IAC-AH-KRL-V1

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/43096/2014
IA/43092/2014
IA/43082/2014
IA/43086/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 7 January 2016	**On 28 January 2016**

Before

UPPER TRIBUNAL JUDGE GOLDSTEIN

Between

MR DHARMENDRA JASHVANTLAL PATEL
MRS VAISHALI DHARMENDRA PATEL
MISS AASHNA DHARMENDRA PATEL
V P
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr J M Rene, Counsel, instructed by Messrs Eagles Solicitors
For the Respondent: Mr S Walker, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is an appeal by the Appellants, a husband and wife and their two children who are all Indian nationals, although VP was born in the UK on 16 June 2012 and as Mr Rene rightly made clear at the outset of the hearing, the focus of this appeal centres on this minor child, whose father was born on 16 March 1974, his mother on 30 May 1976 and his sister Aashna on 12 March 1997.

2. They appeal against the decision of First-tier Tribunal Judge Haria who following a hearing at Hatton Cross on 27 April 2015 and in a decision subsequently promulgated on 7 July 2015, dismissed the appeals of the Appellants against the decision of the Respondent dated 28 October 2014, to refuse to grant to them leave to remain in the United Kingdom and to remove them by way of directions under Section 10 of the Immigration and Asylum Act 1999.

3. The First-tier Tribunal Judge helpfully pointed out at paragraph 6 of his determination, that the Reasons for Refusal Letter of 28 October 2014, explained that the application for further leave to remain was reconsidered under Article 8 of the ECHR further to an agreement to reconsider the Appellants' application, taking into account Section 55 of the Borders, Citizenship and Immigration Act 2009 and the Immigration Rules put in place on 9 July 2012 under Appendix FM.

4. The brief immigration history of the Appellants has been succinctly set out by the First-tier Tribunal Judge in his determination, namely that on 1 February 2007 Mr Patel entered the UK with leave to remain until 18 July 2007 and had remained in the UK unlawfully ever since.

5. On 10 November 2008, Mrs Patel entered the United Kingdom on a visitor visa for business valid until 4 May 2009 and her daughter Aashna was granted entry clearance in line with her mother. They too have remained in the UK unlawfully ever since.

6. On 16 June 2012, VP was born in the UK.

7. On 10 September 2012, the Appellants applied for leave to remain outside of the Immigration Rules and their application was refused on 14 October 2013, because Mr Patel's partner and children were not British citizens or settled in the UK and that it was considered reasonable for them to return to India as a family unit.

8. Subsequently an application for judicial review was made, as a result of which, the Respondent by way of a Consent Order, agreed to reconsider the Appellants' application. Following that reconsideration, the Respondent issued the Reasons for Refusal Letter of 28 October 2014.

9. VP is 3 years old and, as set out in the grounds, is physically and mentally handicapped. Indeed the First-tier Tribunal Judge at paragraph 42 of his determination accepted that VP had cerebral palsy affecting his left side and also left sided hemiplegia that was confirmed by the medical evidence produced. VP had

been having speech and language therapy as well as physiotherapy. The Judge continued at paragraph 42:

> "He is only 3 years old … and given his young age and dependency on his parents he would not have acquired a family or private life in the UK independent of his parents and it is clear that his best interest lies in conserving the exceedingly powerful and not insignificant caring and nurturing relationship between himself and his parents. So if both his parents are to be removed then it is in his best interests to be removed with them. Since VP is still quite young it is reasonable to expect that he will easily adapt to life in India with the support of his parents".

10. The Judge continued over paragraphs 43 and 44 as follows:

> "43. I note the letter from Dr Dinesh N Thakkar a Consultant Orthopaedic Surgeon from Long Life Hospital Ahmedabad which states the treatment for VP's condition can take a long time and is costly. I also note that the Respondent submits that the Indian Institute of Cerebral Palsy (IICP) which is based in Kolkata but works on a national level in partnership with a closer network of NGOs in many districts in West Bengal and eleven other States of India, offers a specialist resource for cerebral palsy including school services. It is clear that treatment for his condition is available in India.
>
> 44. Considering all the evidence I do not accept that there would be very significant obstacles to VP's integration into India".

11. The Judge noted the Appellants' Counsel submission, that in the event that the Appellants did not satisfy the relevant parts of paragraph 276ADE, that the remaining issue in the case was the consideration of their Article 8 rights outside the Immigration Rules and in the case of VP, there were issues as to his health and considerations under Section 55.

12. The Judge found that since the Appellants for the reasons given, could not meet the Immigration Rules, it was incumbent upon him to consider the application outside of the Rules with reference to Article 8 of the ECHR.

13. At paragraph 49 of his determination, the Judge recognised that the Respondent and the Tribunal were subject to a duty under Section 55 to assess the best interests of children who were in the United Kingdom. He referred to the case law guidance given in ZH (Tanzania) [2011] UKSC 4 and in Zoumbas [2013] UKSC 74. The Judge noted that in the latter case, the Supreme Court confirmed that the best interests of a child formed an integral part of the proportionality assessment under Article 8 and that those best interests must be a primary consideration, although they would not always be the only primary consideration and did not themselves have the status of a paramount consideration. He noted that the best interests of a child might be outweighed by the cumulative effect of other considerations. The Judge observed that "*a child must not be blamed for matters which he or she is not responsible such as the conduct of a parent*".

14. The Judge continued by giving a recent example of the correct approach in EV (Philippines) and Others [2014] EWCA Civ 874, noting that in that case it was held,

that the Tribunal had been entitled to find that the need to maintain immigration control outweighed the children's best interests, notwithstanding a finding of fact that those best interests lay in continuing their education in the United Kingdom in the care of their parents whom the Secretary of State proposed to remove with the whole family as a unit. In that regard the Judge noted that in the present case, the Appellants lived together as a family unit. It was accepted by the Respondent that Mr and Mrs Patel had a genuine marriage.

15. The Judge proceeded to undertake a comprehensive consideration of relevant case law that he set against the backdrop of the facts as found and he concluded inter alia, for example at paragraph 54, that on the facts of the case it seemed to him that:

> "… this is a case where over the seven or so years that the Appellants (except for VP who is in my view too young to have established a private life of his own) have been in the UK they must have at the very least established a private life and as a result Article 8 is engaged".

16. The Judge was entirely satisfied that to remove the Appellants to India would amount to an interference with their right to respect for at least their private life and possibly even their family life and that such interference would be of such gravity as to engage Article 8.

17. The Judge referred to the oral evidence given before him by Mr and Mrs Patel and their daughter Aashna finding all of them to be *"honest truthful and credible"* and that they did not seek *"to embellish their case and responded to questions in an open and sincere manner"*.

18. He noted the evidence that Mr and Mrs Patel had no academic qualifications and had been working in various jobs while in the UK and that they claimed that their employment prospects in India were poor and that they would be able to get jobs in the UK once their immigration status was resolved.

19. The Judge continued at paragraph 58 of his determination as follows:

> "In relation to their children, if they were to be returned to India, there is no guarantee that they would be able to get VP into a suitable school and Aashna into university. They would have to have a job so that they could pay for their education. They do not own a property in India so they would have to find somewhere to live on return to India. Mrs Patel's parents are not able to assist them financially but they may be able to accommodate them initially".

20. Within the Judge's consideration of relevant case law, he placed particular emphasis on the decision of the Upper Tribunal in MK (Best interests of child) [2011] UKUT 00475 (IAC).

21. The First-tier Tribunal Judge referred to the comments of Jackson LJ in EV Philippines, at paragraph 60, that he considered to be particularly relevant to the present case as the circumstances were very similar, noting as follows:

> "In our case none of the family is a British citizen. None has the right to remain in this country. If the mother is removed, the father has no independent right to remain. If the parents are removed then it is entirely reasonable to expect the children to go with them … it is obviously in their best interests to remain with their parents. Although it is, of course a question of fact for the Tribunal, I cannot see that the desirability of being educated at public expense in the UK can outweigh the benefit to the children of remaining with their parents. Just as we cannot provide medical treatment for the world, so we cannot educate the world".

22. The Judge noted at paragraph 35 of EV Philippines further guidance had been offered regarding consideration of the best interests of children.

23. At paragraph 66 and 67 of his determination the Judge had this to say:

> "66. Applying the principles and bearing in mind the guidance offered in the above cases, in my view in this case the best interest of VP certainly lies in remaining with his parents. In relation to Aashna she is now 18 years old and she could if she wishes remain in the UK to pursue her studies subject to obtaining a LTR to do so in her own right".

24. I have already cited above what the Judge had to say in relation to VP at paragraph 42 of his determination and in terms repeated at paragraph 67.

25. The Judge continued by observing that the Appellants were not British citizens, they were overstayers and they had no rights to future education or healthcare in this country.

26. The Judge in continuing his assessment of the Appellants' human rights appeal under Article 8, returned specifically to the question of VP's medical condition at paragraph 76 as follows:

> "76. I note VP's medical condition. There was no objective evidence before me that any treatment required would not be available in India. In fact the letter from Dr dinesh N Thakkar, a Consultant Orthopaedic Surgeon from Long Life Hospital, Ahmedabad states that treatment for VP's condition that can take a long time and is costly. The respondent has put forward evidence that the Indian Institute of Cerebral Palsy (IICP) which is based in Kolkata, works or national level in partnership with a close network of NGO's in many districts in West Bengal and 11 other states of India offer a specialist resource for cerebral palsy included in the school services. It is clear from this that treatment for VP's condition is available in India. I appreciate the treatment may not be provided free by the state in India, but to allow VP and his family to remain in the UK would be an undue burden on the UK taxpayer. For the reasons given, I do not consider that VP's medical condition amounts to exceptional circumstances and I find that his removal to India in the care of his parents would not amount to a serious detriment to his well-being."

27. In considering proportionality the Judge took into account the factors set out in Sections 117A and 117B of the 2002 Act that required him to take into account the considerations listed in Section 117B in all cases. He considered "*the public interest*"

question namely whether an interference with a person's right to respect for private and family life was justified under Article 8(2). In that regard, the Judge continued by reciting further case law guidance that included Dube (ss.117A-117D) [2015] UKUT 00090 (IAC) that recognised that Judges were duty bound to have regard to the specified considerations not least in relation to the public interest. He noted that 117B(4) and (5) were clear that little weight should be given to a private life that was established by a person at a time when the person was in the United Kingdom unlawfully and that established by a person at a time when his/her immigration status was precarious.

28. The Judge concluded over paragraphs 82 and 83 of his determination as follows:

> "82. For the reasons given above and having regard to the age of the children, the nature and extent of their integration into UK society, the length of time they have been in the UK being seven years (in the case of Aashna during her most formative years of her life) and the close family unit in which they live, the fact that it is intended they will be removed as a family unit, that for the reasons stated above the need to maintain effective immigration control outweighs their rights to family and private life. Mr and Mrs Patel do not speak English, they have not shown they have integrated into society in the UK. They have both been working on odd jobs but there is no evidence before me that they have paid any tax or National Insurance. There will obviously be some burden on the taxpayer in that children will be entitled to education, if Aashna decided to go to university depending on Mr and Mrs Patel's earnings it is highly likely that Aashna will be entitled to the grant funding for both her tuition fees and living expenses and VP would be entitled to State funded education. The family will be entitled to access the National Health Service. This will be a burden on the taxpayer.
>
> 83. On balance for the reasons stated above I find the public interest considerations are not in the Appellants' favour and the removal decisions are proportionate".

29. The Judge thus proceeded to dismiss the appeal under both the Immigration Rules and on human rights grounds.

30. In granting permission to appeal, First-tier Tribunal Judge P J M Hollingworth noted in summary, that at paragraph 44 of his determination, the Judge had stated that in considering all the evidence it was not accepted that there would be very significant obstacles to VP's integration into India. Judge Hollingworth considered it arguable that the Judge had failed to assess the consequences of VP's integration into India *"if in fact he is unable to receive treatment because of costs."*

31. FtJ Hollingworth concluded:

> "An arguable error of law has arisen in relation to the presence or adequacy of any findings as to the relationship between the length and cost of treatment of VP and the effect upon VP of such treatment or the absence of such treatment and the implications for his integration and of the significance of such a finding in the context of the application of Section 55 and in the proportionality exercise".

32. Thus this appeal came before me on 7 January 2016, when my first task was to decide whether the determination of the First-tier Tribunal Judge disclosed an error or errors on a point of law such as may have materially affected the outcome of the appeal.

33. At the outset of the hearing, I drew to the parties' attention the guidance of the Upper Tribunal in Akhalu (health claim: ECHR Article 8) [2013] UKUT 400 (IAC) and GS (India) and Others v SSHD [2015] EWCA Civ 40.

34. The head note in Akhalu reads as follows:

> "(1) MM (Zimbabwe) v Secretary of State for the Home Department [2012] EWCA Civ 279 does not establish that a claimant is disqualified from accessing the protection of Article 8 where an aspect of her claim is a difficulty or inability to access healthcare in her country of nationality unless possibly her private or family life has a bearing upon her prognosis. The correct approach is not to leave out of account what is, by any view a material consideration of central importance to the individual concerned **but to recognise that the countervailing public interest in removal will outweigh the consequences for the health of the claimant because of a disparity of healthcare facilities in all but a very few rare cases**.
>
> (2) The consequences of removal for the health of a claimant who would not be able to access equivalent healthcare in their country of nationality as was available in this country are plainly relevant to the question of proportionality. **But, when weighed against the public interest in ensuring that the limited resources of this country's health service are used to the best effect for the benefit of those for whom they are intended, those consequences do not weigh heavily in the claimant's favour but speak cogently in support of the public interests in removal**" (emphasis added).

35. The Court of Appeal in GS (India) followed a consistent line of domestic and Strasbourg authority when it was held (indeed upholding the Upper Tribunal's decision that was referred to in Akhalu) that foreign nationals may be removed from the UK even where by reason of a lack of adequate healthcare in a destination State, their lives would be drastically shortened. Such action would not, save in the most exceptional case infringe Articles 3 or 8 of the ECHR. However Laws LJ at paragraph 86 went on to say:

> "If the Article 3 claim fails (as I would hold it does here) Article 8 cannot prosper without some separate or additional factual element which brings the case within the Article 8 paradigm – the capacity to form and enjoy relationships – or a state of affairs having some affinity with the paradigm".

36. Notably the court referred to what had been said in its earlier decision in MM Zimbabwe at paragraph 23:

> "The only cases I can foresee where the absence of adequate medical treatment in the country to which a person is to be deported will be relevant to Article 8 is where it is an additional factor to be weighed in the balance with other factors which by themselves engage Article 8. Suppose, in this case, the Appellant had established firm family ties

in this country, then the availability of continuing treatment here, coupled with his dependence on the family here for support, together establish private life under Article 8 …

Such a finding will not offend the principle expressed above, that the United Kingdom is under no Convention obligation to provide medical treatment here when it is not available in the country to which the Appellant is to be deported".

37. Under the subheading "The Article 8 claims" at paragraph 85, Laws LJ continued as follows:

> 85. It is common ground that in cases where the claimant resists removal to another State on health grounds, failure under Article 3 does not necessarily entail failure under Article 8. In her skeleton argument at paragraph 55 Ms Giovaneeti for the Secretary of State cites JA (Ivory Coast) and ES (Tanzania) v SSHD [2009] EWCA Civ 1353 in which the Appellants had been given a "de facto commitment" that they would be allowed to remain in the UK for treatment. Sedley LJ with whom Longmore and Aikens LJJ agreed said this at paragraph 17:
>
> > "There is no fixed relationship between Article 3 and Article 8. Typically a finding of a violation of the former may make a decision on the latter unnecessary; but the latter is not simply a more easily accessed version of the former. Each has to be approached and applied on its own terms and Ms Giovaneeti is accordingly right not to suggest that a claim of the present kind must come within Article 3 or fail. In this respect as in others these claims are in Mr Knafler's submission distinct from cases such as D and N in both of which the Appellant's presence and treatment in the UK were owed entirely to their unlawful entry".

38. Thus it followed that Article 8 might be taken in circumstances where the combination of family life and problematic health could lead to an Article 8 *"health case"*.

39. Notably Mr Rene for the Appellants confirmed to me, that the challenge to the First-tier Tribunal Judge's decision in this case was essentially predicated upon his findings in relation to VP. Mr Rene accepted that the First-tier Tribunal Judge had made reference to all relevant case law but felt *"she has erred – mindful of whether it is a material error of law when she records at paragraph 33 that the father had debts and family problems in India and no property there. There were no credibility issues in relation to that"*.

40. Mr Rene also referred to paragraph 58 of the determination when the Judge was clear that there was *"no guarantee that they would be able to get VP into a suitable school …"*.

41. Mr Rene continued, that the Judge had thus made clear findings as to the difficulties the Appellants would face on return to India and in VP accessing medical treatment in India because of the cost factor. He continued that when one looked at EV (Philippines) it was important for the Judge to have borne in mind, that the precarious immigration history of the parents should not be held against the children.

42. In that regard and to put the Judge's findings in that regard into their proper context, not least in his recognition that the circumstances of the Appellants were not dissimilar to that of the Appellant in EV, I referred Mr Rene to what the Judge had to say at paragraph 62 when quoting from paragraph 60 of EV and then at paragraphs 64 and 67 .

43. Mr Rene further submitted that the guidance in GS (India) concerned adults. I do not share that view, the guidance in terms of *"health cases"* referred to applicants in general.

44. Mr Rene further submitted that it was not for the Respondent in terms of the consideration of Section 55, to pay lip service to its provisions but to approach the matter with care.

45. Upon my consideration of the letter of refusal, it is apparent that in terms of Mr and Mrs Patel's children and in particular that of their youngest child VP, that such care on the part of the Respondent was clearly demonstrated. Indeed I note under the subheading "Decision under Exceptional Circumstances" the Respondent stated *inter alia*:

> "Whilst you have raised the fact that your clients' youngest child VP Dharmendra suffers from Subdural haemorrhage with a midline shift and cerebral palsy which has a debilitating effect on his gross motor skills, you have also raised the fact that your clients' son does not currently take any regular medications. However evidence such as NHS reports dated 29 May 2014 confirmed that your clients' son VP … has been making significant improvements in his motor skills. He can now work independently and is steadier on his feet.
>
> Based upon current research into India's medical facilities from doctors and other experts working there in the Indian Institute of Cerebral Palsy (IICP) there is a specialist resource centre for cerebral palsy working since 1974 for the rights of persons with disability particularly cerebral palsy. IICP is based in Kolkata but works on a national level in partnership with a close network of NGOs in many districts of West Bengal and another eleven States of India. It has vast international linkages and is working with advocacy groups nationally and internationally for the implementation of the UN Convention on the Rights of Persons with Disabilities.
>
> IICP offers multifaceted services to infants, children and adults with cerebral palsy and a range of training programmes for persons with disability, parents and family members, professionals, students and personnel working in the community.
>
> IIPC also offer school services which your clients' son would be able to enter. The schools offer different types of facilities and therapy for students that take into account their strength and needs [reference is then made to the appropriate website].

> Therefore it is not accepted that there are exceptional circumstances which would mean removal is inappropriate in your case whilst this may involve a degree of disruption to your private life this is considered to be proportionate to the legitimate aim of maintaining effective immigration control".

46. The Respondent in her letter, separately considered matters in terms of Section 55, pointing out that the situation as relating to the two children had been carefully considered and that:

> "Your clients would be returning to India with their children and would be able to support them whilst they became used to living there and enjoying their full rights as citizens of India. Your clients' children may be currently enrolled in education in the United Kingdom but it is clear from the objective information available that India has a functioning education system which their children would be able to enter. Your clients have not provided any evidence which indicates that they would be unable to maintain their children in India, or that they would be unable to provide for their safety and welfare.
>
> Your clients and their children would return to India as a family unit and continue to enjoy their family life together. Whilst this may involve a degree of disruption to their private life this is considered to be proportionate to the legitimate aim of maintaining effective immigration control and is in accordance with our Section 55 duties. It has been decided that a grant of leave outside the Rules is not appropriate. Your clients' application for leave to remain in the United Kingdom is therefore refused".

47. The above referred matters were of course clearly taken into account by the First-tier Tribunal Judge in the course of his reasoned determination.

48. Mr Rene further submitted that there was an absence of findings in relation to whether VP would be able to access the medical treatment he required. In that regard I referred him, not least to paragraph 76 of the Judge's determination, that made reference to the IICP and which I have set out in full above.

49. Notably Mr Rene concluded his submissions by accepting that *"one cannot go behind case law"*.

50. Mr Walker in response, considered that the Judge's findings at paragraph 76 were most important and that the Judge had gone on to consider VP's medical condition appreciating that the medical treatment might not be provided free of charge in India.

51. Upon a reading of the Judge's determination as a whole, Mr Walker submitted that it did not disclose any material error of law.

52. There was no response from Mr Rene to Mr Walker's submissions.

53. I reserved my decision.

Assessment

54. I am entirely satisfied that the determination of the First-tier Tribunal Judge discloses no material error on a point of law. Indeed I find that this was a detailed determination prepared with evident care in which the Judge gave the most careful consideration to relevant case law guidance in terms of Article 8 that he applied against the backdrop of the facts as found, not least in relation to the Appellant VP Patel. It is apparent to me that in considering the proportionality of the Appellants' removal to India and in the light of his treatment of the authorities, I find that it cannot reasonably be said that the Judge did not have the correct principles in mind nor do I think that there was any basis for saying that he misdirected himself by applying the wrong legal test.

55. It is apparent that the Judge for reasons supported by and open to him on the evidence, was not satisfied not least in relation to VP, that there were any compelling circumstances in the present case, such as to show that the removal of the family as a unit would be disproportionate. Indeed, had the Judge allowed this appeal it would suggest that anyone admitted to the United Kingdom on a temporary basis who was in need of medical treatment that he could not find in his own country would be entitled to the benefit of Article 8.

56. In any event and in the present case, the Judge found that VP indeed could access any such medical treatment from the IICP, the Indian Institute of Cerebral Palsy that as was noted, worked on a national level in partnership with a closer network of NGOs in many districts in West Bengal and eleven other States in India offering a specialist resource for cerebral palsy, including school services.

57. As a matter of law this appeal cannot succeed. The Secretary of State of course retains a broad discretion notwithstanding that, but that is a matter for the Secretary of State and not the Tribunal.

58. I note that in the course of his determination, the First-tier Tribunal Judge also referred to the submissions of the Appellants' Counsel with reference to the decision in Iftikhar Ahmed v SSHD [2014] EWHC 300 (Admin) where the "Partner and ECHR Article 8 guidance" of October 2013 provided guidance for officials as to the meaning of exceptional circumstances and insurmountable obstacles from which the Judge quoted that included the following:

> "However leave can be granted outside the Rules where exceptional circumstances apply. Where an applicant fails to meet the requirements of the Rules caseworkers must go on to consider whether there are exceptional circumstances. 'Exceptional' does not mean 'unusual' or 'unique'. Whilst all cases are to some extent unique, those unique factors do not generally render them exceptional. For example a case is not exceptional just because the criteria set out in EX.1 of Appendix FM have been missed by a small margin. Instead 'exceptional' means circumstances in which refusal would result in unjustifiably harsh consequences for the individual or their family such that refusal of the application would not be proportionate. That is likely to be the case only very rarely".

59. It is apparent on the basis of the Judge's comprehensive and reasoned findings in the present case, that the circumstances of the Appellants and in particular VP, simply did not cross this high and rarely found threshold. Such of course was reflected by the Tribunal in Akhalu (above) not least at subheading (2) and in the guidance of the Court of Appeal in GS (India).

60. Mindful of the guidance of the Court of Appeal in R (Iran) [2005] EWCA Civ 982 I find that it cannot be said that the First-tier Tribunal Judge's findings were irrational and/or Wednesbury unreasonable, such as to amount to perversity. It cannot be said that they were inadequate. This is not a case where the First-tier Tribunal Judge's reasoning was such that the Tribunal were unable to understand the thought process that he employed in reaching his decision.

61. I find the Judge properly identified and recorded the matters that he considered to be critical in his decision on the material issues raised before him in this appeal.

Decision

62. The making of the previous decision involved the making of no error on a point of law and I order that it shall stand.

63. No anonymity direction is made.

Signed Date: 23 January 2016

Upper Tribunal Judge Goldstein