



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

Appeal Numbers: IA/04115/2014
IA/04116/2014
IA/04117/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 10th December 2015**

**Determination
Promulgated
On 31st December 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

**(1) MRS SHAHANARA AKHTER CHOWDHURY
(2) MR MUHAMMAD AKRAM
(3) MASTER M F
(ANONYMITY DIRECTION NOT MADE)**

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr D Bazini (Counsel)
For the Respondent: Ms A Holmes (HOPO)

DETERMINATION AND REASONS

1. This is an appeal against a determination of First-tier Tribunal Judge Majid, promulgated on 1st June 2015, following a hearing at Taylor House on 27th May 2015. In the determination, the judge allowed the appeals of Mrs Shahanara Akhter Chowdhury, Mr Muhammad Akram, and Master M F. The Respondent Secretary of State, subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellants

2. The Appellants are a mother, father, and their son. The First Appellant, the mother, was born on 17th January 1981, and she is a citizen of Bangladesh. The Second Appellant, the father, was born on 19th December 1975, and he is a Pakistani national. The Third Appellant, the son, was born on 1st February 2011, and he is also a Pakistani national. They appeal against the decision of the Respondent dated 30th December 2013, refusing them leave to remain in the UK under the Immigration Rules. The relevant Immigration Rules are paragraph 397 of HC 395.

The Judge's Findings

3. The judge's findings are minimal, in a determination that is rich in citation of the law, but has comparatively little by way of factual analysis. The judge observes that the basis of the claim is that the First Appellant had been granted "discretionary leave," and given that her circumstances remained unchanged, she was entitled to discretionary leave again. The judge referred to the presence of "three children" which is incorrect, and laid store on the "best interests" of the children, requiring them to be taken into account (see para 10(a)). The judge also observed that the First Appellant was a Bangladeshi lady who was married to a Pakistani national, and that her family were opposed to the marriage, and this had been her oral evidence. There had been difficulties in terms of the two of them being able to live together in their home countries. The judge then went on to say that the Appellant wished the case to be considered on the basis of Article 8 of the Human Rights Act. The judge then returned to the earlier statement that the First Appellant was the beneficiary of "discretionary leave" and that it would be inconsistent with past decisions to now deny her the same status (see para 26).
4. The appeal was allowed.

The Grounds of Application

5. The grounds of application state that the judge erred in two fundamental respects. First, the judge failed to give reasons, or adequate reasons, for allowing the appeals under the Immigration Rules, on human rights grounds, and on the basis of existing discretionary leave. Second, the judge made material mis-directions of law, both in relation to the Immigration Rules, and in relation to Article 8 and the Section 117 public interest considerations.
6. On 25th August 2015, permission to appeal was granted on the basis that it was arguable that the judge erred in failing to identify the relevant Immigration Rule under which the appeal was being allowed. The judge also erred in failing to give adequate reasons. Second, the judge did not explain how the Appellant's Article 8 rights were infringed. Third, the judge did not explain how the Immigration Rules and Article 8 and under paragraph 276ADE were relevant on the facts of this case. Third, he failed

to show what the legal basis was for past grants of discretionary leave. Fifth, there was no analysis of the best interests of the children. Finally, the public interest requirement under Section 117A to B of the 2002 Act was not properly evaluated.

The Hearing

7. At the hearing before me on 10th December 2015, Mr Bazini, appearing on behalf of the Appellants, submitted that, although it was the Respondent's appeal, he had taken the opportunity to discuss the matter with Ms Holmes on behalf of the Respondent Secretary of State, and it was agreed that the best course of action was for this matter to be remitted back to the Secretary of State for a fresh decision. This was because, whilst it was accepted that the judge's determination fell into error for the reasons given by the Respondent in the Grounds of Appeal, there had been no decision with respect to the First Appellant, the husband, and the Third Appellant, the child.
8. If there were decisions with respect to all three Appellants, then they could be properly considered by a First-tier Tribunal Judge upon appeal. At this point in time, the applications had been fundamentally misunderstood by the Respondent Secretary of State, because her view was that there is no jurisdiction with respect to the husband's appeal and the child's appeal because the wife, the First Appellant, alone had been granted discretionary leave.
9. Initially the Home Office view was that there was no right of appeal even for the First Appellant, the wife, but a decision by UTJ Renton on 30th May 2014, confirmed that, given that the First Appellant had applied for leave to remain during the currency of an existing leave, she had an in-country right of appeal and reliance was placed upon **EA (Timeliness of Appeal Treated as Late) Ghana [2006] UKAIT 00036**.
10. By the time that the First Appellant had been granted an acknowledged right of appeal, there were still no decisions for the Second Appellant, the husband, and the Third Appellant the child. The entire basis for the refusal of a further grant of discretionary leave to the First Appellant, the wife, was on the basis that she had not produced evidence to show that she was still enjoying family life with her husband and son, but this was inaccurate, because it was not the husband who had discretionary leave, and there was no child born to the First Appellant at that time.
11. For her part, Ms Holmes submitted that the proper course of action was indeed now to remit the matter back to the Secretary of State to have three decisions with respect to these three parties made which would then be the subject of a linked appeal before the First-tier Tribunal, should that prove necessary.

Error of Law

12. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of **TCEA [2007]**) such that I should set aside the decision. My reasons are those given in the grant of permission. The factual analysis is incomplete and the recital of the law does not show how it is that particular provisions apply to the facts of this case.

Re-making the Decision

13. I re-make the decision on the basis of the findings of the original judge, the evidence before him, and the submissions that I have heard today. I am allowing this appeal to the extent that it is remitted back to the Secretary of State for reconsideration, and for a making of specific decisions in relation to these three specific parties before me. The reasons for this are amply set out by UTJ Grubb in his decision dated 18th November 2014 when he allowed an application for a judicial review on the basis that, "there is a procedural muddle in these claims."
14. The First Appellant's appeal was rejected on the basis that she had no right of appeal because no appealable decision had been made under Section 82 of the 2002 Act. It was said that this was a "excluded decision." The other two applicants, the husband/father and child, did not have a right of appeal as they did not have leave when the application was made. Their only redress was by judicial review. However, an appealable decision had been made in relation to the first applicant, the wife/mother in this case.
15. In that event, the second and third applicants fell within the exceptional circumstances category because the first applicant's claim and theirs were intimately connected and required resolution together before the First-tier Tribunal. UTJ Grubb had also held that there was some merit in the "discretionary policy" point made because this would have a knock-on effect on the decisions made in respect of the dependants of the First Appellant, namely, the Second and Third Appellants.
16. One must consider, as a starting point, why the First Appellant obtained discretionary leave in the first instance. She was granted discretionary leave under the legacy because of her own particular circumstances. There is no evidence to suggest that it had anything to do with her husband and child (because had this been the case they too also would have been granted discretionary leave) but they were not considered by the Respondent to be a factor in whether to grant discretionary leave back in 2010 to the First Appellant.
17. To suggest then, that the First Appellant would be refused discretionary leave now because she had failed to show that she was "still enjoying family life" with her husband and son, was irrational because this was not the reason why discretionary leave had been granted in the first place in 2010. The First Appellant's family life in the UK had nothing to do with the grant of discretionary leave in 2010. The matters have to be kept under

active review and had this been done it would have transpired plainly that there is no connection between the First Appellant and the Second and Third Appellants with respect to discretionary leave to the First Appellant.

18. If anything, the facts that led to the grant of discretionary leave in the first instance still persisted now. All the evidence indicated that the First Appellant was enjoying life with her husband and children and this is clear from the solicitor's letter of 10th December 2013. There are full birth certificates for both children indicating the Appellant's details and address. These are matters, for further consideration by the Respondent Secretary of State when a fresh decision is made. It is not a matter for this Tribunal.
19. These issues are flagged up for now so as to make the decision maker aware of the nature of the issues so that a proper focus is given to the essential facts upon which a decision has to be made. Since it is agreed between Ms Holmes and Mr Bazani that the right course of action is for this matter to be remitted back to the Secretary of State for a fresh decision this is the decision of the Tribunal.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. I re-make the decision as follows. This appeal is allowed to the extent that it is remitted back to the First-tier Tribunal to the Secretary of State for the Home Department for a fresh decision with respect to all three Appellants, this having been agreed by way of consent between both representatives appearing before me, so that all three matters can be linked in a conjoined appeal before the First-tier Tribunal, should that be the case.

No anonymity direction is made.

Signed

Date

Deputy Upper Tribunal Judge Juss

18th December 2018