Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/38423/2013
IA/38429/2013
IA/38434/2013
IA/38444/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 12 February 2015	**On 1 May 2015**

Before

MRS JUSTICE THIRLWALL DBE and
DEPUTY UPPER TRIBUNAL JUDGE SHAERF

Between

SALIM SADRUDDIN SINDHWANI
SALMAN SALIM SINDHWANI
NASREEN SINDHWANI
SAIFALI SALIM SINDHWANI
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Pretzell of Counsel
For the Respondent: Ms J Kenny of the Specialist Appeals Team

DECISION AND REASONS

1. This is an appeal by four members of the same family against a determination of the First Tier Tribunal (FTT) to dismiss their appeals against a decision of the Secretary of State for the Home Department

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made on 19 September 2013 to remove them from the United Kingdom. They appeal with leave of a judge of the First-tier Tribunal.

Background

2. The first appellant, dob 12th October 1968, is married to the third appellant, dob 14 July 1970. They are the mother and father respectively of the second and fourth appellants, their sons. They were born on 9th June 1991 and 23 November 1995. Thus at the time of the decision by the Secretary of State the second appellant was 21, the fourth appellant was 17. As at the date of the hearing (February 2014) they were 22 and 18 respectively.

3. The appellants are all nationals of India. The first and third appellant came to the UK as visitors with leave to remain from 22nd May until 22nd November 2003. The third appellant, Mrs Sindhwani, returned to India during the period of leave and thereafter came to this country with her sons on visitors' visas. They entered the UK on 27th May 2005. Thereafter they overstayed, as they had planned to do.

4. The fourth appellant has comprehensive special needs. This has been the case since shortly after he was born. He is wholly dependent on his family. He suffers from seizures. He cannot walk unaided and requires support in all aspects of his daily living. He cannot be left alone. We observe that the question of the capacity of the fourth appellant does not seem to have been specifically considered at any stage. The evidence that he lacks capacity within the meaning of the Mental Capacity Act 2005 is overwhelming but it is plain that throughout these proceedings his parents have sought to act in his best interests. We were not invited to and we do not think it necessary to take any further action in that regard.

5. On 19th September 2006 the family applied for leave to remain. The basis of the application was the physical and mental health needs of the fourth appellant. To remove him would constitute a breach of Article 3, they argued. To remove him and the rest of the family would also be a breach of Article 8. The application was eventually refused but the decision was reconsidered following the issue of judicial review proceedings which were compromised on the basis that the Secretary of State would reconsider. By that stage the claim included the assertion that the delay had prejudiced the family, particularly the fourth appellant. The Secretary of State sent a further refusal letter on 19th September 2013. The notice of appeal was lodged on 2nd October 2013. The hearing took place on 5 February 2014.

Ground 1, Private life under the Rules.

6. It was the appellants' case before the FTT judge that he should first consider the fourth appellant's application under para. 276ADE of the Immigration Rules which, at that time, read:

> "The requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that at the date of application, the applicant:
>
> …
>
> (iv) is under the age of 18 years and has lived continuously in the UK for at least 7 years (discounting any period of imprisonment)."

7. It was submitted that by operation of para.276ADE (1)(iv) the fourth appellant was entitled to leave to remain because he was "under the age of 18 years and has lived continuously in the UK for at least seven years". This argument overlooked the fact that the period of seven years is measured as at the date of the application. The date of the application is the date it was posted (see para.34G(i)). At the date of the application (September 2006) the fourth appellant had been in the UK for barely a year. The FTT judge rightly rejected the submissions in this regard. Mr Pretzell, who produced at short notice for this tribunal a succinct and properly focussed skeleton argument, made it clear from the outset that the argument (which was effectively ground 1 of the appeal) was no longer pursued. It was misconceived. The Secretary of State had considered the position under the Rules and, correctly, the FTT judge considered what the position would have been under the Rules but, as a matter of law, all four cases fell outside the Rules.

8. No complaint is made about the FTT judge's decision that there was no breach of Article 3. The contrary was unarguable. No complaint is made about his findings of fact, all of which were justified on the evidence. We turn to the grounds which were pursued.

Ground 2, Delay.

9. Mr Pretzell argues that the FTT judge should have found the delay in this case to be "exceptional". He referred us to the decision of Collins J in **R (FH) v Secretary of State for the Home Department [2007] EWHC 1571** (Admin). Collins J observed "applicants should not suffer any more than is inevitable because of delays that are not in accordance with good administration even if not unlawful." Mr Pretzell submits that the point there being made is that delays that are not in accordance with good administration could still be a relevant consideration albeit that they would not be decisive save in "exceptional cases". He referred to paragraph 26 of the judgment where Collins J said "the longer a claim has been outstanding the more important it is that it should be dealt with". We agree. At paragraph 27 he said this:

> "This concern applies particularly in H's case. His human rights claim has not been determined and has been outstanding for some 5

> years. In the circumstances that claim is more akin to an initial claim. Whether or not the system should cater expressly for the length of any delay, he falls into what may properly be regarded as an exceptional case."

10. Mr Pretzell submits that on any view, the judgment of Collins J justifies the submission that a time span of 6 years and 2 months (as here) is capable of "making the case exceptional". We agree that delay can be a relevant factor but we do not accept that a delay of 6 years and 2 months of itself renders a case exceptional. The judge has to consider the whole of the circumstances, including the effect, if any, of the delay. We have reminded ourselves of the decision of the House of Lords in **EB Kosovo (FC) v the Secretary of State for the Home Department [2008] UKHL 41.** The question at the heart of that appeal was what (if any) bearing does delay by the decision making authorities have on any non-national's rights under Article 8. At paragraph 14 Lord Bingham said that:

> "… delay in the decision making process is not necessarily irrelevant to the decision. It may be …relevant in any one of 3 ways. The first, the applicant may during the period of any delay develop close personal and social ties and establish deeper roots in the community than he could have shown earlier. …to the extent that it is true, the applicant's claim under Article 8 will necessarily be strengthened."

The second way that may be relevant is what Lord Bingham described as less obvious. Where a person has a precarious immigration status and yet is not removed the longer the delay in removal the less the sense of impermanence and "the expectation will grow that had the authorities intended to remove the applicant they would have taken steps to do so". As Lord Bingham said, that depends on no legal doctrine but on an understanding of how minds may work in some situations. It may affect the proportionality of removal. The third way in which delay may be relevant may be in reducing the weight otherwise to be accorded to the requirements of a firm but fair immigration control. Thus it is relevant again to the proportionality of removal.

11. The FTT judge considered the effect of the delay at paragraph 21. Mr Pretzell argues that the reference to "legitimate expectation" is misconceived in this context. The judge said:

> "The appellants knew full well that they had no right to be in the UK. They had shown scant regard for the immigration rules of the United Kingdom. There was nothing to prevent them from returning to India. Whilst the appellants have been in the UK they have taken advantage of the facilities which have been available to them [this was a reference to earlier findings in respect of education and medial services, amongst others] and they have not been disadvantaged in any way. They have continued to build their family life in much the same way that they would have done if they had remained in India. There has been no disadvantage to them of the delay in the decision making."

There is nothing wrong with that conclusion. The reference to a legitimate expectation is no more than a reference to the second way in which delay might be relevant as set out in **EB (Kosovo)**. The conclusion is reinforced, rather than undermined, by the letters to the Secretary of State, pressing for a decision to which Mr Pretzell referred us. The appellants plainly did not consider that their position was secure as a result of the delay. As to the first way in which delay may be relevant the judge found, correctly, that family life was not affected by the delay and there was no evidence of the development of any close personal ties within the community (see paragraph 25 of the decision). On analysis therefore, there is nothing in this ground.

12. The appellants submitted that the case should be looked at under the old Rules. The FTT judge found that even were the case to be looked at under the old Rules the appellants would struggle to demonstrate that removing them as a family unit would be a disproportionate interference with their rights under Article 8. This was because (see paragraph 25) their private lives are inter-dependent with the lives of other family members.

Ground 3 Exceptionality

13. Mr Pretzell submits that the FTT judge was wrong to approach his decision on the basis that the circumstances must be compelling or exceptional to consider Article 8 outside the Immigration Rules. At paragraph 23 the judge said "The appellants do not meet the requirements of the amended Rules and apart from the fourth appellant's disability there are no exceptional circumstances in this case which warrant taking it outside the rules". The judge went on to refer to the determination in **Gulshan (Article 8 –new rules – correct approach) [2013] UKUT 00640** which contained a review of the decisions in **MF (Article 8-new rules) Nigeria [2012] UKUT 00393** and **R (on the application of Nagre) v SSHD [2013] EWHC 720,** including paragraph 29 of **Nagre.** The judge then summarised the decision thus "[it] decided that the Tribunal had to consider Article 8 applications under the amended Rules, and only look beyond where the circumstances were exceptional or compelling." He then went on (paragraph 24) to observe "There are no exceptional or compelling circumstances in this case to warrant consideration outside the rules". The reference to the need for "exceptional circumstances" was an error.

14. Since the decision was promulgated in this case the Court of Appeal has further considered the decision in **Nagre. In MM (Lebanon) [2014] EWCA Civ. 985. T**he Court found that "there was not much utility" in a preliminary or threshold stage (of an arguable case) before an Article 8 claim could be considered. We do not think that the judge sought to impose such a test in any event.

15. Most recently (23rd April 2015) in **SS (Congo) and others [2015] EWCA Civ 387** the Court of Appeal considered the question of exceptional circumstances again. At paragraph 33 the judgment of the Court reads "it is accurate to say that the general position outside the sorts of special contexts referred to above [which do not exist here] is that compelling circumstances would need to be identified to support a claim for grant of LTR outside the new Rues in Appendix FM. In our view that is a formulation which is not as strict a test as exceptionality or a requirement of "very compelling reasons" (as referred to in **MF (Nigeria)** in the context of the Rules applicable to foreign criminals) but which gives appropriate weight to the focussed consideration of public interest factors as finds expression in the Secretary of State's formulation of the new Rules in Appendix FM. It also reflects the formulation in **Nagre** at paragraph 29, which ahs been tested and has survived scrutiny in this court, see eg **Haleemedeen [2014] EWCA Civ.558** at [44], *per* Beatson LJ". We assume that is a reference to the second half of paragraph 29 namely the consideration of whether "there are compelling circumstances not sufficiently recognised under the new rules to require the grant of such leave".

16. In our judgment whilst the judge erred in referring to "exceptional circumstances" the error was immaterial since he went on to consider the Article 8 claims outside the rules and by reference to the earlier case law. The judge acknowledged the position of the fourth appellant. He applied the **Razgar** test to the facts as he found them to be. He began with the observation, which is not challenged, that there is family life between the appellants and that the decision of the Secretary of State to remove them all from this country as a family unit does not interfere with that family life. He found that each had a private life but it was a private life which was interdependent on the lives of the other family members. He observed that

> "… apart from the treatment and education facilities which are provided for the fourth appellant, there is no evidence of a separate private life or any real roots in the host community."

It is not suggested that he was wrong about any of that.

Grounds 4 and 5, the fourth appellant

17. The central complaint in these grounds is that the FTT judge should have considered first and separately the position of the fourth appellant before considering the rest of the family. Had he done so, the judge would have concluded that removal would be a breach of his Article 8 rights.

18. Mr Pretzel began a submission that the FTT judge should have treated the fourth appellant as a child notwithstanding that he was, by then, 18 because his functioning is so limited. Mr Pretzel sought to develop an argument based on the determination in **Azimi-Moayad and Ors**

(decisions affecting children; onward appeals) [2013] UKUT 00197 (IAC) where the Upper Tribunal identified the following relevant propositions when deciding how to approach the question of the best interests of a child who is in education but whose parents are subject to administrative removal:

> a. as a starting point it is in the best interests for children to be with both parents and if both their parents are being removed from the UK then the starting point suggests that so should dependent children who form part of their household unless there are reasons to the contrary.
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> b. 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.
>
> c. lengthy residence in a country other than the state of origin can lead to development of social, cultural and educational ties that would be inappropriate to disrupt, in the absence of compelling reasons 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.
>
> d. apart from the terms of published policies and Rules, the Tribunal notes that 7 years from age 4 is likely to be more significant to a child than the first 7 years of life. Very young children are focused on their parents rather than their peers and are adaptable.

19. We do not think it permissible or desirable simply to treat an adult who lacks capacity as a child. Whilst some of the practical welfare considerations may be similar the fourth appellant is an adult with special needs who lacks capacity and should be considered as such. Even if we are wrong about that we are quite sure that a consideration of **Azimi-Moayad** would not have made any difference here. In particular, given the very young age at which the fourth appellant functions, dependent as he is on his family for all his needs, the effect of lengthy residence is likely to be much less significant in his case than it would be to (say) a 17 year old without his difficulties. The FTT judge found

> "… regardless of whether he is a child or not, his needs are such that care is going to be required for the rest of his life and he is a vulnerable person and will remain so."

20. There can be no sensible complaint about this conclusion. The judge correctly found that at home all his care is given by his family. Much of his time is spent at a special school. Mr Pretzell argues it is clear from the FTT judge's determination that no consideration was given to factors pointing in favour of the fourth appellant remaining in the UK. It is difficult to see that attendance at a special school and the receipt of medical care when necessary constitutes a private life for this young man such that it would be disproportionate to remove him from the UK. Whilst the judge did not

say that in terms we cannot see how he could have reached any other conclusion. Such other private life as he might have was dependent on other members of his family, and vice versa.

21. Mr Pretzell argues that the judge should have sought an assessment of the fourth appellant's needs. We disagree. His needs are comprehensive as is plain from the decision. That moving him from his special school to a different country would be disruptive does not need to be said. Complaint is made about the judge's observation "that there is no evidence … to suggest that the fourth appellant's needs were not being met whilst he was in India". Mr Pretzell submits that this is pure speculation. It is not. There is extended family there. The first and third appellants left both their children in India for some time when they first came to this country. They were looked after by members of the extended family. The judge, reasonably, did not accept that medical treatment had not been available or adequate in India. The judge was entitled to find that there was no evidence to support the assertion that the fourth appellant's needs had not been met whilst he was in India.

22. It follows that even if the judge had started with the fourth appellant and considered his Article 8 right to private life separately before considering the rights of his parents and his brother he would have been bound to come to the same conclusion. In reality this is a case about a family whose family life would not be affected by removal. It is unarguable that either separately or collectively removal would be disproportionate to their right to respect for their private life.

23. In our judgment none of the grounds of appeal is made out and no other decision was reasonably open to the judge on a proper application of the law to the facts of this case. Accordingly, the determination of the First-tier Tribunal did not contain any material error of law and shall stand.

NOTICE OF DECISION

The determination of the First-tier Tribunal did not contain any material error of law and shall stand.

The effect is that the appeal of each of the appellants is dismissed.

Signed Date **12 February 2015**

Mrs Justice **Thirlwall**