



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

Appeal Numbers: IA/35107/2014
IA/35105/2014

THE IMMIGRATION ACTS

**Heard at Bennett House, Stoke
On 29th May 2015**

**Decision and Reasons Promulgated
On 11th June 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE GARRATT

Between

**DR AWAIS AHMED
NADRA YOUNAS
(ANONYMITY DIRECTION NOT MADE)**

First Appellant
Second Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr H Sarwar of Counsel

For the Respondent: Mr A McVeety, Senior Home Office Presenting Officer

DECISION AND DIRECTIONS

1. On 22nd January 2015 Judge of the First-tier Tribunal Osborne gave permission to the appellants to appeal against the decision of Judge of the First-tier Tribunal J S Law who dismissed the appeals against the decisions of the respondent to refuse leave to remain on the basis of private and family life under Article 8 applying the provisions of Appendix FM and paragraph 276ADE of the Immigration Rules.
2. This matter first came before the Upper Tribunal on 9th April 2015 when it was adjourned by Deputy Upper Tribunal Judge Coates in order that Counsel

representing the appellant at the hearing before the First-tier Tribunal could provide a statement to indicate whether or not he had raised an additional ground of appeal on the basis of ten years' long residence arising under paragraph 276B of the Immigration Rules at that hearing. At the commencement of the hearing before me Mr Sarwar handed to me a statement by Raja Rashid dated 28th May 2015. In this statement Mr Rashid indicates that he was Counsel representing the appellant before the First-tier Tribunal and that he had raised the issue of long residence under paragraph 276B "throughout the course of the hearing" and the Home Office Presenting Officer, Mr Malcolm, had made submissions on the issue. Mr Rashid also claims that his submissions to the Tribunal detailed how it was contended that the appellants met the requirements of paragraph 276B.

3. The grounds of application which Judge Osborne thought were arguable can be summarised as follows. It was argued that the judge had given inadequate consideration to the appellants' human rights arising under both Article 8 and Article 9 of the ECHR and had failed to consider and give weight to the first appellant's ten years' lawful residence in the United Kingdom for the purpose of paragraphs 276B to 276D of the Immigration Rules. Specifically, the judge failed to consider medical evidence regarding spinal muscular atrophy (SMA) from which the appellants' son suffered and also failed to consider the son's best interests in the light of his health condition. Further, no consideration was given to the appellants' custom to visit the grave of their deceased first child.

Error on a Point of Law

4. Mr Sarwar made initial submissions by confirming that the grounds were relied upon. He also contended that, in relation to the interests of the appellants' surviving child, the judge's consideration of the respondent's obligations under Section 55 of the Borders, Citizenship and Immigration Act 2009 was inadequate. He also submitted that the judge had failed to consider objective material about the child's illness particularly that contained in the NHS letter at page 47 of the bundle stating that no treatment was available anywhere for SMA although it could be managed successfully in UK.
5. Mr McVeety conceded that the judge had not specifically dealt with ten years' long residence under the Immigration Rules but thought this might be because of the respondent's refusal decision of 5th December 2013 relating to the first appellant's earlier application on this basis. This stated that the appellant did not have leave from 30th November 2006 to 19th February 2010, a period of three years and two months which would have broken the ten years' continuous residence period. My attention was also drawn to the decision of the Supreme Court in *Zoumbas* [2013] UKSC 74 which concluded that there was no irrationality in a conclusion that it was in a child's best interest to go with his or her parents to the country of origin even if, other things being equal, it was in the best interests of children to remain in the United Kingdom to obtain such benefits as healthcare and education.
6. Additionally, Mr McVeety submitted that the judge had considered the health issues of the surviving child and reached the conclusion, available to him, that the levels set by *N v UK – 26565/05* [2008] ECHR 453 (27 May 2008) were not reached. In relation to the claim that Article 9 was also infringed because of the parties' inability to visit their child's grave he indicated that this could be overcome by visits.

7. At the conclusion of submissions both representatives submitted that, if an error on a point of law was found, the matter would be dealt with more appropriately by a fresh hearing before the First-tier Tribunal.

Conclusions

8. The decision of the First-tier Judge is detailed and contains cogent reasoning for conclusions reached. However, although it is evident that the claim of ten years' residence was put to the judge as there is more than one reference to the issue (e.g. paras 13 and 15), the decision does not show that the judge examined any of the detailed arguments which might have shown lawful residence for that period or that he reached any specific conclusion under the Immigration Rules about it.
9. According to the statement from Counsel, such arguments were put and Mr McVeety agrees that the decision shows they were not considered in the context of paragraph 276B of the Immigration Rules. Indeed, paragraph 13 suggests that the judge had concluded that the first appellant had already resided legally in the United Kingdom for a period in excess of ten years. If that is so, then the judge should have considered whether or not he could examine the application of paragraph 276B in force at time of the respondent's decision on the basis set out in *RM (Kwok On Tong: HC 395 para 320) India* [2006] UKAIT 00039. The omission amounts to an error on a point of law.
10. I should point out that I am unable to accept Mr McVeety's argument that the judge may have had in mind the earlier refusal of an application made by the first appellant on the basis of ten years' continuous residence dated 5th December 2013 and so did not need to refer to the long residence claim. That is because the judge was evidently of the view that the first appellant had been lawfully in the United Kingdom for ten years even if no reasons were given to overcome the respondent's conclusion that the appellant actually had no leave for three years and two months during the ten year period.
11. The judge's failure to consider the application of paragraph 276B of the Immigration Rules means that the decision should be re-made for that reason. However, I have also considered whether the judge's consideration of human rights issues is inadequate as alleged. In isolation, inadequacies in consideration of the human rights claims might not appear to be material. The best interests of the surviving child have been considered against the background of the respondent's obligations under Section 55 and, certainly, having regard to the conclusions of the Supreme Court in *Zoumbas*, it is difficult to see how the judge could be wrong to conclude that his best interests could properly be met by him remaining with his parents. However, at paragraph 18, the judge states that there was no independent evidence to establish whether or not the medical resources in Pakistan would be adequate in the light of the child's SMA condition. In this respect the judge does not show that specific consideration was given to all of the medical evidence set out in Appendix B to the appellants' bundle covering the availability of treatment for the disease. The judge also fails to give specific consideration to the appellants' claim that their removal will stop them visiting the grave of their deceased child. The judge does not specifically refer to this issue in the context of either Article 8, generally, or Article 9 even if, as an isolated issue, it is difficult to see how it could amount to a breach of Article 8 or

Article 9 rights such as to make the respondent's decision disproportionate when return visits would be possible.

12. In any event the ten year residence issue requires examination and only if that cannot avail the appellants will it be necessary to look at human rights issues. It is, therefore, appropriate that the matter should be re-heard afresh before the First-tier Tribunal when evidence on both matters can be called. This conclusion accords with paragraph 7.2(a) of the Practice Statement for the First-tier and Upper Tribunal made by the Senior President on 10th February 2010.

DIRECTIONS

13. The appeal is to be heard afresh before the First-tier Tribunal sitting at Stoke on 2nd November 2015.
14. The appeal should not be put before First-tier Tribunal Judge J S Law.
15. An Urdu interpreter will be required.
16. The time estimate is two hours.

Signed

Date

Deputy Upper Tribunal Judge Garratt