



**Upper Tribunal
(Immigration and Asylum Chamber)
IA/33363/2014**

Appeal Numbers:

IA/33364/2014

IA/33368/2014

THE IMMIGRATION ACTS

Heard at Field House

Decision & Reasons

On 16 February 2016

Promulgated

On 29 February 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

**FLSCS
ASS
MLS**

(ANONYMITY DIRECTION MADE)

Respondents

Representation:

For the Appellant: Ms N Willocks-Briscoe, Senior Home Office Presenting Officer

For the Respondents: Mr S Canter, Counsel, instructed by Proficient Immigration Services

DECISION AND REASONS

Introduction

1. For ease of reference I will refer to the parties as they appeared before the First-tier Tribunal. Thus the Secretary of State is the Respondent and the three members of the S family are once more the Appellants.
2. The Respondent appeals against the decision of First-tier Tribunal Judge Bowes (the judge), promulgated on 10 July 2015, in which he allowed the Appellants' appeals on the limited basis that the Respondent's decisions were not otherwise in accordance with the law.
3. The judge's conclusion was based upon particular references in the Respondent's reasons for refusal letter of 8 August 2014, in which incorrect terminology was used when assessing the Appellants' Article 8 claims. In particular, at paragraph 18 of the letter reference was made to social and cultural "ties" with Brazil. In fact, the correct test to be applied under paragraph 276ADE(vi) of the Immigration Rules (the Rules) was whether there would be "very significant obstacles" to reintegration into Brazilian society. Further, at paragraph 20 of the letter reference was made to whether or not the third Appellant would face "exceptional disruption" to his life if he was removed to Brazil: the correct question was whether departure would be reasonable. It was the judge's view that these matters rendered the decision under appeal unlawful, and he therefore allowed the appeal on a limited basis. No findings of fact were made.

The grounds of appeal and grant of permission

4. The Respondent sought permission to appeal. Her grounds were based upon the argument that notwithstanding the incorrect terminology used in the reasons for refusal letter the judge ought to have gone on and assessed the merits of the appeals using the correct legal tests.
5. In granting permission to appeal Upper Tribunal Judge Grubb made reference to the decision in CP (Dominica) [2006] UKAIT 00040 and commented that the judge should have gone on to determine the appeals on their merits in light of the correct terminology of the applicable Rules. The grant of permission is dated 17 November 2015.

The hearing before me

6. At the outset of the hearing Mr Canter provided me with his rule 24 response. He also informed me that before the judge he had submitted that the merits of the appeals should have been dealt with, findings made, and that the appeals should have been allowed outright under Article 8. The 'not in accordance with the law' point was, Mr Canter informed me, only his fallback position.
7. In the circumstances, I did not call upon Ms Willocks-Briscoe to make submissions.

Decision on Error of Law

8. In the circumstances of these appeals I did not find it necessary to call upon Ms Willocks-Briscoe for submissions. In my view there are clear material errors of law in the judge's decision.

9. In CP (Dominica) it was stated that the usual course of events where an incorrect Rule has been applied to an application was for the judge to go on and consider the correct Rule subject to issues of fairness and a potential lack of relevant evidence. Allowing an appeal on the limited basis that the matter could not be determined substantively was regarded as being an unusual route to take.
10. In the case before me the correct Rule was in fact stated in the reasons for refusal letter (see page 5). The error in terminology lies only in paragraph 18 where reference is made to “social and cultural ties”. It was in my view obvious to all concerned that the relevant test was indeed “very significant obstacles” and not “ties”. It is clear that the Appellants approached the appeal on a correct basis. They presented evidence, and indeed oral evidence was taken by the judge. There was no prejudice caused to the Appellants by the infelicitous use of the word “ties” in paragraph 18 of the letter. The Appellants had come prepared with relevant evidence on relevant issues. Further, there is no reasoning by the judge as to why the approach set out in CP (Dominica) was not to have been followed (in other words that the unusual route of allowing on a limited basis was to be taken).
11. In short, the judge was not entitled to conclude as he did, in the way that he did.
12. The same applies to the issue arising from paragraph 20 of the reasons for refusal letter. Although there is no test of “exceptional disruption”, the reasons for refusal letter does make reference to reasonableness at paragraph 24 and deals with the issue of education at paragraphs 22 and 23. Once again, it was obvious to all what the appropriate provision of the Rules was, what the correct test was to be applied, and that one of the live issues related to the third Appellant’s educational prospects on return to Brazil. Again, there was no prejudice to anyone, the evidence was before the judge, and there is no reasoning as to why he proceeded as he did.
13. In respect of paragraph 23, the reference to the production of further evidence is, in my view, an afterthought by the judge following on from his conclusion that he was going to allow the appeals on the limited basis that he did. What he is not saying there is that he was simply unable to reach a decision on the merits through lack of evidence.
14. For these reasons I set aside the decision of the First-tier Tribunal.
15. I would just add one observation. It is unsurprising that Mr Canter had asked the judge to deal with the appeals substantively: that approach is consistent with CP (Dominica) and the interests of appellants obtaining final judicial decisions expeditiously (particularly where children are concerned). It is unfortunate that the judge did not follow this course and thus avoid the errors of law outlined above. It is also unfortunate that he failed to state in his decision that he had been asked, in the first instance, to consider the appeals on their merits.

Disposal

16. Although I considered retaining these appeals in the Upper Tribunal, I have decided to remit them all to the First-tier Tribunal bearing in mind paragraph 7 of the relevant Practice Statement. In this case there have

been no findings of fact whatsoever and there is no overall agreement as to the factual basis upon which these appeals should be decided.

17. In light of this and the probable need for additional evidence relating to the third Appellant, it is appropriate to remit.
18. I issue relevant directions below.

Anonymity

19. The First-tier Tribunal made a direction and I maintain it in order to protect the identity of the third Appellant.

Notice of Decision

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

I set aside the decision of the First-tier Tribunal.

I remit the case to the First-tier Tribunal.

Directions to the parties

- 1. These appeals are all remitted to the First-tier Tribunal for complete rehearing;**
- 2. The issues to be considered at the remitted hearing concern Article 8 both within and without the Immigration Rules. In particular, it is accepted by the Respondent that at the date the relevant applications were made, the third Appellant had been in the United Kingdom for seven years. Therefore, paragraph 276ADE(iv) is a live issue;**
- 3. Any further evidence relied upon shall be filed with the First-tier Tribunal and served upon the other party no later than 14 days prior to the hearing of the remitted appeals;**
- 4. The Appellants are to file with the First-tier Tribunal and serve upon the Respondent no later than 14 days prior to the hearing of the remitted appeals a skeleton argument setting out relevant issues, with reference to evidence and case-law;**
- 5. Both parties shall comply with any other directions issued by the First-tier Tribunal.**

Directions to Administration

- 1. The appeals are all remitted and shall be heard at the Hatton Cross hearing centre on a date to be fixed by that centre;**
- 2. The remitted appeals shall be reheard by First-tier Tribunal Judge N Bowes;**
- 3. A Portuguese interpreter is required;**
- 4. There is a time estimate of 2 hours for the hearing.**

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

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

Date: 25 February 2016

Deputy Upper Tribunal Judge Norton-Taylor