



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/05389/2015
HU/05390/2015

THE IMMIGRATION ACTS

Heard at Field House
On 9 May 2018

Decision & Reasons Promulgated
On 15 May 2018

Before

UPPER TRIBUNAL JUDGE SMITH

Between

NOOR [A]
RASCHIDA [A]

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R Deepchand, Lambeth Solicitors
For the Respondent: Mr S Walker, Senior Home Office Presenting Officer

Anonymity

Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008

Anonymity was not granted by the First-tier Tribunal. There is no reason in this case to make an anonymity direction.

DECISION AND REASONS

Background

1. The Appellants appeal against a decision of First-Tier Tribunal Judge S D Lloyd promulgated on 15 June 2017 (“the Decision”) dismissing the Appellants’ appeals against the Secretary of State’s decision dated 3 August 2015 refusing them leave to remain in the UK on the basis of their family and private lives. Their appeal is against the refusal of their human rights claim made on Article 8 ECHR grounds.
2. The Appellants are nationals of Mauritius. They came to the UK as visitors on 2 February 2003 with their four children (then aged fifteen, twelve, ten and eight years). The First Appellant thereafter obtained leave to remain as a student until 30 November 2005 with the Second Appellant and their children as dependents. Further applications for leave to remain were refused on 29 March 2006 and 3 January 2008.
3. In September 2011, the Appellants made an application for leave to remain based on their private and family lives and those of their two younger children, the youngest of whom was still a minor at the date of application. Leave was granted due to the age and length of residence of that child and the Appellants’ parental responsibility at that time. They were granted thirty months leave (as the application was not decided until 6 November 2012).
4. The application which led to the Respondent’s decision under appeal was made on 29 April 2015. The two children who were born on 15 June 1992 and 31 October 1994 and were therefore by then adults obtained leave to remain based on their own private lives (having by then lived in the UK for half their lives and being under twenty-five years). However, since the children were no longer minors, the Appellants were refused further leave.
5. It was accepted before the First-tier Tribunal Judge that the Appellants are unable to satisfy the Immigration Rules (“the Rules”) in relation to their family and private lives. The Judge considered the Appellants’ human rights outside the Rules but concluded that removal would not be disproportionate.
6. The Appellants’ grounds of appeal are discursive and not easily separated into individual issues. It is therefore more convenient to set those out by reference to the grant of permission by First-tier Tribunal Judge Scott-Baker which reads as follows (so far as relevant):

“... [2] The grounds assert that the First Tier Tribunal judge had erred in law as the original application had been made in September 2011 and that in the light of Edgehill the further application should have been considered under the transitional provisions for applications received before 9 July 2012. The remainder of the grounds then confusingly seek to make assertions based on the new rules, quotes from Agyarko [2017] UKSC 11 without explaining why and ultimately argues that there had been a breach of fairness, without identifying any error of law and refers to

Beoku-Betts [2008] UKHL 39, EB (Kosovo) [2008] UKHL 41 and Huang [2007] UKHL 11 again without identifying the principles relied upon.

[3] The appellants had made applications to remain on 29 April 2015, long after the introduction of the new rules. Two of the youngest children were granted leave on 28 September 2015 for 30 months, but the appellants' status, as their parents were not reconsidered.

[4] The FTT Judge at [16] noted that the appellants could not qualify on the parent route as both children were aged over 18. And at [24] records that the appellants could not meet the requirements of the immigration rules. At [22] the judge found that Article 8 was engaged and [23] concluded that the issue was one of proportionality. At [27] the judge noted that the two elder children had married and were now British citizens with their own children and that the two younger children, aged 22 and 24, were working full time. The findings as to the breach of family life of the children and grandchildren are brief and arguably inadequate. There was no consideration of the effect of the two younger children who remained living with their parents and the effect on them if the appellants should be required to return. Nor was there any consideration of the grandchildren's interests with reference to the section 55 duty. The decisions under appeal arguably have unjustifiably harsh consequences for all members of the family and this issue has not been fully considered by the FTT judge.

[5] Permission is granted."

7. The matter comes before me to decide whether the Decision contains a material error of law and, if so, to re-make the decision or remit the appeal for rehearing to the First-Tier Tribunal.

Discussion and conclusions

8. I can deal shortly with two issues raised in the grounds. The first concerns the application of the Court of Appeal's judgment in Edgehill & Anor v Secretary of State for the Home Department [2014] EWCA Civ 402 ("Edgehill"). That judgment concerns the application of the new Rules to applications made prior to the changes in July 2012. Although, as identified in the grant of permission, the Appellants' application here was not made until April 2015, Mr Deepchand explained that what was intended by the grounds is that the earlier application (in November 2011) should have been decided under the Rules prior to the July 2012 changes. If that had occurred, so he argued, the Appellants would have benefitted from the grant of leave applicable to pre-2012 Rules changes.
9. There are a number of difficulties standing in the Appellants' way in this regard. First, the Court of Appeal revisited Edgehill in its judgment in Singh and Khalid v Secretary of State for the Home Department [2015] EWCA Civ 74 and determined (at [56] of the judgment) that, where the Secretary of State made a decision after 6 September 2012 in relation to an application made before 9 July 2012, the post-2012 Rules apply due to amended transitional arrangements. That was the position here. Second, the Appellants did not apparently challenge the application of the post-2012 Rules to the grant of leave when it was granted in 2012. Third, and most importantly, if the pre-2012 Rules applied, the position would scarcely have availed

these Appellants. That is because they would have had no basis to remain under the Rules because the provisions of EX.1 which formed the basis of their grant of leave was introduced only by the 2012 Rules. Furthermore, by the time that leave was granted to them in November 2012, both of their youngest children were aged eighteen and therefore no longer minors. The only reason why the Appellants were able to benefit from the grant of leave at all at that time is because the provisions of Appendix FM to the Rules (introduced in July 2012) provide for the age and length of residence of the child to be determined as at date of application not date of decision.

10. The second issue is whether the Appellants are now able to succeed within the Rules. They cannot do so based on their family lives because all of their children are now adults. In relation to their private lives, although Mr Deepchand did at one point suggest that there are “insurmountable obstacles” (or put more accurately “very significant obstacles”) to their return to Mauritius, it is clear from [24] of the Decision that it was conceded before the First-tier Tribunal Judge that the Appellants could not succeed under paragraph 276ADE of the Rules based on their private lives. In any event, it was not clear to me what he said were very significant obstacles to the Appellants’ integration in Mauritius (as opposed to the consequences of removal for their family lives).
11. I turn then to the central focus of the Appellants’ case before the First-tier Tribunal Judge and of the submissions to me that the First-tier Tribunal Judge erred in his consideration of the appeals outside the Rules. That aspect of the claim focusses on the Appellants’ family lives with their family in the UK. Briefly, they have four children. The eldest two born 30 January 1988 and 4 March 1990 are both married to British Citizens and settled in the UK in their own right. The youngest of those two children has three children of her own. The youngest of the Appellants’ children are now aged twenty-five years and twenty-three years respectively. As I have already noted, they have leave to remain in the UK based on their own private lives. The Appellants also have extended family in the UK including the Second Appellant’s three siblings. The First Appellant does have a sister and brother still living in Mauritius.
12. The focus of the appeals before the First-tier Tribunal Judge was therefore the Appellants’ human rights based on the disruption which removal would cause to their family lives (in particular) in the UK. The Judge dealt with that case at [25] to [36] of the Decision as follows:

“[25] Regarding the immigration history, I note that there have been quite substantial periods in the UK where the Appellants did not have leave to remain. For some of that time leave would have been based on section 3C, but there was certainly no leave to remain between January 2008, the date of the most recent refusal before the current one, and next application which had not made [sic] until September 2011. The leave granted at all other times has always been limited. At the hearing, I asked the first Appellant why the family did not leave the UK in 2006, after the first refusal of further leave to remain following the expiry of student leave and 2005. Mr [A] told

me that they were unable to do so because the Home Office held their passports. However, he also confirmed that he took no steps to ask for them back or to otherwise arrange return. I asked that if he had his passport at that stage whether he would then have returned, to which he replied that it would have been difficult because his children were in school and having a good education. This, of course, was at the time after an initial visit Visa and approximately 2 years of leave to remain as a student. It was apparent to me from Mr [A]'s responses that it was never his intention to leave the UK and the chronology demonstrates that he was prepared to stay well beyond the expiry of his lawful right to do so.

[26] Taking all this into account I consider some of the requirements under s.117B of the Nationality Immigration and Asylum Act 2002, and note that at all times, the family's presence in the UK has been precarious and indeed for a substantial period, was unlawful. Family and private life therefore carry a reduced weight accordingly.

[27] I accept the fact that their children have put down strong ties in the UK. This is demonstrated by their older children now having leave to remain in their own rights as married to British citizens and the granting of limited leave to remain to the two younger children under paragraph 276ADE. Nevertheless, the two younger children are now 22 and 24 respectively. Both are working full-time and both have received an education. [UA] wishes to attend university in the UK but has not yet started a course.

[28] If returning to Mauritius the Appellants' two younger children could return with them if they wished. Alternatively, if they wish to remain along with their older siblings, the Appellants would not be prevented from applying for leave to enter the UK for the purpose of visits, or the family could visit them in Mauritius and I also find that contact can be maintained through modern methods of communication.

[29] The first Appellant maintains that he would be unable to work in Mauritius because the retirement age of 60 and it was very difficult to find employment when over the age of 50. However, I give little weight to that claim as it is not supported by any objective information and it was also apparent from his evidence that no attempt had been made to examine the possibilities of finding employment there. Furthermore, he is a qualified healthcare professional who is now trained and experienced in working in a hospital setting. He does have some chronic health problems, but none are severe and there is no evidence before me that treatment is not available in Mauritius for such conditions.

[30] I am reminded that both Appellants arrived in the UK as adults, having spent all their formative and prior adult lives in Mauritius, from which I infer there is no reason to suppose that there are any cultural or language obstacles.

[31] It was also confirmed in oral evidence that the whole family have made visits to Mauritius in 2013 and 2015 and the second Appellant had both a brother and sister remaining there as well.

[32] In regards the other s117B considerations, as the first Appellant is working and is economically active I have accepted for the purposes of the proportionality assessment is that the Appellants are financially independent. They can also speak English.

[33] As mentioned above, I also heard from all four of the adult children. While they were consistent and I accept them all to be reliable witnesses, there was nothing factually remarkable about any of their evidence. In the Appellants' bundle are also a number of character references from various sources. I have read all of these and it is not necessary to go through them here, other than to say both Appellants come with glowing references from various individuals including family friends and work colleagues.

[34] Summarising all of the above, I accept that both Appellants have significant ties in the UK. The Immigration Rules are not met. I find that to be a significant factor in the proportionality assessment, as the rules reflect the Respondent's interpretation of the UK's compliance with Article 8. The enforcement of effective immigration control is therefore a significant factor, with s117B confirming that such considerations are in the public interest.

[35] Outside the rules, whilst their ties are significant, there is nothing particularly compelling regarding the Appellants' situation, and their private life in the UK is to be given reduced weight, for the reasons already stated. They must have been aware from the time of arrival, that presence in the UK was precarious and their actions have demonstrated a willingness to remain in the UK unlawfully. That being said, they did obtain further leave to remain after a period of remaining unlawfully and I do not find that this is a case where the Appellants have purposefully tried to evade the Respondent's attention.

[36] However, having considered all of this together, I find that the decision made by the Respondent was proportionate and accordingly I dismiss the appeal on human rights grounds."

13. Mr Deepchand submitted that the Judge failed to take into account three matters when assessing the proportionality balance. The first is the best interests of the Appellants' grandchildren, the second the inter-dependency between the Appellants and their family in the UK and third the Appellants' length of residence and ties to the UK. On a more general level, Mr Deepchand argued that the Judge failed to consider the Appellants' family lives on a "holistic basis" (relying on the case of PD and Others (Article 8 – conjoined family claims) Sri Lanka [2016] UKUT 00108 (IAC) ("PD and others"). He said that this was of particular importance here since the application which led to the refusal of the Appellants' claims was one involving not only the Appellants but also their two younger children. Finally, Mr Deepchand submitted that the Judge had failed to give proper weight to the impact on the Appellants' human rights when compared with the public interest.
14. I can deal very shortly with that final point. The Judge was required to have regard to section 117B Nationality, Immigration and Asylum Act 2002 when considering the claim outside the Rules. The Judge considered the relevant factors, left out of account those factors which were not adverse to the Appellants and gave appropriate weight to the relevant factors, in particular the public interest in maintaining effective immigration control. In reality, this submission is no more than that the Appellants do not agree with the outcome of the balance struck. However, that is not an error of law unless the Appellants can show that the outcome is perverse on the evidence.
15. I turn then to consider whether the Judge approached the balance in the wrong way, based on what is said in PD and others. The headnote in that case reads as follows:

"In considering the conjoined Article 8 ECHR claims of multiple family members decision-makers should first apply the Immigration Rules to each individual applicant and, if appropriate, then consider Article 8 outside the Rules. This exercise

will typically entail the consideration and determination of all claims jointly, so as to ensure that all material facts and considerations are taken into account in each case.”

16. That headnote needs to be read though in the context of the facts of that case. It was a case involving a family where the whole family unit was to be removed from the UK. That family unit included a minor child who could, potentially, succeed in a claim within the Rules if it was not reasonable to expect him to leave the UK. As such, as the Tribunal put it at [21] of the decision:

“[21] We consider that the answer to the principal question of law upon which permission to appeal to this Tribunal was granted lies in the public law framework within which the Appellants’ applications to the Secretary of State were made and determined. One of the overarching principles of public law thereby engaged was the duty imposed on the Secretary of State to take into account all material facts and considerations. We consider that if the application of the third Appellant had been severed from the other two and determined in isolation from them, in some kind of vacuum, this would have given rise to a breach of this duty. It is the very essence of Article 8 ECHR claims based on the family life dimension of this Convention provision that there are relationships, bonds and ties joining together the members of the family unit in question. In circumstances where the claims of several family members coincide, it would be artificial and unrealistic to determine them on their individual merits, in a rigid sequence and in insulated packages, without reference to the other claims.”

17. Properly understood, therefore, all that the Tribunal decided in PD and others was that consideration of a claim based on family life requires recognition of the effect of removal on all those within that family unit. That point does not avail the Appellants because it is clear from what is said at [27], [28], [33] and [34] of the Decision that the Judge recognised that the effect of the Appellants’ removal would impact on the part of the family who would or might remain in the UK. Thus, the Judge has taken into account that the elder two children are settled in the UK with their own family (and therefore would not leave) but that the younger two children could choose to accompany the Appellants if they wished or remain in the UK without their parents. Family life could continue via visits and other communication. The extent of family life between parents and children was not “factually remarkable” but the Judge recognised that, based on their ties with family here, the Appellants “have significant ties in the UK”. There is no error of law in that approach.
18. I turn finally to the matters which Mr Deepchand says were not taken into account. Dealing first with the Appellants’ grandchildren, Mr Walker accepted that the Judge has not referred to their best interests. However, he said that this is not a material error. I agree. I asked Mr Deepchand to take me to the evidence which was intended to show that the best interests of the grandchildren require their grandparents to remain in the UK. He referred me to the following extracts from witness statements as follows:

First Appellant

"[8] My daughter, [UA] is married to [MO] who is a British National and they have three children, all British living together as a family unit. They live close to me and we maintain a very good relationship with each other. My wife and I help to look after the children when we can..."

Second Appellant

[8] I wish to inform the Court that I am housewife and I have always been looking after my children at home which led to a development of a special bonding and relationship with them and I am very close to them. I have three grandchildren from my elder daughter who lives very close to me and I helped to look after the children. My daughter usually drops them to me in the morning whilst she goes to work and I take them to school, nursery etc and I collect them afterwards. This enables my daughter and son-in-law to have time to work as well as having free time together. I confirm that my grandchildren are very attached to me and vice versa. It is important for me to stay here to maintain consistency and be able to continue looking after them. I play an active role in their life, development and best interest."

Appellants' daughter

"[11] I wish to stress that we live very close to my parents and we visit them every day and I maintain contact with them every day because my parents play an important role in my children's life. They help with looking after the children which enables me and my husband to work full-time. I confirm that we are a very close knit family and my parents are a major source of support for me and my husband..."

[12] If my parents were to return to Mauritius our relationship will be broken apart and our family life will be seriously and adversely affected as well as the children because we are very attached to each other. They form an integral part of my family life and my children..."

19. I have no doubt that the Appellants' grandchildren would prefer their grandparents to be present in the UK as they grow up. I also have no doubt that the children's parents would prefer that the children are looked after by their grandparents rather than a child minder. I am though quite unable to read the evidence as being that the grandchildren's best interests require their grandparents to be physically present and responsible for their care. What a child's best interests require is not about what a child or its parents would prefer but what is necessary to safeguard and promote the welfare of the children. It is those interests which the Respondent has a duty to arrange to ensure under section 55 Borders, Citizenship and Immigration Act 2009. In the absence of any specific evidence that the presence and care of their grandparents is required for the children's well-being, the general position must be that a child's best interests require them to remain living with and in the care of their parents. The evidence is simply insufficient to show that the removal of the Appellants' will have any or any sufficient adverse effect on the well-being of the grandchildren. If there is any error made by the Judge in failing to take into account the very cursory evidence on this point, it is not material.
20. Turning then to the inter-dependency between the Appellants and their children, it is of course necessary to consider this in the factual context in which the family unit exists. The elder children have moved out of the family home and formed their own families (as noted by the Judge at [27] of the Decision). The two younger

children are also now adults (in their twenties and therefore not very young adults). They are in work and therefore beginning to lead independent lives. Those matters are taken into account also at [27] of the Decision.

21. Of course, simply because children have grown up does not mean that the family unit no longer exists. As is made clear, though, in cases such as Singh and Singh v Secretary of State for the Home Department [2015] EWCA Civ 630 “[t]he love and affection between an adult and his parents or siblings will not of itself justify a finding of a family life. There has to be something more”. Whilst the evidence refers to financial and emotional interdependency, there is little by way of evidence to show how that demonstrates itself or whether and if so how that goes beyond the normal ties which exist between parents and children and their siblings. The evidence refers to the family being “close knit” and living in close proximity to one another but that is not in and of itself sufficient to show a very strong family life with which removal will disproportionately interfere.
22. In this case, the Judge has noted that the two elder children have formed families of their own. As such, although those families are themselves part of the overall family unit, the evidence does not show that they enjoy family life (in the legal sense) with their parents. Even if their rights are engaged in the legal sense, in terms of impact of removal of the Appellants, the Judge found that they would remain in the UK. There could be no suggestion that they would uproot from the UK and follow their parents back to Mauritius. It might be said, as the Judge appears to accept at [27] of the Decision, that the two younger children still enjoy family life with their parents based on the fact that they still live at home (albeit have now taken steps towards independence by entering into work). However, as the Judge observes at [27], those two children can, if they wish, return to Mauritius if they wish. If they choose not to, that is their decision. There is no evidence that there would be obstacles to them doing so. In relation to the continuation of family life between the Appellants and their children, the Judge found at [27] of the Decision that this could be maintained by visits and “modern method of communication”.
23. Neither can it be said that the Judge has failed to take into account the Appellants’ length of residence in the UK and ties to this country. The Judge accepts that they have formed significant ties ([34]). Reference is made to evidence in their support ([33]). However, the Judge was bound to have regard on the opposite side of the equation to the fact that the Appellants’ status in the UK has been either precarious or unlawful ([25]).
24. As was observed in the grant of permission, in order to succeed outside the Rules, the Appellants need to show that the consequences of their removal are “unjustifiably harsh” (see also [45] of the judgment in Agyarko and Ikuga v Secretary of State for the Home Department [2017] UKSC 11: “Agyarko”). The onus is on the Appellants to demonstrate that level of impact. The hurdle is a high one ([55]: Agyarko). It is not a matter of showing that the consequences of removal are

inconvenient or unwelcome. It is not a matter of showing that there might be some difficulties which the Appellants will face on return to a country they left in 2003 and have only returned to twice since. The question is whether the resulting consequences are unjustifiably harsh when balanced against the public interest.

25. On the evidence here, the Appellants have not shown that this will be the impact of removal. Further and more importantly given the stage that this appeal has reached, they have not shown that the Decision made by the Judge that removal is proportionate discloses any material error of law.
26. For the above reasons, I am satisfied that the Decision does not contain any material error of law. I therefore uphold the Decision with the consequence that the Appellants' appeals remain dismissed.

DECISION

I am satisfied that the Decision does not contain any material error of law. The decision of First-tier Tribunal Judge S D Lloyd promulgated on 15 June 2017 is maintained.



Signed
Upper Tribunal Judge Smith

Dated: 11 May 2018