Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: HU/17782/2016
HU/17784/2016

THE IMMIGRATION ACTS

Heard at Bradford	**Decision & Reasons Promulgated**
On 30 August 2018	**On 02 October 2018**

Before

UPPER TRIBUNAL JUDGE LANE

Between

AMANPREET [K] (FIRST APPELLANT)
GURPREET [S] (SECOND APPELLANT)
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr Lourdes, instructed by Farani Taylor, Solicitors
For the Respondent: Mr McVeety, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellants, Mr Gurpreet [S] and Mrs Amanpreet [K], are citizens of India. By a decision promulgated 10 May 2018, I found that the First-tier Tribunal had erred in-law such that the decision fell to be set aside. My reasons for reaching that finding were as follows:

> "1. I find that the First-tier Tribunal erred in law such that its decision falls to be set aside. My reasons for reaching that decision are as follows. First, I find that the judge has failed to apply the law clearly and accurately. At [18], the judge found that the child IK would not

attain seven years of residence in the United Kingdom until 10 November 2016, that is after the date of the decision which is the subject of the appeal. The child had, of course, attained seven years' residence by the date of the First-tier Tribunal hearing (3 April 2017). The judge held that he was "obliged only to consider the situation at the date of the decision and on the evidence that was before the decision maker at that time". He found that there was:

> "A strong indication that [IK] might now meet the requirements of paragraph 276ADE. No application has been made in that application. The appellants are free to make an application now that circumstances appear to have changed. That will give the respondent an opportunity to consider family circumstances within the relevant Immigration Rules."

2. The judge's approach is problematic. Under Section 85 of the 2002 Act (as amended) it was open to the judge to take account of circumstances as at the date of the hearing, when considering the appeal on Article 8 ECHR grounds. Indeed, having decided that he should consider Article 8, the judge found at [46] that he was "satisfied on the evidence before me today that the proposed removal may be an interference by a public authority with the exercise of the applicants' right to respect for … family life". Furthermore, there was no obligation upon an appellant to make a further application during the course of the appeal process. At [18] (see above) the judge appears have penalised the appellants for failing to take steps which they were not obliged to take whilst, in the human rights appeal, refusing from taking into account factors weighing in favour of the appellants at the date of hearing.

3. Secondly, the judge's approach appears to have led him into error in his assessment of Section 117 of the 2002 Act (as amended). Given that, by the date of the hearing, IK was a "qualifying child" having attained seven years' residence, the judge should have considered Section 117B(6):

> '(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—
>
> (a) the person has a genuine and subsisting parental relationship with a qualifying child, and
>
> (b) it would not be reasonable to expect the child to leave the United Kingdom.'

4. The judge considered Section 117 at [32] but he made no specific reference either there or elsewhere in the decision to the application of Section 117B(6) to the particular facts in the appeal.

5. Thirdly, as the grounds of appeal point out, the judge appears to have ignored the provisions of MA (Pakistan) [2016] EWCA Civ 705. At [45], the Court of Appeal found that "… where the seven year Rule is satisfied, it is a factor of some weight leaning in favour of leave to remain being granted". The judge should have considered Section 117B(6) as part of his analysis of the best interests of IK pursuant to section 55 of the Borders, Citizenship and Immigration Act 2009.

6. In the light of my observations set out above, I find that the judge's decision is flawed. I set it aside. The decision can be re-made

> in the Upper Tribunal. I direct that there be a resumed hearing in the Upper Tribunal before myself on a date to be fixed at Bradford. Should either party seek to rely upon fresh evidence, that evidence should be served on the other party and filed with the Upper Tribunal no less than ten days prior to the resumed hearing.
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> Notice of Decision
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> 7. The decision of the First-tier Tribunal which was promulgated on 10 April 2017 is set aside. Findings of fact are not preserved. The decision will be re-made at or following a resumed hearing before Upper Tribunal Judge Lane at Bradford on a date to be fixed (two hours).
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> 8. No anonymity direction is made."

2. I heard evidence from Amanpreet [K], the first appellant, at the resumed hearing at Bradford on 30 August 2018. She gave her evidence in Punjabi with the assistance of an interpreter. She said she had no-one living in India now. Her husband had sold his business there to a partner. The appellant and her family are supported by her sister and also friends. The child (I K) cannot read or speak Punjabi and has been now living in the United Kingdom for four years. The appellant said that, should she be forced to return to India, her life there would be "dull and faded." I also heard evidence from the second appellant, Gurpreet [S]. He adopted his written evidence as his evidence-in-chief. He told me that all his family members were now living in the United Kingdom.

3. Mr McVeety, for the Secretary of State, did not seek to support the decision of the respondent dated 10 September 2015 to refuse these appellants further leave to remain. He said that it was difficult to see why the public interest, given the particular circumstances of this case, should require the removal of the appellants and their child, IK. In the light of Mr McVeety's comments and the evidence adduced in the Upper Tribunal and First-tier Tribunal, I find that the appeal should be allowed on human rights grounds (Article 8 ECHR). I accept that family life cannot reasonably be continued in India, the ties (both familial and economic) between the appellants and their country of nationality having been effectively severed during the time which the family has resided in the United Kingdom. In any event, the child IK has now been living in this country for nearly 9 years.

Notice of Decision

4. The appeals of the appellants against the decision of the Secretary of State dated 10 September 2015 are allowed on human rights grounds (Article 8 ECHR).

5. No anonymity direction is made.

Signed Date 26 September 2018

Upper Tribunal Judge Lane