



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

Appeal Number: IA/32621/2015  
IA/32622/2015

**THE IMMIGRATION ACTS**

**Heard at Field house**

**On 3 July 2017**

**Decision &  
Promulgated  
On 10 July 2017**

**Reasons**

**Before**

**UPPER TRIBUNAL JUDGE HANSON**

**Between**

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

Appellant

**and**

**SMM  
IMM**

**(anonymity direction made)**

Respondents

**Representation:**

For the Appellant: Ms K Pal Senior Home Office Presenting Officer

For the Respondent: Mr R Deepchand of Lambeth Solicitors

**ERROR OF LAW FINDING AND REASONS**

1. This is an appeal by the Secretary of State against a decision of First-tier Tribunal Judge M J Gillespie promulgated on 24 November 2016 in which the Judge allowed the appeals against the Secretary of States refusal of an application for leave to remain on human rights grounds

and direction for the removal of SMM and IMM from the United Kingdom.

## **Background**

2. SMM and IMM are twins born on 14 August 1998. SMM entered the United Kingdom as a visitor on 7 July 2013 with leave valid to 7 January 2014. IMM entered the United Kingdom on 7 November 2013 as a visitor with leave valid until 7 May 2014.
3. SMM and IMM are nationals of Mauritius who formerly lived with their parents in Mauritius but who claimed their father was abusive and physically violent both to them and their mother. The Judge records the allegation of facts at [3] to [10] of the decision. An assessment of the evidence and findings of fact are set out from [13] which can be summarised in the following terms:
  - a. The core of the factual account has not been challenged [13].
  - b. When SMM came to the United Kingdom there was no deliberate intention that he should remain indefinitely although it seems clear from the prompt arrangements made for SMM in the United Kingdom that by August or September it had been decided he should not return to Mauritius. This was said to imply that by the time IMM was brought to the United Kingdom it was intended he would remain and that each would immediately prior to the expiry of their visit visas make an application for leave to remain. It was found this further implies an intention from late 2013 following divorce proceedings that the twins mother would marry and make a home together with SMM and IMM in the United Kingdom [13].
  - c. There was no documentary evidence as to the financial circumstances of the appellant's mother or stepfather. It was accepted that monies alleged or expected constitute funds from which SMM and IMM might be supported in the United Kingdom or in Mauritius [14].
  - d. Named relatives are present in Mauritius. SSM and IMM's maternal grandparents could not be expected to accommodate and support them and funding would have to be made available by their mother to provide accommodation. The situation is that SMM and IMM's mother is or expects to be in a position where she must be seen as being able to make potentially adequate financial provision for the twins should they be obliged to return to Mauritius [15].
  - e. In relation to Appendix FM — it was found the Secretary States consideration of the Rules potentially available was inadequate [17 - 18].
  - f. In relation to paragraph 276 ADE - it was found it ought to have been unreasonable to return the twins to Mauritius as children "because they had there suffered abusive treatment". It was said their uncle and mother protected them in the United

Kingdom and their mother intended to join them and was winding up her business and personal affairs in Mauritius. The decision on unreasonableness was not based on all the facts and was not a lawful and correct decision [20].

- g. Assuming the decision under the Rules is correct it is necessary to consider the matter by reference to Article 8 ECHR. The removal of the appellants will bring about interference with their family and private life. The question was one of the proportionality of the interference [21].
- h. The Judge acknowledged the obligation under section 117A of the Nationality, Immigration and Asylum act 2002 to consider the public interest question and to attach due weight to the public interest set out in section 117B. The appellants are English speakers, assimilated into United Kingdom society where they live with their stepfather, a British national, married to their mother. They have benefited from education and psychological support in the United Kingdom in circumstances where "they had suffered significantly from paternal abuse during their childhood". Family and private life to date has been accomplished while the parents have been present precariously though have been lawful throughout. There is reduced public interest in enforcement for the purposes of deterrence [22].
- i. There was no clear evidence of the financial circumstances. The application form did not show they were not in receipt of public funds. They were supported by bank statements and the payslips of their stepfather. No point of lack of finances or potential burden on the public funds was raised in the refusal letter. [23].
- j. In favour of the appellants are the "significantly compassionate circumstances which they demonstrate" it is said they have suffered abusive childhoods before being brought to the United Kingdom and the home of their paternal uncle in order to escape the violent behaviour of their father. The mother and maternal uncle are now married and will be pursuing a family life in the United Kingdom [24].
- k. There are relatives in Mauritius although they cannot accommodate or support the appellants. This is, however, insignificant as the evidence of the mother and father serves to show they will be financially able to fund accommodation and provide support for the appellants in Mauritius [25].
- l. At [26] it is written "*I do not think that the appellants are likely to be at real risk from their father. Were they to return to him, then no doubt they would suffer further abuse. They could not return to him, and could not live with various relatives, but need not do so. They could take, with funding from their mother and stepfather in the United Kingdom, their own rented accommodation while completing education. Such an expedient, however, would be a substantial interference in their private and family lives. Although they are now over 18, there is, as is*

*said, no bright line between adulthood and minority. Both appellants remain dependent financially and emotionally on their mother and stepfather. They are not in a position to be independent, to form their own independent family units or to be self-supporting. While this dependency remains, and bearing in mind that the applications were brought while both remained minors, their best interests ought to be given, if not a primacy of importance, at least considerably more weight than would be extended towards independent adults. While they remain so dependent upon their protectors over the last three years, their enforced removal from the daily companionship and emotional support of those protectors would be disproportionate”.*

4. The Secretary of State sought permission to appeal noting in her grounds that both SMM and IMM arrived as visitors and have only been in the UK since 2014, that both were 18 years old and adults at the date of the hearing, that their mother has no status in the United Kingdom although their mother married their uncle and intends to make an application on that basis, and that the uncle did not meet the financial requirements of the Immigration Rules.
5. The Grounds also asserts there was no evidence about the claim of domestic abuse asserted to be perpetrated by SMM and IMM’s father despite the claimed involvement of the police and court proceedings in Mauritius. There was no evidence that their father had any connection with politicians and there was evidence of family members living in Mauritius. There was no detailed psychiatric report and neither SMM nor IMM could satisfy the Immigration Rules at the date of the hearing or indeed date of application on the facts of the case.
6. The grounds also assert the consideration of Article 8 is flawed and that even if the Judge was correct to venture into considering the matter outside the Rules the consideration of the full factual matrix of the case and of section 117B at [22] is incomplete and inadequate. It is said it is not clear how the Judge concluded SMM and IMM are assimilated and it cannot be disputed that their status at the date of hearing was precarious and that there was no financial independence.
7. The Secretary State also asserts the fact the family life with the uncle/stepfather is clearly precarious has not been factored into the Judges analysis - *Rejendran (s117B - family life) [2016] UKUT 00138* refers.
8. Permission to appeal was granted by another judge of the First-tier Tribunal and the matter comes before the Upper Tribunal for the purposes of an Initial hearing to establish whether the Judge made an error of law material to the decision to allow the appeals.

### **Error of law**

9. I find the Judge erred in law in a manner material to the decision to allow the appeals. This was clearly illustrated in the question put to

- Miss Pal when she was asked if she understood why the Secretary of State had lost the appeal to which she stated that she did not.
10. The Judge finds that there was manipulation at [13] but fails to factor that into the Article 8 proportionality exercise.
  11. At [18] the Judge suggests the Secretary of State should have considered an application under the Rules but no application was made on this basis as the application was for leave outside the Rules and no claim has been made for leave on the basis of SMM and IMM's mothers marriage.
  12. It is accepted the Judge was right to go on to consider Article 8 outside the Rules, but there is a clear obligation upon the Judge to do so properly. It is claimed for example that SMM and IMM are assimilated with no explanation of how this is so or adequate reasoning. Their status has always been precarious and there is a clear lack of adequate analysis, reasoning, or application of the facts appertaining to the financial aspects in light of the conclusion that there was no clear evidence before the Judge of financial issues. The economic well-being of the United Kingdom is a legitimate aim pursuant to Article 8(2) yet there is no proper analysis of this element of the appeal.
  13. The precariousness of the status applies to both private and family life but does not appear to have been adequately factored into the proportionality assessment.
  14. In a case like this there is a need to identify "compelling circumstances" sufficient to override the public interest.
  15. The Judge refers to abusive childhoods but provides inadequate reasoning and/or findings as to what is meant by this or what evidence was relied upon. It is also necessary to examine any evidence regarding the impact upon SMM and IMM of returning to Mauritius. There is, as noted in the grounds, no psychological evidence to support an adverse effect.
  16. The Judge found SMM and IMM have relatives in Mauritius and could be adequately accommodated and maintained by their mother, who has adequate resources to do so, but the Judge seems to make this observation without factoring this element into the proportionality assessment adequately.
  17. The reason Ms Pal was unable to understand why the Secretary of State lost the appeal is because in what purports to be the balancing exercise undertaken by the Judge, which led to the appeal being allowed, a proper analysis of the public interest is missing. A reading of the decision clearly explains why SMM and IMM won by reference to the positive factors they sought to rely upon but does not indicate that the correct approach has been taken to assessing the proportionality of the decision or proper and adequately argued reasons have been given.
  18. I find the extent of the error is such that the Judge has failed to undertake the proportionality exercise properly in relation to which it is necessary for the matter to be considered further with a view to extensive findings of fact being made and a proper and detailed

proportionality exercise conducted in the structured manner set out in *Razgar*.

19. Article 8 does not give a person the right to choose where they wish to live. IT is about preventing unwarranted interference with protected family and/or private life.
20. I therefore set the decision aside. There shall be no preserved findings. I remit the appeal to the First-tier Tribunal sitting at Hatton Cross to be heard afresh by a judge of that Tribunal other than Judge Gillespie.

### **Decision**

21. **The First-tier Tribunal Judge materially erred in law. I set aside the decision of the original Judge. I remit the appeal to be heard afresh by a judge of the First-tier Tribunal sitting at Hatton Cross, other than Judge Gillespie.**

Anonymity.

22. The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed.....  
Upper Tribunal Judge Hanson

Dated the 7 July 2017