



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/11748/2014
IA/11750/2014
IA/11752/2014
IA/11753/2014

THE IMMIGRATION ACTS

Heard at Bradford
On 23rd September 2015

Decision & Reasons Promulgated
On 6th October 2015

Before

UPPER TRIBUNAL JUDGE D E TAYLOR

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SMT
PT
JT
MT

(ANONYMITY DIRECTION MADE)

Respondents

Representation:

For the Appellant: Mr M Diwnycz, Home Office Presenting Officer
For the Respondents: Mr A Pipe, Counsel instructed by Fursdon Knapper Solicitors

DECISION AND REASONS

1. This is the Secretary of State's appeal against the decision of Judge Snape made following a hearing at Birmingham on 29th July 2014.

Background

2. The first claimant is a citizen of Zimbabwe born on 26th August 1962. The second is his wife and the third and fourth are their children.
3. The first claimant came to the UK in September 1979 as a student, leaving in September 1984 to return to Zimbabwe, where he remained until 1990. He then lived with his wife in the United States, obtaining an MBA from the University of Pennsylvania, and was subsequently employed by an American bank before being transferred to London. He stayed in the UK between 1992 and 1998 when he returned to Zimbabwe. The family lived there between October 1998 and December 2000 when they moved to Johannesburg in South Africa where they remained until December 2006.
4. The claimant came to the UK as a highly skilled migrant on 4th November 2007 accompanied by the second claimant. The third and fourth claimants had arrived in the UK earlier, on 8th September 2006 on student visas.
5. The visas were renewed until 25th November 2012. On 24th November 2012 they applied for indefinite leave to remain but the application was rejected for insufficient funds. On 22nd December 2012 they gave the required fees to their lawyer but the applications were not in fact submitted until 14th January 2014. They were refused on 19th February 2014 without a right of appeal. An appeal was nevertheless lodged on 6th March 2014. It was argued that the claimants did have a right of appeal because in substance the application was self-evidently a human rights application at the initial stage because it included three dependants two of whom were minors in full-time education in the UK (R Jirshe) v SSHD [2010] EWHC 2043).

The Judge's Determination

6. The judge recorded that no consideration was given to the claimants' rights under paragraph EX of Appendix FM of the Immigration Rules because they had not made an application and paid the required fee. However the respondent considered whether it would be appropriate to allow the family to remain in the UK outside the Immigration Rules.
7. The judge set out the law. She said that it was clear that the children were both gifted young men, able and willing to participate fully in the educational system and it was highly unlikely that they would be able to be educated to a similar level, were they to be returned to Zimbabwe. They had lived in the UK for most of their lives and were well-integrated into UK society. The first and second claimants were highly skilled and would in all likelihood be able to obtain employment in the UK.
8. She noted that the third and fourth claimants had spent very little time in Zimbabwe. The elder had been there for two years whilst a very young child and the younger child had only lived there for a couple of months. Both had been in the UK for just short of eight years. They were funded by one of the most prestigious public schools in the UK, Eton, and it was clear that both boys were extremely talented.

9. The first claimant was highly skilled and had considerable expertise and the second was a lawyer who wanted to continue her legal practice. They should have been able to qualify in 2012 for indefinite leave to remain but were unable to do so because of a debt of £34,000 owed by a former client.

10. She concluded as follows:

“I do not consider that the interests of the third and fourth appellants would be safeguarded and protected by obliging them to leave the UK to face an uncertain educational future in Zimbabwe. Given the degree of their integration in UK society and the length of time that they have resided in this country with their parents I do not find that the removal decision is proportionate to the legitimate public end sought to be achieved namely the maintenance of immigration control and on that basis the appeals are allowed.”

The Grounds of Application

11. The Secretary of State sought permission to appeal on the grounds that the judge had erred in law by failing to have regard to the relevant requirements in the Immigration Rules as a relevant consideration in the assessment of proportionality. The requirements of the Rules were a relevant consideration and a factor to be accorded great weight.

12. Second, in assessing the family’s case with reference to the children’s interests, the judge had erred in failing to consider the test in paragraph 276ADE(iv) of the Rules which would allow the children to remain on the basis of private life only if they are under the age of 18 years, had lived continuously in the UK for at least seven years and it would not be reasonable to expect the applicants to leave the UK. That test captures the essential elements in any Article 8 assessment absent compelling features not recognised in the Rules of which none were identified. Had the test been considered in the context of the parents’ immigration position and general public interest in immigration control, the judge would have found it reasonable for the children to leave the UK.

13. Permission to appeal was granted by Judge Nightingale on 17th October 2014. Judge Nightingale stated that it was arguable that the judge had erred in failing to consider in the first instance the requirements of Appendix FM and/or paragraph 276ADE with regard to Article 8. He observed that it might be that the outcome would have been the same in view of the findings of fact made which were not challenged in the grounds pleaded and the lack of any adverse immigration history.

Submissions

14. Mr Diwnycz relied on his grounds. Although invited to do so, he said that he was not seeking to enlarge them.

15. Mr Pipe acknowledged that there was some merit in the grounds but that even if there had been an error in law it would have made no difference to the decision.

Findings and Conclusions

16. The first issue before the judge relates to jurisdiction. The application made by the first claimant was after his leave had expired and the refusal of that application does not therefore in principle carry a right of appeal. Removal decisions were made against all four claimants on 19th February 2014. The Secretary of State's initial position was that the decisions attracted only an out of country appeal.
17. The matter came before Judge Law at Arnhem House in Leicester on 24th March 2014. He said that the appeal relies, inter alia, on human rights grounds which were referred to in the Notice of Appeal. R (Jishe) v SSHD [2010] EWHC 2043 (Admin) and Anwar and Adjo v SSHD [2010] EWCA Civ 1275 suggested that incorporating a human rights claim may satisfy the definition of claims with the IAC to be regarded as a designated place for claims to be lodged. He directed that the appeal should proceed before an Immigration Judge so that the Secretary of State could pursue any validity arguments before the judge at the hearing.
18. The Presenting Officer at the hearing before Judge Snape did not argue that there was no in-country right of appeal. It seems to have been agreed between the parties at the hearing, and not challenged since, that this appeal falls within Section 92(4) of the Nationality, Immigration and Asylum Act 2002 on the basis that the claimant has made a human rights claim and therefore, under Section 92(1) may appeal against the removal decision whilst he is in the UK.
19. The reasons for refusal letter, unsurprisingly, deals with the application which was made by the first claimant for indefinite leave to remain following leave as a Tier 1 Migrant. The Secretary of State specifically excluded from her considerations paragraph EX.1 of Appendix FM because no specified application on the basis of family and private life had been made. In effect the judge adopted the same approach as the Secretary of State and did not address the Rules.
20. The provisions of Appendix FM could not assist the claimant since no application on the basis of the partner or parental route could succeed. To that extent the grounds are arguably correct and the judge should have taken as her starting point the fact that the appellants cannot succeed within Appendix FM.
21. However, the more relevant Rule is that set out in paragraph 276AD(iv) which would allow the third and fourth claimants leave to remain on the basis of private life if they

“are under the age of 18 years and have lived continuously in the UK for at least seven years (discounting any periods of imprisonment) and it would not be reasonable to expect the applicants to leave the UK.”
22. In this case the children have lived in the UK for over seven years. Both have been here for just short of eight years.

23. The question therefore is whether the judge addressed herself to the question of whether it would be reasonable to expect them to leave the UK.

24. The judge recorded as follows:

“The third and fourth appellants have spent over seven years living in the UK and have successfully obtained scholarships to an extremely prestigious school. It is clear they are engaged not only in school activities but also in sporting activities and with the local community in religious observance.

I have seen letters written by both boys at pages 17 and 18 of the Appellants’ bundle of evidence and it is clear that they are gifted young men who are able and willing to participate fully in the educational system. It is highly unlikely that they would be able to be educated to a similar level were they to be obliged to return to Zimbabwe. In their letters they say they have had very little contact with Zimbabwe and on that basis it is clear that their education would be prejudiced.”

25. As at the date of hearing the boys were 14 and 16 years old and both were about to embark on A level and GCSE courses at Eton College.

26. It is quite clear that the judge had at the forefront of her mind the question of reasonableness of return, even though there is no specific reference to paragraph 276ADE. She recorded that both had obtained scholarships to Eton College and were at a critical stage of their education. She also took into account the fact that neither had spent any significant time in Zimbabwe. The older child had lived there for two years between 1998 and 2000 when he was a baby/toddler and the younger had only been there for a few months as a baby.

27. Judge Nightingale was correct in the grant of permission to observe that, even if the judge had cited the relevant Rule, the outcome was likely to have been the same.

28. This case was heard the day after Section 117 of the 2014 Act came into force. The judge recorded that she was required to consider the public interest question and the factors set out in Section 117.

29. Section 117B states as follows:

“(1) The maintenance of effective immigration controls is in the public interest.

(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English –

(a) are less of a burden on taxpayers, and

(b) are better able to integrate into society.

- (3) It is in the public interest, and in particular in the interests of the economic wellbeing of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons –
 - (a) are not a burden on taxpayers, and
 - (b) are better able to integrate into society.
- (4) Little weight should be given to –
 - (a) a private life, or
 - (b) a relationship formed with a qualifying partner, that is established by a person at a time when the person is in the United Kingdom unlawfully.
- (5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.
- (6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where –
 - (a) the person has a genuine and subsisting parental relationship with a qualifying child, and
 - (b) it would not be reasonable to expect the child to leave the United Kingdom.”

30. The judge accepted that the claimants had an impeccable immigration history and that the first and second claimants were highly skilled and would in all likelihood be able to obtain employment in the UK. However, she did not address herself to the question of Section 117B(5), namely that little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.
31. No reference to any error of law is made in the grounds in relation to Section 117B. Mr Diwnycz was invited to state whether he wished to apply to enlarge his grounds and he specifically stated that he did not wish to do so in relation to 117B(5).
32. It is not for me to make the Secretary of State's case. I am not prepared to find an error of law in a decision where no challenge is made by the Secretary of State either in the grounds or at the hearing on the issue of whether the judge erred in law in relation to her consideration of precariousness.
33. Finally, with respect to EV (Philippines), cited in the grounds, there is no inconsistency between this decision and that of the Court of Appeal in this case. At paragraph 58 Lord Justice Lewison stated:

“In my judgment therefore the assessment of the best interests of the children must be made on the basis that the facts are as they are in the real world. If one parent has no right to remain but the other parent does that is the background against which the assessment is conducted. If neither parent has the right to remain then that is the background against which the assessment is conducted. Thus the ultimate question will be: is it reasonable to expect the child to follow the parent with no right to remain to the country of origin?”

34. The judge did address herself to that question. These two children are enjoying opportunities in the UK which simply could not be matched in Zimbabwe. They are at a particularly critical stage of their education. The loss to them of removal at this time would be huge. It would of course have been open to the Secretary of State to argue that the children could remain boarding at Eton and their parents could be removed, but that is not her position since she has issued removal decisions against all of the members of the family.

Decision

35. The original judge did not err in law. Her decision stands. The Secretary of State’s appeal is dismissed.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date

Upper Tribunal Judge Taylor