IAC-FH-AR-V1

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/02139/2015
IA/02141/2015
IA/02143/2015
IA/02145/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 23 February 2016	**On 14 March 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SHIRLEY [P]
DAVID [M]
[J A]
[A A]
(ANONYMITY DIRECTION NOT MADE)

Respondents

Representation:
For the Appellant: Mr S Whitwell, Senior Home Office Presenting Officer
For the Respondents: Miss S Akinyinka, from Duncan Lewis & Co Solicitors

DECISION AND REASONS

1. I refer to the parties as they were before the First-tier Tribunal. Thus, the Secretary of State is the Respondent and the claimants are once more the Appellants.

2. This is an appeal by the Respondent against the decision of First-tier Tribunal Judge Sweet (the judge), promulgated on 28 August 2015, in which he allowed the Appellants' appeals on Article 8 grounds within the Immigration Rules (the Rules). Those appeals had been against the Respondent's decisions, dated 16 December 2014, to remove the Appellants from the United Kingdom by way of directions under section 10 of the Immigration and Asylum Act 1999.

3. The Appellants are all nationals of Bolivia. The first and second Appellants are husband and wife and are the parents of the third and fourth. The children have been minors at all material times.

The judge's decision

4. In a brief decision the judge first sets out the respective positions of the Appellants and the Respondent. He then notes the submissions made by counsel for the Appellants. The Respondent was unrepresented at the hearing.

5. The judge's conclusions are contained in paragraphs 14 to 18 of his decision. In paragraph 14 he makes reference to the third and fourth Appellants' ages and the evidence provided that extended family in Bolivia would not be able to assist the family unit upon return to that country. It is said that the third and fourth Appellants spoke mainly English, there being some communication in Spanish as well. The judge stated that there would be "difficulties" in the two children integrating into Bolivian life now.

6. In paragraph 15 the judge stated as follows:

> "I am satisfied that it would not be reasonable to expect him [the third Appellant] to leave the UK, as he has been in the UK for at least seven years immediately preceding the date of the application pursuant to EX.1 of Appendix FM. In the case of Azimi-Moayed [2013] the Tribunal observed that seven years from the age of 4 is likely to be more significant to a child than the first seven years of life. [JA] is nearly 9. His removal from the UK to Bolivia would result in a substantial change to his life, which he has only known to date in the UK. It would be unreasonable to expect him to leave the UK and likewise for the rest of the family."

7. In paragraph 16 the judge refers to particular eligibility requirements under Appendix FM and concludes that these were not required to be met by the first and second Appellants. There is reference to section 117B(6) of the Nationality, Immigration and Asylum Act 2002 Act. In the same paragraph the judge states:

> "It is also not clear that the Secretary of State has had any regard to the requirements to consider the child's welfare under Section 58 of the Borders, Citizenship and Immigration Act 2009 or the guidance given in JO [2014] and MK [2015]."

8. He concluded that the Appellants all succeeded on Article 8 within the Rules.
9. At paragraph 18 the judge states that alternatively he would have allowed the appeal on the basis that the Appellants could satisfy paragraph 276ADE(iv) and (vi) of the Rules because it would not reasonable for the third Appellant to leave the United Kingdom, and that there would be very significant obstacles to the integration of the first and second Appellants into Bolivian society.

The grounds of appeal and grant of permission

10. The Respondent sought permission to appeal on three grounds: first, that the judge erred in considering section 117B(6) of the 2002 Act in isolation from the rest of that section; second, that the judge failed to explain what the very significant obstacles were in relation to the first and second Appellants; third, that the judge failed to deal adequately with the issue of reasonableness as it related to the third Appellant.

11. Permission to appeal was granted by First-tier Tribunal Judge Page on 5 January 2016.

The hearing before me

12. Mr Whitwell raised a preliminary point in respect of whether the second, third and fourth Appellants had in-country rights of appeal at all. He made reference to the immigration decisions issued in respect of these Appellants. It is right that these notices state that the right for appeal was exercisable only from out of country. However after some further discussion on the point Mr Whitwell withdrew this initial point.

13. In my view he was right to do so. It is true that the immigration decision notices say what they say. However, the Respondent has said all along (in particular within the reasons for refusal letter) that all of the Appellants had made combined applications based on human rights. On this basis the assertion that the rights of appeal were exercisable out of country only appears to be incorrect. The true position is that human rights claims were made and in view of section 92(4) of the 2002 Act the consequent rights of appeal were all in-country.

14. Turning to the substance of the Respondent's challenge, Mr Whitwell relied on the grounds of appeal. He submitted that the judge was wrong to have considered EX.1 of Appendix FM. The Appellants could not meet the

eligibility requirements within this Appendix and therefore could not succeed under the Rules in this regard. He submitted that the core issue in these appeals was that of reasonableness as it related to the third Appellant. He submitted that the judge had failed to make adequate findings and/or give adequate reasons on this core issue. In addition, the judge had conflated the issues for reasonableness with time spent in the United Kingdom when in fact the time spent here was simply the first limb of the overall test. Reasonableness had to be dealt with separately.

15. Miss Akinyinka accepted that the judge had been wrong in his consideration of Appendix FM. However she maintained that his conclusions on reasonableness were sustainable.

Decision on error of law

16. In my view there are material errors of law in the judge's decision.

17. First and foremost is the judge's consideration of the reasonableness issue. In my view, having regard to paragraphs 14, 15 and 16 there is an inadequacy of findings and reasons on the issue.

18. At paragraph 14 there is reference to "difficulties" but there are simply not enough findings of primary fact as to what these were, with reference to whatever evidence was before the judge, and certainly no adequate reasons as to why such difficulties existed and their extent.

19. On the face of paragraph 15 it is apparent that the judge has indeed conflated the issue of reasonableness with the time spent in the United Kingdom by the third Appellant. In my view that is clear from the second sentence of the paragraph and the use of the word "as".

20. Later on in the same paragraph the judge refers to substantial changes to the third Appellant's life, but once again there is a lack of clear fact-finding and adequate reasoning as to why removal at this stage would be unreasonable. The fact that the third Appellant had been in this country for over seven years was not *in and of itself* sufficient to lead to a conclusion that it would not be reasonable for him to return to Bolivia.

21. The erroneous consideration of the reasonableness issue is clearly material to the outcome of not only the third Appellant's appeal, but those of the others as well. The decision must be set aside on this basis alone.

22. The judge has further erred in concluding that the appeals could succeed under Appendix FM. Contrary to what he concluded, the first and second Appellants could not meet the eligibility requirements under E-LTRPT.2.3

and 2.4 of Appendix FM. These provisions were mandatory and clearly could not be satisfied on the facts of this case. Once that has been established and in light of the Upper Tribunal decision in Sabir [2014] UKUT 63 (IAC), EX.1 could not be relied on.

23. With reference to the judge's comments about section 55 of the Borders, Citizenship and Immigration Act 2009, he reached no firm conclusions on this issue and in any event the relevant factors relating to the two children had been addressed in the reasons for refusal letter dated 16 December 2014.

24. Finally, in respect of paragraph 18, what is apparently an alternative conclusion is unsustainable on the basis that the reasonableness issue has not been dealt with adequately (see above), and that there are no reasons provided as to why "very significant obstacles" existed.

25. The decision of the judge is set aside.

Disposal

26. The representatives were both of the view that these appeals should be remitted to the First-tier Tribunal. Having regard to paragraph 7 of the Practice Statement and that the usual course of events would be to retain the matter in the Upper Tribunal and to remake the decision, on the facts of this particular case I agree that the appeals must be remitted.

27. This is because in effect the judge has failed to make any findings on the core issues in the appeals, in particular that of whether it is reasonable for the third Appellant to leave the United Kingdom. Oral evidence will be required and very likely further documentary evidence will need to be gathered. Therefore all of the appeals are remitted to the First-tier Tribunal for complete rehearing.

28. I set out relevant directions below.

Notice of Decision

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

I set aside the decision of the First-tier Tribunal.

I remit the appeals to the First-tier Tribunal.

No anonymity direction is made.

Directions to the parties

1. **The right of appeal for all Appellants is in-country;**

2. **The issues at the remitted hearing are:**
   a) **Whether any or all of the Appellants can succeed under Paragraph 276ADE of the Immigration Rules;**
   b) **Alternatively, whether any of all of the Appellants can succeed on free-standing Article 8 grounds outside of the Rules.**

3. **The Respondent has accepted throughout that the third Appellant had been in the United Kingdom for 7 years as at the date of the latest application. Therefore, paragraph 276ADE(iv) is potentially applicable;**

4. **None of the Appellants can succeed under Appendix FM to the Rules, and this is not a live issue;**

5. **The Appellants shall, not later than 28 days prior to the remitted hearing, file and serve on the First-tier Tribunal and Respondent any further evidence relied upon;**

6. **The Appellants shall, not later than 14 days prior to the remitted hearing, file and serve on the First-tier Tribunal and Respondent a skeleton argument setting out relevant issues with reference to case-law and the evidence;**

7. **Both parties shall comply with any further directions issued by the First-tier Tribunal.**

Directions to Administration

1. **These appeals are all remitted to the First-tier Tribunal, to be heard at the Hatton Cross hearing centre on a date to be fixed by that centre;**

2. **The appeals shall not be heard by First-tier Tribunal Judge Sweet;**

3. **No interpreter is required;**

4. **There is a time estimate of 2 hours.**

Signed Date: 4 March 2016

Deputy Upper Tribunal Judge Norton-Taylor