



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

Appeal Numbers: IA/25618/2014
IA/25627/2014
IA/25636/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 19th January 2016**

**Decision and Reasons
Promulgated
On 29th January 2016**

Before

UPPER TRIBUNAL JUDGE LINDSLEY

Between

**MRS MARIAM WASIM ASLAM BUTT (1)
MB (2)
AB (3)
(ANONYMITY ORDER NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R Spurling, Counsel, instructed by Goodfellows Solicitors

For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The first appellant is a citizen of India born on 16th May 1974. The second and third appellants are also citizens of India. They are her children born on 29th June 2006 and 18th June 2011 respectively. The first appellant entered the UK first on a work visa in 31st August 2004. She made other visits after this, and has been continuously present since approximately December 2005. The second appellant and third appellants have lived in the UK continuously since their births. On 17th December 2011 the appellants made a human rights claim which was refused on 4th December 2012. On 5th November 2013 the first appellant made a claim based on long residence which was refused on 19th December 2013. On 25th April 2014 the appellant was served with notice as an overstayer.
2. On 9th May 2014 the appellants raised additional human rights grounds in a one stop notice. On 11th June 2014 the application was refused; and on 17th June 2014 the appellants appealed against the decision of the respondent. This appeal against the decision was dismissed by First-tier Tribunal Judge R G Handley in a determination promulgated on the 4th December 2014.
3. Permission to appeal was granted by the Vice President of the Upper Tribunal on 24th August 2015 following a grant of permission for judicial review by Mr Justice Blake dated 7th July 2015 against the previous refusal of permission by the Upper Tribunal. Mr Justice Blake noted that the second appellant's period of residence had not been factored into the assessment under EX1 when considering the reasonableness of expecting him to leave the UK as a child who had lived in this country for more than seven years.
4. I found that the First-tier Tribunal had erred in law at a hearing dated 17th November 2015 for the reasons which are appended at Annex A below. The remaking of the appeal was adjourned.

Evidence & Submissions

5. The first appellant gave evidence mainly in English but occasionally through the Tribunal Hindi interpreter, whom she confirmed she could understand. Mr Abraham Sillah, a family friend, also gave oral evidence to the Tribunal in English. Both witnesses confirmed that their statements were true and correct, and their evidence to the Tribunal. The second appellant gave evidence to confirm he had written his letter and answered a few questions from Mr Melvin. In summary the totality of the evidence is as follows.
6. The first appellant came to the UK first in 2004 for three months on a work visa as a make-up artist for some Indian performers. She had done training and a couple of years work as a beautician before travelling to the UK whilst she lived at home with her family. It was on this visit to the UK she met her future husband Mr Wasim Butt. She returned in May 2005 with a visit visa to see him. Her husband had told her to name a

friend of his, Mr Khalil Rehman, as the sponsor on her visa application as he was a man with property and was therefore a preferable sponsor.

7. During this visit she married her husband, Mr Wasim Butt whom she believed to be a British citizen who had lived in the UK for the past 15 years. She had an Islamic conversion, changed her name, and married Mr Butt without consultation with her family. She showed the Tribunal tattoos that she has of the Hindu god Ganesh and the word "Om" on her arm which support her Hindu origins, and gave her original Hindi name, Manisha Bhalchandra Malvankar, which also appears on the children's birth certificates with a note she was previously known by this name. The first appellant has not removed the tattoos as she believes there is a danger of damaging her hand.
8. The first appellant then returned to India to tell her family about her conversion and marriage. They were furious and hostile, and did not want anything further to do with her due to her religious conversion and marriage.
9. The first appellant re-entered the UK again on another visit visa (again giving Mr Rehman her husband's friend as the sponsor) in approximately December 2005 to escape her family there and return to her husband. On arrival in the UK her husband took her passport. He was extremely controlling and isolated her from the community. He did not even allow her to do things like shopping.
10. The second appellant was born on 29th June 2006, and it was around this time that the first appellant found out that Mr Wasim Butt had lied to her about his nationality (he was not British by a Pakistani citizen) and that about the fact he had another wife and two children in Pakistan. The first appellant wished to end the relationship but her husband threatened to take the second appellant away from her, and did so for one night. She therefore decided to remain in the relationship out of fear of losing her child. The third appellant was born on 18th June 2011.
11. A couple of months' after the birth of the third appellant the first appellant's husband was arrested and removed by the Immigration Service. The first appellant's husband has not been in touch with any of the appellants since he was removed from the UK, even though they have remained living in the same property. The first appellant has no wish to contact Mr Butt and has made no efforts to do so. The first appellant describes the second appellant as being initially quiet or shocked by his father's absence but then he has seemed to adapt to the situation, and has not asked about his father since that time. The second and third appellants have had no contact with anyone, including any family, in India.
12. Initially after Mr Butt was returned to Pakistan the first appellant felt depressed and suicidal. She was given antidepressants by her GP but she found these made her too tired to care for her children. She stopped taking them, and found friends and support within the Muslim community. One of the sources of support is Abraham Sillah and his

family who have befriended the appellants over the past three years, and provided practical support such as mending the heating boiler; giving money, toys and groceries; as well as providing friendship to all the appellants including playing X-box games with the second appellant.

13. The appellants say they cannot reasonably return to live in India because the first appellant's family will not accept her or her children due to her religious conversion and being separated from her Pakistani husband and so there will be no family support. The first appellant remains deeply hurt by their rejection.
14. The first appellant says she would not be able to support and protect her young family as a single parent in a reasonable way in terms of accommodation and other material things from work as a beautician in India given the low pay she would be likely to receive from this work, her lack of work experience and lack of support with childcare. The first appellant felt that the second and third appellants would not be well treated in India as she would be a single parent converted Muslim and their father an absent Pakistani, and she would be unable to protect them against any societal hostility due to their background.
15. The second and third appellants are very well integrated into their schooling in the UK and are excelling at their school work, and extra curricular activities such as street dancing and drawing. The first appellant attends events, celebrations and parents meetings at the second and third appellants' school. The second appellant has a strong circle of friends in the UK with whom he plays football, swims and plays computer games. He is a very competitive boy who tries his best to win always. He also has regular Islamic lessons and understands some Arabic. The second appellant is asthmatic which is well managed but needs the daily use of inhalers.
16. The second and third appellants speak a bit of Hindi but since starting school speak in English both within and outside the home. They cannot read or write in Hindi. The second appellant has largely taught the first appellant to speak English. The second and third appellants' only knowledge of India is through what they have learned about Hinduism at school.
17. All the appellants are supported by the Muslim community in the UK who provide them with financial and social support in this country. The support comes via a man called "uncle" who lives in Ilford who collects money for them; the Zakat Foundation (which believe it is particularly important to support Muslim converts); a circle of Muslim ladies via a whatsapp group; and individuals such as Mr Sillah and his family. The support provides sufficient funds to pay the rent on the property where the family live and buy food, but they are also given food and clothes. The money is provided in cash and there is no paperwork or receipts as it is informally collected charity money. The appellants have never been reliant on any UK state benefits and the first appellant has never worked in the UK. In the UK the first appellant believes she would eventually be able to support her family from work as a beautician.

18. The second appellant explains in his own letter and also in oral evidence to the Tribunal that he does not wish to be forced to relocate to India. He is very attached to the UK and in particular to his school and teachers in this country, and is engaged with a number of other activities such as football and dance, and Islamic learning in his community. He aspires to be a creator of computer games.
19. Mr Melvin relied upon the reasons for refusal letter and made further submissions. It is contended in summary that it would be reasonable for the second appellant to leave the UK and live in India as he is only in primary education, and is at an age when he can adapt to life in India with the help of his mother who lived there for the first 30 years of her life. Other family members would also be able to support his integration there. Children in India are entitled to education to 14 years, and although the education might not be of such high standard it would be accessible. The second appellant would be capable of learning Hindi with the support of his mother. His best interests were simply to be with his mother and sister. There was no evidence that there would be societal persecution of the second and third appellants as Muslim children of a single mother. His mother would be able to support him financially as she has a profession. The second appellant was capable of making new friends quickly according to the first appellant.
20. The appellants were not in the UK lawfully: the first appellant should be seen as someone who had used deception to enter the UK on visit visas; who contrary to her evidence had known her husband was unlawfully present and that she was remaining without status. The family remaining was not in the public interest as the children were receiving public funds for their education and health needs. The evidence of the first appellant and Mr Sillah should not be accepted with regards the support the first appellant receives in the UK from charitable sources. If the first appellant were allowed to remain there was no evidence that she could support her children here or that she was integrated into UK society.
21. Mr Spurling submitted that no protection claim was made for the appellants. The first appellant was however concerned that she would not be able to protect her children in the sense that she would be a single mother returning to India without a network of support in a country where it is public knowledge that there is communal violence. He submitted that the evidence given should be found to be credible, particularly in relation to the first appellant's conversion to Islam, the circumstances of her marriage, her dislocation from her family and support from the Islamic community in the UK.
22. In relation to whether it was reasonable for the second appellant to live in India he submitted that I should not place issues of the economic impact on the UK in the balance or the conduct of his parents. These were not relevant according to the respondent's own guidance. (See Immigration Directorate Instructions Family Migration: Appendix FM Section 1.0b Family Life and Private Life: 10 Year Routes August 2015 at

paragraph 11.2.4 “Would it be unreasonable to expect a non-British child to leave the UK?”).

23. Mr Spurling submitted that in accordance with this guidance it would not be reasonable to expect the second appellant to leave the UK. There were not major health issues but it was relevant that he had asthma that was well managed in the UK; he is highly integrated in the UK and presents culturally as a “London boy”; he has significant community support equivalent to extended family in the UK from the Sillah family and others in the Muslim community; he has no connection with India: he had never lived there, had contact with anyone in that country as his mother was estranged from all of her family there, or attended school. If he returned there he would be in a precarious situation as the child of a single mother on a low wage who had never supported herself through work in that country. The second appellant’s cultural ties had been made complicated by his mother’s conversion to Islam; he is able only to speak a little Hindi and cannot read or write in this language. Whilst there were factors that went the other way this sufficed to meet the test of it not being reasonable to expect the second appellant to leave under paragraph 276ADE (1)(iv) of the Immigration Rules. This in turn meant also that the first appellant was entitled to succeed under EX1 of Appendix FM, and that in turn meant of course that it would not be proportionate under the general law relating to Article 8 ECHR to remove the third appellant.
24. At the end of hearing I reserved my decision.

Conclusions – Re-making

25. It is accepted that Appendix FM E-LTRPT 2.2-2.4 and 3.1 are met in this case. It is accepted that the second appellant met the requirement of having lived in the UK for 7 years immediately preceding the date of application and that the first appellant has a genuine and subsisting parental relationship with him. It thus remains to be determined whether it would be reasonable to expect him to leave the UK. If the appellants can show on the balance of probabilities that it would not be reasonable to expect the second appellant to leave the UK then the first appellant can show that she satisfies EX 1 of Appendix FM, and qualifies for permission to remain under the 10 year route under the Immigration Rules. Similarly the second appellant needs to show on the balance of probabilities that it would not be reasonable to expect him to leave the UK for him to qualify for leave to remain under paragraph 276ADE (1) (iv) of the Immigration Rules.
26. I find the first and second appellants and Mr Sillah all to be credible witnesses. Their evidence was consistent with their written statements and other known facts, and was given without hesitation and was heartfelt.
27. I have no hesitation in finding that it is in the best interest of the children, the second and third appellants, to remain in the UK where they are settled with a highly dedicated community of friends and where

they are excelling in school. The appeal documentation provides numerous examples of prizes and projects completed by the second appellant and his school reports refer to him as a “great organiser who can always be relied upon to be a group leader”. The second appellant has lived in the UK since his birth, now for nine and a half years, and is in his sixth year of schooling. If he were to remain here for another six months (until his 10th birthday on 29th June 2016) he would be entitled to register as a British citizen on the basis of having been born here and lived in the UK for the first 10 years of his life regardless of his lack of immigration status during this time, see s. 1(4) of the British Nationality Act 1981. This must be a measure of how close he is to the relevant degree of integration into UK society that would generally be needed to be seen as a citizen in the eyes of the law. The third appellant has started her primary schooling and has lived in the UK since her birth for the past four and a half years.

28. To require the second and third appellants to leave this environment where they are doing so well, and have such a high degree of positive integration into the life of their school and community would particularly not be in these children’s best interests in the light of the following factors. They would be going to a country where they have no connection bar through their mother the first appellant, their only carer and parent. The first appellant, has genuine trepidation and some realistic fears about her ability to establish a happy independent life for the second and third appellants due to the breakdown in relations with her family there; her children’s mixed nationality parentage; her status as a single parent; her own lack of recent work experience; and the fact that her only work experience is in a relatively low paid area. It is clear that the first appellant has already suffered two serious life upsets: being very unkindly and violently rejected by family following her marriage and being deceived by her husband as to his immigration and marital status and unkindly treated by him during that marriage. It is therefore understandable in this context that she has no confidence in her ability to build a new life protective of her children’s best interests without her current extensive network of Muslim community supporters (which I find could not be simply transferred to India given it is an informal face to face and cash based support), and given her previous lack of experience of forming a family unit alone. In these circumstances I find it highly unlikely that the child appellants would, at least for an initial period of many months, have equivalent housing, financial support and social and community life and are likely to be impoverished in the these basic provisions.
29. Additional factors pointing to leaving the UK not being in the best interests of the child appellants are that it is accepted that they would not have access to the same quality of schooling and would have to contend with a new language not written in the Roman script which they are totally unable to read and write. I acknowledge however that the best interests of the children are simply a primary consideration and

only are not decisive of the question of whether it would be reasonable to expect the second appellant to leave.

30. I am guided by the respondent's guidance on whether it would be reasonable to expect a non-British child to leave the UK referred to above and also by EV (Philippines) v SSHD [2014] EWCA Civ 874, which cites Lady Hale in ZH (Tanzania) v SSHD [2010] UKSC 4 at paragraph 33 as saying:

"Specifically, as Lord Bingham indicated in *EB (Kosovo)*, it will involve asking whether it is reasonable to expect the child to live in another country. Relevant to this will be the level of the child's integration in this country and the length of absence from the other country; where and with whom the child is to live and the arrangements for looking after the child in the other country; and the strength of the child's relationships with parents or other family members which will be severed if the child has to move away."

31. As Mr Spurling has submitted this is not a case where all the factors point one way when the reasonableness of the second appellant leaving the UK to live in India is considered. It is not disputed that he is entitled to citizenship of that country, and it is clear that his mother the first appellant (and only parent exercising any parental responsibility in this case) has not been lawfully present since the expiry of her visit visa in 2006 and that the second and third appellants have never had leave to remain. He is not a child who has been shown to have a serious life threatening illness which could not be treated in India. I am sure that asthma inhalers are available there. He is clearly an able and friendly boy who has himself not be scarred by the difficult circumstances in which the first appellant has found herself as a result of her marriage. He also has no extended biological family members who are entitled to live in the UK.
32. In terms of whether it is reasonable that the second appellant leave the UK and go to live in India I have preserved the finding from the First-tier Tribunal that the first appellant would not be at risk of serious harm from her family in that country. I find ultimately for the reasons set out below that it would not be reasonable to expect the second appellant to leave given his degree of integration in the UK and the factors which are likely to make integration in India difficult in his case.
33. I find that the first appellant is estranged from her family in India on grounds of her conversion to Islam (which I find to have been a genuine and one which has endured the breakdown of her Islamic marriage as is evidenced by her continuing involvement with and support by the Muslim community and the second appellant's learning of the Koran) and on the basis of her now being a single parent with children from a marriage to a Pakistani man the family did not support. I find therefore she would be returning to live as a single parent in India with two young children (the first and second appellants) to support without the provision of any accommodation or money assistance from others in that country. I find on the balance of probabilities that at least it would

take many months for the first appellant to establish a support network of friends and find reasonable accommodation, work and financial support. This is because the return would not be one which would be supported by any friends or family in India; because the informal cash and in part commodity based support she has here could not be easily transferred; and because she has never actually had to work to provide for herself and her children independently; and because she has no recent work experience; and because she is not highly qualified or trained in an obviously well paid profession.

34. I also consider relevant to issues of the second appellant integrating that he has never visited India, and has no social or other ties to that country himself and has never attended school there. He is able to speak a little Hindi, but cannot read or write in that language. He has also lived in the UK for nine and a half years, and become as Mr Spurling submitted "a London child", and would have to deal with losing all of the cultural certainties and friendships he has built up over this period of time with only the support of a mother who has no faith in her own ability to protect him and his younger sister, and who has experienced serious set backs in her own recent life. As set out above, I find leaving the UK would not be in his best interests.
35. Whilst it is generally reasonable to expect a child who is not a British citizen to return with a parent who has no right to remain in this country I find there are particular circumstances in this case which mean it would not be reasonable to expect the second appellant to leave the UK, and thus that the first and second appellants are entitled to remain under the Immigration Rules.
36. I also conclude in these circumstances that it would be a disproportionate breach of the right to respect for family life to remove the third appellant which would clearly be interfered with were she removed. I have outlined above why I find that removal would not be in her best interests, which must a primary consideration. I also note that under s.117B(4) of the Nationality, Immigration and Asylum Act 2002 does not require little weight to be given to family life relationships to a mother and brother formed whilst she was unlawfully in the UK; and also that she can speak English. So whilst accepting that she is not financially independent and giving weight to immigration control and her inability to meet the Immigration Rules I find that her removal would not be proportionate to her right to respect to family life.

Decision:

1. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.
2. I set aside the decision relating to Article 8 ECHR both under the Immigration Rules and outside of those Rules.
3. I remake the appeal allowing the appeal of the first and second appellants under the Immigration Rules relating to Article 8 ECHR and of the third appellant under Article 8 ECHR .

Fiona Lindsley

Signed:
Upper Tribunal Judge Lindsley

Date: 20th January 2016

Fee Award Note: this is **not** part of the determination.

In the light of my decision to re-make the decision in the appeal by allowing it, I have considered whether to make a fee award. I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals. I have decided to make no fee award because as I was not asked to do so, and because it was clearly necessary to consider evidence given in the appeal process to reach my conclusion

Fiona Lindsley

Signed:
Upper Tribunal Judge Lindsley

Date: 20th January 2016

Annex A

DECISION AND REASONS

Introduction

1. The first appellant is a citizen of India born on 16th May 1974. The second and third appellants are also citizens of India. They are her children born on 29th June 2006 and 18th June 2011 respectively. The first appellant entered the UK first as a visitor on 31st August 2004. She made other visits after this. She and the second appellant have lived in the UK continuously since his birth, and the third appellant has lived in the UK for her entire life. On 17th December 2011 the appellants made a human rights claim which was refused on 4th December 2012. On 5th November 2013 the first appellant made a ten year claim based on long residence which was refused on 19th December 2013. On 25th April 2014 the appellant was served with notice as an overstayer. On 9th May 2014 the appellants raised additional human rights grounds in a one stop notice. On 11th June 2014 the application was refused; and on 17th June 2014 the appellants appealed against the decision of the respondent. This appeal against the decision was dismissed by First-tier Tribunal Judge R G Handley in a determination promulgated on the 4th December 2014.
2. Permission to appeal was granted by Vice President of the Upper Tribunal on 24th August 2015 following a grant of permission for judicial review by Mr Justice Blake dated 7th July 2015 against the previous refusal of permission by the Upper Tribunal. Mr Justice Blake noted that the second appellant's period of residence had not been factored into the assessment under EX1 when considering the reasonableness of expecting him to leave the UK as a child who had lived in this country for more than seven years.
3. The matter came before me to determine whether the First-tier Tribunal had erred in law

Submissions

4. At the start of the hearing I supplied Mr Spurling with copies of the refusal letters and Mr Duffy with a copy of the decision of Mr Justice Blake.
5. Mr Duffy said, in summary, that whilst he accepted that there was a failure to engage with aspects of the Immigration Rule EX1 of Appendix FM that there were ultimately no material errors of law as contained in the decision were proper reasons for finding that it would not be reasonable to expect the child to leave the UK.
6. Mr Spurling argued that the First-tier Tribunal had not appreciated that seven years residence or more was indicative of their being strong connections by a child with the UK such that it was very likely to be in their best interests to remain and would not be reasonable to expect them to leave. He said that the respondent's IDI at 11.2.4 stated that

“strong reasons will be required in order to refuse a case with continuous UK residence of more than 7 years”. He also argued that there were inadequate factual findings for the First-tier Tribunal to have been found to have properly determined the issue of whether it would be reasonable to expect the second appellant to leave the UK.

Conclusions – Error of Law

7. I find that the First-tier Tribunal has erred in law as the decision under Appendix FM is flawed. As noted by Mr Justice Blake the period of UK residence of the second appellant is not mentioned at all when reasonableness of return to India is considered, thus excluding a relevant factor. Further at paragraph 26 of the decision it is said that “he has not long started his formal education” when in fact he was in year 4 of primary school, thus having done over four years of compulsory UK education (reception, years 1-4). It is not therefore clear that the First-tier Tribunal had in mind the correct period of residence of the second appellant or the private life ties that this would imply and indeed which are documented in the copious school documents provided to the First-tier Tribunal which show an extensive involvement with school life by the second appellant, and his being a group leader in the school context (see school report H- Primary School). There is no reference at all to these school documents in the decision.
8. There is also no finding as to whether the First-tier Tribunal accepted the first appellant’s evidence of her conversion to Islam following her marriage to a Pakistani citizen; or whether it was accepted that this had caused a rift with her family. It is clear that the decision of the First-tier Tribunal on reasonableness of return was predicted on there being financial support from family, as well as UK based friends and the first appellant’s work. However I find that there was insufficient reasoning to support the finding at paragraph 22 of the decision that “the appellants would be able to receive some support and assistance from members of their family in India”. I do not accept that the finding that the appellants did not face a real risk of serious harm from the family, which is clearly set out in the decision and is not challenged by any party as legally flawed, means that it follows that the family would provide such assistance. Clearly family support on return to India (particularly given that the second appellant would be returning with a single parent mother – the first appellant) would be a relevant factor in considering the best interests of the second appellant in returning there and whether it was reasonable to expect him to return especially as the evidence of the first appellant was that she would not be able to support the appellants through her work as a beautician and would have nowhere to live.
9. I do not accept Mr Spurling’s view that seven years residence (or more) creates a presumption absent any evidence to the contrary that it would not be in the best interests of a child to remove them or that it would not be reasonable to remove such a child. It is a factor which must be considered along with other evidence adduced by the appellants going

to these issues. It is notable that at 11.2.4 of the IDI on Family Life dated August 2015 relied upon by Mr Spurling the view of the Secretary of State at b. is that if the child would be leaving with their parent(s) "it will generally be reasonable to expect a child to leave the UK with their parent (s), particularly if the parent(s) have no right to remain in the UK;" This clearly is seen by the Secretary of State as a strong reason to refuse a case where a child has more than seven years residence.

10. I am mindful that the views of the child ought to be considered in assessing their best interests where this is appropriate. Those representing the appellants should give consideration as to whether the second appellant should set out his own views on his best interests and the reasonableness of his returning with his family to India to the Tribunal in a letter in his own words, and whether it would be appropriate for him to attend to give very brief oral evidence confirming he had written the letter. It would also be desirable for a more detailed and up-to-date statement from the first appellant to be drafted setting out the social / private life ties of all family members in the UK, her employment prospects in this country and the financial, work, education, accommodation and social situation for the family on return to India, and her views (and reasons for those views) on the best interests of the second appellant.

Decision:

1. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.
2. I set aside the decision relating to Article 8 ECHR both under the Immigration Rules and outside of those Rules.
3. I adjourn the re-making of that decision.

Directions

1. The remaking hearing will take place on 19th January 2016.
2. A Hindi interpreter is required.
3. Any further evidence relied upon by either party must be filed with the Tribunal and served on the other party at least seven days prior to the hearing date on 19th January 2016.

Fiona Lindsley

Signed:
Upper Tribunal Judge Lindsley

Date: 17th November 2015