Upper Tribunal

(Immigration and Asylum Chamber)

Appeal Numbers:
IA/00211/2015
IA/00212/2015
IA/00213/2015
IA/00214/2015

THE IMMIGRATION ACTS

Heard at Manchester Piccadilly

Decision & Reasons Promulgated

On the 18th March 2016

On the 6th April 2016

Before:

DEPUTY UPPER TRIBUNAL JUDGE MCGINTY

Between:

MRS D. B
MR P.B.
MASTER K.B
MASTER K.D.B
(Anonymity Direction made)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss Smith (Counsel)

For the Respondent: Mr Harris (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. This is the Appellants' appeal against the decision of First-tier Tribunal Judge M. Davies promulgated on 10th June 2015, in which he dismissed all four Appellants' appeals on Article 8 grounds, both under the Immigration

Rules and outside of the Immigration Rules.

2. Within the grounds of appeal it is argued that the First-tier Tribunal Judge erred in respect of his approach to Article 8. Within ground one it is argued that the maintenance of an effective immigration control is only relevant to the six public interest considerations under section 117B of the Nationality, Immigration Act 2002 and is not part of the legitimate aim for the purpose of Article 8 (2) of the ECHR. It is argued that the only legitimate aim was the economic well-being of the United Kingdom and that the Judge had failed to take account of the undisputed documentary evidence of the First and Second Appellants in relation to the financial means.

3. Within ground two it is argued that the First-tier Tribunal Judge misdirected himself in his assessment of the public interest under section 117 B of the Nationality, Immigration and Asylum Act 2002, and that the Third Appellant is a "Qualifying Child" for the purposes of Section 117D (1) as he was under the age of 18 and had lived in the UK for a continuous period of over 7 years and it is argued that the Judge failed to give adequate reasons for his finding in relation to the public interest assessment under section 117B.

4. Within the third ground of appeal it is argued that the evidence submitted before the Tribunal referred to the lack of medicine in relation to treatment of conjunctivitis, rather than lack of treatment and that the Judge failed to give regard to the lack of medicine of conjunctivitis in Mauritius.

5. In ground four it is argued that the First-tier Tribunal Judge had failed to give adequate or sufficient reasons for his finding in respect of section 55 other than at [40] stating that "there is no substance in the suggestion on the basis of section 55 that it would not be in the best interests of the children to return to Mauritius with their parents" and that the Judge simply noted that he read and consider the submissions of the Appellants’

solicitors, but had not fully considered the same.

6. Permission to appeal has been granted by First-tier Tribunal Judge Keane on the 10th September 2015, on the grounds the Judge had arguably erred in law by not mentioning within his findings the 9 years that the Third Appellant had resided in the UK, longer than the 7 years envisaged by section 117D (1) (b) of the Immigration Act 2004 and had thereby arguably not accorded due weight to a most important consideration.

7. In her oral submissions before the Upper Tribunal, Miss Smith argued that the Respondent had conceded that there was a genuine relationship between the First Appellant and the Third Appellant, and the Third Appellant had been in the UK continuously for over 7 years, and had been in the UK in fact for 9 years as at the date of the previous hearing. He had been in the UK for a significant period of his life and it was argued had developed significant ties here. She argued that the First-tier Tribunal Judge had not properly considered the level of his integration into the UK and had failed to take account of the statement/letter provided by the Third Appellant himself, school reports, letters from his school, and evidence of his social activity such as attendance at scouts.

8. Miss Smith submitted that the consideration is as to whether not the private lives of the Appellants were formed at a time when their immigration status was precarious was not a relevant consideration for the purpose of a consideration as to whether not they met the requirements of the Immigration Rules, and only fell to be taken into account in respect of a freestanding Article 8 assessment. She argued the Judge had failed to take account of the evidence from the Appellant's teachers as to his friendships and integration into the UK. She argued that the First-Tier Tribunal Judge had simply made a bald and sweeping assertion that he would be able to pick up other languages without difficulty and that inadequate findings were given in this regard.

9. Although there was no formal Rule 24 response, I did give Mr Harris permission to raise arguments on behalf of the Secretary of State in

response to the appeal, given the wording of Rule 24 the Upper Tribunal Procedure Rules simply indicates that the Respondent may file a Rule 24 reply, and does not actually make it a formal requirement and does not explicitly exclude oral submissions if there is no Rule 24 reply. In any event, I considered that it was in the interests of justice that the Respondent should be allowed to make oral submissions in reply to the grounds of appeal, but that time I ensured was given to Miss Smith given to respond thereto, in order to ensure fairness and to ensure that the interests of justice were met.

10. Mr Harris sought to argue that the Appellants however could not have a legitimate expectation to remain in the United Kingdom. However, he conceded quite properly that he could not say that the Judge had taken account of all relevant evidence in his consideration of the private life of the Third Appellant in that the Judge had not mentioned the letter from the Third Appellant himself, nor had he specifically dealt with the evidence in his school in respect of his friendships and social activities. He conceded that First-tier Tribunal Judge Davies had not included his usual standard paragraph indicating that he had taken all of the evidence into account. He also considered that the Appellant's argument in respect of Section 55 had weight.

My findings on error of law and materiality

11. The Upper Tribunal in the case of Bossade (ss.*117A*-D- interrelationship with Rules) [*2015*] UKUT 415 (IAC) made it clear that ordinarily a Court or Tribunal will, as a first stage, consider an Appellant's Article 8 claim by reference to the Immigration Rules that set out substantive conditions, without any direct reference to Part 5A considerations under the Nationality, Immigration and Asylum Act 2002 and that such considerations have no direct application to Rules of this kind. Part 5A considerations only have direct application, the Upper Tribunal found, at the second stage of the Article 8 analysis. The Upper Tribunal made it clear that Part 5A had not altered the need for a two-stage approach to Article 8 claims and that this was not according priority to the Rules over

the primary legislation but rather of recognising their different functions. Indeed, at paragraph 44, the Upper Tribunal specifically found that:

"44. It is important to the foregoing analysis to emphasise the degree of overlapping subject matter between Part 5A and certain provisions of the Rules. However, in light of what we have just said about Part 5A containing overarching statement of principle, it is pertinent to note that some provisions of Part 5A find no precise equivalent in the Rules. For example the rules do not contain a provision stating in terms, as does section 117(4)(a) that little weight is to be given to a private life that is established by a person at a time when the person is in the UK unlawfully. That only goes to reinforce the two legal regimes, although complimentary, are different in kind, because the private life provisions of the Immigration Rules represent the Secretary of State's weighting, without more, as to what conditions have to be met in order for leave to remain to be granted on private life grounds."

12. First-tier Tribunal Judge Davies at [37] found that any private life the Appellants had established in the UK been established when their immigration status was precarious. However, he made this finding when considering the appeal under the Immigration Rules, and at the part of his decision where he was considering paragraph 276 ADE of the rules. This was not a relevant factor for the Judge to consider initially when considering the Appellants' appeal's under paragraph 276 ADE of the Immigration Rules. Although this was a relevant consideration for his second stage assessment under the five stage test set out within the House of Lords case of Razgar v Secretary of State for the Home Department [2004] UKHL 27, it was not a relevant factor when considering the appeals under paragraph 276 ADE.

13. Simply having considered that any private life was established when their immigration status was precarious, has led First-tier Tribunal Judge Davies into error, as was conceded by Mr Harris on behalf the Respondent, in not considering within his determination the evidence from the Third Appellant himself regarding his schooling, social activities, friendships and integration into the UK, or the evidence from the Appellant’s school

regarding his friendships and level of integration into the UK. There is simply reference within the decision to the appellant doing well at school. There has therefore been a failure to take account of material evidence in this regard in respect of the Third Appellant's private life.

14. The Judge's failure to take account of this evidence was particularly important given that as was set out by the Upper Tribunal in case of Azimi Moayed and others (decisions affecting children-onward appeals) (2015) UKUT 197, within the headnote at 1 (iii) "Lengthy residence in a country other than the state of origin can lead to development of social cultural and educational ties that it would be inappropriate to disrupt, in the absence of compelling reason to the contrary. What amounts to lengthy residence is not clear cut but past and present policies have identified seven years as a relevant period." The Upper Tribunal went on to note that 7 years from the age of 4 is more likely to be significant than the first 7 years of life.

15. In this regard First-tier Tribunal Judge Davies also failed to have regard in making his findings in respect of paragraph 276 ADE that the Third Appellant had arrived in the UK when aged 3 years old, and by the date of the hearing before the First-tier Tribunal Judge had been in the UK continuously from 9 years had thereby failed to assess the degree of social, cultural and educational ties that the Third Appellant had, in that light, when considering whether not it was reasonable for him to return with his parents to Mauritius. The Judge simply considered that the Third Appellant's private life should be given little weight given that it was formed at a time when he was in the UK and his status was said to be precarious. Although the decision by First-tier Tribunal Judge Davies predated the reporting of the decisions in Bossade and Azimi-Moayed, his failure to take account of the propositions of law set out within those cases does amount to a material error, as the two cases simply set out how section 117 and issues of private life for the purposes of Article 8 respectively should be considered. They did not seek to change the law, but simply clarified the existing law. A failure to conform to these principles therefore does amount to a material error of law on the part of

First-tier Tribunal Judge Davies.

16. I do further find that the First-tier Tribunal Judge has failed to give adequate reasons at [40] for his finding that "there is no substance in the suggestion on the basis of section 55 that it will not be in the children's best interest to return to Mauritius with their parents" and that simply stating at paragraph [41] that he had considered the submissions made by the Appellants' solicitors in the letter 15th August 2015 does not indicate that he has considered the best interests of the children in light of the fact that the Third appellant had been in the UK for 9 years and in light of the evidence produced regarding his integration into the UK, his friendships and social activities. The finding of the Judge in this regard does not explain to the losing party why they have lost and does not show consideration of all of the relevant evidence in this regard.

17. I therefore do find that the decision of First-tier Tribunal Judge Davies does contain material errors of law, such that the decision is set aside and the matter is remitted to the First-tier Tribunal Judge be heard before any First-tier Tribunal Judge other than First-tier Tribunal Judge M Davies.

Notice of Decision

The decision of First-tier Tribunal Judge M. Davies does contain material errors of law and is set aside;
The matter is remitted back to the First-tier Tribunal for rehearing de novo before any First-tier Tribunal Judge other than First-tier Tribunal Judge M. Davies.
Unless and until a Tribunal or Court directs otherwise, the Appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies both to the Appellants and to the Respondent. Failure to comply with this direction could lead to contempt of Court proceedings.

Signed

R McGinty

Deputy Upper Tribunal Judge McGinty Dated 18th March 2016