IAC-AH-SC-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: IA/23786/2014
IA/23793/2014
IA/23796/2014

THE IMMIGRATION ACTS

Heard at Field House
On 31st July 2015

Decision & Reasons Promulgated
On 10th November 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

(1) MRS AISHA ABDI
(2) MR ABID SIDDIQUE
(3) MISS FAJAR SIDDIQUE
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr I Ali (Counsel)
For the Respondent: Mr S Walker (HOPO)

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Stokes, promulgated on 31st March 2015, following a hearing at Taylor House on 13th February 2015. In the determination, the judge allowed the appeals of Mrs Aisha Abdi (the principal Appellant), and her husband, Mr Abid Siddique, and their daughter Miss Fajar Siddique. The Respondent,

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Secretary of State, subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a national of Pakistan, she was born on 2nd May 1981. The second Appellant, her husband, is also a national of Pakistan, and was born on 31st December 1975. The third Appellant, also a national of Pakistan, was born on 1st March 2011. On 31st March 2014, the principal Appellant made an application for leave to remain as a Tier 4 (General) Student Migrant, and the remaining two Appellants applied as her dependants. By a decision dated 15th May 2014, the applications were dismissed.

The Principal Appellant's Claim

3. The principal Appellant's claim is that she arrived in the UK on 17th September 2005 with a student visa valid until 31st October 2008. She had been granted further leave to remain in the same category until 31st December 2010. She had a further grant until 31st December 2011. However, she then fell pregnant, and "having a medically difficult pregnancy so had to give up studying for a time".

4. She maintained that in order to remain in the UK she applied as the second Appellant's dependant. This was initially refused but she won her claim after a successful appeal. She then had leave to remain until 15th March 2014. She claimed her intention had always been to continue with her studies. Therefore, after having recovered from her previous medical conditions, she applied to the college for a course starting in March 2014.

5. She paid the full course fees. She started the course. However, her claim then was that,

> "She was now pregnant again and suffering from the same complications as before. These prevented her from currently continuing with her course. The college had been informed. She would return to her studies as soon as her health permitted as she had done after her first pregnancy" (paragraph 11).

The Judge's Findings

6. The judge recorded how the Appellant could not meet the requirements of paragraph 245ZX as she was last granted leave to remain as the second Appellant's dependant and was not within the category that allowed her to switch to a Tier 4 Student status.

7. Therefore, the Respondent Secretary of State's decision was in accordance with the law and the applicable Immigration Rules. If the principal Appellant's appeal failed, then the dependant appeals of the two remaining Appellants also failed.

8. However, the decision with respect to Article 8 ECHR rights was rather different. The judge applied the **Razgar** principles (see paragraph 21) and

then proceeded to look at the Section 117B considerations under the Immigration Act 2014 (see paragraph 22). In so doing, the judge observed that both Appellants spoke English.

9. Both are willing to work and support their family, both are unlikely to be a burden on the state, both have contributed to the economic wellbeing of the country, the second Appellant pays taxes and the first Appellant pays college fees, and that "the first Appellant's failure to meet the Immigration Rules was for a technical rather than a substantive reason and she met all the other requirements of the Immigration Rules" (paragraph 23). The judge also observed that, "she has submitted evidence of her notifying the college of her current inability to attend classes" (paragraph 23).

10. On the basis of these considerations, the judge concluded that the first Appellant if removed,

> "Would have to restart a similar course in Pakistan. The Respondent has produced no evidence that such courses exist. I accept that an English qualification may be regarded with more prestige in Pakistan. The first Appellant came to study which she has done, interrupted only by medical circumstances ...." (paragraph 26).

In the end, the judge allowed the appeal on the basis of the case law in **CDS (Brazil) [2010] UKUT 000305**. This was because the first Appellant's removal would be disproportionate (see paragraph 27).

Grounds of Application

11. The grounds of application state that the judge had misapplied the case of **CDS (Brazil) [2010] UKUT 000305** because the cessation of studies in this case has arisen due to medical conditions, on account of the Appellant having become pregnant, whereas in the **CDS** case the cessation of studies had occurred because of the transitory provisions in the Rules. Second, the judge also erred at paragraph 26 in placing the weight on the Respondent to produce evidence that similar courses would not be available in Pakistan. On 28th May 2015, permission to appeal was granted.

Submissions

12. At the hearing before me on 31st July 2015, Mr Walker, appearing on behalf of the Respondent Secretary of State relied upon the Grounds of Appeal. He submitted that the judge had misapplied the case of **CDS (Brazil)**. The judge had accepted that the Appellant could not satisfy the Rules and so to allow the appeal under Article 8 was misconceived on grounds that the Secretary of State had failed to demonstrate that similar courses would be available for the Appellant in Pakistan.

13. For his part, Mr Ali, appearing on behalf of the Appellants, submitted that the distinction is made about **CDS (Brazil)** that the particular feature there was the cessation of studies on account of the transitory provisions,

whereas in this case it is on account of medical condition, was not a viable distinction to make. The judge himself did not make that distinction. The general point in **CDS (Brazil)** is that someone who has been admitted to undertake a course may lawfully build up a private life outside the grant of leave on the basis of the Rules.

14. Second, the judge clearly does have **CDS (Brazil)** in his mind and does apply it accurately.

15. Third, the judge has regard to the factors in favour of the Appellant at paragraph 25 pointing out that the adults have contributed to this country and that they are not a charge on public funds and that the Appellant has informed her college that she could not attend because of a medical condition. At the same time, the judge has had regard to the adverse factors at paragraph 25 and 26.

16. Mr Ali also drew my attention to his very helpful and comprehensive skeleton argument which refers to the recent Court of Appeal judgment in **SS (Congo) [2015] EWCA Civ 387**, containing the statement that,

> "However, it cannot be said that the fact that a case involves a 'near miss' in relation to the requirements set out in the Rules is wholly irrelevant to the balancing exercise required under Article 8. If an applicant can show that there are individual interests at stake covered by Article 8 which give rise to a strong claim that compelling circumstances may exist to justify the grant of LTE outside the Rules, the fact that their case is also a 'near miss' case may be a relevant consideration which tips the balance under Article 8 in their favour. In such a case, the applicant would be able to say that the detrimental impact on the public interest in issue if LTE is granted in their favour will be somewhat less than in a case where the gap between the applicant's position and the requirements of the Rules is great, and the risk that they may end up having recourse to public funds and resources is therefore greater." (See paragraph 56).

17. It was, submitted Mr Ali, in this respect that Article 8 could be invoked in relation to the Appellant only having just missed coming under the Immigration Rules, and the judge was correct to draw attention to this at paragraph 23 of the determination. Furthermore, on 13th March 2014, the Appellant was not pregnant when the application was made. At the date of the refusal letter on 15th May 2014, the Appellant was still not pregnant. The second daughter was born only on 22nd March 2015. On this basis, the principal Appellant would have been pregnant round about June 2014 (and not in May 2014 when the refusal letter was issued). After that date, the college was aware of the Appellant's medical condition and her inability to attend. The Appellant could not be punished for falling pregnant.

18. There was no reply by Mr Walker.

No Error of Law

19. I am satisfied that the making of the decision by the judge did not involve the making of an error on a point of law (see Section 12(1) of TCEA 2007)

such that I should set aside the decision and remake the decision. My reasons are as follows. First, it is plain that the function of this Tribunal is a supervisory function. This Tribunal can only intervene if, as Brooke LJ stated in **R (Iran) [2005] EWCA Civ 982**, there was a "perversity" in the decision of the judge below. As Brooke LJ stated this "represents a very high hurdle (see paragraph 11). His Lordship also went on to explain that, "far too often practitioners use the word 'irrational' or 'perverse' when these epithets are completely inappropriate (paragraph 12).

20. This is a case where, the judge has had regard to the Rules and concluded that the Appellant could not succeed under the Rules. The judge is absolutely emphatic in this (see paragraph 15). The judge then goes on to consider Article 8, setting out the case law (see paragraphs 18 to 21). Regard is then had to the personal circumstances of the Appellant under the rubric of Section 117B of the 2014 Immigration Act. It is observed that a number of factors fall in the Appellant's favour (see paragraph 23). At the same time, the judge has regard to the factors that weigh against the Appellant (see paragraph 25).

21. It is against this background that the judge states that she has "made a careful assessment of the severity and consequences of the interference to the Appellant's family life which removal would cause " (paragraph 26). All the matters set out in this paragraph are open to the judge to give due regard to. It is, of course, not the case that the burden is upon the Secretary of State to show that similar courses would not be available to the Appellant in Pakistan. The judge errs in this respect.

22. However, this is not a material error, in the light of the fact that the judge has allowed the appeal really on the basis of the inevitable "disruption to her life" for the first Appellant (see paragraph 26). The judge also allows the appeal on the basis that, "I accept that an English qualification may be regarded with more prestige in Pakistan". And this can be taken as a given in the Indian subcontinent as a general rule and the judge is not wrong to draw attention to this. Another judge may well have taken a different view.

23. However, on the basis of the considerations that the judge did have proper regard to, it was open to the judge, evaluating the evidence as she did, to come to the conclusion that she did.

Notice of Decision

24. There is no material error of law in the original judge's decision. The determination shall stand.

25. No anonymity order is made.

Signed Date

Deputy Upper Tribunal Judge Juss 9th November 2015