



**First-tier Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: IA/31470/2014

**THE IMMIGRATION ACTS**

**Heard at Taylor House  
On 13 November 2014**

**Decision & Reasons  
Promulgated  
On 17 December 2014**

**Before**

**JUDGE OF THE FIRST-TIER TRIBUNAL HANBURY**

**Between**

**MRS BIBI REEZWANAH GOPEE  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr Islam Khan

For the Respondent: Mr M Lowton, a Home Office Presenting Officer

**DECISION AND REASONS**

**Details of the Appellant**

1. The appellant is a Mauritian national born on 6 July 1979.

**The Appellant's Immigration History**

2. The appellant entered the UK on 15 July 2004 on a visit visa valid from 15 July 2004 to 15 January 2005. She came here with her family, namely her two children Bibi Sameena Gopee born 9 February 1999 and Nudaar Zakiyah Gopee born 7 April 2001. Her husband, Muhammad Zubair Gopee born 16 November 1996, also accompanied her. Prior to the expiry of their leave, the appellant's husband applied for a variation so he could remain as a full-time student. It seems that a false document was used, allegedly innocently, by him. However, a subsequent appeal against the dismissal of that application was unsuccessful. The appellant and her children were dependents on that application.
3. In March 2012 Mrs Gopee along with her husband and children applied for leave to remain in the UK on human rights grounds. Those applications were also refused on 30 April 2013. An application was made for judicial review which resulted in a consent order dated 16 April 2014. By that consent order the respondent agreed to reconsider their case. On completion of that review on 24 July 2014 the respondent decided to refuse leave to remain on the grounds that the UK would not be in breach of its obligations under the European Convention of Human Rights, as incorporated into English law by the Human Rights Act 1998. The respondent made directions under Section 10 of the Immigration and Asylum Act 1999. The respondent served notice to the appellant as a person liable to removal and set out her detailed reasons for refusal in a letter dated 24 July 2014. The appellant appealed that refusal by completing form IAFT1 on 1 August 2014 stating that the decision was not in accordance with the law or with the Immigration Rules. The appellant also states that the respondent had failed to follow the correct approach to an application under Article 8.

### **Basis for the Appellant's Claim**

4. The appellant claims that although her partner was in the UK unlawfully her children had nevertheless been brought up in the UK, having lived here for ten years and nine years, respectively, at the date of the decision. They formed a family unit. The appellant was not their sole carer but was settled in the UK. The appellant claimed that it was relevant that her application had originally been made prior to the changes in the Immigration Rules on 9 July 2012, i.e. in April 2012. Accordingly, she should not be prejudiced by the more stringent requirements of the Rules after that date.

### **The Respondent's Decision**

5. The respondent gave careful consideration to the immigration history and the requirements of Article 8 as incorporated in the Immigration Rules including Appendix FM (family life) and paragraph 276ADE (private life). She also had regard to the need to protect the appellant's children and for their welfare to be a primary consideration. However, the respondent was

conscious of the changes in the Immigration Rules. She did not consider the appellant qualified under either the old or the new Rules. She considered that EX.1 did not apply and the appellant's private life was not of such duration as to engage paragraph 276ADE. The respondent also considered whether there were exceptional circumstances for treating the appellant more generously than the rules allowed but they did not. Accordingly, the respondent thought it necessary and proportionate for the appellant to be removed from the UK.

### **The Hearing**

6. The appellant pointed out the background to this case; stating that a new decision was issued in July 2014. At this point the respondent pointed out that there had been an earlier determination by the First-tier Tribunal following a hearing on 31 August 2011. Immigration Judge Buckwell in his determination promulgated on 28 September 2011 had decided that there was nothing in the appellant's husband's account having been deceived by an agent into submitting application forms and had rejected the argument that the decision to remove the appellants in that appeal (i.e. the appellant, her husband and her children) contravened their Article 8 rights. It seems that in evidence it was established that the appellant's husband had made false representations but these were blamed on an agent. At the end of the hearing the Immigration Judge concluded there would be no contravention of the appellants' Article 8 rights. The appellant had been given finite leave to enter the UK. That leave was at an end and they could return as a family to Mauritius. There was no professional evidence in terms of medical or other material to suggest any significant "trauma" to the children and the Immigration Judge was satisfied, having undertaken a balancing exercise that the respondent's public interest in enforcing immigration control should take precedence over the appellants' family life.
7. The subsequent appeal to the Upper Tribunal before Upper Tribunal Judge Spencer failed.
8. The appellant nevertheless invited me to consider a "freestanding claim". Mr Khan claimed not to have previously seen the Upper Tribunal decision but nevertheless agreed to take instructions on it. There was no application for an adjournment.
9. Having given Mr Khan an opportunity to consider the decision of Upper Tribunal Judge Spencer Ms Gopee gave evidence. She said that the statement she had provided to her solicitors was true. There were no further questions. She was cross-examined. She said that she had a sister, a brother, a mother and father living in Mauritius. She also had cousins, aunts and uncles. She did not, however, own a property there. According to the appellant the family had rented before marriage. The appellant had been a housewife and the appellant's husband had been studying. She said that he was funded by his sister.

10. In re-examination the appellant said she did not have contact with her mother, brother or sister. This was due to the relationship she had had with her husband. It seems that the appellant's mother and siblings did not want her to marry her husband.
11. Sannaiah Gopee then gave evidence. She adopted her witness statement at page 8 in the appellant's bundle. Clarifying the information in paragraph 9 of her statement she said that she could not recall her childhood in Mauritius. She was currently doing her GCSEs having already taken other exams in the past. She did not know how she would continue with her studies in Mauritius and did not know which family members she had there.
12. The respondent relied on **Edgehill [2014] EWCA Civ 402**. She submitted that it did not matter which Rule applied, i.e. whether it was before or after July 2012, given that the decision would have probably have been the same. There was a weak case under Article 8. The appellants did not come within the Rules. Compelling circumstances were necessary. This case did not meet any either the old or the new Rules. I was referred to the case of **Shahzad [2014] UKUT 85**. Here, the appellant had arrived as a visitor in 2004 with six months' leave to remain. She had lived the majority of her life in Mauritius. It was submitted that the ties the appellant had developed with the UK were not abnormal and there was no flagrant denial of family life in deciding to remove her. Even if the family were divided, they could communicate by all modern means available to them. The children had experience of both the education systems in the UK and in Mauritius and there is no reason why they should not be adequately educated in the latter. No significant hardship would follow from having to return there. Furthermore, the parents would be returning as one unit and would provide support at appropriate milestones. A structured approach was needed to these questions and the need for effective immigration control was recognised by Section 117B (3) and (4) of the Nationality, Immigration and Asylum Act 2002 as amended by section 19 of the Immigration Act 2014. In all the circumstances, I was invited to dismiss this appeal.
13. The appellant's representative, Mr Khan, submitted that there was no deliberate attempt by his client to deceive the immigration authorities. The appellant's daughter had reached a crucial stage in her education which may be disrupted by her removal. I was referred to paragraph 33 of **Edgehill** wherein it was pointed out that a mere reference to the twenty year requirement in the new Rules would not invalidate the decision. It was only if the decision maker relies on Rule 276ADE(iii) as a consideration affecting his decision in a pre July 2012 case that it may, arguably, amount to an error of law.
14. In this case the decision was on 20 July 2014 and the requirements of the Immigration Rules was very different by that stage. It was necessary to

look at what is “reasonable”. It was disproportionate to remove the children, including the daughter. That she had strong reports from her head teacher and would suffer significant disruption by her removal. Given these difficulties there were compelling reasons not to remove this family. It was disproportionate in all the circumstances and unduly harsh. I was invited to allow the appeal.

## **Discussion**

15. The focus of the discussion in the case of **Edgehill** and other cases has been the fact that the new Rules, introduced in July 2012, increased the period of continuous residence required before an applicant qualifies under paragraph 276ADE of the Immigration Rules. The former provision, enforced at the time of this application, was paragraph 276B which specified a period of fourteen years’ continuous residence. In **Edgehill** Laws LJ explained that the Immigration Rules are detailed statements of ministerial intent which must be construed sensibly according to their natural and ordinary meaning. But provided the Secretary of State does not place reliance on the new Rules in refusing an application made before they came into force on 9 July 2012 the decision will not be unlawful on this basis.
16. It seems to be accepted by the appellant’s representatives the appellant does not qualify under either the Immigration Rules as they existed before 9 July 2012 or under the new Immigration Rules since that date. The only basis on which the application could succeed is on the freestanding basis that the interference with the appellant’s private or family life by removal would be disproportionate and hence should be ruled unlawful. Provided the Secretary of State does not assert that a period of residence in excess of fourteen years is required to satisfy the Rules the decision will not be unlawful on that basis.
17. The decision here is thoroughly explained in the refusal letter. The respondent states on the first page under the heading “Article 8 consideration”:

“I have considered Article 8 by applying the relevant provision of the Rules in force on 9 July 2012”.

I can find no evidence in the refusal that the respondent had treated the “twenty year” requirement as being a material consideration although there is reference to it in parts of the refusal. Furthermore, it is clear that the respondent did consider the application in the round including taking into account the welfare of the children involved. It is clear that the appellants would not have qualified under the Immigration Rules either in their pre or post July 2012 form.

## **Findings**

18. I find that this is the second occasion in which the First-tier Tribunal has had to consider the Article 8 rights of the appellant and her family. The previous appeal in 2011 considered her rights in connection with the refusal of her husband's application as a student. I find that having regard to the case of **Devaseelan [2002] UKIAT 00702** it is incumbent upon this Tribunal to give appropriate weight to the earlier determination, particularly since it was upheld by the Upper Tribunal on 22 March 2012. Following the case of **Devaseelan** it is appropriate to consider the extent to which there had been change in circumstances since the determination of the First-tier Tribunal in 2011. I find that there has not been a material change in circumstances since then, although the appellant's children have continued to be educated in the English state school system and I bear in mind the potential disruption to their education by the removal of their mother.
19. I find that many of the material points to be considered in an Article 8 claim have been incorporated into the Rules. I now set out the more important considerations and consider the facts of this case. The appellant has extensive family members in Mauritius. The appellant and her family have been in the UK for a long period of time, but the appellant has known of her limited right to be here. The whole family must have envisaged it would need one day to return to Mauritius as one family unit. I find that there are no compelling circumstances why the appellant and her family should not do so, even taking into account the potential disruption to her children's education. Leave to remain was temporary. The appellant's have exhausted all the avenues available to them, indeed the appellant and her family would not have been in the UK as long as they have been but for the deception used by her husband to remain on the basis that he was a Tier 1 post-study migrant. Mauritius does have an education system of its own to which the children can be sent. They will be assisted by their parents who will be returning there with them to settle into its education system. The needs of immigration control and the economic wellbeing of the UK are not considerations to be disregarded lightly, particularly having regard to the changes in primary legislation introduced by Section 19 of the Immigration Act 2014. There is a significant cost to tax payers in allowing uncontrolled immigration which puts pressure on public services and causes anxiety amongst lawful residents.
20. For the above reasons I am satisfied that the respondent's decision is not disproportionate and was in accordance with the Immigration Rules and indeed did not contravene the ECHR.

### **Notice of Decision**

The appeal is dismissed on human rights grounds and under the Immigration Rules.

No anonymity direction is made.

Signed

Date

Judge Hanbury  
Judge of the First-tier Tribunal

**TO THE RESPONDENT**  
**FEE AWARD**

I have dismissed the appeal and I make no fee award.

Signed

Date

Judge Hanbury  
Judge of the First-tier Tribunal