The Upper Tribunal
(Immigration and Asylum Chamber) **Appeal number: IA/02326/2014**
IA/02327/2014

THE IMMIGRATION ACTS

Heard at Manchester	**Determination Promulgated**
On November 21, 2014	**On November 24, 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

Between

MR SHEIKH KAMRAN
MS ANUN KAMRAN
(NO ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Afzal (Legal Representative)
For the Respondent: Mrs Pettersen (Home Office Presenting Officer)

DETERMINATION AND REASONS

1. The first-named appellant (hereinafter referred to as the appellant), born March 8, 1966 and the second named appellant is his daughter, born September 26, 1988. They are both citizens of Pakistan. The appellant's wife and other child are dependants on his application. They both submitted applications for leave to remain under article 8 ECHR on

January 25, 2012. These applications were refused without a right of appeal but following a request for reconsideration dated June 8, 2012 the respondent reconsidered their applications but refused them on December 16, 2013. At the same time a decision was taken to remove them.

2. The appellants appealed to the First-tier Tribunal under Section 82(1) of the Nationality, Immigration and Asylum Act 2002 on January 6, 2014. On June 6, 2014 Judge of the First Tier Tribunal T Jones (hereinafter referred to as the "FtTJ") heard their appeals. He refused all their appeals under the Immigration Rules and article 8 ECHR in a determination promulgated on June 25, 2014.

3. The appellants lodged grounds of appeal on July 2, 2014 and on July 14, 2014 Judge of the First-tier Tribunal Levin granted permission to appeal finding it arguable the FtTJ had possibly erred in considering the appeal under the new Immigration Rules as the application was lodged before July 9, 2014 and it was also arguable the FtTJ had not taken into account the best interests of the children.

4. The appellants and family attended the hearing before me and was represented by Mr Afzal.

SUBMISSIONS

5. Mr Afzal adopted his grounds of appeal and skeleton argument and submitted:

   a. The FtTJ erred by considering the appeal under the new rules. As the application had been made before July 9, 2012 the respondent and FtTJ should have considered the appeal without having regard to Appendix FM or paragraph 276ADE. By considering the case under those Rules the FtTJ materially erred.

   b. The FtTJ failed to have regard to the respondent's own policy on children who had been in the United Kingdom for over seven years. The appellant's children including the second-named had been in the United Kingdom for over seven years and the respondent failed to have regard to the provisions of EX.1 of Appendix FM which provides for leave to be granted where a child has been here for at least seven years. The second appellant has been here for 9 ½ years and there are no countervailing circumstances requiring her removal. The FtTJ failed to have regard to Section 55 of the Borders, Citizenship and Immigration Act 2009.

6. Mrs Pettersen responded to the appellants' grounds of appeal and submitted there was no error in law. She submitted:

   a. The grounds of appeal had no basis.

   b. The appellants had not made an application under the Rules and accordingly the respondent correctly considered the appeal under the new Rules. The Court in Edgehill v SSHD [2014] EWCA Civ 402 made clear that where an application under the Rules was made before July 2012 then it should be considered under the old Rules. Paragraph A277 states:

      > "From 9 July 2012 Appendix FM will apply to all applications to which Part 8 of these rules applied on or before 8 July 2012 except where the provisions of Part 8 are preserved and continue to apply, as set out in paragraph A280."

   c. The appellant had not made an application under any of the provisions of part 8 and the FtTJ was perfectly entitled to consider the application as he did.

   d. In any event, the FtTJ clearly considered the appeal under article 8 as demonstrated by his approach in paragraphs [23], [25], [32] and [33]. At paragraph [34] he dismissed the appeals under article 8 ECHR. In reaching his decision he clearly had regard to section 55 of the 2009 Act.

   e. Mr Afzal argued that the FtTJ erred by considering the appeal under the new Rules but also sought to argue that the respondent should have had regard to the policy guidance from 2014 when applications were considered under the new Rules. In any event the second appellant did not meet the requirement of the Rules because she and her sibling only arrived in the United Kingdom on June 14, 2005. The children could not demonstrate at least seven years at the date of application as the seven year period would mean the application would have to have been made after June 14, 2012 and these applications were initially made on January 12, 2012 and then renewed on June 8, 2012. The period was less than seven years and any policy did not apply.

   f. There was no error in law.

7. Mr Afzal responded to those submissions and questions posed by myself as follows:

a. The transitional provisions apply to all cases where there has been an application under the Rules. This was a reconsideration of earlier decisions so was caught by the transitional provisions.

b. Whilst noting the calculation of time spent here by the second-named appellant he submitted that the guidance should be taken into account as she had now been here for 9 ½ years.

c. The finding in paragraph [34] of the determination was a "throwaway" comment.

8. I reserved my decision on all issues.

MY FINDINGS ON ERROR IN LAW

9. The main thrust of this appeal was that the FtTJ wrongly considered this application under the new Rules and should have considered the appeal under the old Rules.

10. Having listened to the submissions I am satisfied Mr Afzal's submission is flawed. Both the application submitted in January and June 2012 were applications for "discretionary leave to remain in the UK on the basis of the most compelling and compassionate grounds under article 8 ECHR". The renewal letter dated June 8, 2012 refers to the fact the respondent had refused this application without a right of appeal and the June letter purely deals with an article 8 application.

11. The transitional provisions of the Immigration Rules as set out in paragraphs A277 to A280 make it clear the application has to be under the Rules and a part 8 application. This application was not under the Rules. This issue was argued before the FtTJ and he came to the same conclusion as I do. Although permission was granted on this point I am satisfied that the rules and the case of Edgehill make it clear that applications under specified Rules made before July 9, 2012 are to be dealt with under the old Rules so the appellant is not prejudiced. As this was an application under article 8 ECHR the respondent and FtTJ were correct in their approach.

12. The second issue raised related to policy guidance. It is clear that neither child were covered by the policy because neither had accrued 7 years stay at the date of application and the second named appellant was over the age of eighteen when the application was lodged in any event. The FtTJ did not err in the circumstances in her approach to this issue.

13. The FtTJ clearly had regard to all of the circumstances. In paragraph [32] of his determination the FtTJ considered the position of the youngest child and made clear he had considered the best interests of the child.

He further considered the position of the family in paragraph [33] and in light of the decision of EV (Phillipines) & Ors v SSHD [2014] EWCA Civ 874 the FtTJ was perfectly entitled to find removal of the family including the younger child was proportionate.

14. The FtTJ clearly considered the position under the new rules and article 8 ECHR. He clearly considers proportionality and dismisses the appeals under article 8 ECHR in paragraph [34] of his determination.

15. There is no error in law.

DECISION

16. There was no material error of law and the original decisions shall stand both in respect of the Immigration Rules and article 8 ECHR.

17. Under Rule 14(1) The Tribunal Procedure (Upper Tribunal) Rules 2008 (as amended) the appellant can be granted anonymity throughout these proceedings, unless and until a tribunal or court directs otherwise. No order has been made and no request for an order was submitted to me.

Signed: Dated: **November 24, 2014**

Deputy Upper Tribunal Judge Alis

TO THE RESPONDENT

I do not alter the fee award decision.

Signed: Dated: **November 24, 2014**

Deputy Upper Tribunal Judge Alis