



Upper Tier Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/03832/2014
IA/03833/2014
IA/03834/2014
IA/03835/2014
IA/03836/2014
IA/03837/2014

THE IMMIGRATION ACTS

Heard at Manchester
On 17 November 2014

Determination Promulgated
On 28 November 2014

Before

Deputy Upper Tribunal Judge Pickup

Between

Secretary of State for the Home Department

Appellant

and

Shazia Iqbal
Mohammad Iqbal Khan
Mohammad Emaz Iqbal Khan
Danish Iqbal Khan
Rohab Iqbal Khan
Ayaan Iqbal Khan
[No anonymity direction made]

Claimants

Representation:

For the claimants: Mr R O’Ryan, instructed by Maya Solicitors
For the respondent: Mr A McVeety, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is the appeal of the Secretary of State against the determination of First-tier Tribunal Judge Robson promulgated 27.5.14, allowing the links appeals of the claimants against the decisions of the respondent, dated 9.1.14, to refuse their applications for further leave to remain in the UK, and to give directions for their removal from the UK. The Judge heard the appeal on 25.4.14.
2. First-tier Tribunal Judge Grimmett granted permission to appeal on 12.6.14.
3. Thus the matter came before me on 17.11.4 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 Robson should be set aside.
5. The relevant background to the appeal can be summarised briefly as follows. The first claimant came to the UK as a student in 2003 with leave subsequently extended. His wife, the second claimant and the elder two children (C3 & C4) joined him in 2005 as his dependants. C5 was born in the UK in June 2006 and was included in their further leave to remain application, which extended their leave to 31.3.09. Applications for further leave to remain were made out of time, rejected for payment issues, and ultimately refused with no right of appeal on 8.9.09. The claimants' complaint against the solicitor acting for them in 2009 was upheld by the ombudsman. Since 31.3.09, the claimants have had no immigration status in the UK and remained here unlawfully. Their last child C6 was born in 2011 and has never had leave to remain.
6. No further application was made for over 3 years, until 16.10.12 when they made applications for leave to remain, including both parents and all 4 children. The applications were refused with no right of appeal on 7.11.13.
7. However, the Secretary of State agreed to reconsider the applications, taking into account the Immigration Rules in place from 9.7.12, article 8 ECHR private and family life, and section 55 of the Borders Citizenship and Immigration Act 2009. This resulted in the refusal decision of 9.1.14, which was the subject of the appeal to the First-tier Tribunal.
8. Judge Robson purported to allow the appeals on both immigration and in the alternative human rights grounds.
9. The judge found that there were no significant ties of any of the claimants to Pakistan and that therefore they each met the requirements of paragraph 276ADE. The judge

found that removal of the children would be disproportionate and harmful to their future development, with reference to section 55 and their best interests. At §86 the judge considered that even if he was wrong on the Immigration Rules, he found compelling circumstances not sufficiently recognised in the Rules so as to justify an article 8 assessment, in which he found there was no claim by the Secretary of State that granting 'entry clearance' would be detrimental to the economic well-being of the UK. "Thus it cannot be maintained that it is not a disproportionate inference with the Family Right's or indeed Private Life."

10. The grounds of application for permission to appeal set out a number of complaints about the way in which the First-tier Tribunal Judge assessed the evidence and applied the law. In his oral submissions Mr McVeety expanded on the errors of law in the determination, pointing out further errors. Whilst he complained about that, Mr O'Ryan did not assert that he was prejudiced by the further grounds and specifically declined the opportunity I suggested to him that if he was so prejudiced, to make an application for adjournment in order to meet the points raised by Mr McVeety. I am not satisfied that the Secretary of State needed any leave to elaborate on the errors of law in the decision, of which the grounds highlight only examples. However, insofar as any such leave is required, in the circumstances outlined above, I grant leave as entirely consistent with the overriding objective to deal with cases fairly and justly, ensuring proper consideration of the issues and avoiding unnecessary delay.
11. In granting permission to appeal, Judge Grimmett found it was arguable that the judge erred in finding that the claimants had no ties to Pakistan, in particular because he did not indicate why the siblings with whom the first claimant had not fallen out were not ties.
12. Quite apart from the inadequately brief, confused, and largely unreasoned article 8 conclusions, completing the entire article 8 assessment in just 6 lines, I find that there are such errors in the decision of the First-tier Tribunal that it cannot stand and must be set aside to be remade afresh.
13. In doing so, I have taken into account the oral submissions of the parties and the rather lengthy skeleton argument of Mr O'Ryan, dated 24.4.14, prepared for the First-tier Tribunal appeal hearing, and his Rule 24 response, dated 1.7.14.
14. In essence, the submissions of Mr O'Ryan are that:
 - (a) The appeals of C3, C4 and C5 succeed under 276ADE91)(iv) on the basis that they had lived continuously in the UK for at least 7 years and that it was not reasonable to expect them to leave the UK;
 - (b) That it must follow that if the removal of C3, C4 and C5 would be contrary to the Immigration Rules, then the parent claimants and the last child C6 should also succeed as it would be disproportionate to split the family;

- (c) That the appeals of the parents must succeed under 276ADE(1)(vi) on the basis that whilst they are over the age of 18 and have lived in the UK for less than 20 years, they have no ties, including social, cultural or family with Pakistan.
15. It appears to be common ground that none of the claimants can succeed under Appendix FM in respect of family life. The parents have no lawful status in the UK and thus cannot meet the eligibility requirements for the partner route under R-LTRP. Similarly, as neither parent has sole responsibility for the children they do not meet the requirements of R-LTRPT. Neither do any of the children meet the requirements of E-LTRC. EX1 is not reached because it is not a free-standing right and is parasitic on the claimants meeting the preceding requirements.
16. In the circumstances, there is no merit in the first ground of appeal, that the judge failed to consider the best interests of the children in the context of EX1 and whether it would be reasonable for them to return to Pakistan. However, the reasonableness issue is relevant to considerations under paragraph 276ADE and article 8 ECHR private life.
17. Nevertheless I find a number of errors in the decision of the First-tier Tribunal. Some of these are listed below, but I do not intend to address every error canvassed in submissions before me. The cumulative effect of the several errors of law listed below are themselves more than sufficient to require the decision of the First-tier Tribunal to be set aside and remade.
18. The finding that the parent claimants had no ties to Pakistan under 276ADE, was flawed. The judge relied on Ogundimu (Article 8 – new Rules) Nigeria [2013] UKUT, cited to him by Mr O’Ryan, to the effect that ties requires something more than merely remote and abstract links to the country of proposed deportation or removal. “It involves there being a continued connection to life in that country, something ties a claimant to his or her country of origin.” However, Ogundimu set out at §125 a number of factors to be considered, including the length of time spent in the country, the age when the left, the exposure to that culture, and their language. None of these factors appear to have been properly taken into account.
19. The parent claimants were born in 1977 and 1965 respectively. They came to the UK in 2003 and 2005. It is clear that they spent the vast majority of their lives in Pakistan, and continue to speak the language. Although it was said that the relationship with one brother had broken down, relied on by the judge at §83, there were other siblings (§33) in respect of whom there was no evidence that those ties had been severed. Even if family ties had been severed, there was no evidence that the claimants had lost all social or cultural ties. The only basis for the conclusion that there were no social or cultural ties is the last sentence of §84, where the judge reached that conclusion solely because of the length of time they had been in the UK. In the circumstances, there has not been a fair and balanced assessment of ties under paragraph 276ADE.

20. The judge failed to take account of the relevant case law on the best interests of the child claimants and in particular Zoumbas, EV (Philippines), and Azimi-Moyad.
21. Whilst two of the children have lived in the UK for 7 years, and two of them were born here, the judge does not seem to have taken into account that they are not British citizens and had no entitlement or legitimate expectation to be able to be remain and be raised in the UK. They were young and largely their lives have revolved around the family unit, which would be removed together.
22. In Zoumbas v SSHD UKSC it was held that there was no "irrationality in the conclusion that it was in the children's best interests to go with their parents to the Republic of Congo. No doubt it would have been possible to have stated that, other things being equal, it was in the best interests of the children that they and their parents stayed in the United Kingdom so that they could obtain such benefits as health care and education which the decision-maker recognised might be of a higher standard than would be available in the Congo. But other things were not equal. They were not British citizens. They had no right to future education and health care in this country. They were part of a close-knit family with highly educated parents and were of an age when their emotional needs could only be fully met within the immediate family unit. Such integration as had occurred into United Kingdom society would have been predominantly in the context of that family unit.
23. In EV (Philippines) and Others v SSHD [2014] EWCA Civ 874 it was held that despite finding, in a family's appeal against a decision to remove them, that the best interests of the children lay in continuing their education in the United Kingdom with both parents also remaining in the United Kingdom, the Tribunal had been entitled to find that the need to maintain immigration control outweighed the children's best interests.
24. In the course of giving judgment the Court of Appeal gave guidance on how to interpret and apply the best interests of children in an immigration context. Paragraphs 32 to 37 state:

"32. There is a danger in this field of moving from looseness of terms to semantics. At the same time there could be said to be a tension between (a) treating the best interests of the child as a primary consideration which could be outweighed by others provided that no other consideration was treated as inherently more significant; and (b) treating the child's best interests as a consideration which must rank higher than any other which could nevertheless be outweighed by others. It is material, however, to note that Lord Kerr, as he made clear, was dealing with a case of children who were British citizens and where there were very powerful other factors – see [41] below -in favour of not removing them ('the best interests of the child clearly favour a certain course' / 'the outcome of cases such as the present'). He also agreed with the judgment of Lady Hale. In those circumstance we should, in my judgment, be guided by the formulation which she adopted.

33. More important for present purposes is to know how the tribunal should approach the proportionality exercise if it has determined that the best interests of the child or children are that they should continue with their education in England. Whether or not it is in the interests of a child to continue his or her education in England may depend on what assumptions one makes as to what happens to the parents. There can be cases where it is in the child's best interests to remain in education in the UK, even though one or both parents did not remain here. In the present case, however, I take the FTT's finding to be that it was in the best interests of the children to continue their education in England with both parents living here. That assumes that both parents are here. But the best interests of the child are to be determined by reference to the child alone without reference to the immigration history or status of either parent.

34. In determining whether or not, in a case such as the present, the need for immigration control outweighs the best interests of the children, it is necessary to determine the relative strength of the factors which make it in their best interests to remain here; and also to take account of any factors that point the other way.

35. A decision as to what is in the best interests of children will depend on a number of factors such as (a) their age; (b) the length of time that they have been here; (c) how long they have been in education; (c) what stage their education has reached; (d) to what extent they have become distanced from the country to which it is proposed that they return; (e) how renewable their connection with it may be; (f) to what extent they will have linguistic, medical or other difficulties in adapting to life in that country; and (g) the extent to which the course proposed will interfere with their family life or their rights (if they have any) as British citizens.

36. In a sense the tribunal is concerned with how emphatic an answer falls to be given to the question: is it in the best interests of the child to remain? The longer the child has been here, the more advanced (or critical) the stage of his education, the looser his ties with the country in question, and the more deleterious the consequences of his return, the greater the weight that falls into one side of the scales. If it is overwhelmingly in the child's best interests that he should not return, the need to maintain immigration control may well not tip the balance. By contrast if it is in the child's best interests to remain, but only on balance (with some factors pointing the other way), the result may be the opposite.

37. In the balance on the other side there falls to be taken into account the strong weight to be given to the need to maintain immigration control in pursuit of the economic well-being of the country and the fact that, *ex hypothesi*, the applicants have no entitlement to remain. The immigration history of the parents may also be relevant e.g. if they are overstayers, or have acted deceitfully."

25. I find that in making the assessment referred to, the judge has failed to properly consider the factors going each way. There is emphasis on those factors favouring the claimant children, but nothing of substances about the balancing public interest factors and in particular the "strong weight" to be given to the need to maintain immigration control. Further the immigration status of the parents was relevant but not included in the balancing exercise.

26. In Azimi-Moayed and others (decisions affecting children; onward appeals) [2013] UKUT 197(IAC) the Upper Tribunal in considering the case law in relation to decisions affecting children identified the following principles to assist in the determination of appeals where children are affected by the appealed decisions:

“i) As a starting point it is in the best interests of children to be with both their parents and if both parents are being removed from the United Kingdom then the starting point suggests that so should dependent children who form part of their household unless there are reasons to the contrary .

ii) It is generally in the interests of children to have both stability and continuity of social and educational provision and the benefit of growing up in the cultural norms of the society to which they belong.

iii) Lengthy residence in a country other than the state of origin can lead to development of social cultural and educational ties that it would be inappropriate to disrupt, in the absence of compelling reason to the contrary. What amounts to lengthy residence is not clear cut but past and present policies have identified seven years as a relevant period.

iv) Apart from the terms of published policies and rules, the Tribunal notes that seven years from age four is likely to be more significant to a child than the first seven years of life. Very young children are focussed on their parents rather than their peers and are adaptable.

v) Short periods of residence, particularly ones without leave or the reasonable expectation of leave to enter or remain, while claims are promptly considered, are unlikely to give rise to private life deserving of respect in the absence of exceptional factors. In any event, protection of the economic well-being of society amply justifies removal in such cases.”

27. The same case also looked at the position of children in onward appeals and noted that:

“(2) Duties to have regard as a primary consideration to the best interests of a child are so well established that a judge should take the point for him or herself as an obvious point to be considered, where the issue arises on the evidence, irrespective of whether the appellants or the advocates have done so.

(3) Although in some cases this may require a judge to explore whether the duty requires further information to be obtained or inquiry to be made, the judge primarily acts on the evidence in the case. Where that evidence gives no hint of a suggestion that the welfare of the child is threatened by the immigration decision in question, or that the child’s best interests are undermined thereby, there is no basis for any further judicial exploration or reasoned decision on the matter.

(4) Even if a decision of the First-tier Tribunal involves the making of an error on a point of law, in deciding whether to grant permission to appeal to the Upper Tribunal, it is relevant whether there are any reasonable prospects of that Tribunal exercising its powers to re-make the decision in a different way. The Upper Tribunal is unlikely to do so if the error was marginal and would not have made a difference to the outcome.

(5) It is incompatible with the overriding objective and the scheme of the Tribunal Procedure (Upper Tribunal) Rules 2008 to permit a rule 25 reply to open up

fundamentally different grounds of appeal for which permission has not been granted.”

28. I find on consideration of the decision that the First-tier Tribunal Judge had no regard for these now well-established principles and thus the assessment of the best interests of the children and the reasonableness of expecting them to leave the UK was flawed, without adequate reasoning and overlooked relevant factors.
29. At §73 and §75 the judge found that C3 and C4 were settled in the UK “and it would be harmful and disproportionate” for them to be removed and certainly not in their best interest. At §81 the judge found that the removal of the children would be “quite disproportionate and utterly harmful to their future development and that readjustment to life in Pakistan would be quite disproportionate.” In reaching that conclusion the judge had failed to take into account that the children would be returning with their parents and that family life would continue together in Pakistan. The judge appeared to give no weight to the fact that the claimants had only temporary status in the UK and from 2009 had no status at all. They had no right to remain here and raise yet another child, taking advantage of British health care and education to which they were not entitled. The claimants including the children are citizens of Pakistan not the UK and not British. Although listed as part of the submissions on behalf of the Secretary of State it is clear that no consideration of these factors was made when weighing the reasonableness of whether the child claimants should be expected to leave the UK under 276ADE.
30. The judge appeared to have given no weight in any proportionality exercise to the public interest in maintaining immigration control. At §87 the judge made the rather odd remark that the respondent had not claimed that ‘entry clearance’ would be detrimental to the economic wellbeing of the United Kingdom. Both case law and now statute (section 117B came into force from 28.7.14 and thus not applicable to the error of law considerations) have made it clear that immigration control is in the public interest. The judge seems to have relied on this peculiar observation to conclude that it could not be maintained that the decision is not a disproportionate interference with private and family life. Quite apart from the fact that the decision had no effect on family life, as they would be removed together, it was obviously the Secretary of State’s case that the decision was proportionate. In the circumstances such article 8 assessment as there may have been was on a flawed basis.
31. When a decision of the First-tier Tribunal has been set aside, section 12(2) of the Tribunals, Courts and Enforcement Act 2007 requires either that the case is remitted to the First-tier Tribunal with directions, or it must be remade by the Upper Tribunal. The scheme of the Tribunals Court and Enforcement Act 2007 does not assign the function of primary fact finding to the Upper Tribunal. The errors of the First-tier Tribunal Judge vitiates all other findings of fact and the conclusions from those facts. Where the facts and conclusions therefrom are unclear on crucial issues at the heart

of an appeal, as they are in this case, effectively there has not been a valid determination of those issues.

32. In all the circumstances, the correct course is to relist this appeal for a fresh hearing in the First-tier Tribunal, I do so on the basis that this is a case which falls squarely within the Senior President's Practice Statement at paragraph 7.2. The effect of the error has been to deprive the appellant of a fair hearing and that the nature or extent of any judicial fact finding which is necessary for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2 to deal with cases fairly and justly, including with the avoidance of delay, I find that it is appropriate to remit this appeal to the First-tier Tribunal to determine the appeal afresh.

Conclusions:

33. For the reasons set out above, I find that the making of the decision of the First-tier Tribunal did involve the making of a number of errors on a point of law such that the decision cannot stand and should be set aside.

I set aside the decision.

The appeal is remitted to the First-tier Tribunal to be made afresh with no findings preserved.



Signed:

Date: 27 November 2014

Deputy Upper Tribunal Judge Pickup

Directions

1. The appeal is to be relisted on a date to be fixed before the First-tier Tribunal at Bradford;
2. The time estimate is 3 hours;
3. The appeal is to be made afresh with no findings of fact preserved;
4. The appeal may be listed before any First-tier Tribunal Judge, with the exception of Judge Robson.

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 remains to be decided, thus there can be no fee award.



Signed:

Date: 27 November 2014

Deputy Upper Tribunal Judge Pickup