



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/22847/2016
HU/23867/2016
HU/23874/2016
HU/23870/2016

THE IMMIGRATION ACTS

Heard at Field House
On 31 July 2018

Decision & Reasons Promulgated
On 22 August 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE HUTCHINSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR MADAN GOPAL
MRS KIRAN BALA
MISS RIYA MAHENDRU
MR MANAV MAHENDRU
(ANONYMITY DIRECTION NOT MADE)

Respondents

Representation:

For the Appellant: Mr A Tan, Senior Home Office Presenting Officer
For the Respondents: Mr A Jafa, Counsel instructed by Mayfair Solicitors

DECISION AND REASONS

1. This is the Secretary of State's appeal. However, I refer to the parties as they were before the First-tier Tribunal where Mr Madan Gopal, his wife and now adult children were the appellants.

Background

2. The first appellant was born on 11 June 1973 and his wife the second appellant on 1 July 1973. The third and fourth appellants are their daughter, born on 26 October 1998 and their son, born on 10 September 1999; all are citizens of India. They appealed to the First-tier Tribunal against a refusal by the Secretary of State, dated 6 September 2016, to refuse their application for further leave to remain. In a decision and reasons promulgated on 20 December 2017, Judge of the First-tier Tribunal Baker allowed the appellants' appeals.
3. The Secretary of State appeals with permission on the following grounds:
Ground 1:
Failure to give adequate reasons for findings on material matters in relation to the third appellant; and
Ground 2:
Failure to give adequate reasons for findings on material matters in relation to the first, second and fourth appellants.

The Hearing

4. Mr Tan relied on the grounds for permission. He noted that at [20] the judge acknowledged that the Rules cannot be satisfied. However there was no further consideration of this factor in consideration of the public interest, contrary to case law (including **Hesham Ali [2016] UKSC 60**). He submitted there was little consideration of what was exceptional or compelling about this case and little consideration of Section 117B including that little weight should be given to private life established when an individual was in the UK unlawfully (regardless of the fact that they were minors at the time). Although Mr Tan accepted that education is a central aspect of one's private life, in his submission this was limited as had been established by various authorities. Looking at the evidence, Mr Tan submitted that at the date of hearing the appellant did not appear to be in education, nevertheless the judge gives significant weight to her right to education.
5. Whilst Mr Tan accepted that the third appellant should not be blamed for mistakes made by her parents, the judge failed to give little weight to her private life as required by Section 117B and he submitted that rather than take a broad evaluative approach the judge's approach was a narrow one. Mr Tan confirmed that the Secretary of State was not seeking to mount a rationality challenge but maintained that the reasons given by the First-tier Tribunal Judge were inadequate and did not amount to anything compelling; it was arguably obvious that she should have considered other factors as set out in the grounds including that she had received an education in the UK and

spoke Punjabi to a high degree of fluency but no findings were made on educational opportunities in India which she could pursue with the support of her parents.

6. In respect of the second ground Mr Tan relied on the same points and noted that there was very little said about the fourth appellant. The judge failed to consider why it would be disproportionate for the other family members, including the fourth appellant to return and erred in attaching the success of the first and second appellants to that of the third and fourth.
7. In reply Mr Jafa stated in summary that the judge's decision did not contain an error of law.

"The mere fact that one Tribunal has reached what may seem an unusually generous view the facts of a particular case does not mean there has been an error of law, ..."
8. Proportionality is a matter for the First-tier Tribunal. The judge set out at [11] that she had had regard to Section 117B of the Nationality, Immigration and Asylum Act 2002 and the public interest considerations. The judge had essentially stated that the parents' cases would not have succeeded but for their children due to the public interest considerations and the fact that they were overstayers. He submitted that it was open to the judge to attach particular weight, as she did including at [25] and [28], attaching particular weight to the fact that the third and fourth appellants were children when the prolonged breach of immigration law occurred. Mr Jafa drew my attention to the judge's findings, which were made on the basis of the evidence, in relation to what the judge found to be exceptional obstacles faced by the third appellant; taking into consideration the evidence that she had integrated into the UK believing she was here legally and reports showing her involvement in her education and associated social contacts. Mr Jafa referred to the judge's findings, which she stated were of "central importance", at [26] that the difficulties the third and fourth appellants would have in integrating in India despite the fact that they speak Punjabi due to the fact that they had been "brought up with freedom of action, in contrast to the social mores particularly for girls in India as she herself explained in oral evidence".
9. Mr Jafa also pointed to the fact that the First-tier Tribunal Judge specifically stated at [29] that her findings in relation to the fourth appellant were the same as for the third appellant save for the gender issues. It was accepted by the parties that the judge made a factual error in stating that the fourth appellant was under 18 at the date of the hearing whereas he had turned 18 in the weeks preceding the hearing.
10. Mr Jafa submitted that in relation to the third and fourth appellants the judge had applied the principles of Kugathas at [21] and found that they enjoy family life; this finding was not challenged. The judge also found that the third appellant is dependent on her parents for her upkeep and that she was still studying. It was Mr Jafa's submission that the conclusions the judge reached was correct, in finding that removal of the first and second appellants would be disproportionate. The fact that the third

and fourth appellants were young adults did not negate their reliance on their parents (Maslov v Austria 23 June 2008 [2009] INLR 47).

11. Mr Jafa submitted that the judge, considering the appeal through the prism of the Immigration Rules to assist her interpretation of Article 8, found that but for the fact that the third appellant would not qualify in relation to the seven year period under paragraph 276ADE the judge found that:

“I would have concluded she met the second limb of the Immigration Rules as to the obstacles she faces.”

12. Mr Tan submitted that in his view if there was an error in relation to the judge’s findings on the third and fourth appellants then the first and second appellants fell with them whereas if I upheld the third and fourth appellants’ appeals the first and second appellants’ appeal decision should also stand.

Error of Law Discussion and Conclusions

13. In respect of the third appellant, Mr Tan confirmed that this was not a rationality challenge and it was the adequacy of the judge’s reasons which were at issue. However the judge set out and had in mind all the relevant factors. The judge had set out the background to the case in some detail including the overstaying and did not find the first and second appellants to be credible in relation to why they had overstayed. She found, at [20], that the first and second appellants could have returned to India but for their family life relationships with the third and fourth appellants.
14. However, the judge went on to find that the first and second appellants continued to enjoy family life including given the age of the third and fourth appellants. I am not satisfied (and it was not contended before me) that anything turns on the judge’s factual error of the fourth appellant remained a minor at the date of the hearing whereas he had just turned 18 that month, as the same factors apply. The judge found that the children of the family remained living in the family home and were dependent on their parents for upkeep and were still studying and that there was emotional dependency and interdependency between all four appellants. I further note that the judge placed weight on the fact that these findings were not challenged before her.
15. The First-tier Tribunal Judge then went on to consider Article 8, it having been accepted by Counsel for the appellants as noted at [13], that the appellants could not succeed under the Immigration Rules owing to the date of lodging of the applications and that the third and fourth appellants were at that date not yet 7 years in the country. However the judge did not fall into any error in erroneously giving weight to “near miss” arguments and such was not contended before me.
16. It was open to the Tribunal to assess, as it did, the obstacles that the third and fourth appellants would face on return through the prism of the Immigration Rules. It was also open to the judge to take into consideration that the third appellant was not aware that she was illegally in the UK until she made an application for university. In terms

of assessing Article 8 through the prism of the Immigration Rules at the time of the decision the third appellant was still a minor and would have had to show that it was not reasonable to expect her to leave the UK (if she had met the 7 year requirement). It was clear that the judge was satisfied that this was very much the case as the judge made a separate finding that the third appellant would face “considerable and insurmountable difficulty in returning now to India”.

17. Although Mr Tan focussed much of his submissions in relation to ground 1 on the assertion that the judge had focussed primarily on the third appellant’s education, that is incorrect. Indeed, at [24] the judge refers to “insurmountable difficulty in returning now to India to try to fit into an educational system and in particular social system ...”. In my view the emphasis of the judge’s findings was very much more on the social difficulties that the third appellant, in particular, would face, although education and her achievements in the UK were a factor. Although the grounds complain that the judge did not take into account the educational opportunities in India where the appellant, it was asserted, could pursue her education with the support of her parents, again that is incorrect. The judge found that both the third and fourth appellant would have difficulties in findings, at [26], which the judge viewed of “central importance”. The difficulties that they would have “in integrating in India having been brought up with the freedom of action, in contrast to the social mores particularly for girls in India as she herself explained in her oral evidence”. Such consideration must by definition take into account the third appellant’s integration into the education system as well as the general social society in India (whether with or without her parents) given that it was her stated intention to continue studying. In addition at [27] the judge went on to find that:

“Her difficulty in integration I find she will face relates to her whole sense of self, her right to self-determination which in the UK over her formative years she has taken for granted and acted on very successfully, not simply entering a new education system.”

18. It is self-evident that this consideration encompassed difficulties in accessing the education system but that this was only a part of the overall consideration and the judge had in mind the evidence including the witness statements of all of the appellants which included their concerns in relation to adjusting to society in India (including as set out at paragraph 13 of the third appellant’s witness statement). The judge’s findings echo the difficulty that the third appellant stated she would face in starting education in India, which is intrinsically linked with her difficulties in adjusting to Indian society given that she has adjusted to UK culture and norms.
19. The judge gives significant weight to the evidence of the third appellant including her oral evidence and this is emphasised in her findings including as follows:

“She has spent her whole adolescence in the UK, imbibing because she believed she was to live here permanently, the latter statement unchallenged by the respondent, the mores and culture and, as she described it, the treatment and expectations of women, in her aspirations for herself. It is her own responses so clearly identified in her oral evidence as to her return to live there that cause me to

conclude that, even with her parents with her in India and supporting her she will face these serious and significant problems in her integration to India.”

20. As correctly noted by Mr Jafa, citing Carnwath LJ in **Mukarkar**, the mere fact that one Tribunal has reached what may seem an unusually generous view of the facts of a particular case does not mean that it has made an error of law. Whilst another Tribunal might come to a different conclusion on the same evidence, the judge had the benefit of hearing from the appellants and reached the sustainable findings she did for the adequate reasons she gave. I have reminded myself what was said in **MD (Turkey) v SSHD [2017] EWCA Civ 1958** that adequacy means no more nor less than that. It is not a counsel of perfection. Still less should it provide an opportunity to undertake a qualitative assessment of the reasons to see if they are wanting, perhaps even surprising, on their merits. The purpose of the duty to give reasons, is in part, to enable the losing party to know why he has lost.
21. It was not suggested that there was anything irrational in the Tribunal’s conclusions and I am satisfied that they were available to her. It is very clear why the third and indeed the fourth appellant succeeded (and I cannot agree with the grounds and submissions of the Secretary of State in relation to the fourth appellant as the judge set out, at [29] that the findings in respect of the third appellant were the same for the fourth appellant save for the gender issue and that this would therefore encompass the cultural and social difficulties).
22. In terms of the public interest, a proper reading of the judge’s decision indicates that she had in mind the public interest considerations which she had directed herself to at [11]. The reasons she gave, for attaching more weight to the private life of the third and fourth appellants, were available to her). In applying the ‘little weight’ provision, the principle is not a rigid one and involves a spectrum in a fact sensitive approach (see **Kaur (children’s best interests/public interest) [2017] UKUT 14**). It was open to the judge to do as she did and give weight to the fact that the majority of the breach occurred when she was a child and that she did not have responsibility for this.
23. Contrary to Mr Tan’s submissions the First-tier Tribunal gave more than adequate reasons as to why she considered the circumstances for the third and fourth and indeed the fourth appellants to be compelling and or exceptional.
24. In respect of the second ground I note Mr Tan’s indication that if the decision in relation to the third and fourth appellants stood, which in my findings it does, the decision of the first and second appellant should also stand. Even if that submission had not been made, a fair reading of the judge’s decision in its entirety discloses that she attached considerable weight to the continuing family life between the first and second appellants and their teenage children albeit that those children were now young adults.
25. Although the First-tier Tribunal might have set out more comprehensively why it was disproportionate to split the family, considered in its entirety there was no error in her

overall approach. A fair reading of the decision discloses that the judge had taken into consideration all the relevant elements including the poor immigration history of the first and second appellant (at [19]).

26. It was not disputed that there is a bright line when an individual turns 18 in terms of family life. In light of the judge's undisputed findings as to the continuing family life: that the third and fourth appellants were living in the family home and dependent on their parents for upkeep (and indeed the judge had not accepted that the parents were not working) and that the children were still studying and were emotionally dependent on their parents and each other, there is no material error in the judge's ultimate conclusions, which were available to her, that it would be a disproportionate interference with family life to refuse the first and second appellants and that on the facts, the public interest in removal was outweighed.
27. The decision of the First-tier Tribunal does not contain an error of law such that it should be set aside and shall stand.

I do not continue the anonymity direction made in the First-tier Tribunal as all the appellants are now adults.

Signed

Date: 14 August 2018

Deputy Upper Tribunal Judge Hutchinson

TO THE RESPONDENT
FEE AWARD

No fee was paid or payable so no fee award is made.

Signed

Date: 14 August 2018

Deputy Upper Tribunal Judge Hutchinson