Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/36038/2013
IA/36039/2013
IA/36040/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 17 June 2014	**On 2 September 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE G A BLACK

Between

MR BALJIT SINGH (FIRST APPELLANT)
MRS AMANDEEP KAUR (SECOND APPELLANT)
MASTER YASHVIR SINGH (THIRD APPELLANT)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr H Samra, Counsel instructed by Harbans Singh & Co Solicitors
For the Respondent: Mr P Deller, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellants are citizens of India. They are father, mother and son whose dates of birth are 18 February 1981, 29 October 1979 and 12 August 2005 respectively. An immigration decision was made on 19

August 2013 to remove the first appellant Mr Baljit Singh together with his wife and son. Their appeal was heard before a Judge of the First-tier Tribunal Pygott who in a determination promulgated on 17 February 2014 dismissed the appeals on immigration and on human rights grounds.

2. This matter comes before me for consideration as to whether or not there was a material error of law in the Tribunal Judge's determination.

Background

3. The appellant and his wife entered the UK on visit visas issued on 18 June 2004 valid until 18 December 2004. On 12 August 2005 their son Yashvir was born. The appellant was encountered in March 2006 and made an asylum application which was subsequently withdrawn. Further encounters with the immigration authorities led to the appellant making an application for asylum with his wife and son as dependants which was refused and certified on 21 January 2010. On 22 February 2012 the parties were served with notices as overstayers. On 2 May 2012 the appellants applied for leave to remain having established a private and family life in the UK.

4. In a Reasons for Refusal Letter the respondent refused the applications having regard to Appendix FM and paragraphs 276ADE-276DH of the new Immigration Rules including Section EX1(a) of Appendix FM. The respondent also considered Section EX1(b) of Appendix FM. The respondent considered the application outside of the Rules with reference to the five stage process in **Razgar [2004] UKHL 27**. Finally consideration was given to the provisions under paragraph 353B of the Immigration Rules.

5. In his determination promulgated on 17 February 2014 First-tier Judge Pygott set out the detailed applicable law in paragraphs 21-29.

6. In his findings at paragraph 30 he sets out that the appellant relies on Article 8 ECHR and further he concludes that none of the provisions in Appendix FM of the Immigration Rules are applicable. His reasoning is set out in paragraph 33 namely that the third appellant (the son) had not lived in the UK continuously for seven years immediately preceding the date of the application. For the same reason he concludes that the third appellant does not meet the requirements of paragraph 276ADE(iv) and the first and second appellants do not meet any of the requirements under the Immigration Rules.

7. From paragraph 39 the Tribunal considers the appeal on human rights grounds and considers the situation as at the date of hearing, at which point the third appellant was over 8 years old. In light of that fact and that his parents had been in the UK for over nine years the judge found arguably good grounds for granting leave outside of the Immigration Rules

by reference to Article 8. There would be no interference to family life as the family would be returning as a unit.

8. The main issue related to the third appellant's private life. Factors with regard to proportionality and the issue of public interest are set out in paragraph 44 with regard to the first and second appellants. The Tribunal considered the third appellant's position from paragraph 45. It took into account that the appellant has special needs, the fact he has an older brother and maternal and paternal grandparents in India, he speaks and understands Punjabi and in the absence of any evidence to the contrary he would be able to receive an appropriate education notwithstanding special needs in India.

Grounds re Permission to Appeal

9. The appellant submitted that the judge erred in law having regard to the fact that the appellant had lived in the UK for at least seven years immediately preceding the date of the hearing. The approach to Article 8 ECHR was erroneous and ought to have followed the step by step approach articulated in **Razgar**. The judge failed to consider all evidence in assessing proportionality and or the best interests of the child.

Permission to Appeal

10. Permission to appeal was refused by First-tier Tribunal Judge Davidge on 10 March 2014. She found the grounds to be misconceived as the appellant's representative had conceded that the appeal could not succeed under Appendix FM. She considered the judge had correctly applied the date of decision as the relevant date under the Rules. With regard to Article 8 she concluded that the judge had considered the family's position and the best interests of the child and the grounds did not reveal any arguable material error of law.

Grounds seeking Permission to Appeal from the Upper Tribunal

11. The appellant submitted grounds for reconsideration.

    (a) FTJ Davidge erred as the appeal was not against entry clearance as a spouse or a refusal in May 2013. The appeals were not under Appendix FM but rather EX1 Exceptions and Article 8.

12. The grounds seeking permission to appeal against the determination of Immigration Judge Pygott were reiterated in the further grounds.

Permission to Appeal (Reconsideration)

13. In a decision dated 8 April 2014 Upper Tribunal Judge Freeman granted permission to appeal for the following reasons.

Arguably the permission judge's mistake about the nature of these appeals (against removal, not refusal of entry clearance) did matter, because it led her to take the date of the decision under appeal as the relevant date, rather than the date of hearing. Unless there is an objection within the time set out in the attached letter, there will be a fresh hearing before the First-tier Tribunal on that basis."

Rule 24 Response

14. The respondent opposed the appeal by way of a response dated 14 May 2014. In terms the First-tier Tribunal directed itself appropriately and at paragraph 33 the judge identified that the appellants did not satisfy EX1(b) given their son had not been living in the UK continuously for at least seven years immediately preceding the date of the application. The grounds seek to disagree with the cogent findings of the judge who came to a conclusion based on the evidence before him and does not disclose any error. The respondent opposed the grounds and requested an oral hearing.

Error of Law Hearing

15. Mr Samra submitted that the respondent's Rule 24 Response was out of time and that no application had been made for any extension of time under Rule 5(3) and or under Rule 7(8). He submitted that pursuant to the directions made by Upper Tribunal Judge Freeman the matter should be remitted to the First-tier Tribunal for a hearing afresh.

16. Mr Deller indicated that he had in mind the possibility of any procedural unfairness however he submitted that the Upper Tribunal's directions related to the refusal of permission by First-tier Tribunal Judge Davidge and was not in relation to the substantive decision before First-tier Tribunal Judge Pygott unless and until an error of law had been found. It was conceded that a mistake was made by First-tier Tribunal Judge Davidge. However that did not support or what justify remittal to the First-tier without proper consideration of the error of law issue.

Decision on Preliminary Issue

17. I heard submissions from both representatives and rejected the initial submissions made by Mr Samra. It is conceded that an error was made by Judge Davidge in her refusal of permission. There was correspondence in the file between the Upper Tribunal and the appellant's solicitors confirming that the matter would be dealt with as a full appeal in light of the response received from the respondent. It would appear that the Rule 24 Response had not been taken to be out of time. A letter had been sent by the appellant's solicitors dated 21 May indicating that the response was out of time and it would appear that no response had been provided with this particular specific point. The matter had been put before Upper Tribunal Judge Jordan on 30 May 2014 who directed as follows "The appeal

will not proceed on 17th June 2014 as a pre-hearing review as you suggest. It will proceed as the full appeal."

18. There has not yet been a finding that there has been an error of law on a point of law and only the Upper Tribunal can determine this. Nor has the Upper Tribunal decided, if such an error is found, to remake the decision. If the determination is to be remade, the question of whether it is appropriate to direct the appeal is reheard in the First-tier Tribunal must be decided by the Upper Tribunal Judge deciding the error of law and by reference to paragraph 17.2 of the Practice Statements of the Senior President of 25 September 2012.

19. If the Upper Tribunal decides it is unnecessary to direct the appeal is reheard in the First-tier Tribunal, the Upper Tribunal will only permit fresh evidence to be adduced if there is a need for such further evidence. There was a substantial amount of evidence provided in the First-tier Tribunal which the Upper Tribunal is able to consider, much of which is uncontroversial. The application fails to make out a need for further evidence. Production of further evidence must comply with the Procedure Rules and any relevant direction given in the appeal.

20. Having regard to the direction made by Upper Tribunal Judge Jordan and the submissions made by Mr Deller with which I concurred, I proceeded to hear submissions on the issue of whether or not there was an error of law in the Tribunal decision.

Substantive Submissions

21. Mr Samra relied on his grounds of appeal and submitted that the judge erred in particular at paragraphs 33 and 37 of the determination. The third appellant was 8 years old at the time of the hearing and the length of residence for a child had been incorporated into the new Immigration Rules and was thus of significance when considering proportionality.

22. Secondly, the judge failed to give sufficient reasons under Section 55 of the Borders, Citizenship and Immigration Act 2009.

23. Mr Deller submitted that it had been acknowledged at paragraph 30 that the appellants did not meet the requirements under Appendix FM and they were consequently not eligible under Appendix EX(b). As regards the child it was necessary to have been living in the UK for seven years as at the date of the application and the period of residence had not been met. A further application could be made in the event that the only issue was the length of qualifying residence.

24. It was the respondent's position that under paragraph 276ADE it was also necessary for the reasonableness issue to be considered. Mr Deller submitted that the judge had considered this aspect and made appropriate findings.

25. Mr Deller submitted that the respondent and the judge correctly applied the new Rules having regarding to transitional provisions under paragraph A277C. Further he submitted that if it was accepted that the new Rules had not been met because of the qualification residence then the judge had appropriately considered the guidance under **Gulshan**, admittedly not specifically stated but whilst he appeared to have looked outside of the Rules at all matters, it was the respondent's position that there was not sufficient to meet the **Gulshan** test.

26. Mr Deller further argued that the third appellant's private life had been fully considered and factored into the determination by the judge who was aware that by the time of the hearing the appellant had lived in the UK for over eight years. The appellant needed to show not only the residence qualification but also to meet the reasonable test under paragraph 276ADE. The conclusion made under Article 8 was sound and there was no material error of law.

Discussion and Decision

27. At the end of the hearing I announced my decision that I find no material error of law in the Tribunal Judge's decision. My reasons are as follows. I heard submissions from both representatives on the issue of error of law in the First-tier Tribunal decision. I have read the thorough and detailed determination prepared by First-tier Tribunal Judge Pygott and I am satisfied that she/he fully and carefully considered all of the relevant issues including the provisions under EX.1 which is clearly referred to at paragraph 33 of the determination and which the judge concluded is not applicable because the appellant has failed to meet the requirements that he has lived continuously in the UK for at least seven years preceding the date of the application; and (ii) it would not be reasonable to expect the child to leave the UK. This conclusion is repeated at paragraph 38 and the judge concluded correctly that none of the appellants meet the requirements under Appendix FM or paragraph 276ADE of the new Rules.

28. The judge goes on to consider the appeal under human rights grounds from paragraph 39 of the determination and at that stage it is clear that she/he has in mind that she must consider the circumstances at the date of hearing which includes the fact that the appellant's son was well over 8 years old and he had been in the UK for a further 18 months since his father's application and at such time his parents had been in the UK for well over nine years. Whilst not specifically citing the case of **Gulshan** the judge in the final sentence of paragraph 39 concluded that there may be arguably good grounds for granting leave outside the Rules for the aforementioned reasons. The judge then proceeded to consider family and private life following the appropriate stage by stage guidance in **Razgar** and in my view has taken into account all the relevant issues including in particular the third appellant's special educational needs which are set out in paragraph 42-43. The judge considered the

proportionality issue insofar as the first and second appellants are concerned at paragraph 44 and took into account their poor immigration history, the fact the appellant has been working illegally and that they have family and connections in India.

29. The Judge separately considered the issue of proportionality with regard to the third appellant and also considered that his best interests are a primary consideration. The considerations, assessment and conclusions are sound and the judge found the decision to remove the appellants to be proportionate.

Decision

I dismiss the appeal.

The determination shall stand.

Signed Dated as amended 1.9.2014

Deputy Upper Tribunal Judge G A Black