



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

Appeal Numbers: HU/19490/2019
HU/11455/2019
HU/11459/2019

THE IMMIGRATION ACTS

Heard at Field House

On 7 January 2022

Decision & Reasons

Promulgated

On 26 January 2022

Before

UPPER TRIBUNAL JUDGE SHERIDAN

Between

**MR MUHAMMED ABUTHAHIR CHUNDIYAN MOOCHI
MRS SAJNA MACHINGAL
AYAAN THAHIR CHUNDIYAN MOOCHI
(ANONYMITY DIRECTION NOT MADE)**

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr H Kannangara, Counsel instructed by Wise Legal Ltd

For the Respondent: Ms S Cunha, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against a decision of Judge of the First-tier Tribunal Morgan (“the judge”) promulgated on 22 July 2021.
2. There are three appellants, all of whom are citizens of India. The first appellant is the husband of the second appellant and father of the third

appellant, who was born in March 2015. Reference in this decision to “the appellant” is, unless stated otherwise, a reference to the first appellant.

3. The appellant came to the UK as a student in February 2010. The second and third appellants joined him in the UK in January 2017.
4. The appellant’s immigration history, in summary, is that he entered the UK in February 2015 as a Tier 4 Student. His leave was extended first as a student and then as a Tier 2 (General) Migrant. In November 2017 he applied for leave on the basis of his family and private life. On 20 November 2018, this was refused with an out of country appeal. He has not had leave since then. On 3 December 2018 he applied for leave on the basis of long residence. The application was amended on 6 April 2018. It was refused on 12 November 2019.

The Respondent’s Decision of 12 November 2019

5. The appellant claimed to satisfy paragraph 276B of the Immigration Rules by having accrued ten years of continuous lawful residence. This was rejected by the respondent.
6. The respondent also considered whether, under paragraph 276ADE(1)(vi) of the Immigration Rules, there would be very significant obstacles to the appellant integrating into India. It was not accepted that there would be, given the amount of time he had lived in India and his ties to the country.
7. It was also not accepted that there were exceptional circumstances. The respondent noted that the appellant’s wife and child live in the UK but found that their family life could continue in India.

Decision of the First-tier Tribunal

8. The judge noted that it was common ground that the appellants did not meet the conditions of the Immigration Rules.
9. The judge found that it was in the best interests of the third appellant to remain in the UK with his parents. The judge stated in paragraph 9 that *“although these best interests are a primary consideration they do not necessarily outweigh the requirements of immigration control”*.
10. The judge then gave several reasons why he was satisfied that removal of the family, as a unit, to India, would not disproportionately interfere with their right to respect of their private and family life under Article 8. These were that:
11. The inability to satisfy the Immigration Rules is a significant factor weighing against the appellants. In paragraph 12 the judge stated:

“I find that the appellant’s inability to satisfy the Immigration Rules is a significant factor that weighs against the appellant in the proportionality exercise”.

12. It was not suggested that the family would face very significant obstacles integrating into India.
13. The third appellant has not been in the UK for seven years.
14. Maintenance of effective immigration controls is in the public interest.
15. In paragraphs 15 – 17 the judge stated:
 - “15. I note that little weight should be given to a private life that is established by person at a time when the person is in the United Kingdom unlawfully. This is not a factor that does weigh against the appellant who has remained in the United Kingdom lawfully for the entirety of his stay.
 16. I find that although the 117 factors do not weigh against the appellant the public policy the requirements of immigration control do weigh against the appellant in the balancing exercise because the appellant is unable to satisfy the private or family life requirements of the Immigration Rules.
 17. In summary I find that the appellant does not satisfy the requirements of the long residence and private life paragraphs of Immigration Rules. I therefore dismiss the appeal on human rights grounds. I note however that the third appellant will in just over two more years have spent seven years as a child in the United Kingdom and an application will be open to the family on this basis. If the respondent is not minded to remove the family in the interim the respondent may wish to consider a grant of discretionary leave, enabling the appellant to work without recourse to public funds until the children have been here for seven years. Such leave however is entirely a matter for the respondent.”

Grounds of Appeal and Submissions

16. The grounds of appeal are brief and not clearly particularised. However, in summary they make four arguments.
 - (1) First, the appellant’s lawful residence was accepted by the respondent and the refusal of his claim on the basis of an absence of continuous lawful residence was “technical”.
 - (2) Second, the best interests of the third appellant should outweigh immigration control.
 - (3) Third, more weight should have been given to the appellant’s private life because he has been in the UK lawfully.
 - (4) Fourth, the judge should have used his discretion to allow the appeal because the third appellant will, in a few years, have lived in the UK for seven years.

17. Permission to appeal was granted by Judge of the First-tier Tribunal Sills. In the grant of permission he makes a point not raised in the grounds but which was the focus of Mr Kannangara's submissions. This was that the judge arguably erred in paragraph 17 by dismissing the appeal because the appellant did not satisfy the Immigration Rules.
18. In his submissions before me, Mr Kannangara argued that in both paragraphs 16 and 17 the judge erred by treating the appellant's failure to satisfy the Immigration Rules as determinative of the appeal.
19. Ms Cunha argued that, although the wording in paragraph 17 could give the impression that the judge dismissed the appeal solely because the Immigration Rules were not satisfied, when the decision is read as a whole it becomes clear that this is not what the judge did. She noted that almost all of the decision is a proportionality assessment outside of the Immigration Rules.

Analysis

20. I will firstly address the four submissions made in the grounds of appeal (even though none of them were addressed in oral submissions at the hearing). I will then turn to the argument, raised for the first time in the grant of permission, on which I did hear submissions.
21. The first argument in the grounds of appeal is that the judge erred in his approach to paragraph 276B of the Immigration Rules. There is no merit to this ground. The appellant's leave ended on 20 November 2018, by which time he had been in the UK for less than nine years. The fact that he subsequently, on 3 December 2018, applied for further leave does not assist him because that application was unsuccessful and leave was not granted. The period between 20 November 2018 and 3 December 2018 was therefore not a period between periods of leave such that the disregard in paragraph 276B(v) could apply. It is surprising this argument was in the grounds given that this point appears to have been conceded in the First-tier Tribunal and the law in this area is now well established following *Hoque & Ors v The Secretary of State for the Home Department* [2020] EWCA Civ 1357.
22. The second submission in the grounds of appeal is that the best interests of the third appellant should outweigh immigration control. It is well-established that the best interests of a child are a primary but not paramount factor in an Article 8 proportionality assessment which can be outweighed by other factors, see, for example, *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4. Consequently, this submission has no merit.
23. The third submission in the grounds of appeal is that more weight should have been given to the first appellant's private life because he has been in the UK lawfully. This ground has no merit because weight is a matter for the judge. In any event, the grounds do not particularise or explain what it

is about the appellant's circumstances that means greater weight should have been given to his private life notwithstanding that it was established when he was in the UK with a precarious immigration status. Section 117B(5) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") stipulates that little weight should be given to a private life established when a person has precarious immigration status. It was recognised by the Supreme Court in *Rhuppiah v Secretary of State for the Home Department* [2018] UKSC 58 that in exceptional circumstances more than little weight can be given to a private life established when a person had a precarious immigration status but there is nothing in the grounds - or in the evidence that was before the First-tier Tribunal - that conceivably could show that there were circumstances that could effectively override the statutory requirements of Section 117B(5) of the 2002 Act in this case.

24. The fourth argument in the grounds is that the judge should have used his discretion to allow the appeal because the third appellant would in a few years have lived in the UK for seven years. This argument is misconceived. The role of the judge was to determine whether or not removal of the appellants would violate Article 8 ECHR based on the evidence at the date of the hearing. The fact that the circumstances may be different in two years' time is immaterial to the assessment that the judge was required to undertake.
25. I now turn to the argument advanced by Mr Kannangara at the hearing, which is that the judge erred by dismissing the appeal solely because the Immigration Rules were not satisfied.
26. A human rights appeal under section 82(1)(b) of the 2002 Act cannot be dismissed simply because the Immigration Rules were not satisfied - a judge must carry out, for herself, an assessment under article 8 ECHR. This assessment, however, can take into consideration that the Rules reflect the respondent's assessment of the public interest under article 8 ECHR, and failure to meet the Rules can weigh against an appellant. See paras. 44-46 of *Hesham Ali (Iraq) v Secretary of State for the Home Department* [2016] UKSC 60 and paras. 46-48 of *Agyarko and Ikuga, R (on the applications of) v Secretary of State for the Home Department* [2017] UKSC 11.
27. Accordingly, if the judge dismissed the appeal solely because the appellants did not meet the conditions of the Immigration Rules that would be erroneous in law. On the other hand, the judge will not have erred if, when assessing proportionality under article 8 ECHR, he gave weight to (but did not treat as determinative) the fact that the appellants did not meet the conditions of any routes to a grant of leave under the Immigration Rules.
28. Mr Kannangara submitted that both paragraphs 16 and 17 show that the judge treated the appellants' failure to satisfy the Immigration Rules as determinative.

29. I disagree with Mr Kannangara about paragraph 16. In this paragraph, the judge stated that because the appellants do not meet the requirements of the Immigration Rules the public interest in the maintenance of effective immigration controls weighs against them in the proportionality assessment. This is plainly correct: if an appellant satisfies the Rules then the respondent cannot point to the importance of maintaining immigration controls as a factor weighing in her favour in the proportionality balancing exercise. Conversely, if an appellant does not satisfy the Rules than the respondent can point to the public interest in maintaining immigration controls.
30. There is some merit, however, to Mr Kannangara's criticism of paragraph 17, where the judge stated:
- “I find that the appellant does not satisfy the requirements of the long residence and private life paragraphs of Immigration Rules. **I therefore** dismiss the appeal on human rights grounds” (Emphasis added).
31. Given their plain meaning and read literally, the words used in paragraphs 17 leave the reader of the decision with the impression that the judge dismissed the appeal on human rights grounds solely because the Rules were not satisfied. I accept that, read alone, paragraph 17 indicates that the judge treated the failure to meet the Rules as determinative of the article 8 appeal, which, as explained above, is erroneous.
32. However, paragraph 17 should not be read alone. It needs to be read as part of the decision as a whole. And it is plain, from reading the decision as a whole, that the judge did not in fact dismiss the appellants' human rights appeal because the Rules were not met - he did so because he found that removal of the appellants was proportionate. As submitted by Ms Cunha, much of the decision consists of a proportionality assessment that the judge undertook after stating that the Rules were not met. This is plain from considering paragraphs 10 and 11. In paragraph 10 the judge found that the Rules were not met. In paragraph 11 the judge stated that he was considering the appeal outside the Rules. The remainder of the decision, as emphasised by Ms Cunha, is the assessment outside the Rules.
33. The language used in paragraph 17 was careless - and understandably gave rise to a grant of permission. However, I am satisfied that the decision as a whole shows that the judge carried out a proportionality assessment under article 8(2) ECHR in which failure to satisfy the Rules was not determinative, and that the judge did not err in the way that paragraph 17, if read alone and out of context, might indicate.
34. Neither the grounds nor the grant of permission identify an error of law. The decision stands.

Notice of Decision

35. The decision of the First-tier Tribunal did not involve the making of a material error of law and stands.

Signed

D. Sheridan

Upper Tribunal Judge Sheridan

Dated: 24 January 2022