Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/07707/2013
IA/43247/2013
IA/43261/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 28th March 2014	**On 15 July 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE HARRIS

Between

MR HARJINDER MAHLI
(ANONYMITY DIRECTION NOT MADE)

First Appellant

And

MRS TILAKPAL KAUR

Second Appellant

And

MASTER HARNOOR SINGH

Third Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Harris, Counsel
For the Respondent: Mr C Avery, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellants are citizens of India. The First Appellant was born on 20th May 1972 and claims to have arrived in the United Kingdom in October 1995. He claimed asylum on 12th April 1998 which was refused on 19th May 1998. His appeal was dismissed on 24th November 1998. He states that his correct name is Mr Hardip Singh and that his actual date of birth is not as quoted by the Secretary of State but 1st July 1970. He has remained in the United Kingdom since arriving in October 1995 and therefore has been in the country in excess of 17½ years. His partner is the Second Appellant born on 24th March 1981, and their son the Third Appellant born on 22nd May 2004. The Second Appellant Mrs Tilakpal Kaur first arrived in the United Kingdom in June 2003 through an agent as a visitor. Whilst in the United Kingdom she met the Appellant and they decided to get married following a Sikh religious ceremony. Mrs Kaur returned to India and gave birth to the Third Appellant then she arrived back in the United Kingdom along with the Third Appellant and since then has lived together with the First Appellant as a family.

2. On 22nd October 2010 the First Appellant wrote to the Secretary of State and his letter was treated as a fresh application for asylum and/or a fresh human rights claim. It was confirmed in a reasons for refusal letter dated 22nd February 2013 at paragraph x. Within the same Notice of Refusal the Appellants claims were refused by the Secretary of State.

3. The Appellant appealed and the appeal came before Judge of the First Tier Tribunal De Garro sitting at Hatton Cross on 17th December 2013. In a determination promulgated on 22nd January 2014, the Appellants' appeal was dismissed.

4. On 31st January 2014 grounds of appeal were lodged to the Upper Tribunal. On 10th February 2014, Judge of the First Tier Tribunal Astle granted permission to appeal. Judge Astle noted that there were predominantly three grounds of appeal

   (i) That the Judge had made no express finding on the credibility of the First Appellant's own evidence and that it was submitted on the First Appellant's behalf that the Judge had failed to explain what weight she attached to the evidence and why, and had not given proper consideration to the evidence.

   (ii) That a central part of the case of the First Appellant was his reliance upon witnesses to support his claim of continual residence in the United Kingdom since October 199 5 and that the Judge it was submitted, had erred in law in paragraph 29 of her determination when deciding to place no evidential weight on that evidence.

   (iii) In paragraph 30 of the determination the Judge found that there was a possibility that the First Appellant left the United Kingdom between 1998 and 2007 and that on that basis she had found that the First Appellant failed to prove his claim of continual residence. It was contended that the Judge had failed to consider that a mere possibility was not sufficient by itself to prevent the discharge of the burden of proof when it is on the balance of probabilities and that a claim can be proved on the balance of probabilities even if a possibility to the contrary exists. It was therefore submitted that the Judge had not correctly applied the standard of proof in this matter.

5. Judge Astle considered that it was arguable that in "attaching no evidential weight" to the evidence of the witnesses, just because they were friends of the Appellant, the Judge erred in law, and on that basis granted permission to appeal to the Upper Tribunal.

6. On 24th February 2014, the Secretary of State responded to the grounds of appeal under Rule 24. The Respondent submitted inter alia, that the Judge of the First Tier Tribunal directed herself appropriately and that she was entitled to find that the Appellant had not discharged the burden of proof and to reject the evidence of the witnesses on the basis that it was self serving and insufficient with the gaps in the documentary evidence to discharge the burden of proof to the requisite standard.

7. It is on that basis that the appeal comes before me to determine whether or not there is a material error of law in the decision of the First Tier Tribunal. The Appellants appear by their instructed Counsel Mr Harris. Mr Harris has experience of this matter in that he is the author of the grounds of appeal in the Upper Tribunal. The Secretary of State appears by her Home Office Presenting Officer Mr Avery.

Submissions

8. Mr Harris submits that the grounds identify the three errors. Firstly, he points out that this is fundamentally a long residence case and that there is no documentary evidence available to cover the whole period that the First Appellant claims that ever since he made the application for asylum he has resided in the United Kingdom continually. He acknowledges that his wife has been in and out of the United Kingdom but that she has in fact been here since 2006 with their son, the Third Appellant.

9. Secondly, he submits there has been no express finding made on the credibility of the Appellant's own evidence, and points out that the Appellant relies on the evidence of other people to confirm his period of long residence and that this is addressed at paragraph 29 of the First Tier Tribunal Judge's determination. He submits that the Judge's finding in rejecting that evidence on the basis that the witnesses were close friends and self serving is entirely wrong and not a reason in itself, and just because people are close friends that does not mean that they cannot be trusted. He considers on that basis the decision is unsafe. He points out that that the Judge has identified no problem with regard to the plausibility of the witnesses, and consequently without having provided a well reasoned explanation for rejecting the evidence, she was wrong to do so.

10. Thirdly he submits that an error in the determination at paragraph 30 is of a more technical nature, pointing out that the existence of a possibility does not prevent the Appellant proving his case on a balance of probabilities and therefore there is an illegal flaw in the approach that has been adopted by the First Tier Tribunal Judge. He submits that all grounds show that the Judge has materially erred in law in her approach, and that the correct approach for the Upper Tribunal is to find a material error of law and to remit the case to be reheard before the First Tier Tribunal.

11. Mr Avery acknowledges that the approach is to whether or not the Appellant was or was not in the United Kingdom as set out at paragraphs 27 and 28 is to use his words "rather odd". He submits that the burden is not a high one. However, he submits that the principle argument is to acknowledge that the determination is by no means perfect, but to point out

that the Judge has looked at everything in the round, and provided that there is no documentary evidence available to show that the Appellant was not in the United Kingdom, has led to a course of findings to be made at paragraphs 29 and 30 which the Judge was entitled to reach. He seeks to advance no further arguments beyond this, but to maintain the position as set out in the Rule 24 Response.

The Law

12. Errors of legislative interpretation, failure to following binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial consideration, reaching irrational conclusions on fact or evaluation give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.

13. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue of argument. Disagreement with an Immigration Judge's factual conclusion, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence which was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because an Immigration Judge concludes that the story told is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

Findings on Error of Law

14. The principle challenge to this determination is that the Judge has made no express findings on the credibility of the Appellant's own evidence. The Appellant relied on witnesses to support his claim of continual residence in the United Kingdom since October 1995. At paragraph 29 of her determination the Judge fails to place any evidential weight on that evidence and I am satisfied that that is an error of law and that is material. It is a leap of faith by the Judge to merely find that as witnesses are close friends, their evidence is self serving and thereupon to place no evidential weight on that evidence. This is particularly true because as is pointed out by Mr Harris and seemingly conceded by Mr Avery, the Judge has not identified any inconsistency or implausibility per se in any of the witness evidence, and that that is after cross examination by the Home Office Presenting Officer. Consequently having carried out such an analysis to reject that evidence simply as being self serving is wrong, and the Judge needed to provide adequate reasoning for rejecting the central part of the Appellant's case.

15. In the light of such circumstances, the technical challenges become of substantially less importance. For all the above reasons, the determination discloses material errors of law and is unsafe and in the interests of justice the correct approach in this matter is to remit the matter back to the First Tier Tribunal to be heard afresh by any Judge other than Immigration Judge De Garro.

Directions

16. It was agreed by both legal representatives that this was a matter that I would need to retire to consider as to whether or not there was a material error of law and I consequently reserved my decision so that it was not immediately possible for this matter to be relisted in the usual manner and assigned to a Judge back at Hatton Cross. What however was agreed, was that if the matter were remitted the following directions would apply.

    i) That the decision of the First Tier Tribunal Judge contained a material error of law and that the decision be set aside and the matter is remitted to the First Tier Tribunal to be heard on the first available date 28 days hence at Hatton Cross with an estimated length of hearing of 3 hours.

    ii) None of the findings of fact of the First Tier determination are to stand.

    iii) The matter to be listed before any salaried or fee paid Judge of the First Tier Tribunal sitting at Hatton Cross other than Immigration Judge De Garro.

    iv) That a record of proceedings from the original hearing be made available for the rehearing before the First Tier Tribunal.

    v) That in the event of the Appellant's representatives requiring an interpreter, they do notify the Tribunal immediately upon receipt of this determination.

Decision

17. The decision of the First Tier Tribunal contains a material error of law and is set aside.

18. The Appellant's appeal against the refusal by the Secretary of State is remitted to the First Tier Tribunal for rehearing at Hatton Cross on the first available date 28 days hence before any Immigration Judge other than Immigration Judge De Garro. Directions for the rehearing of this matter are set out above.

30. The First Tier Tribunal Judge did not make an Order pursuant to Rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. No application is made to vary that Order and none is made.

Signed: D N Harris Dated: 14th July 2014

D N Harris
Deputy Upper Tribunal Judge