



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/08879/2016
HU/08881/2016, HU/08883/2016
HU/08885/2016, HU/08888/2016

THE IMMIGRATION ACTS

Heard at Field House
On 4 June 2018

Decision & Reasons Promulgated
On 26 June 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE ESHUN

Between

HARISH [K] (FIRST APPELLANT)
RAJNI [A] (SECOND APPELLANT)
[A K¹] (THIRD APPELLANT)
[A K²] (FOURTH APPELLANT)
[A K³] (FIFTH APPELLANT)
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr B K Sharma, Solicitor

For the Respondent: Ms Z Ahmad, HOPO

DECISION AND REASONS

1. The appellants have been granted permission to appeal the decision of First-tier Tribunal Judge Davidson dismissing the appeal of the appellants against the

respondent's refusal to grant them leave to remain on the basis of their right to family and private life.

2. The first appellant is a citizen of India born on 2 June 1981. He entered the UK on 16 September 2004 with entry clearance and was subsequently granted further leave to remain until 16 July 2009, most recently as an international graduate. On 21 July 2009 and 22 April 2010, he was refused leave to remain as a Tier 1 Migrant. On 8 August 2013, his application for leave to remain on the basis of his human rights was refused.
3. The second appellant is the wife of the first appellant. She is an Indian national born on 10 May 1987. She was granted leave to remain as the dependant of an international graduate (the first appellant) until 6 July 2009. Since then her applications to remain as the dependant of the first appellant have been refused when his applications have been refused.
4. The third, fourth and fifth appellants are nationals of India born in the UK on 11 November 2007, 22 June 2010 and 22 January 2013 respectively. They are the children of the first and second appellants.
5. The application made by the first appellant on 10 September 2015 for himself and his family for leave to remain on the basis of their right to family and private life, was refused by the respondent on 18 March 2016 on the grounds that the appellants did not meet the requirements of the Immigration Rules under the ten year partner/child routes or the ten year private life route and that there were no exceptional circumstances which applied for leave to be granted outside the Rules.
6. The judge heard evidence from the first and second appellants. The first appellant adopted his witness statement as his evidence-in-chief and was cross-examined. He told the Tribunal that there was an issue in relation to the nationality of his children as the Indian Embassy were not satisfied regarding his own Indian nationality as his passport had expired but he had been given a form to fill in which would enable him to apply for passports.
7. The first appellant confirmed that he had a degree in Engineering from India but that he had never worked in India, having come to the United Kingdom for further studies when he was 23 years old. He had been supported by his parents during his studies but he was no longer in contact with them and was not aware whether or not they were still alive. He has a sister in India to whom he speaks rarely but no other family.
8. He confirmed that he had intended to return to India when he originally came to the UK but, since his children were born, he now believed that the UK was the best place for them to grow up. He had made a number of earlier unsuccessful applications for leave to remain but on each occasion did not leave the country because of the births of his children.

9. He was working as a manager of a takeaway business and then had a courier business until he was no longer permitted to work due to his immigration status. He and his family have been living in a room in his friend's house. He does not currently pay rent to Mr [C] but he pays the household bills.
10. He believed that it would be hard for him to find work in India as he has not worked there before and has no contacts. He confirmed that he had done no specific research of the job market in India.
11. He said since coming to the United Kingdom he has visited India twice, including the visit for his own wedding, and again in 2008 for his brother-in-law's wedding. The third appellant went to India as a young child in 2008 and the fourth and the fifth appellants have never been to India. The children understand Hindi but do not speak it.
12. The second appellant adopted her witness statement as her evidence-in-chief. She confirmed in cross-examination that she had studied in India but had never worked there. Her father died when she was 12 years old and her mother still lived in India with one of her brothers. She also has one other brother and a sister. She was in regular contact with her family in India. Her family in India were struggling financially. She would not be able to live with her mother as daughters do not return to the parental home after they are married in Indian culture.
13. In submissions the appellants' representative contended that the issue was whether it was reasonable to expect the third and fourth appellants to leave the United Kingdom, since at the relevant date, which was the date of the hearing, they were now both over the age of 7. Indeed, the third appellant was over the age of 7 at the time of the application and had therefore been in the United Kingdom for more than seven years at that point. It was submitted that it was relevant that the third appellant would be able to apply for citizenship later in the year (that is, 2017) because parliament has recognised the strength of ties to the UK after ten years' residence and the third appellant has nearly reached this milestone.
14. It was further submitted that under Section 117B(6) and the decision in **MA (Pakistan) [2016] EWCA Civ 705**, the starting point is that a child who has been in the United Kingdom for more than seven years should be able to stay unless there are compelling reasons not to allow this. It would be hard, it was submitted, for the children to continue their education in India as they cannot read or write Hindi and it would not be in their best interests to move to Hindi speaking schools.
15. It was submitted that the expert psychiatrist referred to the second appellant's fears of violence against women in India and this fear could transmit to her daughter as it would not be in her best interest to return to India. It was acknowledged that the first and second appellants have overstayed their right to remain in the UK, this was due to the circumstances of the arrival of their children and at the relevant time. At no time have they been hiding from the authorities and the respondent's inaction has the result

that the public interest in them being removed lessens and the precariousness of their immigration situation is less following the authority of **EB (Kosovo) [2008] UKHL 41**.

16. In conclusion it was submitted that the respondent could not show powerful factors why the third and fourth appellants should not be permitted to stay. If they were permitted to stay, the other members of the family should be permitted to stay with them to preserve their family life.
17. The judge's findings are set out at paragraphs 38 to 50.
18. She found that the first appellant had produced no independent evidence to show that he would not be able to provide for his family in India, given his ability to work, his familiarity with the language and culture. The second appellant would be able to work in India if she wanted to. She still has family links in India and is familiar with the language and culture. She and the first appellant have failed to show any compelling factors which would prevent them continuing their private and family life in India. The judge was not persuaded by the psychosocial report as the expert was not a country expert on India. The judge accepted that it will cause some disruption to relocate but this would be temporary and there was no reason why the family could not build their life in India.
19. The judge did not accept that the third appellant's education within the British school system was a sufficient reason to make it unreasonable for him to be removed from the UK alongside his parents. The judge said India has a developed education system and the third appellant was young enough to be able to overcome any language barriers, particularly as he has some familiarity with Hindi.
20. The judge found that the fourth appellant had not been in the UK for more than seven years at the date of the relevant application and so his claim fell outside the Immigration Rules. He has not discharged the burden of showing that it would not be reasonable to expect him to leave the United Kingdom as he would be able to continue his education and his family life if the family relocated to India.
21. The judge found that the fifth appellant has not been in the UK for more than seven years and therefore does not fall for consideration within the relevant Immigration Rule.
22. The judge found that the third and fourth appellants are qualifying children for the purposes of Section 117B and the first and second appellants have a genuine and subsisting parental relationship with them. She did not accept for the reasons already given that it would not be reasonable to expect the children to leave the UK and therefore this provision did not assist any of the appellants. She gave little weight to the appellants' private life which she said had been established while they were living in the UK unlawfully.

23. The judge found that there can be no interference with the respect for family life as the proposed removal will not interfere with the exercise of their rights to family life.
24. In assessing proportionality, the judge found that the public policy of maintaining effective immigration control was sufficiently important to justify the limitation of Article 8 private life rights and concluded that the impact of rights infringed was not disproportionate to the likely benefit of the public policy considerations.
25. She also found that the appellants have failed to show compelling and compassionate circumstances for an exercise of discretion to allow them to remain in exceptional circumstances. The first and second appellants were well aware that they were in the UK unlawfully once their leave to remain had expired, yet chose to remain illegally and to have more children. Despite each decision of the respondent having been adverse and predictably so, the appellants failed to heed the clearly stated requirement that they must leave the United Kingdom. The judge did not accept the submission that the failure of the respondent to enforce removal had somehow improved the appellants' position, since at no time was any impression created by the respondent that any renewed application would receive favourable consideration.
26. The judge considered the best interests of the children as a primary consideration demanded by Section 55 of the Borders, Citizenship and Immigration Act 2009 and balanced this against all other factors including the public interest in maintaining effective immigration control. She found that there was no evidence that the removal of the three children to India would cause them any significant difficulty and that it was plainly in their best interest to remain with their parents.
27. At the hearing before me was a letter from the appellants' representative Migrant Advisory & Advocacy Service dated 17 May 2018 enclosing a small bundle of documents. The bundle included letters from the Secretary of State enclosing certificates of registration as British citizens in respect of the three children, namely [AK¹], [AK²] and [AK³]. [AK²]'s certificate of registration as a British citizen was dated 13 April 2018, [AK¹]'s was dated 20 February 2018 and [AK³]'s was dated 19 April 2018.
28. Permission was granted to the appellants to appeal the judge's decision on the basis that the judge may have materially erred in failing to give significant weight in carrying out the proportionality exercise to the fact that the third and fourth appellants were qualifying children for the purposes of Section 117B(6) of the Rules, they both being in the UK more than seven years, and the judge had arguably failed to recognise that that established a starting point that leave should be granted unless there are powerful reasons as to the contrary, as decided by the Court of Appeal in the case of **MA (Pakistan)**. It was also arguable that the judge had not properly taken account of the fact that the children were not responsible for their parents living in the UK unlawfully, and further, it was arguable that the judge erred in failing to attach any weight to the expert report of Susan Pagella, the psychotherapist, in respect of the

ability of the children to adapt to life in a new country, even if she was not a country expert on India.

29. Mr Sharma relied on these grounds. He submitted that although in submissions the appellants' representative relied on **MA (Pakistan)**, the principles in this case were not applied by the judge. The judge had accepted that the relationship between the first and second appellants with their children was genuine, affectionate and subsisting. The report by the psychotherapist who has tremendous experience, established that the best interests of the children was that they should be given permission to remain in the UK. He submitted that the judge erred in rejecting this report because she took the view that the psychotherapist did not have sufficient knowledge of India. He submitted that the judge failed to take into account the submission made at the hearing that it was relevant that the third appellant would be able to apply for British citizenship later that year because Parliament has recognised the strength of ties to the United Kingdom after ten years' residence and that the third appellant had nearly reached this milestone.
30. Ms Ahmad submitted that the judge accepted at paragraph 45 that the third and fourth appellants were qualifying children. Nevertheless, the judge made clear findings that the family could build their life in India and that India has a developed education system and that the third appellant was young enough to be able to overcome any language barriers. She said that the judge gave cogent reasons for her conclusion that Section 117B(6) had not been met.
31. With regard to the second ground, Ms Ahmad relied on head note 2 of the Tribunal's decision in **Miah (section 117B NIAA 2002 - children) [2016] UKUT 131 (IAC)**. The head note said that the factors set out at Section 117B(1)-(5) apply to all, regardless of age. Miss Ahmad submitted that the judge's findings at paragraph 46 were open to her. The judge had said the remaining provisions of Section 117B operate to establish that maintenance of immigration control is a legitimate public policy and that little weight should be given to the appellants' private life which has been established while they were living in the UK unlawfully. Ms Ahmad submitted that the first appellant had leave until July 2009 and did not have leave up until the date of hearing in 2017.
32. In respect of the report from the psychotherapist, Ms Ahmad submitted that the judge considered this report briefly at paragraph 40 when she said she was not persuaded by the report as the expert was not a country expert on India. Ms Ahmad said that finding was open to the judge. Ms Ahmad submitted that the judge looked at all the factors that were put before her and her conclusion that it was reasonable to expect the appellant and the children to return to India disclosed no error of law.
33. I find that the judge erred in law for the reasons given by First-tier Tribunal Judge McGinty for granting permission to appeal. **MA (Pakistan)** was brought to the judge's attention but I find that the judge failed to apply the test as set out by the Court of Appeal in that case.

34. I find that whilst it was appropriate for the judge to attach little weight to the private lives of the adult appellants because they had been living in the UK unlawfully, this provision did not have an impact on the qualifying children.
35. I also find that the judge erred in law in failing to attach weight to the expert report of Susan Pagella because she was not a country expert on India. The report was in respect of the ability of the child appellants to adapt to life in India and the extent to which their removal from the UK would be contrary to their best interests. It was therefore incumbent on the judge to consider this report in her consideration of the best interests of the children. Her failure to do so was an error of law.
36. For the above reasons the judge's decision cannot stand. I set it aside.
37. I re-make the decision by considering the evidence that has been put before me.
38. In **MA (Pakistan)** the Court of Appeal held that the starting point, in respect of any qualifying child, is that leave should be granted unless there are powerful reasons to the contrary. I find that the fact that the respondent has recognised the three children as British citizens and given them certificates as proof of their citizenship was evidence that the Secretary of State has decided that it was not in their best interests or reasonable to expect the children to leave the United Kingdom. Indeed, that was the conclusion drawn by the psychotherapist.
39. The judge found that for the purposes of Section 117B the first and second appellants have a genuine and subsisting relationship with the third and fourth appellants who are qualifying children. I find that the fifth appellant should not be excluded from this finding.
40. I find that the three qualifying children are British nationals. They are very young and still require the care of their parents. I find that the appellants have shown that there are compelling and compassionate circumstances for an exercise of discretion to allow them leave to remain in the UK in order to care for their young children.
41. Accordingly, the appeals of the appellants are allowed.
42. No anonymity direction is made.

Signed

Date: 23 June 2018

Deputy Upper Tribunal Judge Eshun