IAC-AH-KEW-V1

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: AA/11122/2014
AA/11125/2014
AA/11129/2014
AA/11131/2014
AA/11135/2014
AA/11139/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination & Reasons Promulgated**
On 20th January 2016	**On 18th February 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

(1) N S
(2) A A
(3) M M A
(4) M M A
(5) J M A
(6) A A A
(ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr M Bradshaw (Counsel)
For the Respondent: Mr E Tufan (HOPO)

DETERMINATION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Andrew, promulgated on 15th October 2015, following a hearing at Birmingham Sheldon Court on 12th October 2015. In the determination, the judge allowed the appeals of the Appellants, whereupon the Respondent subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

2. The Appellants are all citizens of Libya and comprise a family. They were born on 3rd January 1966, 8th February 1977, 10th August 1998, 19th August 2000, 1st January 2006 and 12th March 2007 respectively. The First Appellant, and her husband, together with [AAA], the last Appellant, arrived in the United Kingdom together on 9th July 2013 in possession of a visa. The remaining three children had been refused visas and had remained behind in Libya whereupon they were subsequently allowed to join the remaining family in the UK as well. On 20th November 2013, an application for further leave to remain was made outside the Immigration Rules for [AAA] and the Appellant and her husband are dependants upon that application. On 12th August 2014, they claimed asylum. The Respondent refused the Appellants' applications for asylum on 27th November 2014.

The Judge's Findings

3. The judge observed that the manner in which the First Appellant and her dependants came to the UK was in order to get medical treatment with respect to the health of [AAA], the last Appellant, because they were unable to access proper medical treatment for him in Libya. The First Appellant herself is a dietician and has undertaken two years of medical degree. Her husband has been variously described as a cardiologist or a cardiologist's technician.

4. The judge went on to note how the last Appellant, the child [AAA], had been diagnosed with autism at the Portland Hospital, which was a private clinic in London, and the Libyan government had initially paid the fees for this child's treatment but stopped doing so after November 2013. The Appellant's husband had returned to Libya on three occasions, and he did so in order to collect his other three children and bring them to the United Kingdom.

5. A decision was then made by the family that they would not return to Libya because of the ongoing war situation there and the lack of the availability of treatment for [AAA] in Libya. The judge rejected the asylum claim. The judge also rejected the humanitarian claim, and indeed went on to reject also the human rights claims under Articles 2 and 3 of the Human Rights Convention.

6. However, when considering the position of the child, [AAA], she went on to note that [AAA] was unlikely to be able to access any treatment for his condition. She said that,

> "I have read with care all the medical reports that I have been given. I am further satisfied that the Appellant was unable to access any suitable medical attention for the child in Libya. She had made attempts to do so in Egypt but unsuccessfully ..." (paragraph 37).

7. The judge went on to consider the fact that the family did not come from Tripoli. The judge also considered that [AAA] had

> "Been able to make some progress whilst he has been in the United Kingdom as evidenced by the reports in the Appellants' bundle. To the lower standard I am satisfied that he and his family would have grave difficulties in accessing similar facilities and care to that he receives in the United Kingdom which have permitted the improvement in his health" (paragraph 42).

8. If, concluded the judge, she was wrong in this finding then under Article 8, she would allow the appeal because there were "significant obstacles in his return to Libya" (paragraph 45). The judge considered the applicable Article 8 jurisprudence (see paragraphs 47 to 49). She went on to allow the appeal under the ECHR.

Grounds of Application

9. The grounds of application state that the judge had failed under Article 8 ECHR to conduct a proportionality exercise as required. The judge had also only had regard to paragraph 276ADE in that this was not applicable to a child under 18.

10. On 3rd November 2015, permission to appeal was granted on the basis that, in the light of paragraph 40 of her decision, the judge had noted that there was "some evidence that treatment was available in Libya" and this being so the case could not have succeeded under Article 8.

11. A Rule 24 response was entered by Mr Bradshaw, of Counsel, appearing on behalf of the Appellants dated 17th January 2016.

Submissions

12. At the hearing before me on 20th January 2016, Mr Tufan, appearing on behalf of the Respondent Secretary of State stated that the decision of the judge was contrary to established legal authorities. For example, in **GS (India) [2015] EWCA Civ 40**, it had been established that,

> "The absence or inadequacy of medical treatment, even life preserving treatment, in the country of return, cannot be relied on at all as a factor engaging Article 8: if that is all there is, the claim must fail. Secondly, where Article 8 is engaged by other factors, the fact that the Claimant is

> receiving medical treatment in this country which would not be available in the country of return may be a factor in the proportionality exercise ...” (see paragraph 111).

Mr Tufan submitted that there was an absence of “other factors” in addition to the medical treatment which meant that this case could not succeed under Article 8. Mr Tufan also relied upon the case of **Akhalu (Nigeria) [2013] UKUT 400**.

This case established that whereas the consequences of removal for the health of a claimant who would be unable to access equivalent healthcare in their own country is plainly relevant to the question of proportionality, this has to be weighed “against the public interest in ensuring that the limited resources of this country’s health service are used to the best effect for the benefit of those for whom they are intended.” Mr Tufan submitted that neither of these conditions were satisfied by the judge’s analysis of the facts before her and so the decision amounted to an error of law.

13. For his part, Mr Bradshaw submitted that he would rely upon the case of **Das Gupta [2016] UKUT 000218** which cautioned against the Upper Tribunal’s overturning of determinations by the First-tier Tribunal, except on the basis of the principles expressed in **Edwards v Bairstow [1956] AC 14**. Mr Bradshaw submitted that this Tribunal should be cautious in overturning the decision below given that it had been so carefully arrived at. Mr Bradshaw also submitted that the judge’s approach to the matter before her was meticulous and entirely correct in law. She had rejected the proposition that the Appellant came up to the standard of **N v The UK**, so as to succeed under Article 8 of the ECHR. She did not regard the Article 3 threshold to have been met.

14. However, it is equally true that that threshold is more easily met in relation to a child than it is in relation to an adult: **SQ (Pakistan)** at paragraph 17. What the judge had done was, at paragraph 37, to have referred to the relevant matters before her. She had read all the medical reports in relation to the child. She was not satisfied that any treatment appropriate to this child was available in Libya. She was not simply saying that some treatment would be available. She was absolutely categoric in her belief and finding that no appropriate treatment would be available.

15. Her overall assessment appears at paragraph 37 of the determination. She concluded that,

> “In view of the continuing difficulties in Libya, as highlighted by the expert report, I am satisfied, to the lower standard, that there will have been no improvement in any way of the services to be offered in Libya to a child with autism” (paragraph 38).

16. Much had been made about her reference to paragraph 276ADE. However, this had to be read in context. What it meant was that, although it did not apply to the child, it applied to the adult parents who could not relocate to Libya, given the condition of the child, and therefore stood to fall under paragraph 276ADE.

17. Furthermore, given that the family had moved to the UK for the purposes of getting the medical treatment, they are bound to have established some private life during this time. The other children, who are aged 10, 15, and 17, arrived later. The judge was right in concluding that it was in the best interests of the child to remain here. Consideration was given by the judge to the public interest in immigration control under Section 117B of the 2002 Act, as amended.

18. In reply, Mr Tufan submitted that this was not an "exceptional" case. The child was coming to the UK for treatment. He was coming on a temporary basis. He then decides, with his family, to remain on a permanent basis. This cannot be regarded as "exceptional."

19. My attention was drawn to the case of **EV (Philippines) [2014] EWCA Civ 874**, where the court said that, "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?" (see paragraph 58). Mr Tufan submitted that this case established that, "if the parents are removed, then it is entirely reasonable to expect the children to go with them" (see paragraph 60). This was such a case and the judge was wrong to have allowed the appeal.

No Error of Law

20. I am satisfied that the making of the decision by the judge did not involve the making of an error on a point of law. This is a case where the strictures in **Das Gupta [2016] UKUT 000218** apply in that it would be wrong for this Tribunal to intervene in anything other than the principles set out in **Edwards v Bairstow [1956] AC 14**.

21. First, the judge was clear (see paragraph 18) that the family came to the UK because of a concern with the health of [AAA]. He was unable to access proper treatment in Libya. He had even tried treatment in Egypt which was not accessible. The judge repeated this at paragraph 37 of the determination.

22. It is also the case that in order to come to the UK they were funded by the Libyan government (see paragraphs 23 and 28). Indeed, the expert report by Dr Fatah is clear that there is no certainty of any facilities for treatment for autism in Libya. The judge was right to take this into account (see paragraphs 38 and 39).

23. Second, whereas the judge refers to the fact that the child would be unable to avail himself of the "very significant obstacles" test of paragraph 276ADE(vi), this has to be considered in the context that the parents, who fall under paragraph 276ADE(vi) would not be able to relocate the child has to be left behind in his condition.

24. The judge thereafter gave consideration to the case law as it applies to Article 8, and the best interests of the child, and excluded the possibility that Article 3 of the ECHR applied, and went on, in applying the five-stage approach in **Razgar**, together with the consideration of the public interest requirements of Section 117B, to allow the appeal under Article 8. That was a conclusion open to the judge. There is no error of law.

Notice of Decision

There is no material error of law in the original judge's decision. The determination shall stand.

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

Deputy Upper Tribunal Judge Juss 13th February 2016