Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/07022/2015
IA/07023/2015
IA/07024/2015
IA/07025/2015
IA/07026/2015
IA/07027/2015

THE IMMIGRATION ACTS

Heard at Bradford
On 5 July 2016

Decision & Reasons Promulgated
On 7 July 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE SAFFER

Between

KS
SK
HS
JK
TK
SS
(ANONYMITY DIRECTION MADE)

Appellants

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Ali of Counsel
For the Respondent: Ms Petersen a Home Office Presenting Officer

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DECISION AND REASONS

Background

1. Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the Appellants. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings. I do so as most of the Appellants are minors.

2. The Respondent refused the Appellants' applications for leave to remain on the basis of their private and family life both within and outside the Immigration Rules on 30 January 2015. Their appeal against that decision was dismissed by First-tier Tribunal Judge Ince following a hearing on 11 November 2015. This is an appeal against that decision.

The grant of permission

3. First-tier Tribunal Judge Simpson granted permission to appeal (19 May 2016) on the ground that;

   "... it is arguable that the Judge erred in relying on the previous Judge's view as to whether a photograph was of A or not without expert evidence. As to the view taken as to A's credibility having obtained a passport from the Afghan embassy in London, it is noted that passports have been issued to others in those circumstances. No evidence has been produced to suggest the Afghan documents are false or forged; moreover, the Judge clearly believed that the child "JK" was born in Jalalabad and that the document recording her birth was genuine. It is arguable that the Judge did not apply the correct standard of proof in relation to nationality and, despite the guidance in SSHD v D (Tamil) [2002] UKIAT 702, gave too much weight to the earlier Judge's decision on that issue."

Respondent's position

4. It was asserted in the Rule 24 notice (14 June 2016) that the Judge directed himself appropriately and applied the correct standard of proof. Cogent reasons were provided for the findings. Anxious scrutiny was given to the evidence. The Judge was entitled to come to conclusions he did based on the evidence produced. The grounds are merely a disagreement with the adverse outcome of the appeal without identifying any arguable material error of law.

5. It was submitted orally that Article 8 was considered through the prism of the Immigration Rules and the Judge conducted the proportionality balancing exercise.

Appellant's position

6. The Judge placed too much weight on the previous finding regarding nationality and lost sight of the low standard of proof. The Indian documents were never verified by the Respondent. There was no expert evidence to confirm the photographs with the Indian application were of the Appellants. There was nothing more than a generic challenge to the new documents. Debating reasons but giving no weight to points and applying disproportionate weight to earlier findings is a material error of law. Mr Ali summarised his position orally by stating that too much weight was placed on the previous determination.

7. The children should not be penalised for the behaviour of their parents. Two of the children had accumulated over 7 years' residence in the United Kingdom at the date of decision and were old enough to fully understand the environment they were growing up in. They were qualifying children in accordance with section 117D (1) (b) of the Nationality, Immigration, and Asylum Act 2002 ("the 2002 act"). The Judge did not consider whether it was reasonable for those children to leave the United Kingdom in accordance with section 117B (6) (b) of the 2002 act.

8. PD and others (Article 8 - conjoined family claims) Sri Lanka [2016] UKUT 00108 (IAC) should have been applied. The Judge should have looked at each individual applicant instead of considering the position of the children as appendages of their parents. The Judge erred in looking for sufficiently exceptional circumstances rather than focusing on the best interests of the children. There was no public interest or strong reason for moving the children.

The Judge's findings regarding nationality

9. The Judge stated;

"[41] I was not satisfied that the Appellant told the truth when he appeared before me. For the reasons set out below I was not satisfied that he had been candid about his origins. Moreover, I agree with IJ Hanratty's findings that his attendance at the Afghan Embassy to obtain a passport was contradictory to his alleged fear of living in that country due to religious persecution. Moreover, his account of being issued with a passport simply because he was able to describe various features of Jalalabad did not ring true. It is not plausible that any Embassy would issue a passport to a person who, apparently without producing the documentation, gave information about a place which could have been obtained simply by living there -it does not follow that a person was born in such a place.

[42] In addition, there was little corroboration of his account – given the importance of the issue for him it was notable that none of the signatories to the petition were prepared to attend the hearing and give evidence that they had in fact known the Appellant as a citizen of Afghanistan in Jalalabad. I comment upon the potential corroboration of the documentation below but such by itself was not determinative.

[44] I begin by considering the nationality of the family. I use the determination of IJ Hanratty as the starting point. He found that the family were from India and that the Appellant and his wife had fabricated an asylum claim. He placed particular emphasis upon his assessment that the Appellants before him were the same persons who had attended the BHC in New Delhi and who had had their photographs taken there. Accordingly, he found as a "fact" that the Appellant, his wife and eldest child had physically attended the BHC. The Appellant has always denied this and maintains that he has never been to India (as indeed did his wife before IJ Hanratty). Their account is that the agent took their photographs in Jalalabad and they did not know what the agent then did.

[45] Since that time additional evidence, which it could be said could not have been obtained prior to the hearing before IJ Hanratty due to lack of time and opportunity, has been produced by the Appellant. There are before me copies of the ID documents issued to the Appellant and "JK"; what appears to be a copy of the original document issued by the hospital recording "JK's" birth; and a petition signed by numerous persons who professed to know the Appellant in Afghanistan and/or who knew of his family background. There is the fact that he and his family have maintained that they are from Afghanistan ever since the hearing before IJ Hanratty and this can be added to the fact that the Appellant still speaks the languages of Afghanistan, namely Dari and Pushto. It is fair to say that I have more evidence before me than did IJ Hanratty of the Appellant's Afghan background.

[46] However, that is not to say that it is necessarily determinative. There is still the fact that Indian passports, apparently issued to the Appellants, were used to support their applications for visit visas at New Delhi in 2006, and that the Appellant, his wife and eldest child apparently attended there to lodge the applications and be interviewed. I pause there to comment that what does not appear to have been considered is that the passports may themselves have been forgeries and that they were obtained by the agent as this was his preferred modus operandi. In a case, as here, where the Appellant is being accused of being a party to the obtaining of false documents, it may seem perverse to assume that any of his ID documents were in fact genuine. There is no evidence before me to suggest that the Respondent has submitted copies of these documents to the Indian authorities to check their provenance. Having said that, I take account of the fact that someone purporting to be the Appellant was interviewed by the BHC – if the Appellant's account is correct and he never attended for interview, it means that an imposter attended in his place pretending to be him, which further strains the credibility of his explanation.

[47] I note that the Respondent has had an opportunity to consider these new documents and has relied on a generic challenge to them, namely that forged documents are easy to obtain in that part of the world. No specific analysis of the documents has been carried out by the Respondent, or if there has, she has not revealed the outcome of such. However, it is fair to say that copies of official documents which had already been issued (namely the official ID documents) carry less weight than those originals.

[48] I further note that, although the Respondent has also had an opportunity to consider the backgrounds of the persons who signed the petition (or check whether they originated from Jalalabad or nearby) but has

not come forward with any information about their backgrounds adverse to the Appellant. Having said that, none of those signatories have come to give evidence and have their accounts tested, so the evidential value of that petition is limited.

[49] There is one document which appears to carry greater weight than the others and that is the document issued by the hospital where" JK "is said to have been born. This does not appear to be a duplicate copy issued by the hospital but a copy of the original document issued contemporaneous to" JK's "birth. I remind myself that the Respondent has not produced any evidence specifically stating that this document has been forensically analysed and found not to be genuine. Moreover, as she was not alive in 2006 she is not tainted by any appearance at the BHC in New Delhi. Accordingly, on the face of it, I see no reason not to accept it as genuine and therefore as proof that" JK "was born in Jalalabad which suggests that she is Afghani.

[50] Of course, there is the argument that just because someone is born in Jalalabad does not mean they are Afghani – they might have been living there temporarily. However, it can also be argued that if the family were having the problems they apparently said they were having as Sikhs living in Afghanistan, if they were Indian this begs the question why they simply did not return to India. There is no suggestion that India holds any fears for them, just that they do not wish to go there because they are Afghanis and not Indians.

[51] Having said all the above, however, I return to an inescapable fact and that is that IJ Hanratty made findings that the Appellant, his wife and eldest child all attended at the BHC in New Delhi, were photographed whilst they were there, and produced Indian passports in their names in support of visit visa applications to come to the UK. No new evidence (such as a forensic analysis from an expert stating that the people in the photographs are not the Appellants before me, or a report from the Indian authorities confirming that the passports used by them in support of those applications were not genuine) has been produced to challenge those findings. The additional evidence of their association with Afghanistan may add to their case but is of such a nature that it does not overcome the existing significant disadvantage produced by IJ Hanratty's findings.

[52] In conclusion, whilst I acknowledge that there is more evidence before me than was before IJ Hanratty in support of the Appellants being Afghanis, the answer to the question of the nationality of this family (the burden of proof being on the Appellants) remains firmly on the side of them being Indian. On that basis, I too find that they are Indian nationals. In this regard however I remind myself that the children of the Appellant and his wife are not culpable when the question of responsibility for their fraudulent practice in maintaining that they are Afghanis is considered."

Discussion regarding nationality issue

10. The Judge considered the findings made by IJ Hanratty as the starting point for his consideration of the facts of the case, considered the fresh evidence that had been supplied since then in detail, analysed that evidence in detail, and reached findings that were open to him on the evidence. He was required to do all of these things. He identified and

applied the correct burden and standard of proof. It was a matter for him what weight to place on all the pieces of evidence. It has not been suggested that he missed anything out of his consideration or that he considered something that was not relevant. The grounds amount to nothing more than a disagreement with findings the Judge was entitled to make on the evidence before him. The fact that a different Judge may have reached a different conclusion is not the test. The Judge made no material error of law regarding the nationality issue.

The children

11. The Judge dismissed the applications that were made under paragraph 276 ADE of the Immigration Rules. I set out his findings in relation to that below.

"[53] I now consider the position under paragraph 276ADE, and most specifically, paragraph 276ADE (iv), which states:

> "(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); and it would not be reasonable to expect the applicant to leave the UK".

[54] There is also paragraph 276ADE (vi), which states:

> "(vi) subject to sub- paragraph (2) [which does not apply here], is aged 18 years or above, has lived continuously in the UK for less than 20 years (discounting any period of imprisonment) and there would be very significant obstacles to the applicant's integration into the country to which he would have to go if required to leave the UK."

[55] Paragraph 276ADE (iv) applies particularly to the children" HS "(now aged 12 or 13) and "JK" (now aged 8 or 9), the former having attended school in the UK for over seven years now, with "JK" not far behind. The question I have to decide is whether requiring them to move to another school in India, is "reasonable" at this stage in their education. I note that "HS" is particularly settled into his school and is doing well, that he has a number of connections and interests outside his home environment and that his teacher considers that he would be "devastated" if he had to leave his school at this point. I further note that it is argued that he is at a crucial age and time in his educational career, the early teens, when significant choices have to be made.

[56] There is no information before me as to whether there is a suitable school in India for him to go to but it is the case that that India has a very well-developed education system. Moreover, English is the joint official language in India (together with Hindi) and there should be no cultural difficulties in the sense that the family is a Sikh family and therefore should be able to integrate with other Sikhs there. I appreciate that moving schools and countries may be daunting to a 13 year old, but that would be entirely natural and not a feature particular to "HS" – there is no medical evidence in support of his teacher's contention. Accordingly, on this question I consider that the scales come down on the side of concluding that it would not be unreasonable to expect" HS "to leave the UK.

[57] The issue is less well developed for "JS" since she has not been in the UK education system as long as "HS", and she is not at as crucial a stage as he

is. Having said that she has also embraced the educational opportunities here wholeheartedly and has an outward looking approach. However, even though in her case she has no recollection of a life abroad since she came here as a baby, I am drawn to the same conclusion as with" HS ", namely that it would also not be unreasonable for her to leave the UK at this stage in her development.

[58] It therefore follows that if an application was made today under paragraph 276ADE it would not be successful as regards these two children, which in turn means that the family as a whole would not be entitled to remain in the UK.

[59] In respect of paragraph 276ADE (vi), having agreed with IJ Hanratty's findings that the whole family are Indian; noting that it is likely that they would find Sikh communities in India and therefore be able to practise their religion freely; and there being no allegation from them that they are under any threat from anyone if they return there, I cannot see that there would be any "very significant obstacles to the applicant's integration into the country to which he would have to go if required to leave the UK."

[60] Accordingly, paragraph 276ADE (vi) also remains unsatisfied."

12. The Judge quoted extensively from Gulshan (article 8-new rules-correct approach) [2013] UKUT 640 (IAC) and extracted section 117A and 117B of the 2002 act. He then sets out his findings regarding the children within the context of the rules.

"[71] The situation here is that I have found that it would not be unreasonable for the two eldest children to return to India. Moreover, as they and the rest of their family would be able to follow their religion in India without difficulty and they would be able to participate in the developed Indian education system, I cannot see that any of the criteria set out in the paragraph above would not be satisfied. It therefore follows that Section 55 is satisfied. They are Indians being educated in India and they are not a threatened minority.

[72] I also note that their private lives have been accumulated when their immigration position was precarious (since they had no leave to remain here and had not made a voluntary departure) and that therefore the public interest lies in their removal.

[73] Taken together, I do not consider that all the above factors cumulatively amount to exceptional circumstances that justify the family's case being considered under the residual Article 8 provisions. I do not consider that it would be "*unjustifiably harsh*" for the family to return to India, especially since they have not alleged any persecutory fear of that country. I therefore conclude that the Appellants have failed to show that there are any sufficiently exceptional circumstances in their case which would justify considering their cases outside the Immigration Rules."

13. The Judge then sets out the law on proportionality should that stage have been reached, which in his judgement it had not, followed by his findings on that issue.

[77] On the question of proportionality generally, I would have noted that the House of Lords in the cases of Huang and Kashmiri [2007] 11 said that the "ultimate question" was whether the refusal of leave to enter or remain, (in circumstances where the life of the family could not reasonably be expected to be enjoyed elsewhere), taking full account of all considerations weighing in favour of the refusal, prejudiced the family life of the applicant in a manner sufficiently serious to amount to a breach of the fundamental right protected by Article 8. If the answer to this question is affirmative, the refusal is unlawful. It is not necessary to ask in addition whether the case meets a test of exceptionality. However, I also would have taken account of the requirements of sections 117A and 117B of the Nationality, Immigration and Asylum Act 2002 as set out above.

[79] I would have noted that against the Appellants was the fact that they have no right to remain in the UK under the Immigration Rules and that their private lives had developed when their immigration positions were precarious. Moreover, I would have taken account of the fact that the adults maintained that they were Afghanis whereas the evidence before me indicated to a significant degree that they are Indians. This in turn means that they continue not to tell the truth about their origins, which is a significant point when it comes to assessing proportionality. Moreover, I would have noted that they were Sikhs returning to a country where Sikhs are not persecuted but are allowed to practise their religion freely. They would likely be able to find and be assimilated into Sikh communities, if that was their preference, as they have been assimilated into a Sikh community here in the UK. Language would not be a problem since they speak and/or understand English and Punjabi (another language spoken in India). India has a thriving economy and a well-developed educational system so they would have opportunities there which, if their history in the UK is anything to go by, they would embrace. I see little or no disadvantage in them relocating to India.

[80] In their favour are the facts that since arriving in the UK they have integrated into the culture here; they have otherwise been model citizens; they have remained here for more than seven years and have taken advantage of the opportunities that presented themselves to them, including taking advantage of a health-care system that the Respondent considers they were not entitled to. The children of school age have done well. However, such matters are what I would expect any visitors to these shores to respect and so there is nothing of any real significance in their behaviour to date which is determinative of the issue before me.

[81] Taking all these matters into account, even if I had gone on to consider Article 8 outside the Rules, I would still have conclusively decided that their removal would not be disproportionate."

Discussion regarding the children

14. I do not accept that the Judge incorporated a test of exceptionality into the proportionality balancing exercise because he specifically excluded that in [77]. He correctly applied it when considering whether Article 8 could be considered at all (SSHD v SS (Congo) [2015] EWCA Civ 387, Haleemudeen v SSHD [2014] EWCA Civ 558).

15. It is correct that the Judge did not quote section 117D(1) of the 2002 act. He did not need to because having already found the children had lived here 7 years they were therefore qualifying children which meant that he had to consider section 117B (6)(a) and (b) of the 2002 act which he plainly did given what he said in [77].

16. One only has to read these findings to see that the Judge looked at the children's cases individually at [55-57 and 71]. He did not then have to repeat that same information when he considered Article 8 later on in the determination. He did not visit the sins of the parents on the children (see for example sentence 4 of [49]) and made no reference to their parents' behaviour or their own "precarious status" in [55-57 or 71]. He delineated the parents' behaviour from that of the children (sentence 2 of [79]). He fully considered whether having been here for 7 years (which he accepted) it would be reasonable for them to return to India. The fact that a different Judge may have reached a different conclusion is not the test. He looked at Article 8 through the prism of the immigration rules which was what he supposed to do (Patel & Others v SSHD [2013] UKSC 72).

17. In those circumstances I am not satisfied that there was a material error of law regarding the way he considered the evidence regarding the children.

Decision:

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

I do not set aside the decision.

The decision of the First-tier Tribunal dismissing the Appellants' appeals stands.

Signed:
Deputy Upper Tribunal Judge Saffer
6 July 2016