Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/21521/2014
IA/21520/2014
IA/21519/2014
IA/21522/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 23 March 2016	**On 5 April 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE SAFFER

Between

SAMEER SATWANI
SAMAN KHAN
SNS
HS

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Muquit of Counsel
For the Respondent: Mr Avery a Senior Home Office Presenting Officer

DECISION AND REASONS

Background

1. The Respondent refused the Appellants' applications for leave to remain on 23 April 2014. They were all required to leave the United Kingdom. They sought

leave to remain as they are now "settled" here. Their appeals were dismissed by First-tier Tribunal Judge Freer ("the Judge") following a hearing on 3 July 2015.

2. The 1st Appellant is a citizen of India. The other Appellants are citizens of Pakistan. The 1st Appellant came to the United Kingdom on 1 March 2006 to study. The other Appellants arrived on 5 November 2006 as his dependents. The 2nd Appellant is the 1st Appellant's spouse. The other Appellants are their children born on [ ] 2003 and [ ] 2005 respectively. They all had leave extended on various dates until 23 September 2011. Leave was again granted on 26 March 2012 to all the Appellants. In relation to the 1st Appellant that was until 26 March 2014. In relation to the other Appellants it was until 31 October 2013 and not 2009 as stated in the Respondent's immigration history.

The grant of permission

3. Upper Tribunal Judge Rintoul granted permission to appeal (10 December 2015) on the ground that:

> "It is arguable that FtTJ Freer erred in concluding [69] that it would be in the children's best interests to continue their education abroad. It may be arguable that this, and the consideration of the father being able to go to Dubai [71] and the apparent failure to consider the conditions in the country or countries to which the children could return also amounts to errors of law, given that these were taken into account is assessing proportionality.
>
> Permission is granted on all grounds."

Appellants' position

4. In addition to the matters upon which permission to appeal was granted and which are referred to above [3], too much emphasis was placed on the previous determination (IA/35679/2011 etc) as that was only an Article 8 appeal whereas now the children have been here for more than 7 years and fall within the Immigration Rules. It was also a material error of law not to follow the guidance contained in PD and Others (Article 8 – conjoined family claims) Sri Lanka [2016] UKUT 00108 (IAC).

Respondent's position

5. Mr Avery relied on the Rule 24 notice (18 January 2016) which in essence said that the Judge made adequate findings and considered the best interest of the children and there was no evidence they could not return to India or Pakistan. He added orally that the same test applies to paragraph 276 ADE of the Immigration Rules as to Article 8, namely is it reasonable to expect the children to leave the United Kingdom. Even if there was an error of law, it was not material. PD does not apply retrospectively.

Judge's Determination

6. The Judge stated [1], "This appeal is under Article 8 ECHR outside the Immigration Rules."

7. He asked himself [64], "…is it reasonable to expect the two children or either of them to leave the UK."

8. He stated [65] "I cannot decide this appeal by comparing countries."

9. He found that [68] "…I have to take into account as my starting point the broad position as found very strongly by the previous Judge in 2012, which has not been contradicted by any independent evidence of the education systems in the other countries."

10. He found that [69] "I conclude that while the children show well above average ability, it would be in their best interests (or not in breach) to continue overseas. They are both very likely to continue to University. There are Universities in other countries. The cultural context would be different in each of Dubai, India and Pakistan … As a public interest point, I have to balance the expenditure that is being made on the children of non-UK nationals by the taxpayer and will continue for many years if they are allowed to remain and I must inevitably consider that the higher fees charged to overseas students are also in the public interest."

11. He stated that [70] the Appellants "private life has often been precarious on this basis and therefore I am required to give little weight to it and it cannot lead to a successful outcome on the weighing exercise."

12. He stated [71] "I do not find a defect of law in the respondent's reasoning. Section 55 has already been considered in 2012. I am simply updating that analysis … The very strong ties in Dubai indicate a very high likelihood that the father can resume work there with his good connections and track record. No reason is shown why he would not be given a work visa in Dubai. Any waiting time will be funded by his wife's brother. It is reasonable to expect the children to leave, as there is no legitimate expectation of staying here any longer."

Discussion

13. The Judge was correct to state that this appeal is under Article 8 ECHR outside the Immigration Rules. However it was also under the Immigration Rules. It was clear from the application that this was the case, and the refusal letter which considers the rules, and the grounds of appeal which refer to them at [5]. The Judge himself makes reference to the Immigration Rules where he summarises the refusal letter [6-10, 18]. He does not however apply the Immigration Rules just by stating the

test he has to apply. He has to make findings and then apply the test to them. His failure to do so is a material error of law.

14. The authorities from higher courts merely state what the law is and has always been since a particular enactment. PD merely states what the law is and was at the time of the hearing before the Judge and how to approach cases such as this. In considering the conjoined Article 8 ECHR claims of multiple family members decision-makers should first apply the Immigration Rules to each individual applicant and, if appropriate, then consider Article 8 outside the Rules. This exercise will typically entail the consideration and determination of all claims jointly, so as to ensure that all material facts and considerations are taken into account in each case. The Judge plainly did not follow the process identified in PD. That is a material error of law irrespective of when PD was promulgated.

15. The Judge did not consider how it could be reasonable to expect children to leave the United Kingdom for another country (Dubai, Pakistan or India) without considering what they would be going to. He compounded this error by speculating as to the 1st appellant's ability to enter into let alone find employment in a country (Dubai) he has not lived in for 10 years.

16. I do not agree with Mr Avery that these matters were considered within the proportionality balancing exercise as the Judge specifically excluded them. That exercise in itself was therefore defective and was a further material error of law.

17. I do not agree with Mr Muquit that the Judge erred in his consideration of the 2012 determination as that was nothing more than the starting point for the Judges consideration.

18. I agreed with Mr Muquit that it would be most appropriate to remit the matter to the First-tier Tribunal for a de novo hearing given the defective factual matrix both within and outside the Immigration Rules.

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 Article 8 decision.

I remit the matter to the First-tier Tribunal for a *de novo* hearing by a Judge other than Judge Freer.

Signed:
Deputy Upper Tribunal Judge Saffer
24 March 2016