Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: HU/13840/2015
HU/13844/2015

THE IMMIGRATION ACTS

Heard at Field House **Decision & Reasons Promulgated**
Heard on 18th of December 2017 **27th February 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

AMTUL [K] – 1st Appellant
MOHAMMAD [K] – 2nd Appellant
(Anonymity order not made)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: The Appellants did not appear and were not represented
For the Respondent: Ms J Isherwood, Home Office Presenting Officer

DECISION AND REASONS

The Appellants

1. The Appellants are both citizens of India and are wife and husband respectively. The first Appellant was born on [ ] March 1981 and the second Appellant was born on [ ] August 1981. They appeal against a decision of Judge of the First-tier Tribunal Mailer sitting at Hatton Cross on 14th of February 2017 who dismissed the Appellants' appeals against

decisions of the Respondent dated 2nd of December 2015. Those decisions were to refuse their applications for further leave to remain in the United Kingdom made on 8th of April 2015 pursuant to Article 8. The applications were based on the medical condition of their child A born on 14th of December 2014. The first Appellant was the lead Appellant and I will therefore refer to her as the Appellant. The 2nd Appellant was dependent upon her appeal.

The Appellants' Case

2. The Appellants married on 12th of January 2007 and their first child Y was born on [ ] September 2007 in India. The Appellant first entered the United Kingdom as a student on 17th of February 2011 with leave to remain until 29th of February 2012. She was granted a further period to remain as a student until 10th of April 2015. The 2nd Appellant entered the United Kingdom at the same time as her dependent and was included in her subsequent application. Their son Y entered the United Kingdom as the Appellant's dependent with leave until 10th of April 2015. The Appellant gave birth to 2 daughters the first Al on [ ] September 2013 and subsequently A on [ ] December 2014.

3. The Appellant produced a letter from a consultant paediatrician dated 3rd of July 2015 which diagnosed that A had a bifid renal pelvis which drained into a single ureter which was dilated. Whilst A's kidneys were being investigated she had been maintained on a prophylactic antibiotic to avoid her developing a urinary infection. This was not a kidney function problem as such but rather a potential structural problem which was unlikely to have any long-term consequences for her. She required monitoring by ultrasound scans to assess the drainage of urine from her right kidney. She was unlikely to need any other surgical or medical intervention. If she were to remain in United Kingdom arrangements would be made for her to have ultrasound and clinic appointments every 6 months.

4. The Appellant also argued that the 2nd Appellant had borrowed money from moneylenders to pay for his mother's treatment and the amount was increasing day by day because of interest. If required to return to India any money that her husband would make would be taken away by the lenders.

5. The Respondent refused the application. Although it was accepted that the first and 2nd Appellants had a genuine and subsisting relationship, as neither were British citizens they could not meet the requirements of section EX. 1(B) of Appendix FM. Neither would face significant obstacles to their integration into India. They had spent 29 years living in India before arriving in this country. Y was 5 when he entered the United Kingdom and 7 years old at the date of application. He was not a qualifying child. A had been born in the United Kingdom but there was adequate medical treatment available for her in India. Whilst the drug she was receiving in this country had not been confirmed as being available in India there were alternative prophylactic antibiotics available there.

6. The children would be returning to India with their parents who would be able to support them whilst they got used to living there. Y was currently enrolled in education in United Kingdom but there was a functioning education system in India which the children would be able to enter. They would be returned to India as a family unit.

The Decision at First Instance

7. The Judge noted that apart from medical documents produced up to 3rd of July 2015 no further evidence relating to A's current medical condition had been produced. This was notwithstanding the direction sent to the Appellant's solicitors, who remained on the record, on 27th of September 2016. No evidence had been produced to substantiate the allegations made by the Appellant that money was owed to moneylenders or that there was a possibility of such moneylenders harming the family.

8. The Judge considered the best interests of the children noting that there was no evidence of special needs for either Y or Al. As at 3rd of July 2015 A remained well and was not suffering from any kidney function problem but from a potential structural problem which was very unlikely to have any long-term consequences. The best interests of the children were for them to continue to enjoy both their family and private lives as part of the family unit wherever they may be. There would be adequate medical treatment available for A in India should such treatment be necessary.

9. Both parents were capable of being employed, the Appellant had completed a postgraduate diploma course in United Kingdom and was enrolled on an ACC a course for which she was granted further leave to remain. She was unable to complete the course on account of her pregnancy. There was no assertion that either she or the 2nd Appellant would be unable to obtain employment in India upon return. There was no evidence that the Appellant had no other family members including extended family members who would be unwilling or unable to assist the family upon return.

10. The Judge's overall conclusion at [78] was that there would not be very significant obstacles to the Appellants' integration into India. Whilst removal might involve a degree of disruption to their private lives it was proportionate to the legitimate aim of maintaining effective immigration control. There were no compelling circumstances in the case warranting a grant of leave outside the rules. He dismissed the appeal.

The Onward Appeal

11. The Appellants appealed against this decision arguing that a letter had been sent to the Tribunal on 13th of February 2017 requesting that the appeal should be considered on the papers as the Appellants wished to make submissions by furnishing arguments as well as evidence, on the papers. The Appellants had not been provided with a date to submit the

documents and their request was ignored as the decision was silent about the fact that a request had been made by new legal representatives that the appeal should be considered on the papers. The Appellant was expecting to receive a response in relation to the letter however to his surprise he received a decision and reasons dated 6th of March 2017 refusing the appeal. The Judge should have considered the request for the appeal to be heard on the papers.

12. The application for permission to appeal came on the papers before Judge of the First-tier Tribunal Grant-Hutchison on 20th of September 2017. She found an arguable error of law that due to an administrative error the Judge did not receive the written notification, sent by fax on the morning before the hearing, requesting that the Appellants would like their appeals to be considered on the papers with a view to making submissions. It was arguable that had the Appellant's request been accepted and had they been given time it may have made a material difference to the outcome or to the fairness of the proceedings.

13. The Respondent replied to this grant of permission by letter dated 28th of September 2017. The burden was on the Appellants to show that they had taken the necessary steps for the purpose of the hearing. A last-minute fax did not justify the Appellant's lack of attendance as the appeal was listed as an oral hearing. Simply relying upon a request to have the hearing on papers was not evidence that the Appellant's request would have been accepted. In any event the Judge had paid close attention to the evidence before the Tribunal and had given detailed reasons. A different decision could not have been reached by the Judge.

The Hearing Before Me

14. In consequence of the grant of permission the matter was listed before me for hearing on Monday, 18th of December 2017 at 10 AM and notice was sent out to both the Appellant and her solicitors Lexmark Legal Associates ("Lexmark") on 13th of November 2017. The Appellant responded to this grant of permission by letter dated 13th of December 2017 which stated: "I would like my appeal to be heard on the papers. I request the court to contact me on my above-mentioned address. Please contact me in case of any further queries".

15. When the matter was called on for hearing before me there was no attendance by or on behalf of the Appellant. Although the Appellant had requested the appeal to be heard on the papers, the matter had been listed for hearing and in those circumstances it was not open for the Appellant to insist that the matter should be dealt with on the papers. I therefore heard brief submissions from the Presenting Officer before taking the papers away to prepare my decision. She relied on the Respondent's rule 24 response arguing that the Judge had looked at the evidence. The grounds did not support what had happened in the case.

Findings

16. Notice of the hearing of the appeal before the First-tier was sent by letter to the Appellants and their then solicitors Wimbledon solicitors by letter dated 27th of September 2016. This letter indicated that the appeal would be heard on Tuesday the 14th of February 2017. The Appellants were thus given almost 5 months' notice to prepare for the hearing. On 13th of February 2017 the day before the hearing was scheduled to take place new solicitors Lexmark wrote to the Tribunal asking for the appeal to be considered on the papers. The letter written by Lexmark is on the court file. Nowhere does it state that the Appellants wish to have more time to submit further evidence or make submissions.

17. It does not appear that this letter reached the Judge who heard the matter on 14th of February 2017 but it is difficult to see why that makes any difference. The letter of 13th of February from Lexmark did not contain an application for an adjournment. Even if it had the Appellants and their solicitors should not have proceeded on the basis that any application for an adjournment would automatically be granted. If they had not heard that their case had been adjourned it was their duty to prosecute the case by attending on the day of the hearing. If they did not wish to attend the hearing as the letter of 13th of February 2017 appears to indicate, that was a matter for them but as I have previously said, they cannot insist that the case be dealt with on the papers. That is a decision to be taken by the Tribunal and the views of the Respondent may have to be canvassed.

18. It is not entirely clear why permission to appeal was granted in this case since the grounds of appeal do not accurately reflect what was sent to the Tribunal the day before the hearing. Even if the grounds of appeal were correct and there had been an application for more time, there is no indication of what further evidence or submissions the Appellants would have produced to the Tribunal. It is the case that the medical evidence had not been brought up-to-date but appeared to be almost 2 years old at the date of the First-tier hearing. However that point does not assist the Appellants because there is no indication that A's medical condition has changed and that fresh medical evidence would make a difference in this case.

19. It is significant that the Appellants' present representatives Lexmark did not attend the hearing before me but instead there was a letter from the Appellant in person asking for her case to be considered on the papers. There was no further evidence. There was no request for further time just as there had been no request for further time back in February 2017. In any event there was no need for a further adjournment. Judge Mailer gave a full determination dealing with all of the evidence which was before the

Judge. There was no good reason for the absence of the Appellants and their representatives at the hearing at first instance and nothing to indicate that the Judge made any material errors of law in his determination. The determination is fully reasoned and is based on the evidence presented to the Judge. The only argument I have seen against the determination is that attached to the grounds of onward appeal. I reject those grounds for the reasons which I have set out above. The onward appeal falls away in those circumstances. I dismiss the Appellants' appeals.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error of law and I uphold the decision to dismiss the Appellants' appeals

Appellants' appeals dismissed

I make no anonymity order as there is no public policy reason for so doing.

Signed this 2nd of January 2018

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Judge Woodcraft
Deputy Upper Tribunal Judge

TO THE RESPONDENT
FEE AWARD

No fee was payable and I have dismissed the appeal and therefore there can be no fee award.

Signed this 2nd of January 2018

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Judge Woodcraft
Deputy Upper Tribunal Judge