Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/33519/2014
IA/33525/2014
IA/33533/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 19 November 2015	**On 4 January 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ROSSAN JAHAN AUJNARAIN
UMME RAEESAH AUJNARAIN
OUME SHAHNAZ AUJNARAIN
(ANONYMITY DIRECTION NOT MADE)

Respondents

Representation:
For the Appellant: Ms J. Isherwood, Home Office Presenting Officer
For the Respondents: Mr. M. Murphy of Counsel

DECISION AND REASONS

Introduction

1. By way of a decision dated 15 October 2015, the decision of First-tier Tribunal Judge Amin promulgated on 25 March 2015 was set aside to be remade.

2. For the purposes of this decision, I refer to Rossan Aujnarain, Umme Aujnarain and Oume Aujnarain as the Appellants and to the Secretary of State as the Respondent, reflecting their positions as they were before the First-tier Tribunal.

3. At the resumed hearing I heard evidence from the Appellants and submissions from both representatives. I reserved my decision which I set out below with my reasons.

Immigration rules

4. Although the reasons for refusal letter dated 13 August 2014 appears to proceed on the basis that the Appellants had been in the United Kingdom for seven years, which period of time is particularly relevant to the second and third Appellants, the immigration rules provide that an applicant must have been living in the United Kingdom continuously for at least the seven years "immediately preceding the date of application". This applies equally to consideration under the parent route, paragraphs E-LTRPT.2.2 and EX.1 of Appendix FM, and also to consideration under the private life route, paragraph 276ADE. The Appellants entered the United Kingdom on 24 June 2006. The applications were made on 17 February 2012. I find that at the date of application they had only been in the United Kingdom for five years and seven months and therefore cannot meet the requirements of the immigration rules in relation to family or private life, as the second and third Appellants had not been in the United Kingdom for a continuous period of seven years prior to the date of application.

Article 8 outside the immigration rules

5. I have considered the Appellants' appeals under Article 8 outside of the immigration rules in accordance with the steps set out in Razgar [2004] UKHL 27. In relation to any family life, I find that the Appellants would be returning to Mauritius together and that there would not be any interference with their family life on return to Mauritius. It was submitted that there was an Article 8 type dependency with the first Appellant's sister and her family as the Appellants live with them rent free, and the second and third Appellants have a relationship with their cousins which is more akin to the relationship between siblings.

6. Neither the first Appellant's sister, her husband nor her children attended the hearing before me, but I have witness statements prepared for the previous hearing from the first Appellant's sister, her brother-in-law and their son, Mehran Alighan. The first Appellant's sister said in her witness statement that she was happy to provide the Appellants with unconditional support. She stated that they were extremely close to each other and did most things together, and that their children were extremely close and love the idea of being able to live together (paragraphs 3 and 4). The first Appellant's brother-

in-law also stated that they were happy to provide unconditional support to the Appellants. Their son stated that he had developed a good bond with both of his cousins and they were very close.

7. The first Appellant said at the hearing that the second and third Appellants were very close to their 16-year-old cousin. She said that the second and third Appellants share their feelings, secrets, played and went out with their cousins. The second Appellant said that it would be really upsetting to be separated from her aunt and uncle and cousins as they were really close. The third Appellant said that her uncle and aunt and cousins were the only family that she knew and it would be difficult to break apart from them.

8. I find that the Appellants live with the first Appellant's sister and her family. I find that the Appellants are financially dependent on the first Appellant's sister and her husband. I find that the second and third Appellants have a relationship with their cousins which is more akin to the relationship between siblings rather than cousins. Given the circumstances of the first Appellant's husband's death which happened while they were in the United Kingdom, and given that the Appellants have effectively become part of an extended family consisting of the first Appellant's sister, husband and children, I find that there are bonds between the first Appellant and her sister which go above and beyond the normal emotional ties to be found between adult siblings. I find that the second and third Appellants have a family life with their aunt, uncle and cousins, with whom they have grown up. I find that the Appellants have a family life with their extended family sufficient to engage the operation of Article 8. I find that the decision would interfere with this family life.

9. I find that the Appellants have all established a private life in United Kingdom sufficient to engage the operation of Article 8 and I find that the decision would also interfere with their private lives.

10. Continuing the steps set out in Razgar, I find that the proposed interference would be in accordance with the law, as being a regular immigration decision taken by UKBA in accordance with the immigration rules. In terms of proportionality, the Tribunal has to strike a fair balance between the rights of the individual and the interests of the community. The public interest in this case is the preservation of orderly and fair immigration control in the interests of all citizens. Maintaining the integrity of the immigration rules is self-evidently a very important public interest. In practice, this will usually trump the qualified rights of the individual, unless the level of interference is very significant. I find that in this case, the level of interference would be significant and that it would not be proportionate.

11. In carrying out the proportionality assessment, I have taken into account the factors set out in section 117B of the 2002 Act insofar as they are relevant to the Appellants. Section 117B(1) provides that the maintenance of effective immigration controls is in the public interest. I find the Appellants can speak

English (section 117B(2)). I find that they are financially dependent on the first Appellant's sister and her husband, although I find that the first Appellant has previously worked in the United Kingdom as a dental nurse (section 117B(3)). Section 117B(4) is not relevant as the Appellants have not been here unlawfully. It was accepted at the error of law hearing before me that the Respondent had made a mistake when stating that the first Appellant had been in the United Kingdom in breach of immigration laws (page 3 of the reasons for refusal letter). Section 117B(5) provides that little weight should be given to a private life established when a person's leave is precarious, and I find that the Appellants' leave has been precarious. However, this section does not provide that little weight should be given to any family life established when a person's leave is precarious.

12. The most relevant part of section 117B is subsection (6) which provides as follows:

> "In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—
>
> (a) the person has a genuine and subsisting parental relationship with a qualifying child, and
>
> (b) it would not be reasonable to expect the child to leave the United Kingdom."

13. "Qualifying child" is defined in section 117D as a person who is under the age of 18 and who has lived in the United Kingdom for a continuous period of seven years or more.

14. As at the date of the reasons for refusal letter which reconsidered the Appellants' applications under Article 8, the Appellants had been in the United Kingdom for a period of over seven years. At the date of the hearing before me the Appellants have been in the United Kingdom for nine and a half years. The second and third Appellants have been in the United Kingdom since the ages of eight and six respectively. They are therefore qualifying children. I therefore need to consider under section 117B(6) whether it would be reasonable to expect the second and third Appellants to leave the United Kingdom. If it is not, then the public interest does not require the removal of the Appellants.

15. In considering whether or not it is reasonable to expect them to leave the United Kingdom I have taken into account the best interests of the second and third Appellants.

16. I find that the second and third Appellants have been in the United Kingdom for nine and a half years. This is two and a half years longer than the seven years set out in section 117B(6). I find that in the case of the second Appellant, all of these years have been spent in the United Kingdom when she has been over the age of seven. In the case of the third Appellant, only four months

were spent here when she was under the age of seven. Azimi-Moayed [2013] UKUT 00197(IAC) states in paragraphs (ii) to (iv) of the headnote:

> "It is generally in the interests of children to have both stability and continuity of social and educational provision and the benefit of growing up in the cultural norms of the society to which they belong.
>
> Lengthy residence in a country other than the state of origin can lead to development of social cultural and educational ties that it would be inappropriate to disrupt, in the absence of compelling reason to the contrary. What amounts to lengthy residence is not clear cut but past and present policies have identified seven years as a relevant period.
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> Apart from the terms of published policies and rules, the Tribunal notes that seven years from age four is likely to be more significant to a child that the first seven years of life. Very young children are focussed on their parents rather than their peers and are adaptable. "

17. I was referred to the Respondent's guidance "Statement of intent: family migration June 2012", paragraph 56. This states "the key test for a non-British citizen child remaining on a permanent basis is the length of residence in the UK of the child - which the immigration rules will set at least the last seven years, subject to countervailing factors. The changes are designed to bring consistency and transparency to decision making."

18. I find that the applications were made by the Appellants in February 2012, but the Respondent applied the incorrect rules when coming to her decision of April 2013. I therefore find that the applications were made some two and a half years before a lawful decision was made. The decision under appeal is dated 13 August 2014. This two and a half years is a significant proportion of the nine and a half years spent in the United Kingdom by the Appellants, especially given the ages of the second and third Appellants. During that time the second Appellant has taken her GCSEs and has moved on to her A-levels, and the third Appellant has started her GCSE course and is now halfway through.

19. Following Azimi-Moayed, I find that it is in the interests of the second and third Appellants to have continuity of educational provision. I find that this is especially the case given the stage of education which they have reached. It was submitted that to remove the second and third Appellants would be enormously disruptive to their education. I find that the second Appellant is in the second year of her A-levels. She took her AS-levels last year, the marks from which will count towards her final A-level grades. One of her A-levels is health and social care, and she stated at the hearing that she did not know if she would be able to finish this A-level in Mauritius. She is interested in pursuing further studies in nursing or ICT after her A-levels.

20. I find that the third Appellant is studying for her GCSEs, which she will sit in June 2016. I find that she has completed coursework which counts towards the final results for many of her GCSEs. She stated at the hearing that some exams were as much as 55% coursework, but that all subjects required coursework except religious studies. She said that she was studying child development which was 100% coursework, and she had completed two thirds of this course. She had already taken an exam in science which went towards her final mark. In relation to her child development GCSE, she said that most schools did not offer it and she doubted that it would be possible to study it in Mauritius. She had chosen child development as she wanted a career with children, for example working with children in a hospital setting.

21. I find that, given the stage of education which the second and third Appellants have reached, there would be enormous disruption to their education were they to be required to return to Mauritius. The third Appellant is halfway through her GCSEs and has done a large proportion of the coursework for her GCSEs. The GCSE which is 100% coursework is in child development which the third Appellant has chosen to study as she is considering a career in this area. The second Appellant is in the second year of her A-levels having done her AS-levels. Both of the Appellants have been in education in the United Kingdom for some nine and a half years. They have both received the majority of their education in the United Kingdom. They have been here for longer than the seven years set out in section 117B(6), and also set out in the Respondent's own guidance relating to family migration.

22. Ms Isherwood referred to paragraph [39] of AM (S 117B) Malawi [2015] UKUT 0260. She submitted that the difficulties of the interruption to their education should not be exaggerated. However I find that what is important is the stage that their education has reached. Both the second and third Appellants are at significant stages of their education, being halfway through their A Levels and GCSEs. I find that the interruption to their education at this stage is a significant factor weighing in favour of them remaining in the United Kingdom. It would be different were they not at such a critical stage of their education. Azimi-Moayed points to the need for there to be a "compelling reason" to disrupt the educational ties which have been formed through lengthy residence. I find that there is no such compelling reason here.

23. I find that it would not be reasonable to expect the second and third Appellants to return to Mauritius for a number of reasons. The first is the length of time which they have been in the United Kingdom, some nine and a half years. This is longer than the amount of time they have lived in Mauritius. They have had leave to remain during this period and have not been here unlawfully. The second is the stage that their education has reached, the second Appellant being in the middle of her A-levels and the third Appellant being in the middle of her GCSEs. Azimi-Moayed recognised the importance of stability of educational provision, and given the particular stage which the Appellants have reached in the course of their education, and the length of time that they

have been receiving education in the United Kingdom, I find that particular weight should be given to their interest in continuity of educational provision in the United Kingdom.

24. Thirdly I find that neither the second nor the third Appellants have any meaningful contact or ties with Mauritius. They have not returned to Mauritius since they came to the United Kingdom nine and a half years ago. I find that they came to the United Kingdom with both of their parents but that their father died while they were living in the United Kingdom. I find that for this reason they have developed a particularly strong attachment to their aunt and her family, given that their own close family unit was broken up by the death of their father.

25. I find that their maternal grandmother lives in Mauritius, but I find that they have only brief telephone conversations with her. The second Appellant said that she could not remember when she had last spoken to her grandmother but it had been sometime in 2015. She did not know when her mother had been in touch with her grandmother. The third Appellant could not remember when she had last spoken to her maternal grandmother. I find that the second and third Appellants do not have contact with any of their father's family in Mauritius. The second Appellant said that she was in contact with a paternal aunt and a cousin in the United Kingdom and that she spoke to them on social media, but the third Appellant said that she was not in contact with any paternal relatives either in the United Kingdom or in Mauritius.

26. Fourthly, I find that the nine and a half years that the second and third Appellants have spent in the United Kingdom have been their formative years, when they have been over the age of seven. I find that they have built up their own social ties in the United Kingdom during this time. I find that they have developed their own private lives outside the family. I find that the interruption to their private lives, given the length of time they have spent in the United Kingdom and the social, cultural and educational ties which they have developed in the United Kingdom, will be severe. Given all of these factors, I find that it is not reasonable to expect the second and third Appellants to leave the United Kingdom. Given this I find that there is no public interest in the first Appellant leaving the United Kingdom as I have found it is not reasonable to expect the second and Appellants to leave the United Kingdom.

27. Accordingly, when carrying out the balancing exercise required in the proportionality assessment under Article 8, I find that the balance comes down in favour of the Appellants, and that the public interest does not require their removal from the United Kingdom. I find that the Appellants have shown on the balance of probabilities, at the date of the hearing, that the decisions are a breach of their rights to a family and private life under Article 8 ECHR.

Decision

28. The appeals are allowed on human rights grounds.

Signed:

Deputy Upper Tribunal Judge Chamberlain

Date: 19 December 2015