



Upper Tier Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/07522/2014,
IA/07523/2014 & IA/09933/2014

THE IMMIGRATION ACTS

Heard at Stoke on Trent
On 24 October 2014

Determination Promulgated
On 10 November 2014

Before

Deputy Upper Tribunal Judge Pickup

Between

Lay Peng Ong
Kaydence Ying En Yang
Huimin Yang
[No anonymity direction made]

Appellants

and

Secretary of State for the Home Department

Respondent

Representation:

For the appellants: Ms L Mair, instructed by Henrys Solicitors

For the respondent: Ms C Johnstone, Senior Home Office Presenting Officer

DECISION AND REASONS

1. These are the linked appeals of the appellants against the determination of First-tier Tribunal Judge Thorne promulgated 23.6.14 dismissing their appeals against the decisions of the Secretary of State, dated 23.1.14, to refuse their applications for leave to remain in the UK. The Judge heard the appeal on 9.6.14.

2. First-tier Tribunal Judge Page granted permission to appeal on 21.7.14.
3. Thus the matter came before me on 24.10.14 as an appeal in the Upper Tribunal.

Error of Law

4. In the first instance I have to determine whether or not there was an error of law in the making of the decision of the First-tier Tribunal such that the determination of Judge Thorne should be set aside.
5. The lengthy grounds of appeal raise a number of complaints about the determination of the First-tier Tribunal, including that the judge made no reference to the established case law and applied the wrong legal tests, if any were applied, and failed to properly consider the best interests of the children affected by the Secretary of State's decision.
6. In granting permission to appeal, Judge Page stated, "It is apparent from the judge's determination, which contains a paucity of reasoning and does not make easy reading, that the judge has given little, if any, weight to the position of these children." It is stated that it is not clear how the judge came to his conclusions and did not explain why the evidence was considered to be "inadequate."
7. "Consequently the ground of appeal that the judge did not apply anxious scrutiny to the position of these children is arguable. Given the paucity of reasoning in the determination and the passing reference to evidence that has been considered but not detailed, the detailed grounds that the judge has made various errors in considering the evidence may also be arguable. These appeals have a complicated background. The grounds of appeal at paragraph 3-F argue that the judge has failed to grasp relevant detail. Permission is granted for all the grounds to be fully considered by the Upper Tribunal."
8. The first difficulty is that the judge may have misapprehended what decisions were under appeal. The refusal decision of 23.1.14 was issued in respect of both parents and both children. The child appellant was 6 years of age at the date of the hearing, but another child, Charlene, was already 7 years of age, though her appeal had been ruled invalid. However, at §30 the judge appears to think that the decision in relation to the first appellant was made on 13.9.13. The 'new' decision of 23.1.14 was made after the issue of Judicial Review proceedings.
9. As these are in-country appeals, the relevant date is normally the date of decision, 23.1.14. The judge found that all applications were made after 9.7.12 and thus the 'new' Rules applied. As neither parent is a British citizen or settled in the UK, neither qualify under Appendix FM as partner. Neither parent had sole responsibility for the children and thus they did not qualify as parents of a child in the UK. As the only child appellant before the judge was still 6 years of age, she could not meet paragraph 276ADE. Neither child had in fact lived in the UK for 7 years immediately preceding the date of application. In the circumstances, there was no error of law in

finding that the three appellants did not meet the requirements of the Immigration Rules.

10. There is no merit in the argument that the judge was wrong to regard Charlene's appeal as invalid. There is no right of appeal to the Upper Tribunal against the decision made under Rule 10 of the Asylum and Immigration Tribunal (Procedure) Rules 2005.
11. The relevant provisions dealing with the right of appeal from decisions of the First-tier Tribunal to the Upper Tribunal are contained in s.11 of the Tribunals, Courts and Enforcement Act 2007 as follows:

“11. Right of appeal to the Upper Tribunal

(1) For the purposes of subsection (2), the reference to a right of appeal is to a right to appeal to the Upper Tribunal on any point of law arising from a decision made by the First-tier tribunal other than an excluded decision.

(2) Any party to a case has a right of appeal, subject to subsection (8).

(3) That right may be exercised only with permission (or, in Northern Ireland, leave).

(4) Permission (or leave) may be given by –

(a) the First-tier Tribunal, or

(b) the Upper Tribunal,

on an application by a party.”

12. The right of appeal is from any decision of the First-tier Tribunal on a point of law other than an “excluded decision.” Section 11(5) of the 2007 Act sets out what, for the purposes of subsection (1) is an “excluded” decision. None of the decisions in s.11(5), as originally enacted, are relevant to this appeal. However, Article 3 of the Appeals (Excluded Decisions) Order 2009 (SI 2009/275 as amended) added a further decision to the category of “excluded decisions” which is relevant. Article 3 states that:

“3. For the purposes of section 11(1) and 13(1) of the Tribunals, Courts and Enforcement Act 2007, the following decisions of the First-tier Tribunal or the Upper Tribunal are excluded decisions –

....

(m) any procedural, ancillary or preliminary decision made in relation to an appeal against a decision under section 40A of the British National Act 1981, section 82, 83 or 83A of the Nationality, Immigration and Asylum Act 2002, or regulations 26 of the Immigration (European Economic Area) Regulations 2006.”

13. That provision reflects the wording of s.103A(7) of the Nationality, Immigration and Asylum Act 2002 (now repealed) which excluded from the category of decisions of the Asylum and Immigration Tribunal which could be subject to the reconsideration process any “decision on an appeal” which was “a procedural, ancillary or preliminary decision”. The words “procedural, ancillary or preliminary” which define the nature of the decision remain the same; the current provision (s.11(1)) requires that the decision be “in relation to an appeal”, whilst the reconsideration framework (s.103A(7)) required it to be a decision “on an appeal”.
14. There is no doubt that the decision in this case is a “preliminary” decision by the First-tier Tribunal. Indeed, rule 10(6) of the First-tier Tribunal Procedure Rules states, inter alia, that

“The Tribunal must decide any issue as to whether a notice of appeal was given in time, or whether to extend the time for appealing, as a preliminary decision without a hearing...”
15. That reflects what must be the natural meaning, and consequent effect of, the legislative words initially in s.103A(7) of the 2002 Act and now found in Art 3(m) of the 2009 Order as amended.
16. In the circumstances, there can be no valid appeal before the Upper Tribunal against the refusal of the First-tier Tribunal to extend time so that the appeal of Charlene was not accepted as valid. That appellant’s remedy is Judicial Review of the decision.
17. I find that the First-tier Tribunal Judge properly considered whether there were arguably good grounds for considering family and private life under Article 8 ECHR outside the Rules on the basis of compelling circumstances insufficiently recognised in the Rules and which render the decision of the Secretary of State unjustifiably harsh, referencing Gulshan. However, as there was no proportionality assessment in the consideration of Appendix FM or paragraph 276ADE, which do not amount to a complete code for consideration of private and family life, the judge should have gone on to consider private and family life under article 8 ECHR. Indeed, he is required to do so under section 86 of the 2002 Act, it being a ground of appeal.
18. The judge’s treatment of article in the alternative, set out at §52 is entirely inadequate. It does not amount to a carefully proportionality assessment, balancing on the one hand the private and family life rights of the appellants and on the other the legitimate aim of the state to protect the economic well-being of the UK through objectively applied Immigration Rules. Whilst some factors militating in favour removal are mentioned, there is no indication that any factors in the appellants’ favour have been taken into account. The article 8 assessment is inadequate and flawed, amounting to an error of law.
19. I also agree with Judge Page that the judge has given inadequate reasons for several of the findings in the determination. For example, at §32 the judge did not accept that the children did not speak Cantonese with their parents. Neither did the judge

explain why some of the evidence was inadequate. There is thus an error of law in failing to provide adequate reasoning for findings of fact.

20. Without needing to go through the grounds or determination in detail, I also find and it is clear from any reading of the determination that the First-tier Tribunal failed to give adequate consideration to the children of the family and to determine their best interests. Both of the references to the children are in the negative. There is no consideration of the current case law in respect of the best interests of the children, or assessment of their length of time in the UK and the degree of settlement here, including friends, family and education. There was no finding as to the impact of their removal, other than to say that the evidence was inadequate, and no reference to the material in the appellants' bundle in support of the children. In the circumstances, I find that there is an error of law by inadequate consideration of the best interests of the children, such that the determination cannot stand and must be set aside and remade.
21. In making that finding, I must make it clear that a rehearing of the appeals could well still result in their dismissal, especially given that other factors now need to be considered, including the effect of section 117B. However, unless and until the appeals are considered with reference to the correct approach and case law, I cannot say that the outcome is inevitable or that the errors disclosed are immaterial.

Conclusion & Decision

22. The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law such that the decision should be set aside.

I set aside the decision.

The appeals are adjourned for a continuation/resumed appeal hearing.



Signed:

Date: 31 October 2014

Deputy Upper Tribunal Judge Pickup

Consequential Directions

The appeals are relisted for a continuation hearing reserved to Deputy Upper Tribunal Judge Pickup to take place at Manchester on 17.2.14, with a two-hour hearing estimate.

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Given the circumstances, I make no anonymity order.

Fee Award

Note: this is not part of the determination.

In the light of my decision, I have considered whether to make a fee award (rule 23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007).

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: The outcome of the appeals remain to be determined.



Signed:

Date: 31 October 2014

Deputy Upper Tribunal Judge Pickup