IAC-AH-SC-V1

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/29100/2014
IA/29113/2014
IA/29120/2014
IA/29122/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 2nd October 2015	**On 12th October 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

CHAKRAVARTHY BALLA SRINIVASA (FIRST APPELLANT)
MAIMA ILMAS (SECOND APPELLANT)
MALAIKA BALLA (THIRD APPELLANT)
MISHA BALLA (FOURTH APPELLANT)
(ANONYMITY ORDER NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr T Aitken of Counsel
For the Respondent: Mr S Whitwell, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction and Background

1. The Appellants appeal against a decision of Judge of the First-tier Tribunal Seelhoff (the judge) promulgated on 19th March 2015.

2. The first Appellant is an Indian citizen born 16th October 1974, and the second Appellant is a Pakistani citizen born 7th July 1977 and is the first Appellant's wife. The third and fourth Appellants were born in the UK on 16th April 2009 and 10th January 2013 respectively and are the daughters of the first two Appellants. The third Appellant has been registered as an Indian national, but the fourth Appellant has not yet been registered, although the Respondent maintains that she is a national of India.

3. The first Appellant arrived in the United Kingdom on 22nd September 2003 as a student and overstayed his leave. The second Appellant arrived on 23rd September 2006 as a student and also overstayed her leave. The first and second Appellants married in the United Kingdom on 9th October 2008.

4. In April 2012 the first, second and third Appellants applied for leave to remain in the United Kingdom relying upon Article 8 of the 1950 European Convention on Human Rights (the 1950 Convention). The applications were refused on 23rd May 2013 without a right of appeal. Following judicial review proceedings the Respondent reconsidered the applications, and issued removal decisions in relation to all four Appellants. It was indicated that the first, third and fourth Appellants would be removed to India, and the second Appellant to Pakistan. The Respondent issued a letter dated 1st July 2014 giving reasons for these decisions.

5. The appeals were heard together by the judge on 5th March 2015. It was accepted that the Appellants could not succeed under the Immigration Rules, and the appeals were based upon Article 8 of the 1950 Convention.

6. The judge heard evidence from the first and second Appellants and dismissed the appeals finding that removal of the Appellants from the UK would be proportionate.

7. The Appellants applied for permission to appeal to the Upper Tribunal. They relied upon five grounds which are summarised below:

   (i) The judge erred in law by failing to grant the Appellants' request for an adjournment in order to respond to evidence that was adduced by the Respondent at the hearing.

   (ii) The judge failed to direct himself as to the correct burden of proof applicable when considering Article 8.

   (iii) The judge materially erred in law by finding that all four Appellants can be removed to India.

(iv) The judge's conclusion that the second Appellant would not face significant problems or significant delays in applying for a visa from Pakistan to travel to India is contrary to the evidence and the judge therefore failed to take all material matters into account.

(v) The judge erred in law in his assessment of the best interests of the third and fourth Appellants.

8. Permission to appeal was granted by Judge of the First-tier Tribunal Cruthers on 15th June 2015.

9. The Respondent thereafter lodged a response pursuant to rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008 contending in summary that the judge had directed himself appropriately, was entitled to refuse an adjournment, considered the relevant case law, and did not err in law.

10. The Tribunal issued directions that there should be a hearing before the Upper Tribunal to ascertain whether the First-tier Tribunal erred in law such that the decision must be set aside.

The Upper Tribunal Hearing

11. Mr Aitken applied to submit evidence that had not been before the First-tier Tribunal, pursuant to rule 15(2A) of the 2008 Procedure Rules. This evidence comprised 27 pages and included emails between Mr Aitken and VF Services (UK) Limited relating to the possibility of a Pakistani citizen obtaining a visa to enter and settle in India.

12. Mr Whitwell had not seen the documents and therefore the hearing was adjourned to allow him to consider these. When the hearing resumed Mr Whitwell confirmed he had had sufficient time to consider the documents and objected to any reliance being placed upon them, on the basis that they had not been before the First-tier Tribunal.

13. I indicated that I would consider the documents, and decide whether or not it was appropriate to place any weight upon them.

14. I then heard submissions from Mr Aitken who relied and expanded upon the grounds contained within the application for permission to appeal.

15. Mr Whitwell responded by relying upon the rule 24 response, contending that the decision of the First-tier Tribunal disclosed no material error.

16. At the conclusion of submissions I reserved my decision.

My Findings and Conclusions

17. Firstly I consider whether the judge erred in law in failing to grant an adjournment. I take into account the principles in Nwaigwe (adjournment: fairness) [2014] UKUT 00418 (IAC). In brief summary if an adjournment refusal is challenged on fairness grounds, it is important to recognise that

the question for the Upper Tribunal is not whether the First-tier Tribunal acted reasonably, but the test to be applied is that of fairness, and whether there was any deprivation of the affected party's rights to a fair hearing.

18. The Appellants' case is that the Presenting Officer before the First-tier Tribunal produced three documents at the hearing, which it was argued showed that there had been significant changes to the Indian visa categories such that the second Appellant would be able to apply for a "Long-Term Visa" (LTV) which would provide a 5-year route to settlement.

19. It was argued that the judge should have granted an adjournment which was requested, so that Dr Roger Ballard, an expert anthropologist, who had already prepared a report, could comment on the documents that had been produced at the hearing. It was contended that the judge had relied heavily upon this documentation.

20. It is apparent that the judge did place some reliance upon the documentation as there is reference in paragraph 29 of his decision to evidence from the website of the Indian High Commission that in December 2014 there was a significant relaxation of the Immigration Rules, and that a new 5-year visa was introduced which provided people in the second Appellant's situation with a route to settlement in India.

21. The judge found at paragraph 30, that the second Appellant may have some difficulties in applying for this visa from the United Kingdom because she is here illegally. He went on to find that she would not have significant problems or face a significant delay if she travelled to Pakistan to apply for her visa to allow her to enter India from there. The judge recorded the following in the last sentence of paragraph 30 of his decision;

> "However I have considered proportionality in respect of this in any event and I cannot see how it would possibly be disproportionate to expect the second Appellant to travel to Pakistan to make such an application for an Indian visa."

22. The Appellants have now had the opportunity of providing further evidence, in response to the documentation submitted on behalf of the Respondent at the First-tier Tribunal Hearing. This is summarised in part at paragraphs 18 – 20 of the grounds seeking permission to appeal, which for ease of reference I set out below;

> "18. Dr Roger Ballard now provides his opinion on the documents produced by the Respondent, a copy of which is included with this application. He is of the opinion that the position taken by the Respondent at the hearing that the second Appellant can obtain a Long-Term Visa (or LTV) for India with relative ease is mistaken. The evidence demonstrates that LTVs can be sought once present in India.
>
> 19. The passage within section 47 of the document from the Indian Ministry of Home Affairs relied upon by the Respondent relates to the issuance of LTVs. At section 47 this relates to the categories of persons who are

> eligible for extensions of LTVs in respect of certain Pakistani nationals and includes Pakistani women married to Indian nationals and staying in India (emphasis added).
>
> 20. This passage indicates that it is possible to apply for an extension of LTV once the applicant is lawfully resident in India. As a consequence, the second Appellant will still be required to apply for a visa to enable her to travel to India in the first instance."

23. The position is confirmed in an email from VF Services (UK) Limited sent to Mr Aitken dated 10th July 2015, which states that;

> "As the applicant is a citizen of Pakistan, she will be unable to apply for a 5-year long term entry visa. However, she can apply for a tourist visa."

24. The position therefore appears to be, according to the Appellants' own evidence, that the second Appellant could apply for a tourist visa from Pakistan, in order to enter India. Thereafter she could apply for a visa to enable her to remain in India.

25. I find that the decision to refuse an adjournment has not resulted in any unfairness to the Appellants. The judge at paragraph 30 has recorded that the second Appellant could travel to Pakistan to make an application for an Indian visa, and this has in fact been confirmed by the evidence submitted on behalf of the Appellants. I therefore conclude that the judge did not err in refusing the adjournment application, because no unfairness has resulted from that decision.

26. Secondly I consider whether the judge erred in relation to the burden of proof when considering Article 8. The Appellants' case is that the judge erred by recording at paragraph 6;

> "Accordingly the Appellants must prove on the balance of probabilities that their removal will result in a disproportionate breach of their Article 8 rights."

27. Article 8 is set out below for ease of reference;

> "(1) Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> (2) There should be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

28. In my view when an individual establishes that an Immigration Decision interferes with his or her right to respect for a right protected by Article 8(1) it is for the Respondent to justify the decision under Article 8(2).

29. Having read the decision as a whole, I find that this is the approach taken by the judge, although this could have been set out more clearly in paragraph 6 of his decision. However I do not find that the judge misapplied the burden of proof.

30. It is also contended that the judge erred in law in recording in paragraph 7 that;

> "Considerable weight must be placed on the criteria set out within the Immigration Rules which represent threshold criteria."

31. I do not find that the judge materially erred on this issue. The Court of Appeal confirmed in SS (Congo) and Others [2015] EWCA Civ 387 at paragraph 44 that the proper approach when considering Article 8 should always be to indentify first the substantive content of the relevant Immigration Rules and if the application cannot succeed under the rules, Article 8 should be considered outside the rules if there is a reasonably arguable case which has not already been sufficiently dealt with under the rules.

32. The Court of Appeal in paragraph 44 of Haleemudeen [2014] EWCA Civ 558 stated;

> "44. Mr Richardson's preferred position was that the Rules are only the starting point for an assessment of proportionality. It was with evident reluctance that he accepted that, at least in this court, in the light of the authorities, it is necessary to find 'compelling circumstances' for going outside the Rules."

33. In my view the above authority from the Court of Appeal supports the judge's conclusion that "considerable weight must be placed on criteria set in the Immigration Rules", even if the judge was in error in referring to "threshold criteria". This error is not material.

34. Thirdly I consider the submission that the judge materially erred by finding that all four Appellants can be removed to India as was recorded in paragraph 27 of his decision. This was an error, as the second Appellant is a citizen of Pakistan, and the Respondent's removal directions indicate a removal to Pakistan in her case. However I find that this error is not material. The judge was clearly aware that the second Appellant would have to travel to Pakistan, and there is reference to this in paragraphs 30 and 35 of his decision. The judge based his decision upon the fact that the second Appellant would initially have to travel to Pakistan from the United Kingdom.

35. The fourth Ground of Appeal challenges the judge's conclusion that the second Appellant would not face significant problems or significant delays in applying for a visa from Pakistan to enable her to travel to India. It is said that this finding is contrary to the evidence.

36. I find no error on this issue. The judge took into account all the evidence placed before him, and made a finding which was open to him on the

evidence. My attention was drawn to page 419 of the Appellants' bundle which indicates that the processing time of applications for Indian visas from persons of Pakistani origin could take seven – eight weeks or more, and the processing time for applications from Pakistani nationals or those holding dual nationality can be substantially longer. The information provided does not stipulate what type of visa is referred to, and does not state that all types of visa would take such a length of time, and in fact does not state that all visas would take at least seven or eight weeks to process. I find no material error of law on this issue.

37. The final Ground of Appeal challenges the judge's assessment of the best interests of the third and fourth Appellants as children. It is submitted that the judge has failed to identify their best interests. I do not agree. The best interests assessment is carried out in paragraph 28, and the judge takes into account the fact that the children were born in the UK, their ages, which are 5 and 2, and the fact that one of the children has not started school, and the other has only just started. It is not suggested that the children are British citizens. The judge finds in paragraph 35 that it is proportionate to expect the Appellants to relocate to India, and therefore has made a finding that the best interests of the children would be to remain with their parents.

38. There is a difficulty in this case, in that there may have to be a separation of the children from the second Appellant for a time while she travels to Pakistan to apply for a visa to enter India, but I do not find that this means that the judge erred in law by failing to conclude that this means the best interests of the children must be to remain in the United Kingdom with both their parents. The judge correctly referred to Azimi-Moayed [2013] UKUT 00197 (IAC) noting that the children had not resided in the UK for seven years, and that far more weight ought to be attached to time spent in the UK after a child has reached 4 years of age, rather than the first four years of life. The judge has decided that the best interests of the children lie with remaining with their parents, and does not err in concluding that if the parents are to be removed, so should the children, as there are no adequate reasons to the contrary.

39. The findings made by the judge were open to him on the evidence, and sustainable reasons for those findings have been given. The grounds demonstrate a disagreement with findings made but do not disclose a material error of law.

Notice of Decision

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law such that the decision must be set aside. I do not set aside the decision. The appeals are dismissed.

Anonymity

The First-tier Tribunal made no anonymity direction. There has been no request for anonymity to the Upper Tribunal and no anonymity order is made.

Signed Date

Deputy Upper Tribunal Judge M A Hall 5th October 2015

TO THE RESPONDENT
FEE AWARD

The appeals are dismissed. There are no fee awards.

Signed Date

Deputy Upper Tribunal Judge M A Hall 5th October 2015