



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

Appeal Numbers: HU/10090/2017
HU/11499/2017

THE IMMIGRATION ACTS

**Heard at Field House
On 10 May 2019**

**Decision & Reasons Promulgated
On 28 May 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE HANBURY

Between

**SONIASINGH [R] - FIRST APPELLANT
BEDANAND [R] - SECOND APPELLANT
(ANONYMITY DIRECTION NOT MADE)**

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Aslam of counsel

For the Respondent: Mr Lindsay, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is an appeal against the decision of Judge of First-tier Tribunal Sweet (the Immigration Judge) to dismiss the appellants' appeals against the refusal by the respondent to grant them leave to remain.
2. The appellants are citizens of Mauritius who are husband and wife. On 30 August 2016 they applied for leave to remain on the basis that their family

or private life would be unlawfully interfered with, but those applications were refused by the respondent on 4th and 20th September 2017 respectively. Both appellants appealed to the First-tier Tribunal.

3. The Immigration Judge heard the appellants' appeals on 14 February 2019. He noted that the first appellant (Mrs [R]) had applied under paragraph 276B of the Immigration Rules for indefinite leave to remain on grounds of 10 years' continuous lawful residence in the UK on 30 August 2016. The second appellant's application had been on the basis that he was a dependent relative and therefore fell to be given leave to remain in the UK under Appendix FM of the Immigration Rules.
4. The Immigration Judge allowed the appeals but made no fee award, noting that the appeals had succeeded solely on human rights grounds based on evidence presented at the hearing rather than the evidence presented to the Secretary of State.
5. Judge of the First-tier Tribunal Chohan gave the respondent permission to appeal to the Upper Tribunal because he considered it arguable that the Immigration Judge had miscalculated the appellants' period of residence for the purposes of paragraphs 276B and "paragraph 309E" of the Immigration Rules. At the hearing before the Upper Tribunal it became apparent that the provision Judge Chohan had intended to refer to was paragraph 39E of the Immigration Rules rather paragraph 309E.

Background

6. Their appellants applied for leave to remain was on 24 April 2014 but that resulted in a refusal of leave to remain on 23 June 2014. However, they subsequently appealed that decision on 20 October 2014. That appeal was dismissed by the First-tier Tribunal and the appeal rights therefore became exhausted.
7. The respondent said that the first appellant's application on 30th August 2016, on which the second appellant's application depended (as her spouse) was out of time (because it was more than 14 days after service of the refusal notice). Therefore, the first appellant did not have the statutory form of leave which would otherwise be created by section 3C of the Immigration Act 1971 and lacked the necessary period of "10 years continuous lawful residence" as required by paragraph 276B (i) of the Immigration Rules.

The grounds of appeal

8. The grounds of appeal raise a distinct point of law, statutory or regulatory construction. The grounds of appeal set out that, as a matter of construction, the appellants' rights to remain in the UK came to an end in 2014. Therefore, their leave to remain in the UK thereafter under Section 3C of the Immigration Act 1971 came to an end. At that point, if this argument is correct, their presence in the UK became unlawful. Therefore,

they could not qualify for ten-years continuous lawful residence and the first appellant was unable to qualify under paragraph 276B of the Immigration Rules. It followed that the second appellant would not qualify on the basis of being a dependent relative under those Rules.

The hearing

9. Mr Lindsay stated that the relevant part of the Immigration Rules was paragraph 39E and specifically sub-paragraph (2)(iii) thereof, which provides an exception for over stayers who apply within fourteen days of the applicant leave expiring. Paragraph 30 9E therefore contains provisions for calculating when the application was made. Where an application was made under those Rules after the expiry of the time for making an in-time application the application must be made “within 14 days” of the “expiry of any leave extended by section 3C of the Immigration Act 1971; or (iii) the expiry of the time-limit for making an in-time application for administrative review or appeal (where applicable)...”. The effect of this provision, Mr Lindsay argued, was to bring to an end the leave which is continued pending a variation decision. The decision in this case I was informed that the hearing, was a “variation” decision. I was also provided with a copy of Section 3C of the 1971 Act (as amended) which provides that the section applies in various situations, including under sub-paragraph (2) where leave is extended by virtue of any period when “(a) the application for a variation is neither decided nor withdrawn” or “(b) an appeal under Section 82(1) of the Nationality, Asylum and Immigration Act 2002 could be brought against the decision on the application for variation (ignoring any possibility of an appeal out of time with permission). I have emphasised those last words as it seems that there are crucial to Mr Lindsay’s argument.
10. Mr Lindsay’s submits that, because leave had expired in June 2014, any appeal that was made out of time, albeit following the grant of permission retrospectively, cannot have had the effect of extending the period beyond the fourteen days allowed by paragraph 39E. Section 3C envisaged a situation where once an application for variation was made fourteen days were available following that decision to make an application which would be treated as being in-time. Once that time expired, based on Mr Lindsay’s submissions, the person concerned became an overstayer.
11. Mr Aslam disagreed with that construction and he took the view that you could read the legislation as allowing an appellant who is subsequently granted retrospective permission to appeal, i.e. after the time for appealing has expired, as having leave and therefore not coming within the words of Section 3C (2) (b) of the Immigration Act 1971-i.e. those words would not be aimed at such a person.
12. There was a difference of opinion between the representatives as to what should happen if I did find the material error of law that had been identified by Mr Lindsay. Mr Aslam submitted that in circumstances where

I found a material error of law, I should send the matter back to be re-heard by the First-tier Tribunal. Mr Lindsay submitted that this was a distinct matter which could be re-considered by the Upper Tribunal if necessary.

Discussion

13. I have considered carefully the correct construction of the Immigration Rules in the context of the extension of leave pending decisions provided for by section 3C of the 1971 Act.
14. I am not persuaded by Mr Aslam that it is capable of being read in any way other than the plain wording. The plain wording requires the tribunal to ignore the possibility of an appeal out of time with permission. Therefore, following expiry of leave in 2014 any application for variation after that, i.e. in 2016, would not have afforded them any lawful permission to remain. The appellants became at that point overstayers and therefore, as a matter of law, they do appear to have been overstayers. This should have informed the way that the Immigration Judge assessed the Article 8 application. Here the Immigration Judge allowed the appeal under article 8 of the ECHR because he thought the appellants qualified under the Immigration Rules.
15. It was submitted that there had been a change in circumstances since the hearing before the First-tier Tribunal in that an application for naturalisation on behalf of the appellants' daughter, Roopeshka, born 8 March 1996, had recently succeeded (on a date in April 2019). Therefore, with effect from April 2019 Roopeshka is a British citizen. The question is: what should now happen?

Conclusion

16. The decision of the First-tier Tribunal contains a material error of law in that it misconstrued the Immigration Rules which may have led it to reach an onerous conclusion on the application of article 8 to the facts of the case. Therefore, that part of the decision must be set aside. The findings of fact in relation to family life and private life in the UK are not disputed by the respondent - there being no argument with those findings.
17. It follows from my decision that the First-tier Tribunal contains a material error of law, that it is necessary to set aside the decision that the Immigration Rules were met and to go on and re-make the decision. I have considered whether it is necessary to hear further evidence on this, there having been no application to adduce further evidence.
18. I have decided, having found that there was a material error of law, that the appeal by the respondent should be allowed to that extent. The decision in relation to the Immigration Rules is set aside insofar as that has an impact on the human rights appeal.

19. I reserved my decision as to the ultimate disposal of the case at the hearing. However, I indicated to the parties at the hearing that, in so far as it became necessary to do so, I would re-make the decision in the Upper Tribunal based on the submissions made at the hearing by both parties. There was no application to adduce fresh evidence not before the FTT under rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008. It was agreed that the naturalisation of the youngest child was a matter not before the FTT and there had been no application to adduce fresh evidence, although I cannot ignore the fact that she has UK Nationality- there being no objection to me seeing the copy of her passport. Her change in status may form the subject matter of a fresh application in due course.
20. I heard brief submissions by both representatives on the question of ultimate disposal. The facts were that the eldest daughter of the family (Roopeshka) had discretionary leave to remain in her own right. Mr Aslam submitted that the Immigration Judge had been entitled to reach the conclusion he reached in relation to article 8.
21. Mr Lindsay said it had always been accepted that there was family life between the adult daughter and her parents in the UK. Roopeshka was, however, 23 having been born on 8 March 1996 and there was no evidence amounting to support of the parents. There were the normal emotional ties between parents and their daughter. In relation to the appellants, little weight should attach to their private life as their immigration status had been precarious since 2014. I was referred to the case of **KO Nigeria**. The issue was whether it was reasonable to return the appellants to Mauritius or require the respondent to allow them to stay in the UK. Mr Lindsay referred me to the IDI guidance (at paragraph 10) and to Lord Carnwath's judgment in **KO**. It was pointed out that the younger child would be returning to Mauritius with his/her parents. Neither parent had any right to be in UK. The facts should be considered and when those facts were considered it would be reasonable in all the circumstances to return the appellants to Mauritius. I was specifically referred to paragraphs 17-18 of **KO**. As the press summary states:
- “...It is inevitably relevant to consider where the parents, apart from the relevant provision, are expected to be, as it will normally be reasonable for the child to be with them. To that extent the record of the parents may become indirectly material if it leads to them having to leave the UK. It is only if it would not be reasonable for the child to leave with them that the provision may give the parents a right to remain”.
22. The case of **NS** was put forward as similar on its facts to this case. Again, I quote for the press summary:
- “...**NS** concerned section 117B of the 2002 Act. The parents had falsely claimed to have completed a postgraduate course in order to obtain leave to remain [46]. The Upper Tribunal judge's conclusion, read in its full context, did not involve any error of approach. He was entitled to regard the parents' conduct as relevant to the extent that it meant

they had to leave the country, and to consider the position of the child on that basis [51].”

23. It was therefore submitted that there was no reason in principle why the appellants should not return to Mauritius with their young child. There would be disruption to family life, but it was necessary and proportionate for them to return.
24. Mr Aslam also addressed submissions to the tribunal on the basis that I was to proceed to remake the decision. He referred me to the case of **JG [2019] UKUT 72** and in particular to paragraph 27 thereof where Judge Gill referred to the limits on the case of **KO** and how the case could be misinterpreted. In particular, having pointed out that the requirement in section 117B (6) is derived from the section 55 duty to secure the welfare of children within the jurisdiction, Judge Gill stated that paragraph 18 and 19 of **KO** did not mandate or lend support to the suggestion that in determining whether it is reasonable to expect a child to leave the UK one must ignore the fact that they one or both of the parents will no longer be in the UK. It would not be reasonable to remove this British citizen child to Mauritius and therefore it would not be reasonable to expect parents to be removed either. Family life still exists with the adult child (Roopeshka) also. I refer to her witness statement at paragraph 2, 6 8 and 9, for the degree of support given and the extent of dependency on her parents. She is currently looking for work.
25. Mr Lindsay was allowed the last word as it was the respondent’s appeal. He said that although the Immigration Judge had disagreed with the respondent’s position it was not in any way “overruled”. There was no realistic possibility that Roopeshka would be required to leave the UK and insofar as the family were divided by the respondent’s decision, this was necessary in all circumstances. The FTT was required to recognise the respondent’s position that the appellants would reasonably be able to return to Mauritius as a family unit and continue their family life there.
26. Following the submissions summarised above, I have decided to re-make the decision for the purposes of section 12(2)(b)(ii) of the Tribunal’s, Courts and Enforcement Act 2007 (2007 Act) based on the evidence before the FTT as supplemented by the submissions summarised above. I have regard to the following in deciding the ultimate disposal of these appeals:
 - (1) The first appellant (Mrs Soniasingh [R]) was born on 26 June 1972 and has been in the UK since 2005 having originally come here with a visit visa but having extended her leave several times subsequently. She originally came to the UK as a Tier-4 (general) migrant (see her application at A7). Her occupation at the time of her immigration application (it appears in December 2015) was described as a “legal secretary”. It is likely to that she would be able to resume employment on return to Mauritius, possibly with an improved skill set.

- (2) Her husband (Bedanand) was born on 8 November 1968 and is therefore the eldest of the adult appellants. He first entered the UK in 2006 (see his solicitor's letter dated 30 August 2016). He claims to be dependent on his wife. This seems to have been the basis of his being allowed to remain here for the time he has been in the UK (see the summary on the refusal letter). He does not advance any independent basis for remaining in the UK beyond his dependent status.
- (3) They have two children together: the eldest (Roopeshka) was born on 8 March 1996 and the youngest ([B]) was born on 27 December 2008, but I have been provided with very little detail of the latter, other than that she has now become a British citizen. She is of course young, although she will now be in the educational system here. English is widely spoken in Mauritius.
- (4) Mauritius has a functioning school and health care system and the appellants have a supportive family there. It is by no means entirely negative for [B] to be exposed to the culture of her parents. No evidence of insurmountable obstacles existing to family life continuing in Mauritius has been placed before the Upper Tribunal nor was such evidence placed before the FTT.
- (5) The appellants have been living here, at best, precariously since 2014, I have found. They therefore fall within the little weight provision of section 117B(5) as far as their private life is concerned.
- (6) I have taken full account of section 117B(6) of the Immigration Rules and the guidance in both **KO** and **JG** but consider that this family would be returning as one unit to Mauritius and there is no likelihood they will be divided as a family. Given [B]'s young age any impact on that child's schooling would-be short-term disruption. The respondent has had full regard to his obligations under section 55 of the 2009 Act but, in so far as he has not done so, the parties indicated that the recent change in status of [B] by being given British citizenship could form the subject of a separate application. I say "could", but I am not encouraging them to make a future application as it is undesirable for all considered to be involved in endless litigation about their status.
- (7) The normal expectation where a family come here for a limited stay but fail to return to their own country, or quickly regularise their status in the UK, is that after their limited stay, they will eventually have to do return to the country of their nationality. There appear to be no exceptional circumstances justifying the finding that the removal of the appellants would be unlawful under article 8. The respondent took account of the anticipated impact on the family unit including [B]. However, insofar as the appellants and [B] will be separated from their adult daughter (Roopeshka), modern means of communication will ensure the family remain close.

Decision

27. I have found a material error of law and set aside the decision of the FTT.

28. I have decided, given my interpretation of the Immigration Rules and the appellants' immigration history, that the appeals on human rights grounds should be dismissed.

No anonymity direction is made.

Signed

Date 25 May 2019

Deputy Upper Tribunal Judge Hanbury

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed W.E.Hanbury

Date 25 May 2019

Deputy Upper Tribunal Judge Hanbury