



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

Appeal Numbers: IA/28971/2013
IA/28975/2013
IA/28981/2013

THE IMMIGRATION ACTS

**Heard at North Shields
On 1st April, 2014**

**Determination
Promulgated
On 20 May 2014**

Before

Upper Tribunal Judge Chalkley

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

and

Claimant

**MRS ANUKALPA PAWAR (FIRST APPELLANT)
MR ATUL VIJAY PAWAR (SECOND APPELLANT)
MR AJAY ATUL PAWAR (THIRD APPELLANT)**

Appellants

Representation:

For the Claimant: Mr John Kingham a Home Office Presenting Officer
For the Appellants: Mr Latif, Solicitor

REASONS FOR FINDING AN ERROR OF LAW AND REMITTAL TO THE FIRST TIER TRIBUNAL

1. The appellant in this appeal is the Secretary of State for the Home Department to whom I shall refer as the 'Claimant'. I shall refer to the original appellants in the appeal before the First Tier Tribunal as the 'appellants'.
2. The first-named appellant was born on 20th October, 1976. Her husband, the second-named appellant was born on 1st August, 1978, and her son, the third appellant was born on 19th December, 2009. The second appellant is also the father of the third appellant and all appellants are nationals of India.
3. The first appellant originally entered the United Kingdom on 28th August, 2005, on a visa as a student nurse which was valid until 10th August, 2006. She then obtained further leave to remain as a work permit holder until 16th August, 2011. On 21st July, 2011 she applied for indefinite leave to remain but this was refused on 3rd August, 2011. On 10th August, 2011, the appellant applied for further leave to remain as a Tier 2 (General) Migrant and this was subsequently granted to 11th August, 2013. However on 27th October, 2012 the claimant curtailed the first-named appellant's leave on the basis that the nursing home where she had previously been working had gone into administration and so her job had disappeared and her leave was curtailed to expire on 11th March, 2013. Prior to that date, in fact on 26th November, 2012, the first named appellant had applied for indefinite leave to remain as a Tier 2 (General) Migrant.
4. The first-named appellant married the second-named appellant during her period of leave as a work permit holder and the second-named appellant was granted leave to enter the United Kingdom in 2008, as a work permit holder dependent on his wife. He has remained in the United Kingdom ever since. The third-named appellant was born in India and was granted leave to enter the United Kingdom as a permit holder dependant in 2010.
5. The applications for indefinite leave were refused by the Claimant on 3rd July, 2012. The basis for the refusal was because the first-named appellant had been absent from the United Kingdom between 31st October, 2009 until 17th August, 2010. That is an absence of 289 days. Paragraph 245AAA of Statement of Changes in Immigration Rules, HC 395, as amended ("the immigration rules") provides that for the purposes of calculating a continuous period of five years lawfully in the United Kingdom, a period shall not be considered to be broken where the applicant has been absent from the United Kingdom for a period of 180 days or less in any of the five consecutive twelve month periods preceding the date of the application for leave to remain.

5. The appellant appealed that decision to the First-tier Tribunal. In doing so she also raised a human rights appeal. Her appeal under the Immigration Rules was always bound to fail; it could not possibly succeed because her period of absence was 289 days. Unfortunately, before the Immigration Judge the appellant chose to argue that the decision of the respondent was wrong in law rather than to deal with the Article 8 claim.
6. As a result the First-tier Tribunal Judge Mozolowski heard the appellant's appeal and whilst accepting that the refusal under paragraph 245HFC was simple in its terms, she concluded that there was no mention in the Rules about any period of 180 days. She accepted at paragraph 18 of her determination that a continuous period of five years means a continuous period, without any period of interruption. She believed there to be some provision which might give her scope for, as she put it, "softening this blow". However she failed to have regard to paragraph 245AAA. The judge allowed the appellant's appeal under the Immigration Rules.
7. Not surprisingly the Claimant challenged that decision pointing out that it was wrong in law and failed to have regard to paragraph 245AAA and the definition there in sub-clause (a) of the continuous period of five years lawfully in the United Kingdom.
8. At the hearing before me today Mr Latif appearing on behalf of the appellant accepted that there was an error of law in the judge's determination and accepted that his client cannot succeed under the Immigration Rules. However this leaves the appellant's Article 8 appeal outstanding.
9. I set aside First-tier Tribunal Judge Mozolowski's determination. I determine the issue under the Immigration Rules myself and dismiss the appellants' appeals. The appellant cannot succeed under paragraph 245HF of the Immigration Rules because of her absence from the United Kingdom between October 2009 and August 2010 of 289 days. However the appellant's human rights appeal remains outstanding.
10. Given the length of time the parties would have to wait for the matter to be relisted before me in North Shields and that it could, conversely be heard relatively speedily by the First Tier Tribunal and in view of the overriding objective informing the onward conduct of this appeal, I have decided that this appeal be remitted to the First-tier Tribunal for hearing afresh before a First Tier Tribunal Judge, other than First Tier Tribunal Judge Mozolowski.

Upper Tribunal Judge Chalkley