



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/22164/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 11 November 2015**

**Decision & Reasons Promulgated
On 13 January 2016**

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

**MD SALMAN FARSHI
RASHEDA BEGUM ZIMMADAR
(ANONYMITY DIRECTION NOT MADE)**

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Chowdhury, solicitors from K C Solicitors

For the Respondent: Mr S Walker, Senior Home Office Presenting Officer

DECISION AND REASONS

1. I see no need for, and do not make, an order restricting publication of the details of this appeal.
2. The appellants in this case are citizens of Bangladesh. The first appellant was born in 1993. He is the son of the second appellant who was born in 1973. They appealed unsuccessfully to the First-tier Tribunal against a decision of the Secretary of State on 8 May 2014 (in the case of the first appellant) and 15 May 2014 (in the case of the second appellant) refusing them further leave to remain in the United Kingdom.

3. The appellants were given permission to appeal by Upper Tribunal Judge Frances who said pithily that it is “arguable that the judge erred in law in his application of the transitional provisions of the Immigration Rules”.
4. The essential point in this appeal is extremely simple. It is the appellants’ contention that the Secretary of State and then the First-tier Tribunal Judge applied the wrong Rules. Mr Choudhury, for the appellants, was very persuasive. Mr Walker, who had the opportunity of considering the submissions carefully before the hearing as well as following them during the hearing, was persuaded, as I am, that Mr Choudhury’s submissions are right. This decision was reached with consent. Explaining my conclusion might not be quite as straightforward as stating it I am going to try.
5. The first thing to appreciate is the basis on which these appellants come to be in the United Kingdom. They were given permission after a successful appeal to the First-tier Tribunal. The appeals were allowed by Immigration Judge Callow in September 2011. It is plain from that decision that the applications were made in 2010. In fact they were made in October 2010. That is significant because the Rules changed in November 2010 and, in very broad terms, they imposed an English language requirement on people seeking to settle in the United Kingdom. That requirement did not exist when these appellants made the applications which led to their having leave to be in the United Kingdom.
6. There are transitional provisions in the rules so that people already in the United Kingdom who entered lawfully when they were not required to have competence in the English language can remain without establishing such competence. Applicants who wish to renew their leave and who would otherwise have to satisfy an English language test do not have to satisfy an English language test when that was not a requirement when they obtained the leave that they wish to renew.
7. Such applicants are not allowed to have indefinite leave but they are entitled to significant a further period of leave. The terms of such leave are within the discretion of the Secretary of State but they are usually allowed to remain for 30 months. Mr Choudhury has made it quite plain that it is his case that the appellants in this case are entitled to 30 months further leave. They cannot have indefinite leave to remain because they do not have necessary language skills but they do not need those language skills to qualify for some further leave because that is the effect of the transitional provisions.
8. He argues this, appropriately, by firstly by looking at what the transitional provisions actually state. Most helpfully he drew my attention to paragraph A277B in the following terms:

“When the Secretary of State is considering an application for limited leave to remain or indefinite leave to remain to which Part 8 of these rules continues to apply (excluding an application from a family member of a Relevant Points Based System Migrant) and where the application does not meet the requirements for indefinite leave to remain (where the application is for indefinite leave to remain) or limited leave to remain under Part 8 in force at the date of decision:

(a) the application will also be considered under paragraphs R-LTRP.1.1.(a), (b) and (d), R-LTRPT.1.1.(a),(b) and (d) and EX.1 of Appendix FM (family life) and paragraphs 276ADE to 276DH (private life) of these rules;”.

9. Thus paragraph A277B reminds the decision maker that an application should not fail outright just because the language requirement is not met.

10. Paragraph A277A is also relevant. It states:

“Where the Secretary of State is considering an application for limited leave to remain and indefinite leave to remain to which Part 8 of these Rules continues to apply (excluding an application for a family member of a relevant points-based system migrant), and where the applicant:

(a) does not meet the requirements of Part 8 for indefinite leave to remain (where the application is for indefinite leave to remain) and

(b) meets or continues to meet the requirements for limited leave to remain under Part 8 in force at the date of decision,

further limited leave to remain under Part 8 may be granted for such a period and subject to such conditions as the Secretary of State deems appropriate.”

11. For present purposes, by reasons of paragraph A277A, an appellant last granted limited leave to enter under Part 8 would be considered for further leave if the applicant had last been granted limited leave to remain under Part 8 even if the applicant does not meet the requirements for Part A for indefinite leave to remain.

12. This is the transitional provisions which Mr Choudhury says means that the Rules in force at the time of the original application for entry rather than at the time of application for limited leave are the rules that have to be considered.

13. This is not all. I was referred to a Home Office publication “Immigration Directorate Instruction Family Migration: Chapter 8 Transitional Provisions”. Under the heading “Applications that fall under the transitional provisions” and “3.1 applicants granted or who apply for leave under the Rules before 9 July 2012” we are told at 3.1.1

“A person who meets the following criteria will remain subject to the Immigration Rules in force as at 8 July 2012 until settlement (the grant of indefinite leave to remain) even where the application is granted on or after 9 July 2012:

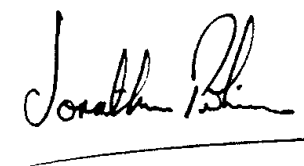
- A person who made an application before 9 July 2012 under Part 8 of the Immigration Rules which was not decided by 9 July 2012 and
- A person who is in the UK and has been granted entry clearance or limited leave to remain under Part 8 following an application for initial entry clearance or leave to remain under Part 8 submitted before 9 July 2012, and this leave is extant where this is a

requirement of Part 8, and they apply for further leave on the same basis.”

14. This, says Mr Choudhury, is a commentary and the instructions make it plain that the interpretation of the Rules that he urged is the one that the Home Office says should be followed. This is itself a further reason for saying that it is what the Secretary of State should have done in this in these cases.
15. As if this were not enough in the same document at 3.4.2 under the general heading “Transitional provisions and applications for limited leave to remain or indefinite leave to remain” we are told:

“Under the transitional provisions, if an application for indefinite leave to remain does not meet the requirements of Part 8 for indefinite leave to remain (in a category other than as a family member of a relevant PBS Migrant) the case worker must consider under paragraph A277A whether the applicant should be granted further limited leave in the same category under the Part 8 Rules in force at the date of the decision.”
16. Once it is established, as I am satisfied that it is, that the relevant Rules do not make a requirement for an English language qualification then it is plain as far as the second appellant, the mother, is concerned that she meets the requirements of the Rules that ought to have been applied and in her case the appeal ought to be allowed. The son’s position for all practical purposes is the same.
17. That takes me to paragraph 298 of the Immigration Rules and its variations. The critical point is 298(b) which makes it plain that a person is entitled to the benefit of that Rule where that person had leave to enter or remain with a view to settlement under paragraph 302 or Appendix FM. It does not matter if that person was a minor. Many people who satisfy the requirements of that Rule are minors, but it is not limited to them. It also encompasses people given leave to remain or enter with a view to settlement. That is the leave that the first appellant enjoyed and therefore he comes under the scope of 298 and therefore his appeal should be allowed as well.
18. It is for these reasons I indicated at the end of the hearing, these appeals should be allowed.
19. It is not for me to say what leave they should be given. It may well that 30 months is right and the appellants would certainly be content with that but the result of my decision is only that the appellants are entitled to further leave under the rules.
20. In each case I set aside the decision of the First-tier Tribunal and I substitute a decision allowing these appeals.

Signed
Jonathan Perkins
Judge of the Upper Tribunal



Dated 17 December 2015

