



**Upper Tribunal
(Immigration and Asylum Chamber)**
IA/18243/2013

Appeal Numbers:

IA/18244/2013
IA/18245/2013

THE IMMIGRATION ACTS

Heard at Field House

On 3 April 2014

**Determination
Promulgated**

On 9 April 2014

Before

UPPER TRIBUNAL JUDGE MOULDEN

Between

**MR RAO MUHAMMAD KAMRAN EJAZ
MRS AMBREEN KAMRAN
MASTER MUHAMMAD AYYAN KAMRAN
(Anonymity Direction not made)**

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Q Anisuddin a legal representative from SZ
Solicitors

For the Respondent: Mr C Avery a Senior Home Office Presenting
Officer

DETERMINATION AND REASONS

1. The appellants are citizens of Pakistan. The first appellant is the husband of the second appellant and both of them are the parents of the third appellant. The first appellant was born on 27 July 1983, the second appellant on 9 September 1987 and the third appellant on 2 September 2010. I will refer to the first appellant as the appellant, the second appellant as the wife, the third appellant as the son and to them together as the family. The family have been given permission to appeal the decision of First-Tier Tribunal Judge Maciel ("the FTTJ") who dismissed their appeals against the respondent's decisions of 3 May 2013 to refuse to grant the appellant leave to remain as a Tier 1 (Entrepreneur) Migrant under the Points-based System with the wife and son as his dependents. The respondent also gave directions for their removal from the UK under s 47 of the Immigration, Asylum and Nationality Act 2006. The appeals of the wife and son stand or fall with that of the appellant.
2. The appellant was granted leave to enter the UK as a student on 24 September 2003. He extended his leave as a student for periods expiring on 31 January 2011. Thereafter he was granted leave to remain as a Tier 1 (Post Study Work) Migrant until 2 August 2012. He made an application for leave to remain as a Tier 1 (Entrepreneur) Migrant under the Points-based System and the wife and son applied as his dependents.
3. The respondent refused the applications. The reasons were that the appellant had failed to submit Specified Documents in support of the application namely any service contract or bank statements. The appellant maintained that a service contract had been served on the respondent.
4. At the beginning of the hearing before the FTTJ the respondent's representative withdrew the s 47 removal directions. I will need to return to the question of how the appeal hearing developed. The FTTJ found that the appellant had not supplied a service contract in the required format. The document he relied on was in fact a business plan. He had not been able to produce a single contract to evidence that he had been in business for any period before or since his application. The appellant had failed to provide the required documents for the purpose of his application to remain in the UK under the Tier 1 (Entrepreneur) Migrant provisions. He had not provided the required documents at any stage and had given no explanation as to why he had not done so. The appeals against the decisions to refuse leave to remain as an Entrepreneur and his dependents were dismissed.
5. The FTTJ went on to consider the grounds of appeal which had not been raised by the family in their applications to the respondent or in the grounds of appeal to the First-Tier Tribunal but at some stage thereafter and in any event at the hearing before the FTTJ. These were that the family had spent more than 10 years in the UK and were entitled to indefinite leave to remain under the long residence

provisions of paragraph 276 of the Immigration Rules and the respondent's Immigration Directorate Instructions ("IDIs"). The FTTJ records in paragraph 29 of the determination that the family's representative insisted that this be dealt with at the hearing rather than being remitted to the respondent for consideration.

6. The FTTJ found that these grounds involved the exercise of a discretion and that it was necessary to consider not only whether the family had been lawfully in the UK with leave continuously for a period of at least 10 years but also whether there were matters to be taken into account which would render it undesirable to grant them indefinite leave to remain. She found that there had been a break in the family's period of continuous lawful residence. This was between the expiry of leave on 31 October 2006 and the grant of further leave on 5 December 2006, a period of 35 days which was more than the permitted concessionary periods. She found that the appellant was not a credible witness, he had lied to the respondent and the Tribunal and that his application to remain as an Entrepreneur did not mirror his true circumstances. It had been made for the purpose of prolonging his leave so that the family could "clock up" 10 years in the UK.
7. The FTTJ went on to consider the appeals on Article 8 human rights grounds both under paragraph 276ADE of the Immigration Rules and under the jurisprudence outside the Immigration Rules. She found that the appellants could not bring themselves within paragraph 276ADE. Under the Article 8 jurisprudence outside the Immigration Rules she concluded that the family had established a private life in the UK, that all the tests in Razgar [2004] UKHL were answered in the affirmative except for the last, proportionality, on which the conclusion turned. If the family was removed they would be removed together and they had family living in Pakistan. Notwithstanding the time they had spent in the UK it would not be a disproportionate interference with their right to respect for private and family life to remove them.
8. The FTTJ dismissed the appeals. The family applied for permission to appeal which was refused by a judge in the First-Tier Tribunal. It was renewed to and granted by a judge in the Upper Tribunal who considered that there was an arguable error of law. The FTTJ might have erred in finding that there was a gap of 35 days in the periods of leave granted and it was arguable that the family did have a continuous ten-year period of residence. The grounds of appeal to the First-Tier Tribunal raised additional allegations of errors of law and in more detail than the grounds submitted in support of the renewal of the application to the Upper Tribunal. Mr Anisuddin told me that the family relied on the grounds submitted to the Upper Tribunal, not the grounds submitted to the First-Tier Tribunal.
9. I have a Rule 24 reply from the respondent and a letter from the family's solicitors dated 18 March 2014 submitting further

documents which were not before the FTTJ. Mr Anisuddin also provided an extract from Macdonald's Immigration Law and Practice.

10. The beginning of the hearing Mr Avery asked to clarify the respondent's current position on whether there was a break in the period of continuous leave in 2006. Further investigations had been made since the hearing before the FTTJ. He confirmed that in 2006 the respondent's caseworker treated the appellant's application as an in time application and that leave was granted. The application was not treated as invalid and he was therefore instructed to concede that there was no break in the family's period of lawful residence. However this was only one reason for the FTTJ's decision that the family could not succeed under the ten-year rule. The other was the appellant's conduct which, he submitted, brought the family within the provisions of paragraph 276B(ii) on which the respondent relied. The FTTJ dealt with this in paragraph 29.
11. Mr Anisuddin relied on the grounds of appeal to the Upper Tribunal. He said that the concession by the respondent did not take the family by surprise and he did not need to ask for an adjournment in order to consider this. The appellant had persevered with and succeeded in his studies and the family had a good immigration history. He accepted that the family had asked the FTTJ to deal with the ten-year residence question rather than remitting it to the respondent consideration. He also accepted that the FTTJ had dealt with the issues raised in paragraph 276B(ii) but argued that the adverse credibility finding was flawed and the evidence did not support the conclusion that the entrepreneur application was falsely based on made for an improper purpose. He submitted that the 10 years continuous lawful residence was now conceded discretion should have been exercised in the family's favour.
12. Mr Avery submitted that on the evidence it was open to the FTTJ to find that the application had been made for improper reasons in order to achieve 10 years residence. The findings in paragraph 29 were open to her. He relied on MU (statement of additional grounds) Bangladesh 2010 UKUT 442 (IAC). There was no error of law and I was asked to uphold the determination.
13. Mr Anisuddin did not wish to reply. I reserved my determination.
14. The FTTJ dismissed the appeals in relation to the 10 years residence point for two reasons. Firstly, she found that there had not been 10 years continuous lawful residence because of a 35 day break in late 2006. It has not been necessary for me to consider whether there was any error of law in the reasoning or conclusion of the FTTJ because the respondent now concedes that there was no interruption in the period of lawful residence. However, the FTTJ dismissed the appeal for another reason set out in paragraph 29 in which she said;

“It was at the appellants’ representatives’ insistence that I decide the issue of Long Residence as opposed to remitting the matter to the respondent. I find that the issue of granting or not granting indefinite leave to remain is an exercise of discretion. The wording of paragraph 276C uses the words “may be granted”. It is the case that a decision maker would have to consider not only whether the first appellant has been lawfully in the UK with lawful continuous leave for 10 years but also whether there are matters to be taken into account which would render it undesirable to grant indefinite leave to remain. I find that the application for an extension of leave to remain one year before he could apply under the Long Residence provision, as an Entrepreneur was simply done to prolong his leave to “clock” up his 10 years. I find that the application was made with that sole intent. There was a dearth of any evidence about the business and the first appellant struggled to explain any aspect of it. Mr Edwards’ submission was that the application to remain as an Entrepreneur did not mirror the first appellant’s true circumstances. There was no intention to carry on his business and it was set up purely to support the application for leave to remain and that he had lied to the Court and to the Immigration authorities. I find that the first appellant has not been truthful about his business - his intention to engage in business or about the time and monies expended to develop the business. I find that this ought to be taken into account in considering the grant of leave to remain under the Long Residence provisions. I find, in all the circumstances that the first appellant is not entitled to indefinite leave to remain under the Long Residence provisions. Accordingly, I dismiss the appeal on this ground in relation to the first appellant and in line with this decision, I dismiss the appeals of the other two appellants also.”

15. The main thrust of the grounds of appeal to the Upper Tribunal was in relation to issues which have now been conceded in the family’s favour by the respondent, namely that there had been a period of 10 years continuous lawful residence. The only other ground is that in paragraph 6 where it is argued that the FTTJ erred in law by basing her conclusion that the appellant made the entrepreneur application in order to complete 10 years lawful residence on nothing more than speculation. Mr Anisuddin amplified this at the hearing in his submission that the adverse credibility finding against the appellant was flawed. No more detailed particulars were given for either submission.

16. The FTTJ gave detailed reasons for her finding that the appellant was not a credible witness. She found him to be evasive and unable to explain his business dealings. He had prepared a business plan purely to support his application. He could not explain his own business plan. He had never intended to set up a genuine business. There was no evidence as to what monies he had used in relation to the business. Whilst the respondent has now conceded that there

was no break in the 10 year period of residence the appellant had given contradictory evidence about whether any application he had made was ever returned to him and if it was when it was resubmitted. The effect on his credibility of these inconsistencies does not disappear with the respondent's concession. The FTTJ's reasoning and conclusions can be found in paragraphs 25 to 28. I find that they provide strong support for the adverse credibility finding and the conclusion that the appellant never intended to carry on business and that his application for leave to remain as an Entrepreneur and the appeal which followed the refusal was intended to prolong the family's stay in the UK in order to claim indefinite leave on the basis of 10 years residence. At the date of his application on 21 July 2012 the family had not been in this country for 10 years.

17. The FTTJ set out the provisions of paragraph 276A, B and C of the Immigration Rules in paragraph 21 of the determination. She considered the relevant provisions of paragraph 276C, which refers back to paragraph 276B, in paragraph 29 including the words "may be granted" which led her to the correct conclusion that the grant of indefinite leave was discretionary. She went on to consider the relevant factors under paragraph 276B namely whether there were matters to be taken into account which would render it undesirable to grant indefinite leave to remain. I find that the factors which she took into account justified the conclusion that the family were not entitled to a discretionary grant of indefinite leave to remain. The family's representatives pressed the FTTJ to deal with the 10 year residence application rather than referring it back to the respondent and I have also been asked to deal with this rather than referring it back to the respondent. I find that MU Bangladesh support the view that this course of action can be followed.

18. I find that the FTTJ did not err in law and I uphold her determination.

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Signed
Upper Tribunal Judge Moulden

Date 4 April 2014