only accommodate them on a short-term basis. The appellant's daughter had an

outstanding application for British Citizenship. A recent acknowledgement of the application was submitted to me. It was begged that the appeals be allowed.”

5. The judge recorded BK’s evidence in cross- examination which was that she had lived with her parents and some of her siblings prior to marriage. She was in contact with family members in Mauritius. EK could understand some Creole but she was unable to speak it. The judge recorded that SK’s evidence in cross-examination was that he had multiple siblings in Mauritius and parents. One of his brothers owned a successful import business and another sold pharmaceuticals. One of his brothers paid for his own daughter to attend a private school. Private education would cost £1,000.00 a month in Mauritius and SK indicated that he would not be able to afford to pay this for the third appellant. Both Appellants had worked in the UK.
6. The Judge’s made findings at paragraphs 14 - 26. The salient parts of the decision are set out below:-

“14. I consider the implication of paragraph EX.1 of Appendix FM and paragraph 276 ADE particularly in respect of the appellant’s children. At the date of the application, the appellant’s daughter was 8 years old and she was 10 years old at the date of the appeal. In respect of paragraph 276 ADE the requirements to be set out for an application is under the age of 18 years and had lived continuously in the UK for at least 7 years and the appellant was the sole carer of that child. Both parents are present in the UK and care for their child and so the appellant cannot meet this exception.

15. In considering section 55 the best interests of the 3<sup>rd</sup> appellant I note that the respondent gave consideration to the same. The appellant’s daughter attended court. She was wearing a hijab and appeared in traditional dress like her mother. I find that the appellants sought to enhance and bolster their evidence before me. The second appellant attempted to claim that the third appellant did not understand more than a smattering of Creole and could not speak it. In the first appellant’s witness statement, he indicated that the 3<sup>rd</sup> appellant spoke and understood basic Creole. The same was true of French. The second appellant indicated that private school fees can amount to £1000 whereas in the first appellant’s witness statement it is stated that they are likely to be £350 per month. Furthermore, it was indicated before me that the third appellant had a connection with her family members in Mauritius and spoke with them via Skype including her cousin. In these circumstances, I find that the appellant has connections with Mauritius through the cultural upbringing that she has enjoyed with her family members. I find that it is in her best interest to remain with her parents and return to Mauritius where she will be surrounded by close family members including her grandparents, aunts, uncles and cousins. I find that she is a bright child who will easily adapt to education in that country. I find that she has an adequate knowledge of the languages spoken in Mauritius which include English and that she will quickly adapt to life in that country.

...

17. It was argued on the appellants behalf that the third appellant has applied for British Citizenship and that Zambrano should apply. However, the

respondent has residual discretion in respect of citizenship applications and there is no certainty that citizenship will be bestowed upon the third appellant. A number of issues will be considered by the respondent and I have noted above that the appellant's parents have remained in the UK legally and have worked in this country illegally and failed to pay tax. In these circumstances, noting that the third appellant is not a British citizen at present, I find that she cannot take advantage of such status.

...

19. The appellant has lived in the UK continuously for in excess of 14 years. The appellant is living in the UK with his wife and daughter and I find that there is a strong family life in existence between them. However, they will be removed the family and there will therefore be no interference caused to their right to a family life. The appellants have lived, studied, worked, and socialised with extended family and friends in the UK and the appellant's daughter has attended school in the UK and socialised with friends. The appellant's removal will cause interference with their rights to a private life. I must consider whether the interference caused to the parties' family and private life is proportionate in all the circumstances.

...

21. I must consider whether any compassionate circumstances are apparent in relation to the children's best interest. In the circumstances, I have outlined I find that they are. Compassionate in this context is regarded as action which would result in unjustifiably harsh consequences and I find that the appellant's daughter will adjust with ease upon return to Mauritius with her close family members.
22. In the above circumstances, I find that it is in the best interests of the appellant's children to travel to Mauritius with her parents. The family has significant ties with Mauritius including accommodation with the parents of the first and second appellants and assistance that may be provided in particular the first appellant's siblings who appear to be highly successful in that country and can fund private education for their own daughters and have businesses of their own. The first appellant used to work in his family business in any event. I find that he may find employment with some ease."

### **The Grounds**

7. The grounds assert that the judge did not properly consider paragraph 276 ADE (1) (iv), in respect of EK. The judge failed to consider material matters when assessing EK's best interests. The judge failed to assess whether it would be unreasonable to expect EK to leave the UK in the context of paragraph 276 ADE (1) (iv) and section 117B (6) of the 2002 Act when assessing proportionality. He did not consider whether it would be reasonable for EK to leave the UK.

### **The Error of Law**

8. Ms Fijiwala conceded that the judge erred in law because he did not properly consider EK's best interests (with reference to MA (Pakistan) [2016] EWCA Civ 705) in the light

of the fact that she had been here more than 7 years. She submitted that the judge did not attach weight to this material factor. She stated that this was, in the view of the Secretary of State, a material error of law and the decision should be set aside. In any event, the judge failed to consider reasonableness in the context of 276ADE or section 117B (6) of the 2002 Act.

9. It was further conceded by the Secretary of State that in the light of the fact that the child is now a British citizen, properly applying the Home Office Guidance (Family Migration: Appendix FM Section 1.0b Family Life (as a Partner or Parent) and Private Life: 10-Year Routes Version 1.0 - see pages 74-77) and relevant case law relating to the issue of reasonableness, it would not be reasonable with reference to section 117B (6) of the 2002 Act, to expect EK to leave the UK. I agreed that the judge materially erred for the reasons articulated by Ms Fijiwala.
10. In the light of the concession made by the Secretary of State, which is in my view correct in law, I set aside the decision of Judge Cohen and remake the appeal. The judge erred for the reasons identified in the grounds. I allow the appeal under Article 8.

#### **Notice of Decision**

The appeal is allowed

#### **Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008**

Unless and until a Tribunal or court directs otherwise, the Appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies both to the Appellants and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

*Joanna McWilliam*

Date 6 September 2018

Upper Tribunal Judge McWilliam