Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/03337/2018
HU/03341/2018, HU/03347/2018
& HU/03350/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 15 November 2019	**On 21 January 2020**

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

JANKIBEN [P]	First Appellant
ELESHKUMAR [P]	Second Appellant
[A P]	Third Appellant
[J P]	Fourth Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr S Kumar, legal representative from Capital Solicitors
For the Respondent: Ms S Cunha, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Notwithstanding that minority of two of the appellants I see no need for and do not make any order restricting publicity about this appeal.

2. This is an appeal against the decision of the First-tier Tribunal on 23 April 2019 dismissing the appeals of the appellants against the decision of the respondent on 11 January 2018 to refuse them leave to remain on human rights grounds. Permission to appeal to the Upper Tribunal was given by First-tier Tribunal Judge Garratt. In summary his reasons for granting permission were that it was arguable that the First-tier Tribunal should not have concluded it was reasonable to expect the third named appellant, a child who had resided in the United Kingdom for nine years, to accompany her parents to India and that the judge had given the impression of unfairness by, for example, reference to the appellant as a "trojan horse".

3. I begin by considering carefully the decision of the First-tier Tribunal.

4. This, helpfully, begins by explaining the family relationship. The first appellant and second appellant are married to each other. They are the parents of the third appellant who was born in the United Kingdom in May 2010 and the fourth appellant who was born in the United Kingdom in August 2012. The appellants are all nationals of India. They appealed a decision of the respondent on 11 January 2018 refusing them leave to remain. The application was made on 25 September 2017. The judge noted that the first appellant was given leave to enter the United Kingdom as a student in 2009 accompanied by her husband, the second appellant. The first and second appellant had their leave extended until June 2014 and the third and fourth appellants were given leave in line with their parents. On 20 June 2014 the first appellant applied for leave but the application was refused. That decision was appealed and the appeal was dismissed. The First-tier Tribunal Judge dealing with that appeal was satisfied that the first appellant had been identified correctly as a person who had relied on a fraudulently obtained certificate of competence in the English language. At that time neither child had achieved seven years' residence in the United Kingdom.

5. The First-tier Tribunal Judge noted that the appellants remained in the United Kingdom. Paragraph 4 of the decision and reasons begins, regrettably, with the phrase:

> "Undeterred by the dismissal of the appeals and in the absence of any application to appeal against the decision of [the Immigration Judge], the appellants remained in the UK until such time as the third appellant had attained the age of 7, whereupon in September 2017 the appellants applied for LTR. This application, refused on 11 January 2018, is the subject of the present appeal."

6. Although factually correct, it is not helpful when judges give in to the temptation to use phrases such as "undeterred by the dismissal of the appeals". The judge must be seen to be acting fairly and there is no need to make comments in that way on the good faith of the appellants, especially as two of them are minors and clearly wholly blameless for any manipulation in which the other appellants might have indulged.

7. The judge noted that in the case of the first and second appellants the respondent took the view that they were adults who had lived in India in their adult life and had

not identified any significant obstacles to their reintegration into life in India. I set out in its entirety the First-tier Tribunal Judge's summary of the respondent's consideration of the third appellant's case. The judge said at paragraph 5(c) of the Decision and Reasons:

> "In addressing the third appellant's application the respondent considered this appellant's claim under the private life route only. She was not eligible to apply as a child under Appendix FM because her parents had no LTR and were at the same time being refused under Appendix FM. Acknowledging that this appellant had lived continuously in the UK for over seven years, it was considered that it would be reasonable for her to leave as she would be returning with parents and the fourth appellant as a family unit. She was a national of India with family ties there. She could speak Gujarati. As her parents spent the majority of their lives in India they would be able to help her adapt to life there. It was in her best interests to remain with her parents."

8. The case of the fourth appellant, the younger child, added nothing of importance to the reasons. The First-tier Tribunal Judge said at paragraph 6:

> "The crucial issue to address in these appeals is whether in the first instance it would be reasonable to expect the third appellant, in particular, to leave the UK in circumstances where she has lived continuously in the UK for over eight years since birth and the fourth appellant for over six years."

9. The judge then summarised the evidence that might be thought to show that removal would be unreasonable. He noted that in cross-examination that the first appellant acknowledged that some Gujarati was spoken at home but she said the children were not fluent and had not been taught to read or write in Gujarati.

10. At paragraph 7 the judge said:

> "At the hearing of the appeals the first appellant gave evidence, adopting the brief joint statement made by her and her husband. The evidence centred on the circumstances of the third appellant and her satisfactory progress at school. For her part the daughter was agitated and concerned about the risk of being removed to India. Her friends were here and it would be impossible for her to continue her schooling in India. Her best interests would be served in remaining in the UK. The appellants' financial situation was difficult in the absence of any right to work. In these circumstances they were dependent on help given to them by others. In his statement R. S. Patel asserted that he occasionally financially helped the appellants. He considered the parents to be responsible people".

11. Overall the Decision and Reasons contains a very slim review of the evidence but I have reviewed the evidence that was available to the First-tier Tribunal and, with respect, there is little to criticise in the judge's summary. It might have been helpful to have added that the joint statement referred to the children having "visited India briefly" but never having lived there permanently. It is also right that there are statements from neighbours and friends and documents in the school tending to suggest that both the third and fourth appellant are well behaved children who are

taking advantage of the opportunities provided them by the education system. That is to their credit and the credit of their parents but does not go very far on the road of showing that it would be unreasonable to remove the third appellant from the jurisdiction.

12. There are aspects of the appeal decision and reasons that surprise me.

13. At paragraph 15 the First-tier Tribunal Judge states, before embarking upon findings about what is "reasonable", that the third appellant is the "remaining appellants' 'T*rojan horse*'". At paragraph 22 the judge refers to "going to their home country" which I find a questionable description of the country of which the third and fourth appellants are citizens but where they have only lived for brief times on holidays.

14. The judge directed himself to leading cases concerning the appropriate test and Section 117B of the Nationality, Immigration and Asylum Act 2002, sub-Section (6) which applies in the case of a person not liable to deportation (and this is such a case) and provides that the public interest does not require a person's removal where the person has a genuine and subsisting parental relationship with a qualifying child and it would not be reasonable to expect the child to leave the United Kingdom.

15. However it is entirely clear to me that the judge identified the correct statutory test and leading cases that illuminated it and concluded that it was reasonable to expect the qualifying child, that is the third appellant, to leave the United Kingdom.

16. I have to say that little had been raised to point to a different conclusion. It is wholly unremarkable that the child should be apprehensive about removing to India. It represents an enormous change in her life. She is being taken away from the school where she is doing well and happy and no doubt has established a circle of friends to somewhere else but this kind of disruption is a common childhood experience. Parents move and they move within their country of nationality and they move to other countries. It would be surprising if the mere fact of removal established unreasonableness.

17. Obviously, as the First-tier Tribunal Judge recognises, the longer a child has spent in the United Kingdom the more likely that child is to have developed a significant private and family life of his or her own and therefore the more likely that it is that removal would not be reasonable, but there has to be evidence and explanation. There is very little here. Nothing is advanced to suggest the children have a special reason to be in the United Kingdom. I hesitate to offer examples because I do not wish to be a hostage to fortune but there are not, for example, special educational or health needs. Neither is there anything to contrast the education available to the child in India that might illuminate the reasonableness of removal. The evidence is not there and the judge cannot be criticised for not making findings based on evidence he had not got.

18. The grounds of appeal are extensive.

19. They begin by complaining the judge gave "too much undue weight to the conduct of the parents".

20. At paragraph 23 of the Decision and Reasons there is a long and appropriate quotation from the decision of the Supreme Court in **KO Nigeria [2018] UKSC 53** and there the judge noted the Supreme Court disagreeing with any lurking suggestion from an earlier decision that reasonableness is otherwise than "in the real world in which the children find themselves." In other words the judge directed himself expressly that he had to look at the impact of the decision and its consequences on the children and that is what he did. He noted that it was good for the children to be with their parents (that much is surely uncontroversial), that the parents could guide the children and expect help from the first appellant's parents and siblings (see paragraph 22).

21. Clearly the judge was looking at the impact on the children and found that they would be supported in the event of return.

22. I agree with the grounds that it is regrettable that the judge chose to see a link between the third appellant obtaining seven years' residence and the subsequent application for further leave to remain. It was in fact made just more than a fortnight after their appeal rights had been exhausted in an earlier application. The link which interested the judge may have been a coincidence. I do not know why the judge referred to a "Trojan horse". The grounds of appeal describe this as "offensive language". Certainly the appellants have done nothing wrong in making an application and then appealing a decision. I have already disassociated myself from the suggestion that the appellants are returning to their "home". Nevertheless I do not regard any of these things as things capable of so undermining the decision that the decision itself becomes unsafe. It does not show prejudice or unfairness even though it would, in my judgement, have been best avoided.

23. Importantly, the correct legal test was identified and there was little evidence to point to another conclusion.

24. I have considered carefully Mr Kumar's submissions which were measured and helpful. Certainly I accept that the children had done nothing wrong and should not be punished for any error by their parents. That is uncontroversial but important and is a point worth emphasising.

25. There was a time when obtaining seven years' residence in the United Kingdom almost guaranteed a right to remain and many parents were able to remain, at least for a time, because their children had obtained seven years' residence. That state of affairs arose from a particular policy which is no longer the policy of the Government. Little that emerged from those years is of direct help now.

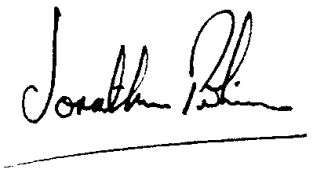
26. There is a two prong test created by statute. A need for seven years' residence is the starting point but it is not the only criteria. The need for reasonableness is not a makeweight or afterthought but a second distinct separate point. This was identified

by the judge who considered the limited evidence before him and reached an entirely rational conclusion.

27. Although I regret some of the phraseology used by the judge in the First-tier Tribunal it has not undermined the decision which is based on a clear legal test and limited evidence.

28. The First-tier Tribunal did not err in law and I dismiss each of these appeals.

Signed
Jonathan Perkins
Judge of the Upper Tribunal



Dated 17 January 2020