



IAC-AH-SAR-V1

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

Appeal Numbers: IA/32694/2014
IA/32695/2014
IA/32696/2014
IA/32697/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 5th January 2016**

**Decision & Reasons Promulgated
On 22nd January 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE FRENCH

Between

**JIGNASHA AMISH SHAH (FIRST APPELLANT)
AMISH KUMAR JAYANTILAL (SECOND APPELLANT)
D S (THIRD APPELLANT)
H S (FOURTH APPELLANT)
(PARTIAL ANONYMITY ORDER NOT MADE)**

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr S Jaisri instructed by Deccan Prime Solicitors
For the Respondent: Miss A Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The adult Appellants are a couple and the other two Appellants are their daughters. The older daughter, DS, was born on 29th November 1998 and she arrived in the United Kingdom with her mother in June 2004. They

came as visitors. The younger daughter, HS, was born in this country on 21st March 2005. The second adult Appellant appears to have come to this country in July 2003. He claimed asylum in 2008 which was refused in the same year. At the relevant time all four Appellants were citizens of India.

2. The Appellants applied on a human rights basis for leave to remain on 17th August 2011 and that application was refused on 27th September 2011. It appears that a further application was made on 10th September 2012. That too was refused but following an application for judicial review, which was concluded by agreement that the application would be reconsidered, it was refused again on 6th August 2014. Decisions for removal were made giving a right of appeal, which was exercised by each of the Appellants.
3. The appeals were heard together before Judge of the First-tier Tribunal Ghani and were all dismissed in a decision promulgated on 3rd June 2015. At the hearing of the appeals it was accepted that the adult Appellants could not succeed under the Immigration Rules and they relied upon Article 8 ECHR. The appeals of the two daughters were put on the basis of paragraph 276ADE of the Immigration Rules and again also under Article 8 ECHR. Judge Ghani considered that it would be reasonable to expect the two daughters to return to India with their parents and the appeals were dismissed both with regard to the Immigration Rules and Article 8 ECHR.
4. The Appellants applied for permission to appeal, claiming that the decision was inadequately reasoned and not in accordance with the law. Parts of that application appeared to pay little relation to the cases as there were references to poor health and to grandchildren, elements which had not been raised in the original appeals. It was also asserted that the appeals should not have been considered in accordance with the Immigration Rules in the light of the date of the original application. There were however references to the assessment of whether it was reasonable to expect the two daughters to go to India in the light of case law. Permission was refused.
5. On renewal in a revised form to the Upper Tribunal permission was granted by Upper Tribunal Judge Reeds on 28th September 2015. The grant reads as follows:
 - “1. Insofar as the grounds make reference to the first and second Appellants’ appeals under the Immigration Rules it is plain from the concession recorded at paragraph 22 that it was conceded on their behalf that neither Appellant could meet the requirements of the Immigration Rules and that the case was advanced upon the basis of Article 8 outside of the Rules and that the issue related to the claims of the Appellants’ two daughters and the reasonableness of return in the light of their length of residence.
 2. It is arguable that the judge failed to consider each child’s best interests when considering the reasonableness of return. Whilst the position of the parents is the context in which the decision is

made, it is arguable that making an assessment of the reasonableness of return the judge failed to have regard to the Appellants' length of residence and their level of integration in the UK and in particular the ages on which they arrived (or were born) and their ages at the date of hearing. Whilst the length of residence is not a 'trump card' (see paragraph 70 of **Behary, R (on the application of) v SSHD [2013] EWHC 3575 (Admin)**) the length of residence and the ages of the children during that period are significant factors established in a number of authorities (see **E-A (Article 8 - best interests of the child) Nigeria [2011] UKUT 315** at [39], **Behary** at [69], **EV (Philippines) v SSHD [2014] EWCA Civ 874** at [36] and **Azimi-Moayed and Others (Decisions affecting children; onward appeals) [2013] UKUT 00197 (IAC)**) and it is arguable that the judge failed to make an assessment taking those factors into account".

6. Following that grant of permission the Respondent filed a response under Upper Tribunal Rule 24 opposing the appeals and contending that the judge had properly considered the issues. The point was also made that there had been no earlier reference to grandchildren or to alleged poor health.
7. At the commencement of the hearing before me I asked whether it could be clarified what was the date of the application to the Secretary of State as this might have a potential bearing upon the impact of paragraph 276ADE of the Rules, for which the relevant date is the date of application. Mr Jaisri said that he understood it to be 10th September 2012 although Miss Everett accepted that the relevant date might be that of the application for reconsideration of the refusal, which would have been a little later. Both parties accepted that the issues turned upon the position of the two daughters, as was made clear in the grant of permission by Upper Tribunal Judge Reeds.
8. Mr Jaisri submitted that the judge had failed to have regard to the relevant period of residence and the impact of that in his decision. He had not articulated the relevant case law and there was no statement of the weight to be attached to Section 55 of the Borders, Citizenship and Immigration Act 2009 concerning the welfare of children. The assessment at paragraph 30 of the decision, he said, included the negative elements relevant to the position of the girls. The position of the younger daughter, HS, appeared to have been subsumed in the assessment of the position of the older daughter, DS. The sisters had not been assessed separately. He said the period that the girls had been in this country was of very substantial significance. Having regard to the presidential decision in **Azimi-Moayed**, DS had spent eleven years after the age of 4 in this country and as at the date of the hearing before the First-tier Tribunal had been taking GCSEs. The younger daughter had lived for six years after the

age of 4. At this point I mentioned to Mr Jaisri the judgment of the Court of Appeal in **EV (Philippines)** and of the Supreme Court in **Zoumbas v SSHD [2013] UKSC 74**, in which it was held that the unlawful status of the parents was the context in which the position of the children fell to be considered. He reminded me that **Zoumbas** had been a judicial review decision but his principal point was that the judge had not weighed the very many positives in the balancing exercise.

9. In response Miss Everett submitted that there was no error. She said that it was clear from paragraph 30 of the decision that the judge had borne the relevant guidance in mind. He had realised that the strongest case was that of the older daughter and had therefore concentrated on her. He had gone through the positive factors relied on, such as the fact that the daughter was doing well at school and attended temple and had strong relationships. However she accepted that the judge did not specifically address the point as to the relevance of seven years' residence in this country but she said that he was clearly aware of it. He had not mentioned the guidance. She submitted that it was not always the case that a child who had lived in this country for seven years after the age of 4 would succeed. The judge had felt that the children's best interests would not be compromised. She accepted that the younger daughter's position had not been gone into in the same depth but that was because the judge correctly assessed the position of the older daughter as the stronger.
10. Having considered the decision, the grant of permission and the submissions made, I came to the view that there was a material error of law in the assessment of the position of the two daughters by the judge at first instance and I set aside his decision. There was no dispute that the adult Appellants could not succeed in their own right and could not meet the requirements of the Immigration Rules. The judge addressed the position of DS at paragraph 30 of his decision. He noted the age at which she had come to this country and that she was doing extremely well at school. He referred to some case law including **ZH (Tanzania) v SSHD [2011] UKSC 4** but noted that neither child was British. He also referred to **Zoumbas**. He had not however referred to the case of **Azimi-Moayed** in which the significance of length of residence is addressed in detail. That appeal was heard after the revisions to the Immigration Rules came into force in July 2012. The relevant criteria are set out at paragraph 13 of **Azimi-Moayed** where it is stated as follows:
 - “(i) As a starting point it is in the best interests of children to be with both their parents and if both parents are being removed from the United Kingdom then the starting point suggests that so should dependent children who form part of their household unless there are reasons to the contrary.
 - (ii) It is generally in the interests of children to have both stability and continuity of social and educational provision and the benefit

of growing up in the cultural norms of the society to which they belong.

- (iii) Lengthy residence in a country other than the state of origin can lead to development of social cultural and educational ties that it would be inappropriate to disrupt, in the absence of compelling reason to the contrary. What amounts to lengthy residence is not clear cut but past and present policies have identified seven years as a relevant period.
- (iv) Apart from the terms of published policies and Rules, the Tribunal notes that seven years from age 4 is likely to be more significant to a child than the first seven years of life. Very young children are focused on their parents rather than their peers and are adaptable.
- (v) Short periods of residence, particularly ones without leave or the reasonable expectation of leave to enter or remain, while claims are promptly considered, are unlikely to give rise to private life deserving of respect in the absence of exceptional factors. In any event protection of the economic wellbeing of society amply justifies removal in such cases”.

11. Whilst the First-tier Tribunal Judge did mention that the older daughter had claimed to have lived continuously in the UK for at least seven years and that it would not be reasonable for her to leave this country, he did not specifically address the significance of that period in his consideration of her position or of that of her sister. As at the date of hearing (23rd April 2015) DS had lived in this country for almost eleven years after the age of four, the starting point for the significance of residence mentioned in **Azimi-Moayed**. That period is obviously far in excess of the seven years there mentioned. The judge accepted that DS had an active social life and was well integrated. The periods of time for the children relevant in **Zoumbas** and **EV (Philippines)** are notably less than seven years. In **Zoumbas** the child had returned to the United Kingdom in March 2006 and the decision under appeal (this was a judicial review decision) was made in October 2011. The period was something over five years in that case. Other children were born subsequently but clearly had lived in this country for an even shorter period. In **EV (Philippines)** the children had arrived in 2009 and their applications refused in 2011. The appeal at first instance had been in 2012. Again, a far shorter period was involved.
12. Whilst the principle that the position of children has to be considered in the context of that of their parents is clear, the current appeals of DS and HS are most notably different having regard to the periods of time they have spent in this country and it was incumbent on the judge to weigh those periods of time, particularly after the age of four, along with the other factors in considering whether, under paragraph 276ADE(1)(iv) or under Article 8 ECHR it was reasonable to expect a child to leave this country. As has been said many times, these situations are profoundly

fact-sensitive. The judge having, in my view, failed to factor in the significance of the period of seven years after the age of four, in particular in the case of DS, in reaching his conclusion he erred in law.

13. Having reached that decision I stated that I was in a position to re-make the decision if the parties were ready to proceed. I put back the appeals for a short period to enable them to prepare and then proceeded to rehear the appeals. I clarified that the findings in respect of the adult Appellants to the effect that they could not qualify under the Immigration Rules nor in their own right under Article 8 ECHR was unaltered.
14. When the hearing resumed I was handed a short statement by DS and a copy of a grant of British citizenship and the British passport in respect of HS. She had become a British citizen in October 2015. DS gave brief evidence, upon which she was not cross-examined. She set out that she had taken her GCSE exams in June and July 2015 and obtained one A*, seven As and three Bs in those examinations. She had now embarked on A level studies in four A level subjects, physics, maths, economics and computer science. Her sister, who was now a British citizen, was continuing to study at the same school.
15. In submissions Miss Everett said that the most significant change was that the second child was now a British citizen but she relied upon the undisturbed findings and the refusal letter. Under the Rules the relevant factor was the reasonableness of removal and that had to be seen in the context of the position of the parents. The Immigration Rules indicated where the balance should lie. The family still had ties in India and she submitted that there was no evidence that the best interests of the children would be compromised by return.
16. In response Mr Jaisri referred again to the guidance in **Azimi-Moayed**. The older child's position had been the most significant but the second child had now been in this country for some ten years and was a British citizen. The younger child was not independent. The family had established roots. The children were attending the same college in the same area where they had always lived. The children had no personal connection with the culture of India and he submitted it would be unreasonable to expect them to return.
17. The background to these appeals is the entry of the parents to this country and then their unlawful overstaying. That is a highly significant factor as is made clear in cases such as **Zoumbas** and **EV (Philippines)** but also in the Immigration Rules themselves and at Section 117 of the Nationality, Immigration and Asylum Act 2002. Immigration control is important and is in the public interest. Each case however must turn on its facts and the significance of the best interests of children is made clear in the Borders, Citizenship and Immigration Act 2009. That is a primary but not a determinative factor. Without the interests of the two daughters being considered, the parents should undoubtedly return to India even though

they have some private life in this country. The judge's findings in that regard are undisturbed. The crucial factor, as was pointed out in the course of the hearing, was the position of the two daughters.

18. As at the date of the hearing before me the older daughter, who it is accepted is doing extremely well at school and is well integrated in this country, had been here for some eleven and a half years since the age of four. I was in no doubt that her best interests are to remain in this country and to continue her education here. The position of the second daughter is different from her position as at the hearing before the Judge of the First-tier Tribunal. She is now a British citizen. That citizenship may have been granted very recently but it would be invidious to seek to establish degrees of citizenship. She is a British citizen and that is the basis upon which I must decide the appeals. The significance of British citizenship was made clear in **ZH (Tanzania)** and was repeated in **Zoumbas** and in **EV (Philippines)**. The younger child is entitled to live in this country and to complete her education here. Although I did not hear directly from the younger child, it was apparent that both of the daughters wished to remain in this country. Their views are of significance.
19. The question I have to answer so far as the daughters are concerned is whether it would be reasonable at this stage in their lives to expect them to go to India, in the context that they would do so with their parents. In the light of the lives they have lived in this country and the period of time they have lived here and the profundity of their integration, I find that it would not. I make this finding notwithstanding the poor immigration history of their parents.
20. Section 117B(6) of the 2002 Act is then relevant in considering the position of the parents. Whilst they have a poor immigration history, their relationship with their children was not in dispute. Sub-Section (6) of Section 117B reads as follows:

“In the case of a person who is not liable to deportation, the public interest does not require the person's removal where -

- (a) the person has a genuine and subsisting parental relationship with a qualifying child, and
- (b) it would not be reasonable to expect the child to leave the United Kingdom”.

The definition of “qualifying child” appears at Section 117D and means a person who is under the age of 18 and who:

- (a) is a British citizen, or
- (b) has lived in the United Kingdom for a continuous period of seven years or more.

There are other factors in Section 117B which would be likely to weigh against the parents but it is clear from the decision of the Tribunal (chaired by the President) in **Treebhawon and Others (Section 117B(6)) [2015] UKUT 00674 (IAC)** that the public interest in Section 117B(6) prevails over the other elements.

21. I accordingly conclude that these appeals should be allowed under Article 8 ECHR. The best interests of the children, to be assessed as at the date of hearing, compel me to consider the cases under Article 8 as well as under the Rules. I would also allow the appeals of the two daughters under paragraph 276ADE(iv) in the light of their period of residence and experience as at the date of applications.

Notice of Decisions

I have set aside the decisions in all four appeals made by the First-tier Tribunal and have re-made the decisions.

For the reasons set out above I allow all four appeals under Article 8 ECHR.

I also allow the appeals of DS and HS under paragraph 276ADE of the Immigration Rules.

No application was made for an anonymity order and no such order is made.

Signed

Date 22 January 2016

Deputy Upper Tribunal Judge French

TO THE RESPONDENT FEE AWARD

I have considered whether to make a fee award and have decided not to do so. These appeals were allowed only after detailed submissions and after further evidence had been given.

Signed

Date 22 January 2016

Deputy Upper Tribunal Judge French