Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/15593/2018
HU/14893/2018
HU/14890/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 23 April 2019	**On 10 May 2019**

Before

UPPER TRIBUNAL JUDGE WARR

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SACHIDANAND [D]
BIB [D]
[S D]
(NO ANONYMITY DIRECTION MADE)

Respondents

Representation:

For the Appellant: Mr S Kandola, Presenting Officer
For the Respondents: Mr C Jacob of Counsel, instructed by Ahmed Rahman Carr Solicitors

DECISION AND REASONS

1. This is the appeal of the Secretary of State but I will refer to the original appellants as the appellants herein. The first and second appellants are the parents of the third-named appellant who was born on 5 February

2001. They are citizens of Mauritius. They applied to regularise their stay on 7 June 2017 on human rights grounds but their applications were refused on 3 July 2018. In relation to the third appellant the Secretary of State noted "You are under the age of 18, you have lived continuously in the UK for at least the last seven years, but it would be reasonable for you to leave the UK". She would be returning with her parents to Mauritius and would be able to reintegrate into Mauritian society. The appellant failed to meet the requirements of paragraph 276ADE(1)(iv) of the Rules. She did not meet the requirements of paragraph 276ADE(1)(v) of the Rules as she was not aged between 18 and under 25. She did not meet the requirements of paragraph 276ADE(1)(iii) having not lived continuously in the UK for at least twenty years. There were no exceptional circumstances despite the interfaith marriage between the third-named appellant's parents and the distress and anxiety which it was claimed affected the third appellant. There was treatment available in Mauritius for depression.

2. The appeal came before a First-tier Judge on 11 February 2019 a few days after the appellant had turned 18. The judge heard from all three appellants. The first-named appellant explained how as a Hindu he had married out of his faith with a Muslim and this had caused great grief for the family. The second appellant highlighted physical assaults in her country of origin. The third appellant spoke of her trauma as to what had happened to her in Mauritius and that she even avoided French TV stations. She spoke of her integration into the UK. She was doing A-levels but hoped to go to university in 2020. Letters of support had been received including a report from a social worker, Sally Deacon. It was accepted in paragraph 11 of the decision that the third appellant had had nine years of schooling in the UK and although now over 18 had been in the UK for over seven years. Having referred to Section 117 of the Nationality, Immigration and Asylum Act 2002 the judge made positive credibility findings in respect of all three appellants. The account of animosity as a result of a mixed-faith marriage was supported by independent agencies and the medical evidence supported the contention that the second appellant was assaulted as claimed and that the third appellant was burnt as claimed. They had suffered as a result of family animosity arising out of a mixed-faith marriage.

3. In paragraph 17 of the determination the judge noted that it was accepted that the third appellant met the requirements of suitability. He was satisfied that she had demonstrated an exceptionally strong private life in the UK having been in this country for over nine years and four months. The evidence from her school and from friends was overwhelming as was the expert opinion of the social worker. She had arrived at the age of 8 and had spent over half her life in the UK. He accepted the argument that the third appellant was at a critical stage of her personal and educational development. She had spent over half her life in the UK and in the light of these matters and her overall integration and her ability to make a useful contribution to the UK he was satisfied that the third appellant met the

requirements of paragraph 276ADE. The judge then addressed Article 8 as follows:

> "18. Turning to consider Article 8 as it is the distinct element in this case. The Tribunal has had regard to the case of **SS (Congo) [2015] EWCA Civ 387** which notes the court will be slow to find a positive obligation on a state to facilitate a choice (also made by a married couple in that case). The Rules themselves are the appropriate starting point (and often the end point) of any consideration. They provide almost a complete code and that any proportionality assessment outside of them must be made through the lens of the new rules **AQ and others [2015] EWCA Civ 250**.
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> 19. The Tribunal has had regard to the case of **Agyarko [2017] UKSC 11** and the commentary therein especially whether an Article 8 proportionality assessment would result in insurmountable obstacles for the Third Appellant so that the refusal of the application would not be proportionate. The Tribunal is beholden to carry out an analysis of the public interest consideration if going outside of the Rules as was noted above.
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> 20. The best interests of the child have at all time to be considered and the usual starting point is that it is in the best interests of the child to be brought up by his or her parents. The Third Appellant has been here in excess of 7 years as a child and although over 18 by a period of a few days does not live independently.
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> 21. The Tribunal therefore considered Article 8 in the light of the above and notes that it is a qualified right. It is normally for an appellant to establish that he or she has family and/or private life that will be interfered with on return to his or her own country, and the burden then shifts to the Respondent to establish that any such interference is not only legitimate but is also necessary and proportionate."

4. Having referred to **Razgar v Secretary of State [2004] UKHL 27** and the five-stage test the judge concluded his determination as follows:

> "23. The Tribunal finds that the Third Appellant has demonstrated that it would be disproportionate for her to leave the UK as her ability to satisfy the Rules for the reasons given would be positively determinative of her Article 8 position even having regard to Section 117B. The Third Appellant has been here for more than half her life and had arrived as an 8-year-old child.
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> 24. Having considered the oral and documentary evidence with some care and giving a proper consideration to the public interest, the

Tribunal is satisfied that it would be disproportionate to remove the Third Appellant in the particular circumstances of this case.

25. The Tribunal is satisfied that much of this is related to the circumstances of these particular individuals, namely the complete lack of physical and emotional support in Mauritius as well as the best interest of the Third Appellant and the system of life and support in the UK enjoyed by both the Appellant's, their lack of a home in Mauritius, wider family estrangement and hence a lack of support. This is beyond merely 'facilitating' a choice but rather is related to the reality of the situation. Taken together these factors together satisfy the Tribunal that to refuse the matter would have unjustifiably harsh consequences for this particular Appellant.

26. In respect of family life as between the Appellant's the Tribunal noted the **Ghising** case, the Tribunal accepted that the Third Appellant has never lived independently and is currently doing her A levels and continues to reside in the family home as she has always done. Her family life did not cease 6 days before the Tribunal hearing when she turned 18 years of age. The Tribunal accepted from the evidence of Ms. Deacon in particular that the family unit is a close knit one and has to an extent been dictated by what has happened to the family in the past. The Tribunal finds that to remove the First and Second Appellant in the circumstances where the Third Appellant can succeed in respect of her own private life in the UK would result in insurmountable obstacles to family life being continued and would have unjustifiably harsh consequences for the whole family unit. The Tribunal has off considered Section 117B in respect of the First and Second Appellant's and noted that they are financially independent and off course family life was in existence because they arrived as a family unit in the first place. The Tribunal was satisfied that if the First and Second Appellant were to be returned this would have unjustifiably harsh consequences for the Third Appellant who has already succeeded under the Rules and under Article 8. This is not allowing the adult child to be used as a 'trump card' but a recognition of the particular facts of this case."

5. Accordingly the judge allowed the appeals under the Rules and under Article 8 for the third appellant and under Article 8 for her parents. The Secretary of State applied for permission to appeal arguing that the third-named appellant did not meet the requirements of paragraph 276ADE. The Judge had not taken into consideration **KO (Nigeria) [2018] UKSC 53**. He had to approach the appeal "as in the real world". The parents had no leave to remain in the UK. Their daughter's best interests lay in remaining with the family unit. The family would not face unjustifiably harsh consequences in the light of the case of **Treebhawon and Others**

(Mauritius) [2017] UKUT 13. Permission to appeal was granted on 19 March 2019 by the First-tier Tribunal.

6. Mr Kandola relied on the grounds of appeal but did not pursue the point based on **KO (Nigeria)**. The point was a narrow one and based on 276ADE. He agreed with the point made in relation to **TZ (Pakistan) [2018] EWCA Civ 1109** that had been referred to in the submissions before the First-tier Judge and featured in paragraph 10 of Counsel's skeleton argument before me. It was accepted that the appellant now met the Rules. However at the date of the hearing one could not ignore that the third appellant was 18. Reference was made to 276 (1)ADE(v). Mr Jacob submitted that the points made with respect to the Rules were academic. The judge had allowed the appeal outside the Rules come what may. Counsel referred to paragraph 23 of the judge's decision. The third appellant had been in the UK for more than half her life and had arrived as an 8-year-old child. Counsel referred to paragraph 276ADE(v). The judge had considered it would be disproportionate to remove the child in the light of the material before him including the social worker's report. The positive credibility findings had not been the subject of challenge and the decision to allow the appeal outside the Rules had not been appealed from. The appeal had been allowed on two bases and the judge had made clear findings determinative of the proportionality argument. Counsel distinguished the case of **Treebhawon** which turned on different facts and where no 276ADE (1)(v) issue had been raised before the Upper Tribunal. Counsel referred to paragraph 11(i) of his skeleton argument. Reliance was placed on paragraph 276ADE(1)(iv). It was clear that the judge had found that it would not be reasonable for the appellant to leave the UK as set out at paragraph 17 of the decision. As argued in paragraph 11(ii) of the skeleton, the appellant would now meet the requirements of paragraph 276ADE (1)(v) if she made a further application – it was analogous to the situation in **Chikwamba [2008] UKHL 40**. The appeal of the Secretary of State should be dismissed. Any error was not material in the circumstances of this case.

7. In response Mr Kandola pointed out that the only appeal was against Article 8 and the arguments covered both limbs. With reference to the case of **Ghising [2012] UKUT 00160 (IAC)** which had been put in, Mr Kandola said there was no challenge to family life being established in this case.

8. At the conclusion of the submissions I reserved my decision. I have carefully considered all the material before me. I can of course only interfere with the judge's decision to allow the appeal if it was materially flawed in law. The positive credibility findings made by the First-tier Judge are not the subject of challenge in the grounds.

9. The judge refers to paragraph 276ADE and while no doubt it would have been helpful to specify which part or parts of the rule were in play I am not satisfied that there is a material error of law in this case for the reasons

advanced by Counsel. I note there was There was no Presenting Officer to assist the First-tier Judge.

10. I accept Counsel's analysis of the basis on which the judge reached his conclusions by reference to particular Rules and in any event outside the Rules under Article 8. I note that the Secretary of State accepted in the decision to refuse the third appellant's application that she was under the age of 18 and had lived continuously in the UK for at least the last seven years but argued it would be *reasonable* for her to leave the UK. It is at least implicit in the judge's decision that he was not satisfied that that was the case. Counsel refers in particular to paragraphs 11 and 17 of the judge's decision. The appeal had also been allowed outside the Rules as said in paragraph 23 of the judge's decision. There is no challenge to family life existing between the members of this family. While another judge might have reached a different decision I do not find his conclusions were not properly open to him.

11. The appeal of the Secretary of State is dismissed and the decision of the First-tier Judge shall stand.

12. The First-tier Judge made no anonymity order in this case and I was not invited to make one.

TO THE RESPONDENT
FEE AWARD

The First-tier Judge made a whole fee award in favour of the appellants as they had been successful in their appeals. There is no reason to interfere with this fee award which stands.

Signed Date: 7 May 2019

G Warr, Judge, of the Upper Tribunal