



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

Appeal Number: IA/39396/2014
IA/39398/2014
IA/39399/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 3 November 2015**

**Decision & Reasons Promulgated
On 9 November 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE A M BLACK

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**V C P
R J P
D P**

(ANONYMITY ORDER MADE)

Respondent

Representation:

For the appellant: Mr S Kotas, Senior Home Office Presenting Officer
For the respondent: Ms Jones, Counsel, instructed by Malik Law Chambers

DECISION AND REASONS

1. This matter comes before me for consideration as to whether or not there is a material error of law in the determination of First-tier Tribunal Judge Munro ("the FTTJ") promulgated on 4 June 2015, in which she allowed the respondents' (hereinafter called the claimants) appeals against the refusal

of leave to remain outside the Immigration Rules and to remove them under s10 of the Immigration and Asylum Act 1999.

2. Given my references to the third claimant, who is a child, an anonymity order is appropriate.

Background

3. The claimants are citizens of India. The first and second claimants are married and the parents of the third claimant, who was born on 12 September 2005. The child was aged 9 at the date of hearing (7 May 2015).
4. On 22 September 2014 the Secretary of State refused leave to remain. The FTTJ decided as a preliminary issue that the claimants each had a right of appeal in country and that finding is not challenged by either party. The FTTJ dismissed the appeals under the Immigration Rules; that decision is not the subject of a cross-appeal by the claimants. The sole issue is whether there is a material error of law in the FTTJ's decision to allow the appeal on human rights grounds. Permission to appeal was granted because it was arguable that the FTTJ ought to have considered more carefully the guidance in **Azimi-Moayed & Ors (Decisions affecting children: onward appeals) [2013] Imm AR 4** and **Zoumbas v SSHD [2013] UKSC 74**, both of which stated, in essence, that 7 school years for an older child, ie attending secondary school, were more important than the first 7 years of life. Moreover, it was also arguable that the FTTJ had failed to consider all the mandatory elements of s117A-D.

Error of Law Submissions

5. Mr Kotas conceded that he did not challenge the FTTJ's decision to make an Article 8 assessment outside the Immigration Rules. However, he submitted that the FTTJ had erred in law in failing to follow the guidance in **Azimi-Moayed**, albeit she had cited the headnote it in her decision. The findings of the FTTJ on the child's best interests were "short" (paragraph 37). The decision was devoid of reasoning and findings as regards the child's ties. Furthermore, the guidance in **Zoumbas** had been misapplied in that the FTTJ had sought to distinguish that case; she had also misconstrued the guidance it contained. Whilst Mr Kotas did not go so far as to submit that the failure to refer to **EV (Philippines) v SSHD [2014] EWCA Civ 874** amounted to an error of law, paragraph 58 of that judgment was relevant: the best interests of the child were not to be decided in a vacuum. This was, according to Mr Kotas, what the FTTJ had done: there was no reference to the status of the parents and the reasonableness of the child returning. Nor was there any analysis of the prospect of family life continuing in India; the FTTJ had just looked at the status of the parents in the UK, concluding that it was disproportionate to uproot the child. The reasonableness issue was echoed, he said, in s117D and s117B(6)(b) which had not been applied. This was fatal to the FTTJ's assessment. Little weight should have been given to the lead claimants'

private lives which had been established while they were here unlawfully (s117B(4) referred). He also submitted that the references to the child moving to secondary school and being entitled to British citizenship were speculative and ought not to have been taken into account. The public interest had been given only cursory mention. In conclusion,

6. For the claimants, Ms Jones submitted that the Secretary of State merely disagreed with the factual findings; there was no error of law. The FTTJ had taken into account (paragraphs 22-23) the poor immigration history of the parents; she had not given significant weight to their private life: she determined that, were it not for the child, the parents could have returned to their country of origin. Ms Jones submitted that, given that the guidance in **Azimi-Moayed** and **Zoumbas** was set out in the decision, it could be assumed that the guidance in those cases was in her mind; there was nothing to suggest that it was not taken into account and the content of paragraph 37 indicated that the FTTJ had conducted a proper analysis of the relevant issues. It was accepted the FTTJ could have expanded her reasoning but it had been sufficient: she had borne in mind the best interests of the child. It had been appropriate to distinguish the **Zoumbas** because, in that case, the parents had employed dishonesty and claimed benefits whereas that was not the case with these claimants. The FTTJ had identified the relevant s117B public interest considerations in paragraph 38. Insofar as the issue of reasonableness was concerned, it was implicit from paragraph 39 that this had been considered. It was submitted that the FTTJ had given weight to the fact that, with effect from the September after the hearing in June, the child would be entitled to apply for British citizenship. Following the hearing, the child had made that application on 28 September 2015. Thus the issue was not a speculative one at the date of hearing; furthermore, if the FTTJ had made an error of law, it was not material because the child was now entitled to British citizenship.
7. In response, Mr Kotas submitted that, as at the date of the appeal hearing, the matter of the child's entitlement to British citizenship was a prospective issue. The facts should, he said, be confined to those at the date of hearing. If the decision were to be remade (with findings of fact) the child's application should be taken into account; until then, it was of no relevance to the issue of materiality of any error of law; nor was it evidence before the FTTJ at the hearing in June 2015.

Error of Law

8. There is no challenge to the FTTJ's decision under the Immigration Rules.
9. As regards her decision on human rights grounds, I am unable to accept Ms Jones' submission that the FTTJ gave sufficient consideration to the public interest factors identified in s117A-D of the Nationality, Immigration and Asylum Act 2002. Whilst the FTTJ has cited s117A and s117B at paragraph 38 and noted that she is required to apply "s117 of the Immigration Act 2014" [sic] to the appeal, she has failed to demonstrate in

her analysis of the facts that she has done so. Whilst I note Ms Jones' references in her submissions to those paragraphs which might be considered to address the public interest factors, in fact the only brief references to the poor immigration status of the parents are in the context of the FTTJ's analysis of whether the parents fulfil the criteria in the Immigration Rules and in relation to considering the best interests of the child in the context of the guidance in **Zoumbas** (paragraph 37). These limited references cannot be taken, even implicitly, to be part of her analysis outside the Rules for the purposes of assessing proportionality or in the context of considering of the public interest in immigration control.

10. Whilst s117A and 117B are cited in full, there is no analysis of the facts in the light of these mandatory considerations. There is no recognition in the decision that the maintenance of effective immigration controls is in the public interest (s117B(1)). There is no reference in the consideration of proportionality to the fact that the parents used a court interpreter to give their evidence (paragraph 23) (ss117B(2)). Nor can it be said that the FTTJ has given little weight (as required by s117B(4) and/or (5)) to the parents' private life having been established at a time when their immigration status was unlawful/precarious. It is particularly relevant that, whilst the FTTJ refers at paragraph 39 to the definition of "qualifying child", she has failed to take into account all the relevant criteria in s117B(6), namely not only that each claimant has a genuine and subsisting parental relationship with a qualifying child, but also that "it would not be reasonable to expect the child to leave the United Kingdom". Furthermore, in her paragraph 40, the FTTJ finds that the "right of the [Secretary of State] to operate a firm fair and consistent immigration policy has been outweighed in this case by the particular circumstances of this family". This finding is not consistent with the terms of s117B(1) which provides that the "maintenance of effective immigration controls is in the public interest". Thus it is not clear that the FTTJ has applied the right criteria in considering the public interest. She has considered the Secretary of State's "right" in weighing the proportionality of the interference with the claimants' protected rights, rather than the "maintenance of effective immigration controls": as is required by s117B(1). In this regard, I bear in mind the guidance in **Forman (ss 117A-C considerations) [2015] UKUT 412 (IAC)** and cite headnote (iii): "In cases where the provisions of sections 117B-117C of the 2002 Act arise, the decision of the Tribunal must demonstrate that they have been given full effect". That has not been demonstrated in the FTTJ's decision.
11. For these reasons, I am satisfied that the FTTJ erred in law in making her decision: her reasoning is flawed and inadequate. I do not accept the submissions of Ms Jones that, given the child has now made an application for British citizenship, the error of law is not material. The issue is whether the error could have made a difference to the outcome, on the evidence available to the FTTJ at the hearing. I reject the submission that the child's current (post-hearing) ability to apply for British citizenship is a reason for finding that the error of law is not material; this would, in effect, put the

child in a better position than she would have been in at the date of hearing, ie at the time of the impugned decision. Rather, the issue is whether, were it not for the error of law, the FTTJ might have come to a different decision on the facts.

12. I find that it could: given that the best interests of the child are a prime consideration but not the prime consideration, had the FTTJ given due weight to the relevant public interest considerations, the outcome may have been different. Furthermore, as Lady Hale said in **ZH (Tanzania) (FC) (Appellant) v SSHD (Respondent) [2011] UKSC 4** "Although nationality is not a "trump card" it is of particular importance in assessing the best interests of any child". For these reasons, the decision to allow the appeal on human rights grounds must be set aside.
13. It was submitted by both parties that, in the event of my finding a material error of law, the matter should be remitted to the First tier-Tribunal for a fresh hearing on all grounds. Mr Kotas submitted that paragraph 276ADE was the starting point; there was an argument to be had as to whether there was a need for consideration outside the Rules. Ms Jones submitted that there was a contradiction between the requirement of the Rules for findings to relate to the date of application (as with regard to the requirement for the child to have resided in the UK for 7 years prior to the date of application) and the statutory provision for facts to be found at the date of hearing.
14. I do not accept the submissions that this matter should be remitted to the First-tier Tribunal. That is an option which should be used sparingly and is inappropriate in this case because there is no challenge to the FTTJ's findings under the Immigration Rules. I consider it appropriate to preserve the findings of fact of the FTTJ and remake her decision on the human rights appeal.

Findings

15. Mr Kotas did not challenge the decision of the FTTJ to decide the appeals in accordance with the Article 8 jurisprudence. I proceed therefore to apply the guidance in **Razgar [2004] UKHL 27**.
16. I particularly bear in mind that the best interests of the third claimant, who was aged 9 at the date of hearing, are a primary consideration. In that regard I adopt the findings of the First-tier Tribunal Judge at her paragraph 37. I summarise those by saying that her best interests are to remain within the family unit and to continue her schooling in this country, including moving to secondary school here in September 2015. It is also relevant that, at the date of hearing, she was three months away from being entitled to apply for British nationality. In that regard, I repeat the guidance in **ZH** to the effect that "Although nationality is not a "trump card" it is of particular importance in assessing the best interests of any child". In the present case, the child claimant is not a British citizen but, that said, at the date of hearing she was three months from making such

an application. I proceed on the basis that she would be granted such citizenship in due course and that it would be in her best interests to remain in this country where she was born and has grown up and been educated and to continue her education here with her parents caring for her.

17. The Secretary of State's decision is a lawful one. The principal issue arises at the third step advocated in **Razgar**, namely whether the proposed interference with the protected rights of the claimants is justified and proportionate to the Secretary of State's legitimate aims. Those aims are set out in (although not limited to) s117A-D. In that regard it is relevant that the maintenance of effective immigration controls is in the public interest; the adult claimants came to the UK as visitors and failed to leave when their visits visas expired; they only sought to rectify their lack of immigration status in 2012. The adult claimants gave their oral evidence at the hearing in June 2015 in their own language but their daughter's chosen language is English. The claimants are not themselves financially independent but they have the financial support of the second claimant's brother with whom they have a close relationship (paragraph 37 of the decision); they are not dependent on public funds. Little weight should be given to the claimants' private lives because it has been largely established, continued and/or developed at a time when they were here unlawfully and/or their immigration status was precarious.
18. I bear in mind the terms of s117B(6) which provide that the public interest does not require the removal of the adult claimants if it would not be reasonable to expect their child to leave the United Kingdom.
19. I have set out the child's best interests above. Her best interests also entail her continuing to live with her parents in the family unit. They would be removed together as a family unit. The adult claimants would be able to re-integrate into society in their home country (paragraph 23 of the decision); there is no evidence that it would be impossible for them to live in Gujarat away from the family village, their families having disowned them due to their marriage (paragraph 23). The adult claimants would not face very significant obstacles to their integration on return (again, paragraph 23).
20. Whilst it is not in the best interests of the child to return to India, she would have the support of her parents on return. She would be able to continue her schooling there. Her schooling is not at a critical stage albeit she was due to go to secondary school at the date of hearing. She is not at the stage of taking significant examinations which would impact on her career choices. The adult claimants speak Gujarati at home and the child is not therefore unfamiliar with the language, albeit English is her language of choice (paragraph 37). The child is familiar with Gujarati culture, language and customs, having been brought up in a Gujarati household, albeit in the UK. Thus she could adapt relatively easily to living in Gujarat. I reiterate her entitlement to British nationality shortly and all the benefits that would give her including a right of residence, free

education and free healthcare.

21. I accept that the removal of the child claimant would entail disruption to her education and her social life. She would also lose the opportunity of gaining British nationality. That loss would not be in her best interests. However, given that she would be removed with her parents and that they would be able to provide for the family in India, her country of current nationality, I consider it would be reasonable to expect her to leave the UK with her family, notwithstanding the significant disruption to her private life. Her parents would assist her in adjusting to life in India. She would continue her education and have access to healthcare, albeit, in both cases, not to the standard she might have received in the UK. I accept she has never been to India and that she would find the transition difficult in the short term, particularly with the loss of personal contact with friends and school. However she would be able to maintain some contact with friends in the UK via the internet, telephone, text and visits. It is also relevant that she has grown up in an Indian family and thus, to some extent, she is familiar with Indian customs and culture; this will assist her in settling into life in India.
22. The adult claimants must have appreciated that they could be removed at any time after their visas expired in 2005. Whilst the child cannot be blamed for her parents' failure to rectify their immigration status, she was due, at the date of hearing, to leave her primary school within a matter of weeks. It was therefore an appropriate time, in educational terms, for her to move to a new school and she can do this in her country of current nationality.
23. For these reasons, notwithstanding the best interests of this child are for her to remain in the UK and to acquire British nationality, I am unable to find that the degree of interference with the claimants' protected Article 8 rights is justified and proportionate to the public interest in maintaining effective immigration control.

Decision

24. I do not set aside the decision of the First-tier Tribunal to dismiss the appeal under the Immigration Rules. That decision stands.
25. The making of the decision on human rights grounds did involve a material error of law.
26. I set aside the decision of the First-tier Tribunal to allow the appeal on human rights grounds and remake it, dismissing the appeal.

Signed
Deputy Upper Tribunal Judge A M Black

Date 2 June 2016

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

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

Fee Award

The FTTJ did not make a fee award and, the appeal having been dismissed there can be no fee award now.

Signed
Deputy Upper Tribunal Judge A M Black

Date 2 June 2016