Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/33035/2013
IA/33043/2013
IA/33049/2013
IA/33055/2013

THE IMMIGRATION ACTS

Heard at Field House, London	**Determination Promulgated**
On 15 May 2014	**On 03 June 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

B A N
M A N
M F-A N
M F-A N
(ANONYMITY ORDER IN FORCE)

Respondents

Representation:
For the Appellant: Mr P Nath, Home Office Presenting Officer
For the Respondents: Ms A Walker, instructed by Raj Law Solicitors

DETERMINATION AND REASONS

1. This determination refers to the parties as they were in the First-tier Tribunal.

2. The appellants, nationals of Mauritius, are a family who appealed to the First-tier Tribunal against the decisions of the Secretary of State to refuse to vary their leave to remain and to remove them from the UK. The respondent refused the applications under Appendix FM and paragraph 276ADE of the Statement of Changes in Immigration Rules,

HC 395 (the Immigration Rules). First-tier Tribunal Judge Trevaskis allowed the appeals and the Secretary of State now appeals with permission to this Tribunal.

3. The background to these appeals is that the appellants, parents and their two sons, entered the UK as visitors on 24 April 2005. At that stage the two sons were aged 9 and 3 years old. On 5 February 2008 the first appellant (the mother) was granted leave to remain as a student until 31 October 2010 with her husband and two sons as her dependants. She applied for further leave to remain as a student and, following a successful appeal to the First-tier Tribunal, leave to remain was granted until 4 June 2013. In May 2012 the first appellant applied for leave to remain in the UK on human rights grounds on the basis of her and her dependants' family and private life. The Secretary of State considered these applications under Appendix FM and paragraph 276ADE of the Immigration Rules and decided that the appellants did not meet the requirements of the Immigration Rules.

Error of Law

4. The First-tier Tribunal Judge found that the appellants did not meet the requirements of Appendix FM. However he found that the first appellant and her husband (the adult appellants) met the requirements of paragraph 276ADE (vi) as, although they have not lived in the UK for 20 years, he found that they had 'no ties', including social, cultural or family, with Mauritius [31].

5. In relation to the two children the Judge found that that they met the requirements of paragraph 276ADE (iv) as they were both under 18, had lived in the UK for a continuous period of at least seven years and it would not be reasonable to expect them to leave the UK because their parents meet the requirements for leave based on private life and because they have spent their formative years in the UK where they have established roots in the community, excelled in their education and lost what little connection they had with Mauritius [32].

6. In relation to the adults' ties with Mauritius the Judge had before him statements from the adults. The first appellant said in her witness statement that her parents died before she came to the UK and that her older brother died since she came. She said that she is concerned that they would be financially crippled without support. The Judge records that she said in her oral evidence that she has no living relatives in Mauritius. In his witness statement the first appellant's husband said; 'Whilst we have some family in Mauritius, our lives are now here'. The Judge noted that both parents gave oral evidence through a Mauritian Creole interpreter. The copy passports in the respondent's bundle show that the family travelled to Mauritius in December 2008 and that the first appellant's husband also travelled to Mauritius in April 2008.

7. Ms Walker submitted that the reasons given by the Judge at paragraph 31 in relation to the adult appellants are sufficient.

8. The Judge failed to consider the evidence before him that the adult appellants speak the language of Mauritius. He failed to consider that the couple spent the majority of their lives in Mauritius - the first appellant was born in 1975 and her husband in 1965 and they had been in Mauritius until 2005, 30 and 40 years respectively, compared to the 9 years

they have spent in the UK. He failed to consider that the husband has some family in Mauritius. He failed to consider that the family had been in Mauritius together in 2008 and the father had been earlier in 2008. On the basis of this evidence I am satisfied that the Judge clearly erred in finding that the adult appellants have no ties in Mauritius. This finding is wholly unsupported by the evidence. This is a material error as it is the sole basis for the Judge's conclusion that the adult appellants qualify for leave to remain in the UK on the basis of their private life.

9. Ms Walker submitted that, even if the Judge erred any error was not material as the decision in relation to the children contains no error as other weighty factors have been considered. In her skeleton argument she submitted that just one of the reasons given by the Judge in relation to his assessment of the children's private life relates to the parents qualifying under the Immigration Rules.

10. However in setting out his reasons at paragraph 32 the Judge took into account the fact that the children's parents meet the requirements for leave to remain based on private life and that the children 'have lost what little connection they had with Mauritius'. This clearly relates to the Judge's findings in relation to the parents and therefore two of the Judge's reasons relate to the parents and their connections to Mauritius. I cannot therefore accept the submission that the findings in relation to the children can stand alone. I cannot be satisfied that the Judge would have reached the same conclusion in relation to the children if he had not erred in relation to his assessment of the evidence in relation to the parents.

11. The application for further leave in this case was made in May 2012, prior to the coming into effect of Appendix FM and paragraph 276ADE of the Immigration Rules on 9 July 2012. Ms Walker submitted that the decision of the Court of Appeal in Edgehill & Anor v SSHD [2014] EWCA Civ 402 means that the Secretary of State and then the Judge should have considered this case under Article 8 of the ECHR and not under Appendix FM and paragraph 276ADE. However she submitted that any error on the Judge's part in considering the appeal under the new Immigration Rules was not material. I do not agree that that it is inevitable that the Judge would have reached the same decision had the appeal been considered only under Article 8.

12. In light of these material errors I set aside the decision of the First-tier Tribunal in its entirety. I indicated that I would proceed to remake the decision and the parties made submissions. I reserved my decision which I now give with reasons.

Re-making the decision

13. The application for leave to remain in this case was made in May 2012, before the current Immigration Rules in relation to Appendix FM came into effect on 9 July 2012. In her decision dated 22 July 2013 the Secretary of State considered the application in accordance with the new Rules and decided that the appellants did not meet the requirements of the new Rules and that there were no exceptional circumstances to warrant consideration outside the requirements of the Rules and therefore so did not carry out a further assessment under Article 8 of the ECHR.

14. Ms Walker relied on the Court of Appeal's decision in Edgehill and submitted that as this application was made prior to the new Rules coming into effect the appeal should be considered under Article 8 only and not under Appendix FM or paragraph 276ADE.

15. This was an application for Discretionary Leave to remain made in May 2012. HC194 which introduced the changes brought into effect on 9 July 2012 states in the preamble entitled 'Implementation';

> "However, if an application for entry clearance, leave to remain or indefinite leave to remain has been made before 9 July 2012 and the application has not been decided, it will be decided in accordance with the rules in force on 8 July 2012."

16. In Edgehill Jackson LJ considered this matter as follows;

> "32. The Immigration Rules need to be understood not only by specialist immigration counsel, but also by ordinary people who read the rules and try to abide by them. I do not think that Mr Bourne's interpretation of the transitional provisions accords with the interpretation which any ordinary reader would place upon them. To adopt the language of Lord Brown in *Mahad*, "the natural and ordinary meaning of the words, recognising that they are statements of the Secretary of State's administrative policy," is that the Secretary of State will not place reliance on the new rules when dealing with applications made before 9th July 2012.
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> 33. Accordingly, my answer to the question posed in this part of the judgment is no. That answer is subject to one important qualification. A mere passing reference to the 20 years requirement in the new rules will not have the effect of invalidating the Secretary of State's decision. The decision only becomes unlawful if the decision maker relies upon rule 276ADE (iii) as a consideration materially affecting the decision.
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> …
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> 41. Major changes to the Immigration Rules came into force on 9th July 2012. The transitional provisions stated that the new rules would not apply to applications for leave to remain before that date.
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> …"

17. I note that the transitional provisions set out in the Rules do not appear to apply to this case as the application for leave to remain was made outside the Rules and not under the old Part 8 of the Immigration Rules. I accept Ms Walker's submission that the preamble to HC194 as interpreted by the Court of Appeal means that this application should have been considered under Article 8. In remaking this decision I therefore consider the appeal under Article 8.

18. In considering Article 8 I follow the five stage approach set out by Lord Bingham in R v Secretary of State for the Home Department ex parte Razgar [2004] UKHL 27. The appellants enjoy family life together in the UK. However they will be returned to Mauritius together and there will therefore be no interference with that family life. Mr Nath accepted that the appellants have established private lives in the UK. I am satisfied on the basis of the connections the adults have made through work and friendships and the children through school and friendships that the appellants have established private

lives in the UK. The decisions to remove the appellants will interfere with their private lives and I am satisfied that such interference may potentially engage the operation of Article 8 and would be in accordance with the law.

19. The next issue to consider is whether the interference is necessary and proportionate. I firstly consider the best interests of the children. Whilst the elder son is now 18, I acknowledge that he is a young adult who still lives with and is dependant on his parents. The older of the two sons was born on 18 November 1995 and is now aged 18, the second son was born on 4 December 2001 and is now aged 12. They entered the UK as visitors when they were aged 9 and 3. I understand that the two sons live with their parents. The eldest son is a young adult and his brother is still a child. It must be in the best interests of the younger son to remain with his parents. It is probably in the best interests of the eldest son to be with his parents too. However it is of course open to the eldest son to apply for leave to enter or remain in the UK as a student should he wish to continue his education in the UK as indicated in his witness statement.

20. In her witness statement the first appellant says that her sons cannot speak Creole or French. However the First-tier Tribunal Judge noted that the mother said in oral evidence that at home the family speak mostly Creole and some English. Also, the eldest son lived in Mauritius until he was 9 years old and I do not accept that he cannot speak either language.

21. In both of their statements the sons said that they would not have any friends if they returned to Mauritius now. However I note that the older son attended primary school in Mauritius. Both children adapted to life in the UK and there is no reason why they could not adapt to life in Mauritius.

22. Ms Walker submitted in the skeleton argument that the respondent's previous policy in relation to children's residence for seven years continued to hold significant weight in an Article 8 assessment prior to the implementation of Appendix FM. She referred to EM and Others (Returnees) Zimbabwe CG [2011] UKUT 98 (IAC) where the Upper Tribunal said [308];

> "(viii) In the absence of any other policy guidance from the Secretary of State, it remains legitimate for Immigration Judges to give some regard to the previous policy that seven years residence by a child under 18 would afford a basis for regularising the position of the child and parent in the absence of conduct reasons to the contrary, in making a judicial assessment of whether removal is proportionate to the legitimate aim having regard to the best interests of the child."

23. Ms Walker relied on the decision of the Upper Tribunal in Azimi-Moayed and others (decisions affecting children; onward appeals) [2013] UKUT 00197 (IAC) and submitted that it would be disproportionate to disrupt the lives of the children in the UK in the absence of compelling reason to the contrary.

24. The period of seven years is not prescriptive and I take into account all of the evidence before me in this case. I take account of the children's length of residence in the UK. I acknowledge that they have now been in the UK for nine years. I acknowledge that the children have made excellent progress in school and in their extra curricular activities. They have obviously adapted well to their life in the UK.

25. However I must also take account of the circumstances of their stay here. They entered as visitors and were subsequently given leave to remain as the dependant of their mother when she began to study in the UK. As she acknowledges in her witness statement the family were never guaranteed a right to live in the UK indefinitely. In fact the first appellant's College closed and she found it difficult to find a new College and was unable to complete her studies. This was some time before she made her application for leave to remain in May 2012. The first appellant has not been studying in the UK for at least two years. The elder child is now 18 years old. He was 9 when he came to the UK and had by then spent a large part of his childhood in Mauritius. I acknowledge that the younger child has spent a large part of his childhood in the UK however he has been with his family throughout this period. They will be a key support to him upon his return to Mauritius. There is nothing in the evidence to indicate that the two sons will be at a disadvantage in terms of their education upon their return to Mauritius.

26. I acknowledge that the first appellant and her husband have worked within the terms of their conditions of stay whilst in the UK. This shows that they would not in fact be dependant on family members upon their return to Mauritius but should instead be able to use their education and work experience in the retail and service industry gained in the UK to secure employment and support themselves there.

27. The first appellant's husband has some family members in Mauritius. The family returned there in 2008. The parents speak Creole and speak the language at home. The parents had no expectation that they would be allowed to remain in the UK indefinitely. I accept that they have previously had leave to remain and appear to have complied with the conditions of that leave. However I also note that the first appellant's College closed and she was unable to enrol in another College and she had therefore not studied in the UK for at least two years.

28. In all the circumstances I am satisfied that the decision to refuse the applications is proportionate to the respondent's legitimate aim of the maintenance of a fair system of immigration control for the prevention of disorder or crime or to secure the economic well-being of the country.

Conclusions:

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

I set the decision aside and remake it by dismissing the appeal.

Signed Date: 2 June 2014

A Grimes
Deputy Judge of the Upper Tribunal

Anonymity

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

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

Signed Date: 2 June 2014

A Grimes
Deputy Judge of the Upper Tribunal