Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/18923/2016
IA/02749/2015
IA/02753/2015
IA/03911/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 28 November 2017	**On 19 December 2017**

Before

UPPER TRIBUNAL JUDGE WARR

Between

REETA RAMJEET (FIRST APPELLANT)
DESHRAJ DOMUN (SECOND APPELLANT)
CHANDRAVESH AKSHAYRAJ DOMUN (THIRD APPELLANT)
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr E Anyene of Counsel instructed by Malik Law Chambers Solicitors
For the Respondent: Miss A Holmes

DECISION AND REASONS

1. The appellants are citizens of Mauritius. The first appellants are the parents of the third named appellant who was born on 2 August 1991. They appeal the determination of a First-tier Judge who decided to refuse their appeals following a hearing on 2 March 2017.

2. There is a somewhat complicated background to the circumstances in which the appeals came before the First-tier Judge which he helpfully sets out in the following extract from his determination:

> "4. There are two sets of appeals before me. The first in time are the immigration appeals whereby the Appellants, in applications made in September 2014, sought to remain in the UK based on their Article 8 rights outside the rules as well as under Paragraph 276ADE based on their private lives within the rules. The second set are based on Paragraph 276B and the claim that the First Appellant can show that she has at least 10 years continuous lawful residence in the UK and that the Second and Third Appellants can remain as her dependants.
>
> 5. I need to set out some of the history. The First Appellant claims to have entered the UK as a visitor on 2nd January 2005 and subsequently she was granted leave as a student until 30th June 2008. The Appellants were granted residence cards for the period between 7th October 2009 and 7th October 2014 as extended family members of an EEA national. The EEA national was the French wife of the First and Second Appellant's eldest son with whom the Appellants all lived.
>
> 6. The Appellants made applications in September 2014 and the First Appellant's form appears at A1-46 of the Respondent's bundle accompanied by a covering letter that appears at B1-5 of the Respondent's bundle. As I have said their claims were based on their Article 8 rights outside the rules as well as under Paragraph 276ADE within the rules. At that stage the First Appellant had not lived in the UK for 10 years and therefore could not meet the 10 years of continuous lawful residence in the UK requirement and did not therefore seek to claim on that basis.
>
> 7. Their applications made in September 2014 were refused in immigration decisions dated variously 31st December 2014 and 5th January 2015. The Appellants appealed and those appeals were listed for hearing but were adjourned on 13th June 2016 (and thereafter) but were eventually listed before me.
>
> 8. The reason for the adjournments was that on 4th April 2016, the First Appellant having lived in the UK for over 10 years by that time, made an application for indefinite leave to remain based on 10 years of continuous lawful residence in the UK. That application was refused with the reasons given in a letter of 21st July 2016. The main grounds were, it was said, that the Appellants could not show that the First Appellant's 10 years of continuous lawful residence in the UK was met even though she might have shown that she had lived in the UK since January 2005. The Respondent in the refusal letter said 'The evidence you provided did not

> show that you were still in a subsisting relationship and did not show that your sponsor was still in the UK exercising treaty rights'. The Respondent cited regulation 7 and 9 of the Immigration (EEA) Regulations 2006 ('the EEA regulations) and said that the Appellants could not meet the requirements of those regulations and in consequence show that the First Appellant had met the requirements of 10 years continuous lawful residence".

3. The judge heard oral evidence from the appellants. The arguments before the First-tier Judge focused on Regulation 7(3) of the Immigration (European Economic Area) Regulations 2006 (SI 2006 No 1003). The judge noted in paragraph 13 of his decision that extended family members issued with a residence card as the appellants had been should be treated as a family member of the relevant EEA national "as long as they continue to satisfy the conditions in regulation 8(2)(c) which requires that the family members continue either to be dependent on her or be a member of her household".

4. The judge found that the second legal aspect was the question of Article 8 outside the Rules. He was referred to **Agyarko [2017] UKSC 11** and in particular paragraph 60 where he highlighted the following words when referring to the Secretary of State's definition of the word exceptional as meaning "circumstances in which refusal would result in unjustifiably harsh consequences for the individual such that the refusal of the application would not be proportionate". The judge also referred to **Treebhawon and Others [2017] UKUT 00013 (IAC)**, citing paragraph 3 of the head note which reads as follows:

> "Mere hardship, mere difficulty, mere hurdles, mere upheaval and mere inconvenience, even where multiplied, are unlikely to satisfy the test of 'very significant hurdles' in paragraph 276 ADE of the Immigration Rules".

5. The judged noted in paragraph 16 of his decision that the EEA national – the first appellant's daughter-in-law – had ceased to be employed in 2012 or 2013. Thereafter the family had pooled their resources but were all living together in the same house until November 2014 when the daughter-in-law and her husband returned to France. Noting that the first appellant had arrived in the UK on 2 January 2005 and that paragraph 276B required ten years living in the UK this would not have been achieved by the first appellant until 2 January 2015 by which time the appellants were no longer living in the same household or dependent on the EEA national. Accordingly paragraph 8(2)(c) of the EEA Regulations could not be met during that period. Moreover, there were problems with Regulation 6 given that the first appellant had said that her daughter-in-law had been a worker until late 2012 or early 2013 but not thereafter. She could not comply with the Regulations concerning having comprehensive sickness insurance cover – it was conceded by Counsel that there was no evidence of this. The judge found that the EEA national was not exercising treaty rights after 2013 and accordingly it could not be shown that the first

appellant met the requirements to show ten years' continuous lawful residence in accordance with the Rules for the period from early 2013 until 2 January 2015 and accordingly none of the appellants could meet the requirements of paragraph 276B of the Rules and show ten years' continuous lawful residence.

6. The judge then turned to consider paragraph 276ADE(1) and (vi) of the Rules and Article 8 outside the Rules. He noted that the first named appellant had lived in the UK since 2005 and had stayed here apart from a two month holiday in Mauritius in 2011. She had been educated in Mauritius although she had completed various courses in the UK. She had two sisters who remained in Mauritius in addition to her mother. She had married the second appellant in Mauritius in December 1978 and they had three children. The eldest was in France with the EEA national. The second son had married and lived with his wife and two sons in Mauritius although the couple were now divorced. The third appellant had been educated in Mauritius and had arrived in the UK when he was about 15 and had done his GCSEs and A levels in the UK before completing a BA (Hons) degree and then an MBA in the UK. He was currently working as a car mechanic. The second appellant had been working in the UK since 2007 and was earning a gross annual salary of £26,000.

7. The judge accepted that the appellants had strong connections to the UK and had never claimed off the state but he did not accept that they had lost all ties and connections to Mauritius given the relatives there and their visit in 2011.

8. In oral evidence the first named appellant said her mother was still alive and she had visited Mauritius for two months in 2011. Her middle son had always lived in Mauritius and had visited the UK only once or twice and had his own business there.

9. In his conclusions the judge referred to his finding that the appellants could not meet the relevant requirements of the Regulations and demonstrate ten years' continuous lawful residence as required under paragraph 276B of the Immigration Rules. The determination concludes as follows:

> "41. I conclude that given their connections with Mauritius, their age when the First and Second Appellants came to the UK, the education that all three have obtained whilst in the UK the Appellants can at best show mere hardship, mere difficulty, mere hurdles, mere upheaval and mere inconvenience but cannot satisfy the test of 'very significant hurdles'. I find that they cannot meet the requirements of Paragraph 276ADE(1)(vi).
>
> 42. Turning to Article 8 outside the rules. Clearly Article 8 is engaged and I have to decide whether at looking at all the evidence it would result in unjustifiably harsh consequences.
>
> 43. I have considerable sympathy for the Appellants. From their standpoint they must feel that their case is exceptional and I understand that they

> would prefer to remain in the UK where they have been for over a decade. They speak English, are financially independent and are integrated however they cannot meet the immigration rules. Their immigration position has always been precarious and from 2009 based on their EEA national daughter in law. All of the Appellants have lived longer in Mauritius than in the UK. All are healthy and relatively young. All were educated in Mauritius (as well as in the UK). They have family in Mauritius and the First Appellant visited relatively recently. It seems to me that in those circumstances I could not conclude that the decision would not be proportionate or have unjustifiably harsh consequences".

10. Accordingly the judge dismissed the appeal under the Rules and under Article 8. In the grounds of appeal reference was made to **Huang v Secretary of State [2007] UKHL 11** and **Razgar [2004] UKHL 27** and it was argued that the judge had failed to form an independent and impartial view of the weight to be afforded to the Secretary of State's case. There had been an error in approach to the question of compassionate and compelling circumstances and the judge had failed to attach appropriate weight to the circumstances of the appellant.

11. Permission to appeal was granted by the First-tier Tribunal on 22 September 2017. A reply was filed on 13 October 2017 in which it was noted that it had not been shown that the appellants could meet the EEA Regulations beyond 2013 and accordingly ten years' residence had not been established. The judge had properly directed himself and applied the law correctly.

12. At the hearing Counsel relied on the grounds. He submitted that the judge had failed to consider 276ADE(v) – the third appellant, the son, had been aged under 25 as at the date of the application. The second appellant had been working since January 2007 having arrived in this country in 2006. He was in charge of two care homes. It was an error of law to focus on the family life in Mauritius. There was a question whether the EEA national was still exercising treaty rights. The family had come very close to meeting the Rules.

13. Miss Holmes relied on the Rule 24 response. It had been accepted by Counsel acting for the First-tier Judge that the Rules could not be met. The grounds of appeal did not refer to **Agyarko** although the judge had been referred to that authority. The judge had clearly demonstrated in paragraph 43 of his determination why the appeals could not succeed. He had made it clear that the appellants had all lived longer in Mauritius than in the UK. He had been bound to conclude that the decision was not disproportionate or unduly harsh. I was referred to paragraphs 54 to 57 of **Agyarko** in relation to exceptional circumstances. Where family life was precarious a very strong or compelling case was required. Miss Holmes also referred to **Treebhawon** and it was clear that the judge had applied the principles in this case in paragraph 41 of his determination.

14. Counsel submitted that there had been no precariousness involved in the situation of the appellants. When the EEA national had returned to France their leave had carried on and they were very close to meeting the Rules.

15. At the conclusion of the submissions I reserved my decision. I remind myself that I can only interfere with the decision of the First-tier Judge if it was flawed in law.

16. No point is taken in the grounds of appeal that the Rules had been satisfied. The case was not argued on the basis that the second appellant satisfied the requirements of 276ADE(1)(v) no doubt because although he fell within the relevant age range at the time of application he had not spent at least half of his life living continuously in the UK, he had arrived at the age of 15 as appears from paragraph 27 of the determination. The argument is without merit and did not feature in the grounds.

17. The judge was clearly sympathetic with the position of the appellants and noted the positive aspects of their cases. However he quite clearly rejected the claim that they had lost all ties and connections to Mauritius as he says in paragraph 30 of his decision "I have to say with a mother, two sisters and a son in the Mauritius plus a visit by her in 2011 I cannot accept that". The judge makes the point in paragraph 43 of his decision that all the appellants had lived longer in Mauritius than in the UK. He directed himself by reference to **Agyarko** and **Treebhawon** and did not misdirect himself in concluding that the appellants could at best show "mere hardship, mere difficulty, mere hurdles, mere upheaval and mere inconvenience" but could not satisfy the test under the Rules.

18. The grounds of appeal did not refer to **Agyarko** and did not make a complaint that the judge erred in taking into account the precarious nature of the status of the appellants in the UK. In relation to Article 8 outside the Rules as the judge observed apart from the question of living longer in Mauritius than in the UK all were healthy and relatively young and all were educated in Mauritius as well as in the UK. They had family in Mauritius and the first appellant had visited relatively recently. In those circumstances as Miss Holmes submitted the judge had little option but to conclude as he did. **Agyarko** made the position quite clear.

19. For the reasons I have given I am not satisfied that the judge materially erred in law and I direct that his decision shall stand and this appeal is dismissed.

Notice of Decision

Appeal dismissed.

Anonymity Direction

Anonymity direction not made.

TO THE RESPONDENT
FEE AWARD

The First-tier judge made no fee award and I make none.

Signed Date: 18 December 2017

G Warr, Judge of the Upper Tribunal