Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/29582/2014
IA/29583/2014
IA/29584/2014
IA/48575/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 09 December 2015	**On 21 December 2015**

Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

AKTHER HOSSAIN
(AND THREE DEPENDANTS)

Respondent

Representation:
For the Appellant: Mr S. Whitwell, Home Office Presenting Officer
For the Respondent: Mr A.A.M. Rahman of MQ Hassan Solicitors

DECISION AND REASONS

Background

1. For the sake of continuity I will refer to the parties as they were before the First-tier Tribunal although technically the Secretary of State is the appellant in the appeal before the Upper Tribunal.

2. The first appellant ("the appellant") appealed against the respondent's decision dated 08 July 2014 to refuse him, his wife and two dependent children (X aged 8 and Y aged 10 years old) leave to remain on human rights grounds. First-tier Tribunal Judge Dean allowed the appeal in a decision promulgated on 23 March 2015.

3. The appellant entered the United Kingdom on 11 January 2003 with entry clearance as a student that was valid until 01 January 2006. His wife, Eshrat Jahan, claims to have entered the UK in 2003. The appellant was granted further leave to remain as a student nurse until 30 June 2006. Leave to remain as a student nurse was extended until 31 August 2007 and again until 30 November 2008. Both children were born in the UK. The appellant was then granted further leave to remain as a Tier 1 (Post-study work) Migrant until 21 October 2010. On 20 October 201 the appellant applied for further leave to remain as a Tier 4 (General) Student Migrant but the application was refused on 17 January 2011. It is unclear whether they appealed the decision but on the face of the chronology it appears that they remained without leave for a period of around one year and eight months. On 29 September 2012 the appellant and his dependents applied for leave to remain on human rights grounds. In a decision dated 15 October 2012 the appellant, his wife and youngest son were refused leave to remain. In a decision dated 23 October 2012 their oldest son, Y, was refused leave to remain. Following judicial review proceedings the respondent agreed to reconsider the applications but refused them in fresh decisions dated 08 July 2014.

4. The First-tier Tribunal Judge ("the judge") considered Y's position first. She found that the respondent had failed to apply the correct version of paragraph 276ADE(1)(iv). At the date when the application was made paragraph 276ADE(1)(iv) only required the applicant to show that he was "under the age of 18 years and has lived continuously in the United Kingdom for at least 7 years (discounting any period of imprisonment)" [11]. The subsequent requirement relating to whether it would be reasonable to expect the child to leave the UK was not inserted into the immigration rules until 13 December 2012 [12]. She noted that Y had made his application for leave to remain before 13 December 2012 and that the version that should have been applied was the one without the 'reasonableness test'. As such she concluded that Y met the requirements of paragraph 276ADE(1)(iv) because he was under 18 years and had lived continuously in the UK for at least seven years.

5. The judge went on to consider the position of the appellant and his other two dependents under the immigration rules. She was satisfied that the two adults had a genuine and subsisting parental relationship with the children. The family spoke English and were well integrated in the UK. She concluded that the two adults met the requirements of paragraph EX.1 of

Appendix FM. She went on to consider the position of the youngest child, X. The respondent had refused the application under paragraph E-LTRC.1.6 because his parents did not meet the requirements of Appendix FM. In view of her findings relating to his parents she concluded that X met the requirements of paragraph E-LTRC.1.6 of the immigration rules.

6. The respondent seeks to challenge the First-tier Tribunal decision on the ground that the judge erred in failing to consider the 'reasonableness test' contained in paragraph EX.1(a)(ii) of Appendix FM. The assessment of whether it would be reasonable for the family to return to their country of origin should have been made with reference to the relevant case law relating to the best interests of the child. The fact that the other members of the family did not qualify for leave to remain under the immigration rules was relevant to whether it would be reasonable to expect them to return to their country of origin.

Decision and reasons

7. After an informal discussion with both parties at the beginning of the hearing it was agreed that the First-tier Tribunal decision involved the making of an error on a point of law.

8. The respondent initially sought to appeal the First-tier Tribunal's finding that the reasonableness test was not contained in paragraph 276ADE(1)(iv) at the date of application, subsequently resiled from the position in the grounds of appeal to the Upper Tribunal and then changed her mind once again when her representative applied to amend the grounds of appeal to the Upper Tribunal at a hearing on 11 November 2015.

9. Whether the First-tier Tribunal was correct to conclude that the 'reasonableness test' was not applicable at the relevant date is immaterial for the purpose of the decision that I have to make today because it is quite clear that when the judge went on to consider whether the child's parents met the requirements of paragraph EX.1 of Appendix FM she failed to consider the 'reasonableness test' contained in paragraph EX.1(a)(ii), which had formed part of that paragraph since it was introduced in July 2012. It was on this point that both parties agreed that the First-tier Tribunal Judge had erred.

10. For these reasons I conclude that the First-tier Tribunal decision involved the making of an error on a point of law. Given that the issue of whether it is reasonable for the oldest child to leave the UK has not yet been considered in any detail, and there are no existing findings, I consider it appropriate to remit the appeal to the First-tier Tribunal for a fresh hearing.

DECISION

The First-tier Tribunal decision involved the making of an error on a point of law

The appeal is remitted to the First-tier Tribunal

Signed  Date 09 December 2015

Upper Tribunal Judge Canavan