Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/42251/2013
IA/42252/2013
IA/42253/2013
IA/42255/2013
IA/42257/2013

THE IMMIGRATION ACTS

Heard at Bradford	**Determination Promulgated**
On 8th May 2014	**On 15th May 2014**

Before

UPPER TRIBUNAL JUDGE D E TAYLOR

Between
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellants

and

QA (FIRST APPELLANT)
MA (SECOND APPELLANT)
HA (THIRD APPELLANT)
AA (FOURTH APPELLANT)
FA (FIFTH APPELLANT)
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellants: Miss Farrall, Adamson Legal Solicitors
For the Respondent: Mrs R Pettersen, Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is the Secretary of State's appeal against the decision of Judge Kelly who allowed the Claimants' appeals following a hearing at Bradford on 20th January 2014.

2. The First Claimant came to the UK in September 2001 with leave and was joined by the Second Claimant in 2005 after marriage in Pakistan. Their children, the minor children, were all born in the UK.

3. The First Claimant was continuously and lawfully resident in the UK for a period of eleven and a half years but did not make the application which was the subject of the appeal before the judge until some six months after the last period of leave to remain had expired.

4. The application was considered under paragraphs A277C, Appendix FM and paragraphs 276ADE of the Immigration Rules. The Principal Claimant could not meet the requirements for limited leave to remain as a partner under R-LTRP.1.1 because his partner cannot satisfy the requirements of paragraphs E-LTRP.1.2 since she is neither settled in the UK nor a British citizen. Nor could he meet the requirement for limited leave to remain as a parent under R-LTRPT.1.1 since the children are not settled in the UK.

5. The Secretary of State considered paragraph EX1 of Appendix FM and concluded that there were no insurmountable obstacles to family life with the Second Claimant continuing outside the UK and it would not be unreasonable for the family to return to Pakistan as a family unit. She also considered paragraph 276ADE.

6. The judge made the following findings of fact. The First Claimant's father and two of his five siblings reside in Pakistan. His other three siblings are married with children and reside in the UK. He obtained a Bachelor of Commerce degree whilst in Pakistan and since coming to the UK has obtained a Diploma in Business Studies and a Bachelor of Business Administration.

7. With respect to the Third Claimant he said that she was nearly 8 years old and attends a primary school where she is settled, popular and making excellent progress with her studies. Also attending the school are a number of first cousins on her father's side with whom she has regular contact outside the immediate family. She has been diagnosed as having celiac disease which means that she requires a gluten-free diet, although the judge rejected the First Claimant's assertion that it would be prohibitively expensive to maintain the diet in Pakistan. Similarly he accepted that she had been diagnosed with a problem with her knees which may require surgical intervention, but there was no evidence that it would unavailable in Pakistan.

8. He wrote as follows

> "The Third Appellant has clearly lived continuously in the UK for a period of at least seven years and I note that in these circumstances the test is whether it would be reasonable to expect her to leave the UK rather than whether there are insurmountable obstacles to private and family life continuing in Pakistan (see Section EX1 quoted at paragraph 6 above). In considering this question I have noted that the Third Appellant was born and has spent the entirety of her life in the UK and that she has not visited Pakistan within her living memory. She is as one might expect in such circumstances happy and fully integrated into her local community in Hull. I thus have no hesitation in holding that it would be unreasonable to expect her to leave the UK.
>
> The adult Appellants are however unable to meet the requirement of paragraph E-LTRP2.2 of the Immigration Rules. This is because they share responsibility for their children and neither of them is settled in the UK. Paragraph 6 defines this phrase as meaning the applicant has unlimited leave to remain and is ordinarily resident in the UK without having entered or remained in breach of the immigration laws. As noted at paragraph 3 above the adult Appellants have only ever had limited leave to remain in the UK and they remained without leave for a period of six months prior to making the instant applications. However as Ms Farrall pointed out had he acted promptly the First Appellant would have had good prospects of being granted unlimited leave to remain under paragraph 276B on the ground that he had acquired at least ten years' lawful residence in the UK.
>
> Having taken full account of the matters that I have set out at paragraphs 15 to 17 above I am nevertheless satisfied that the circumstances I have outlined in paragraph 19 and 20 above are exceptional and that removal of the Appellants would consequently be unjustifiably harsh and thus incompatible with the Appellants' rights to respect for private and family life under Article 8 of the 1950 ECHR."

9. On that basis he allowed the appeal on Article 8 grounds.

The Grounds of Application

10. The Secretary of State submitted detailed Grounds of Appeal which are as follows.

11. Firstly the judge materially misdirected himself in law by finding that the Third Claimant meets the requirements of EX1 because the First and Second Claimants do not meet the requirements of Sections R-LTRPT and

E-LTRPT. The Immigration Judge materially misdirected himself by finding that the requirements of EX1 can be met independently. The judge failed to make any findings regarding the Fourth and Fifth Claimants and the failure to indicate the outcome of their appeals amounts to material error of law.

12. Alternatively the judge has allowed the appeals on Article 8 grounds but failed to take into account that the Claimants remained in the UK unlawfully for six months and failed to make an in time application. It is not clear whether the Claimants gave any reasons for failing to make the application and the judge failed to give adequate consideration to the Secretary of State's interests in maintaining an effective immigration policy. The decision by the Court of Appeal in Miah and Others [2012] EWCA Civ 261 confirmed that there is no near miss principle applicable to the Immigration Rules.

13. Thirdly the judge misdirected himself in finding that the best interests of the child made removal disproportionate. The Immigration Rules make it clear that children who have spent less than seven years in the UK will not have developed a strong enough private life in the UK to outweigh the public interest in immigration control outside of exceptional circumstances. Children whose parents are in the UK on a temporary basis can reasonably be expected to leave with them. Moreover the best interest principle does not automatically mean that it is in the best interests of the child to remain in the UK.

14. Finally the judge failed to consider whether there were insurmountable obstacles to the family continuing family life outside the UK.

15. Permission to appeal was granted by Judge Hodgkinson for the reasons stated in the grounds on 25th February 2014.

Submissions

16. Mrs Pettersen relied on her grounds and submitted that since the family came to the UK on a temporary basis with no expectation of settlement it would not be disproportionate for them to be removed. There was nothing exceptional about the Third Claimant's circumstances and there would need to be something more in order to justify the judge's decision. The fact that the First Claimant overstayed by more than six months was not properly weighed by the judge when reaching his decision.

17. Miss Farrall initially submitted that the Claimant could successfully navigate his way through to EX1 but after reflection accepted that he could not. She did however submit that there was no error in this determination because the judge had made a clear finding open to him that it would not be reasonable for the Third Claimant to leave the UK and she was therefore in a position to satisfy paragraph 276ADE(iv) namely that the applicant

> "Is under the age of 18 and has lived continuously in the UK for at least seven years and it would not be reasonable to expect the applicant to leave the UK."

Findings and Conclusions

18. Despite Mrs Pettersen's able defence of the grounds they do in fact merely amount to a disagreement with the decision.

19. With respect to ground 1 the judge did not allow the appeal on the basis that the Claimants met the requirements of EX1. He allowed the appeal on human rights grounds rather than under Appendix FM of the Rules. He did take into account the provisions of EX1, which he was fully entitled to do, but then properly directed himself to the fact that the adult Claimants were unable to meet the requirements of the Immigration Rules which would allow them to successfully navigate through to EX1.

20. It is right to say that no separate findings were made with respect to the Fourth and Fifth Claimants but, having found that it would not be reasonable for the Third Claimants to be removed it is inevitable that the Fourth and Fifth Claimants'' appeals would be allowed in line. The determination refers to all five Claimants as Appellants and the fact that the decision is formulated in the singular is not material.

21. With respect to ground 2 essentially this is simply a question of weight. The judge was plainly aware of the fact that the first Claimant failed to make the application within the currency of his leave. Some reference seems to have been made in the evidence that it was overlooked because of the distraction caused by the Third Claimant's illness. Be that as it may it is not properly arguable that the judge failed to take a relevant matter into account. The reference to near miss is one which refers to the Immigration Rules but is not an irrelevant factor so far as consideration of Article 8 is concerned.

22. The remaining grounds simply amount to a re-argument of the Secretary of State's case. It was for the judge to decide whether the best interests of the Third Claimant should dictate the outcome of the appeal. The reference to insurmountable obstacles is misconceived since the appeal was not allowed on the basis of the Second Claimant's position. In this case there was a clear finding by the judge that it would be unreasonable to expect the Third Claimant to leave the UK, a finding plainly open to him on the evidence and on that basis there is no error in his allowing the appeal for the reasons which he gave.

Decision

23. The Secretary of State's challenge fails. The judge's decision stands.

Signed Date

Upper Tribunal Judge Taylor

Direction Regarding Anonymity – Rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date

Upper Tribunal Judge Taylor