Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/47351/2013
IA/47344/2013
IA/47359/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 20th March 2013	On 2nd April 2014

Before

UPPER TRIBUNAL JUDGE COKER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

GURJIT SINGH DHIMAN
DALJIT KAUR
NORPREET SINGH DHIMAN

Respondents

Representation:

For the Appellant: Mr S Walker, Senior Home Office Presenting Officer
For the Respondent: Mr M Mahmud; S Z solicitors

DETERMINATION AND REASONS

1. The appellant (hereafter the SSHD) appeals a decision of the First-tier Tribunal which allowed an appeal on human rights grounds by the respondents (hereafter the claimants) against a decision of the SSHD on the grounds that the removal of the claimants from the UK was disproportionate and in breach of

Article 8. It was accepted by the claimants that the finding by the judge that claimants did not meet the requirements of the Immigration Rules was not challengeable.

2. Permission to appeal had been granted on the basis that it was arguable that all the grounds seeking permission to appeal were arguable.

3. The grounds seeking permission assert that the judge erred in the following matters:
    A. having regard to the comparative quality of healthcare in India and the UK;
    B. having regard to the comparative quality of educational provision for the third appellant as compared to the UK;
    C. failed to have regard to the respondent's submission that the third appellant's requirement for medical care and educational attention is low;
    D. erred in finding that there would be significant obstacles to the family accessing special educational resources;
    E. had regard to an irrelevant consideration in supposed difficulties in accessing potential medical negligence litigation from the UK;
    F. failed to have regard to the failure to meet the requirements of the Immigration Rules;
    G. failed to have regard to the public interest in immigrate control.

Immigration background

4. The first appellant sought and was granted entry clearance as a student in 2003. He married his wife, the second appellant, in India in 2005 and she arrived in the UK with valid entry clearance in 2006. Their leave to remain in the UK expired in May 2006 and they have remained in the UK unlawfully since then. In October 2006 their child was born, the third appellant. The family sought leave to remain on medical grounds, such application being refused, subjected to judicial review, retaken and refused again. It is that refusal dated 25th October 2013, taken pursuant to s10 Immigration and Asylum Act 1999 that is the subject of these proceedings.

Factual background

5. The undisputed facts are as follows:
    a. the child was receiving medical treatment by way of two appointments a year for neurological problems which may in the future be the subject of litigation for negligence against the NHS;
    b. such medical assistance may be required until he is aged 16;
    c. that the child had recently started school and was receiving part of two days SEN assistance per week;
    d. that his parents help him a lot with his homework;
    e. that the standard of medical care available in India is lower than that available in the UK;
    f. there are Special Educational Needs facilities in Gwalior which is in a different province to that from which they come;

g. Punjabi (the appellants' language) is a minority language in Gwalior;

6. The SSHD was unable to comment on the assertion that the couple had been informed by telephone that they could switch categories ie that the second appellant could switch from being a dependant to being a student although there was a letter on file that indicated there had been telephone conversations. It remained the position however that such a switch was not permitted under the Rules although it was of course open to the SSHD to exercise discretion.

7. It was not accepted by the SSHD that there were no or limited educational or medical facilities in the appellants' home province; no evidence to that effect had been produced by the appellants, upon whom the burden of proof lay, and the judge had given no reason for accepting the appellants' evidence to that effect.

8. It was not accepted by the SSHD that it was not possible to undertake the possible litigation from abroad - there were medical experts, the possibility of video link evidence and communication methods permitted such actions to proceed.

9. It was not accepted by the SSHD that the family would not be able to obtain the assistance of their family in India. Nor was it accepted that the family would suffer language, discrimination or employment problems.

Error of law

10. The First-tier Tribunal Judge made unassailable findings as regards the inability of the family to meet the requirements of the Rules. He self directed himself to Gulshan [2013] UKUT 00640 (IAC) and in particular refers to *"only if there may be arguably good grounds for granting leave to remain outside [the Rules] is it necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under [the Rules]: Nagre [2013] EWHC 720 (Admin)."* In [29] the judge found that there may be arguably good grounds because of the circumstances of their son (the third appellant) and he states that he then went on to consider whether there are compelling circumstances not sufficiently recognised under the Rules.

11. The judge then set out the five stage test of Razgar [2004] UKHL 27. The judge, in purporting to assess the proportionality of the removal decision, referred to the factors he had found in favour of the claimants. He failed totally to give any credence or even refer to the weight to be given to the public interest in reaching his assessment. He failed to pay any regard to his own self direction as to the need to find whether there were compelling circumstances that were not sufficiently recognised under the Rules. Although he refers to Patel [2013] UKSC 72 as establishing that education is not in itself a right protected by Article 8, he considers the third appellant's education as *"a significant reason why his family should be able to stay"*.

12. The judge failed to give reasons why it was a compelling reason that the claimants had to remain in the UK in order to access two medical appointments

a year; why parts of two days SEN teaching was a compelling reason to remain in the UK when there were facilities available in India, albeit not in the same province; he failed to give reasons why family living some hundreds of miles away but with no evidence that they would not be able to help amounted to a compelling reason to remain in the UK given that there are no family members here in the UK; he fails to give reasons why possible future litigation (not pending as he states) against the NHS could not be exercised from abroad and being abroad amounted to compelling reasons to remain in the UK; he failed to give reasons for his finding that there are significant obstacles to the appellants accessing available medical and educational facilities in India.

13. I am satisfied that the judge erred in law in failing to apply relevant jurisprudence and failing to give adequate or any reasons for his findings. I set aside the decision to be remade.

Consideration and findings

14. I heard submissions from both representatives and, with no objection raised by Mr Walker from Mr Dhiman. Mr Dhiman explained the approaches made to the SSHD and through his MP in order to attempt to resolve the family's immigration status. I am satisfied , as I expressed to him during the course of the hearing, that he and his wife have attempted to ensure that they remained within the Rules and that there had been some delay by the SSHD in dealing with their application. The fact remains however that they did not meet the requirements of the Rules and any decision by the SSHD to enable them to remain was a matter of discretion to be exercised by her outside the Rules. I expressed my sympathy for the family because of the worry that must be caused by the neurological problems suffered by their son and their desire to do what was best for him.

15. Mr Mahmud's submission concentrated upon the best interests of the child and he referred to the hardships that would be suffered by the child in the event of removal; that any shock may be detrimental to his well being; that the cost of treatment in India was prohibitive; that the family would have no home to return to and no jobs. He said that it would not be financially possible for the family to seek medical treatment visas to return to the UK for the child to attend the two medical treatments he required and they did not know the cost in India of such additional educational needs as were required. He stressed the best interest of the child and that this was a matter to be taken very seriously; that the child was very vulnerable; that the family met the requirements of the "old fashioned' Article 8. Although acknowledging that the child had not been in the UK for seven years past his 4th birthday, the particular vulnerabilities of the child rendered it disproportionate for him to be removed. He relied in particular on ZH (Tanzania).

16. Mr Walker reiterated the points made about the lack of evidence and that although the best interest of the child were a primary consideration, when considered in the round this appeal fell far short of showing the compelling circumstances required for it to succeed outside the Rules.

17. I have taken careful note of the submissions made and am of course very aware of the distress caused to the family when their child suffers as this child is doing. There is however scant evidence that adequate treatment is not available in India. It is acknowledged that there are educational facilities available in a province in India albeit not the family's home province. There was no evidence before me that research had shown that similar facilities were not available in their home province. There was no evidence why or how the family would sustain language, employment or race discrimination if they moved province. The burden lies upon the appellants and they have not discharged that burden. Of course the best interests of this child are that he lives with his family and receives their care and support. It is not axiomatic that such care and support can only be provided in the UK and nor is it axiomatic that without UK medical and educational treatment the child's best interest would be undermined in any way. There is adequate medical treatment available (albeit at a cost) and there are adequate educational facilities in India; there are family members in India who have not been shown to be unavailable for assistance. Possible future litigation can be carried out at a distance through the medium of international communication methods. The family were granted entry on a temporary basis and could have had no expectation that they would be granted leave to remain outside the Rules. Issues of cost do not render compelling that which is otherwise available; see Akhulu [2013] UKUT 400 (IAC). All of these factors when balanced against the public interest result inevitably in a finding that removal is not disproportionate.

18. I dismiss the appeal by the claimant's against the decision of the SSHD dated 25th October 2013 to remove them from the UK.

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 aside the decision

I re-make the decision in the appeal by dismissing it

Date 1st April 2014

Judge of the Upper Tribunal Coker