Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/19517/2014
IA/19522/2014
IA/19518/2014

THE IMMIGRATION ACTS

Heard at Bradford	**Determination Promulgated**
On 23rd September 2014	**On 15th October 2014**

Before

UPPER TRIBUNAL JUDGE D E TAYLOR

Between

SNP
KTP
SSKP

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr J Wells, Legal Representative from M & K Solicitors
For the Respondent: Mrs R Pettersen, Home Office Presenting Officer

DETERMINATION AND REASONS

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1. This is the Appellant's appeal against the decision of Judge Bircher made following a hearing at North Shields on 23rd June 2014.

Background

2. The Appellants are citizens of India. The first and second Appellants are married to each other and they are the parents of the third Appellant.

3. The first Appellant arrived in the UK on 9th April 2001 on a visitor's visa and has overstayed. The second Appellant joined him on 10th February 2004, also on a six month visit visa, and also overstayed. Their child was born in the UK on 4th April 2010.

4. On 26th May 2011 they submitted an application for further leave to remain on the basis of their private and family life in the UK. It was refused on 26th July 2011 with no right of appeal.

5. On 18th May 2012 there was a request to review the original decision and to grant an in-country right of appeal. No action was taken by the Respondent in response to that letter.

6. A year later, in May 2013, there was a further request for an appealable removal decision and, following JR proceedings which were settled by consent, the decision letter which was the subject of the appeal before the judge was issued in April 2014.

7. It was submitted before the judge that the applications and appeal ought to be considered under the pre-9th July 2012 legal framework.

8. The judge wrote as follows:

> "I disagree for the following reasons. The Appellants made their applications for leave to remain on 26th May 2011 and the Respondent refused the applications on 26th July 2011. The refusal decision was therefore decided before 9th July 2012 and in any event with no in-country right of appeal the Appellants' appeals are reconsidered in the context of the new Immigration Rules."

9. In the grounds of appeal it was argued that the judge had erred in her approach to the post July 2012 Rules, and had failed to properly carry out the full five stage proportionality assessment under Razgar. Moreover she had erred in finding that the Appellants had not demonstrated that they had lived in the UK for a continuous period of thirteen years because their original passports had not been submitted. There was no evidence before the Tribunal or from the Respondent that the Appellants were not in the UK for the time claimed.

10. On 14th August 2014 the Respondent served a reply submitting that the First-tier Tribunal Judge directed herself appropriately and carried out a careful analysis of the factual issues as required.

Submissions

11. Mr Wells submitted that the judge had started her considerations from the wrong starting point which had infected her consideration of Article 8 under Razgar which she had failed to mention. She may have come to a different decision had she approached the issue correctly. He asked that the appeal be remitted for a de novo hearing before another Immigration Judge at Newport where the Appellants were now living.

12. Mrs Pettersen submitted that the error was immaterial because the facts of the Appellants' immigration history were not challenged. The judge had dealt with all of the relevant factors and had considered the best interests of the child who would be removed with his parents.

Findings and Conclusions

13. With respect to the application of the new Rules in applications made before 9 July 2012, in Edgehill and Another v SSHD [2014] EWCA Civ 402 the Court of Appeal considered the arguments in relation to whether the Respondent is entitled to rely upon the post 9 July 2012 Rules in rejecting applications made before that date.

14. The transitional provisions expressly state that any application for indefinite leave to remain before 9 July but not yet decided "will be decided in accordance with the Rules in force on 8th July 2012".

15. The Court said:

> "The Immigration Rules need to be understood not only by specialist immigration Counsel but also by ordinary people who read the Rules and try to abide by them. I do not think that Mr Bourne's interpretation of the transitional provisions accord with the interpretation which ordinary reader would place upon them. To adopt the language of Lord Brown in Mahad 'the natural and ordinary meaning of the words, recognising that they are statements of the Secretary of State's administrative policy' is that the Secretary of State will not place reliance on the new Rules when dealing with applications made before 9th July 2012."

16. The Secretary of State was not entitled in her decision letter of 9th April 2014 to rely on the new Rules and the Immigration Judge should have so found. It also follows that she herself should not have founded her decision upon whether the Appellant could meet the requirements of the new Rules. To that extent she was in error.

17. The judge accepted that the couple had established private life in the UK, unsurprisingly, and that removal would interfere with their private lives with consequences such as to engage the operation of Article 8. She then addressed herself to the third and fourth of the Razgar questions, albeit not referring to it directly, and properly considered all of the relevant evidence before coming to a decision on the proportionality of removal.

18. She stated that the main thrust of the case was that the first and second Appellants maintained that they had lived in the UK for thirteen years and ten years unlawfully. The first Appellant arrived in the UK as a visitor and overstayed unlawfully for a very lengthy period of time. Moreover his wife, who must have lied to an Immigration Officer when applying for her own visit visa, did exactly the same since she could not have been unaware of the fact that her husband had no status here. She rejected the explanation that no application to regularise was made until 2011 because they did not know how to go about it, as she was entitled to do, especially since their close friend had already engaged with the authorities years before 2011 in order to achieve status for himself and his family. She concluded that the birth of their son the year before made them realise that they would need to register him in school which would require an engagement with the authorities.

19. She properly observed that the first and second Appellants had developed their private lives in the UK at a time when they had no legitimate expectation that they would be allowed to remain here.

20. She considered their financial situation and was satisfied that a family friend, DP, a British citizen, was able and willing to offer the first Appellant a job here. She accepted that the family were holding their own financially with the help of their friend and that they were meeting their expenses but there was very little documentary evidence which shed light upon the quality of their private life.

21. She also considered the best interests of the third Appellant as a primary consideration. It was in his best interests to live with both his parents and the family would all be removed together. The evidence was that the couple maintain contact with their relatives in India, speaking to them about once a month by telephone. She recorded that the third Appellant had not yet started mainstream school and would be returning with both of his parents to his country of nationality and to relatives in India with whom he would be afforded the opportunity to get to know in a close and meaningful way. There were no health issues.

22. Her conclusion that removal would not be disproportionate was properly reasoned and open to her.

23. She was also fully entitled to find that, because the passports were missing, she could not be satisfied that they had demonstrated continuous residence.

24. Accordingly, since the judge did in fact conduct a detailed and thoughtful analysis of all relevant Article 8 issues, her error in relation to the application of the Immigration Rules post July 2012 is immaterial.

Decision

25. The original judge did not err in law. Her decision stands. The Appellants' appeals are dismissed.

Signed Date

Upper Tribunal Judge Taylor