Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: HU/08723/2018
HU/08730/2018
HU/08732/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 4th February 2019	**On 15th March 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

NILESHKUMAR [M]
STELLA [M]
SMIT [M]
(ANONYMITY DIRECTION NOT MADE)

Respondents

Representation:
For the Appellant: Mr E Tufan (Senior HOPO)
For the Respondents: Mr B Hawkin (Counsel)

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Devittie, promulgated on 29th November 2018, following a hearing at Taylor House on 1st November 2018. In the determination, the judge allowed the appeal of the Appellants, whereupon the Respondent Secretary of State, subsequently applied for, and was granted, permission

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to appeal to the Upper Tribunal, and thus the matter comes before me. I shall refer to the parties as they were before the First-tier Tribunal.

2. The First Appellant is a male, a citizen of India, and was born on 25th August 1970. He has two dependants. The Second and Third Appellants are his dependent wife and son and they were born on 19th August 1968 and 23rd July 1998 respectively.

The First Appellant's Claim

3. The First Appellant arrived in the UK initially on a student visa on 21 February 2007, and was thereafter granted various extensions of leave to remain, which took him to 14th July 2009. He then made an application for further leave as a Tier 1 (Highly Skilled Post-Study) Migrant, and was granted further leave until 29th July 2010. Another application as a Tier 2 (Skilled Worker) was then refused, with the right of appeal on 1st December 2010. He applied for further leave on 20th September 2011 as a Tier 2 (Skilled) Migrant and was granted leave until 16th October 2014. His leave was finally curtailed on 21st April 2014, so as to end on 22nd April 2014. He applied for leave to remain under the family and private life provisions on 24th May 2014 and that application was refused with a right of appeal on 23rd July 2014. It was on 29th January 2016 that he then submitted a long residence application. This was refused on 29th June 2016. He submitted a family and private life application on 1st July 2016. It was the refusal of that application that led to this appeal.

4. The Respondent's decision was that the First Appellant had lived in the UK for nine years and four months, and had not demonstrated that he met the provisions of paragraph 276ADE, or that there would be very significant obstacles to his integration upon return to India.

5. The First Appellant's claim is based upon the fact that his son, under the age of 18, had resided in the UK for more than seven years, and that an application was pending with the Respondent, in this respect. His son had come to the UK on 27th May 2009 with entry clearance as his dependant. He had come when he was 10 years of age. He was now 19 years of age. When his son made the application he was 17 years of age and had lived in the UK for over seven years. The position now was that he had been in the UK in excess of ten years. He had gained qualifications in management. He was of good character. There were exceptional circumstances.

The Judge's Findings

6. The judge observed that it was not contested that the principal Appellant and the Second Appellant, his wife, could not rely on any grounds under Appendix FM in their applications for leave to remain. The appeals, therefore, turned largely, if not wholly on the application of the Third Appellant, whose application properly failed to be considered under

Appendix FM of the Immigration Rules. There had been an earlier decision by an Immigration Judge who had:-

> "dismissed the 3rd Appellant's application, but it is not contested that the First Immigration Judge did not and was not able to consider it under the Immigration Rules for the reason that at the date of the application that is the subject of that appeal, the Appellant had not spent 7 years in the United Kingdom" (paragraph 14).

7. What the judge had in the instant case before him, however, was a psychiatric report. This made it clear that:-

> "[~]'s health may deteriorate further if he is faced with having to return to India after spending his childhood and adolescence in the UK. Adolescent years are the years where a young person forms and develops the identity and interacts with their social world. [~] is rooted in this country after developing his identity as a young man living in the United Kingdom. He will be going into a country with systems that he is unfamiliar with and does not have the language skills to negotiate his way through the system …" (see paragraph 19 of the determination).

8. The judge went on to recite the psychiatrist's report in detail, observing that:-

> "[~] is vulnerable due to risk factors of family history of suicide and history of self-harm. The instability and change of being forced to move back to India could become another significant risk factor which may lead to the deterioration of his mental health …" (see paragraph 19).

The judge went on to note that the conclusion of the psychiatrist was that:-

> "In my professional opinion [~]'s mental health problems are a result of his environmental circumstances and once changes are made at immigration level, this will in turn impact positively on his mental health by giving him control and options" (paragraph 19).

9. Against this background, the judge had regard to whether it would be reasonable to expect the First Appellant to leave the United Kingdom. The judge observed that there were no compelling public policy considerations to do with the immigration history of the First Appellant's parents. He noted that:-

> "It is true that they do not have immigration status and have remained in the United Kingdom, and engaged in employment in breach of the Immigration Rules. They have, however, at all material times, sought to regularise their stay by making a serious of bona fide immigration applications. Furthermore, there is a limit to which the immigration history of his parents can be visited upon this Appellant" (paragraph 22).

10. The judge decided to allow the appeal because:-

> "The psychiatrist's report points to the 3rd Appellant's mental frailty, and I think it is fair to say that the continued support of his parents, having regard to his symptoms would be absolutely essential for the improvement in his mental health" (paragraph 25).

11. The appeal was allowed.

Grounds of Application

12. The grounds of application state that the judge erred in allowing the appeal because he failed to take as a starting point the findings of the Tribunal decision made earlier in December 2017. There had been no change in the circumstances of family members since that decision. All that existed now was fresh evidence in the form of a new psychiatric report in relation to the Third Appellant, the son of the First Appellant, but this did not suggest that his health had deteriorated, or that it would continue to deteriorate in the event of removal to India. The new evidence also fell considerably short of showing that the Article 3 threshold would be met if the Third Appellant were to be removed, given what had been set out in **GS (India)**. Finally, there was no "family life" appeal in this case because the entire family stood to be removed together.

13. On 19th December 2018, permission to appeal was granted.

Submissions

14. At the hearing before me on 4th February 2019, Mr Tufan, appearing on behalf of the Respondent Secretary of State, made the following submissions. He stated that all three Appellants in this case were adults. There was also an earlier decision by Judge Eldridge, promulgated on 2nd January 2018, following a hearing at Hatton Cross on 3rd November 2017, which should have been the starting point for this hearing before Judge Devittie.

15. In that case, Judge Eldridge had dismissed any suggestion that the Third Appellant did not speak the Gujarati language, which was his native tongue, observing that:-

> "The Third Appellant lived in India, with his mother, until he was almost 11, I do not accept the evidence that he speaks little Gujerati and find it is much more likely that he is fluent in this language" (see paragraph 23).

16. But most importantly, even if the expert report provided by the clinical partners Wimpole Street clinic, under the hand of Dr Hasanen Al-Taiar, was to be taken at face value, there was no reason why any of the conditions that were being referred to by the expert psychiatrist, were not treatable in India, bearing in mind the high threshold established by the European Court in **N v UK**. In fact, the Third Appellant did not appear to be under any medication as such. Accordingly, the judge was wrong to have allowed this appeal.

17. For his part, Mr Hawkin submitted that the reference to the earlier decision of Judge Eldridge was a red-herring. This is because at the time that the decision by Judge Eldridge was made, the First Appellant had not been in this country for seven years, so as to bring himself within the Immigration Rules, and that appeal before Judge Eldridge was entirely based upon freestanding Article 8 jurisprudence, so as to fall outside the Immigration Rules.

18. That being so, the essential question, which fell to be considered under the Immigration Rules, as to whether or not it would be "reasonable" to expect the Third Appellant to return to India, had not even been considered by Judge Eldridge, because it was not a relevant consideration to take into account.

19. This is why, the judge in this instant case, had made it quite clear that:-

> "It is true that the first Immigration Judge dismissed the Third Appellant's application, but it is not contested that the first Immigration Judge did not and was not able to consider it under the Immigration Rules" (paragraph 14)

because the Third Appellant had not spent seven years in this country. Mr Hawkin drew attention to how Mr Tufan had been critical of why an appeal so quickly after the last application had been dismissed, was being made now.

20. However, the reason was quite simply, as Judge Devittie made clear, that the application was made on 1st July 2016:-

> "and as at that date, the 3rd Appellant had spent 7 years in the United Kingdom, and was under the age of 18 at the date of the application. It is the case that as at the date of decision, on 3rd April 2018, and indeed as at the date of this hearing, the 3rd Appellant had become an adult" (paragraph 15).

None of this was contentious, submitted Mr Hawkin. What was in contention was the treatment given by the judge to the Third Appellant in his decision.

21. The position of the Third Appellant, however, was that he had now lived in the UK for over seven years. He had spent the most formative part of his seven year period, namely the latter four years of his time, in this country, and this complied with the strictures of **Azimi-Moayed [2013] UKUT 00197**. The judge properly took this into account. It was also consistent with the concerns raised by the psychiatrist when he referred to the level of disruption that the Third Appellant would have to face.

22. Mr Hawkin went on to say that the reference to **N v UK** was entirely irrelevant, because the Third Appellant's case was not the availability or otherwise of medical treatment in India. His case was that he had lived in the UK for over seven years and the question then was whether it would be "reasonable" to expect the Third Appellant to relocate, his having spent

the crucial parts of his life in this country from the age of 11 to 19. This was in fact a very strong case on the material facts in this case. The existence of the psychiatrist's report was simply "the icing on the cake" and was not essential for the Third Appellant to succeed in the manner that he did.

23. The particular question that had to be answered with specificity was whether it would be "reasonable" to expect him to return to India after having spent his developmental years in this country. What the psychiatrist did do was to draw attention to:-

    (a) the family history of bereavement;

    (b) the suicide; and

    (c) the history of self-harm.

    The grounds by the Secretary of State challenging the decision of Judge Devittie were misconceived because they get off on a completely wrong footing. Neither **Devaseelan** nor **N v UK** were actually relevant. What was in issue was the "reasonableness" of the Third Appellant having to return to India after more than seven years in this country. In this regard, the judge had given sufficient reasons for his decision.

24. In reply, Mr Tufan submitted that the Third Appellant was an adult and that the Section 117B consideration in favour of immigration control could not be overlooked, and that the latest Supreme Court decision in **KO (Nigeria) [2018] UKSC 53**, makes it clear that whereas the immigration history of the parents is not directly relevant, it can become relevant when regard is had to what will happen to the parents, because "the natural expectation" (see paragraph 51 of the Supreme Court's decision) would be that the child would go with the parents to the country of removal. In this case, the Third Appellant was in fact an adult.

No Error of Law

25. I am not satisfied that the making of the decision by the judge did not involve the making of an error on a point of law (see Section 12(1) of TCEA 2007), such that I should set aside the decision and remake the decision. My reasons are as follows.

26. First, at the time of the previous decision by Judge Eldridge on 23rd December 2017, the Third Appellant did not qualify under paragraph 276ADE(1)(iv) of the Immigration Rules. He had not lived continuously in the UK for seven years. The wording of the Rule is that the requirements set down by the law must be met "at the date of application". This being so, at the date of application, the Third Appellant was a minor under the age of 18 years.

27. Second, by the date of the hearing before Judge Devittie, the Third Appellant had lived continuously in the UK for over seven years and was

under the age of 18 (see paragraph 15 of the judge's determination). These were highly material considerations for the judge hearing the appeal.

28. Third, the judge did consider (from paragraphs 17 onwards) whether the requirement of the Immigration Rules in paragraph 276ADE(1)(iv) could be met and that the Third Appellant could reasonably be expected to leave the UK. The judge set out several very good factors (at paragraph 18) and then went on to refer to the psychiatrist's report of 12th October 2018 (at paragraph 19). He was entitled to state that this was a "significant consideration", bearing in mind the report's conclusions (which were set out at paragraphs 19 to 20 of the determination and which the judge set out in full).

29. Fourth, it is of course, for the judge to ultimately make a finding, and not for the expert, but in this case, the judge was impressed with "the detailed reasons and the quality" of the report (see paragraph 21 of the determination), such that he was satisfied that the best interests of the Third Appellant would lie in him remaining in the UK with the support of his parents, so as to enable him to recover and avoid the very real risk of serious deterioration in his mental health, and the judge was clear that the report had spoken of this in "emphatic and persuasive terms".

30. I note that the expert's report records that "Mr Sigfrid shows features of severe depressive episode F33.2. This is triggered by his social stressors such as and worries about his immigration status and the lack of progress in his life" (paragraph 8.1). The expert also observed that "It is likely that these conditions will worsen should Mr Sigfrid return to India as this would expose him to similar stressors …" (paragraph 8.2). The expert went on to look at the "risks" in this regard and observed that "current clinical risks to self are moderate (risk of impulsive suicide) and low to others" (paragraph 9.1).

31. Fifth, however, as against the medical assessment, the judge also, in looking at the "reasonableness" of relocation, had regard to the fact that the principal Appellant in this case had always sought to regularise his stay, and the judge concluded that there was a limit to which the history could be visited on the Third Appellant (see paragraph 22).

32. Sixth, it was open to the judge to have regard to the expert (at paragraph 23) that there would be "serious consequences for the mental health of the [Third Appellant] were he compelled to leave the UK", and that it would therefore "not be reasonable" (paragraph 24) to expect him to leave.

33. Finally, the judge considered the appeals of the principal Appellant and his wife (at paragraphs 25 to 26) under Article 8 and concluded that their continued support would be essential for the improvement of the Third Appellant's mental health, and that removing him from the UK and

separating them from their son would have potentially serious consequences that "outweigh the imperatives of maintaining effective immigration controls".

34. If the complaint against the decision of the judge is that he failed to provide adequate reasons, this is manifestly not the case (see paragraphs 19 to 21). The judge did consider whether, with the Third Appellant having lived in this country from the ages of 11 to 18, it would be "reasonable" to expect him to leave this country, and it was entirely open to the judge to conclude as he did.

35. It is not the case, as the Secretary of State maintains that the judge has to show that there were "compelling circumstances" as this was not a requirement of the Rules. Another judge may well have taken a different view, but this was a decision that was open to Judge Devittie, and he has given ample reasons for coming to the decision that he did. The decision will stand.

Notice of Decision

36. The decision of the judge does not contain a material error of law. The decision will stand.

37. No anonymity direction is made.

38. The appeal of the Secretary of State is dismissed.

Signed Date

Deputy Upper Tribunal Judge Juss

TO THE RESPONDENT
FEE AWARD

The appeal is dismissed and therefore there can be no fee award.

Signed Date

Deputy Upper Tribunal Judge Juss 13th March 2019