



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/08176/2013
IA/08273/2013

THE IMMIGRATION ACTS

Heard at Field House
On 29th October 2013

Determination Promulgated
On 5th November 2013
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Before

UPPER TRIBUNAL JUDGE D E TAYLOR

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

TOOBA JAWED
SHUJA JAWED

Respondents

Representation:

For the Appellant: Ms H Horsley, Home Office Presenting Officer
For the Respondents: Mr P Ahmed, Counsel instructed by Talat Naveed Solicitors

DETERMINATION AND REASONS

1. This is the Secretary of State's appeal against the decision of Judge Amin made following a hearing at Hatton Cross on 26th July 2013.

Background

2. The claimants are nationals of Pakistan born on 21st April 1989 and 5th June 1991. They were first granted leave to enter the UK as dependants of their father on 30th November 2005 and subsequently granted leave on five occasions to 21st November 2010. They made a late application for leave to remain as children of a Tier 1 Migrant under the points-based system on 9th December 2010 and were refused but, following appeal, were granted discretionary leave to remain until 26th November 2012.
3. On 23rd November 2012 the claimants applied as Tier 1 dependants of their father for further leave to remain but were refused on the basis that they could not meet the requirement that their last grant of leave was as the child of the relevant points-based system migrant.
4. The judge allowed the appeals on the basis that he was satisfied that both claimants were totally dependent on their father for their day-to-day expenses and needs. The father is paying for their college fees and they live with their parents as a close family along with their other younger siblings. Both had established a strong network of family and friends since their arrival in the UK in 2005. He said that their removal would be an interference with their private and family life and was disproportionate.
5. The second Appellant was also refused under paragraph 322(1A). In his application form he had answered 'no' to the question of whether he had previous convictions but in fact on 26 October 2011 he was convicted at Great Yarmouth Magistrates' Court for possession of drugs and received a twelve months' conditional discharge. His explanation was that the conviction was not mentioned in the form because he did not want his parents to know about it and he had sought advice and was told that the offence was spent and he did not have to disclose it.
6. The judge wrote as follows:

“Dealing with the issue of deception alleged to have been committed by the second Appellant, having heard the evidence in this case I find that the Appellant did not deliberately set out to deceive the SSHD. It was a foolish decision on the second Appellant's part to withhold this information from the SSHD because he did not wish his parents to know about the conviction. Even if he was dishonest in not disclosing his conviction I do not find that the second Appellant has contrived in a significant way to frustrate the intentions of the Immigration Rules. I do not find that the Respondent has shown to the higher level that the second Appellant was dishonest in the sense described in Mumu.”

The Grounds of Application

7. The Secretary of State sought permission to appeal on three grounds. First, the judge had materially erred in law in failing to give adequate reasons why it was disproportionate for the Appellants to leave the UK. Second, he had erred by misapplying the standard of proof when he referred to a higher level. Third, he had

misapplied the case of Mumu and not given proper reasons for finding that Rule 322(1A) does not apply.

8. Permission to appeal was granted by Judge Brunnen for the reasons stated in the grounds on 23rd August 2013.

Submissions

9. Mrs Horsley submitted that the decision in respect of proportionality was woefully inadequate. There was no consideration in that decision that the Appellants do not meet the requirements of the Rules since they were not permitted to switch from the category of discretionary leave to dependants under the points-based system. They are in the UK in a temporary capacity with no legitimate expectation that they would be able to stay. They cannot meet the requirements with respect to private life as set out in Rule 276ADE nor EX1 of Appendix FM since that applies to partners and children only.
10. Secondly the judge had erred in referring to a higher standard of proof when the own correct standard was that of the balance of probabilities. She said that in fact the judge had applied a higher standard on the Secretary of State. The second Appellant had stated that he did not have a criminal conviction when this was not the case and his explanation for having filled in the form as he did was discrepant as between the Grounds of Appeal and his witness statement. The judge appears to have accepted that the Appellant knew what he was doing and that was sufficient for the Secretary of State to show that there had been deception. Furthermore the judge had plainly been referring to the wrong Rule in his reference to the case of Mumu which was referring to paragraph 320(11).
11. She asked that the decision be set aside and re-made on the basis of the evidence as it was at the hearing.
12. Mr Ahmed submitted that this was an adequate determination in which the relevant factual findings had been made. The judge had said in terms that the claimant had not deliberately set out to deceive having taken account of all of the evidence before him. He had accepted that the claimant had been honest when he ticked 'no' because it was his genuine belief on the basis of advice which he had taken that he did not need to disclose the conviction. He was a young man at the time who had made mistakes.
13. Secondly he submitted that the judge's Article 8 findings were open to him and that the judge had had the Secretary of State's position in mind when reaching his decision. The claimants had been granted Article 8 leave in the past and nothing had changed since the previous determination except that their ties with the UK had become stronger.

Consideration of whether there is an error of law

14. The Secretary of State's grounds are made out. The judge's analysis of Article 8 makes no reference at all to the Respondent's position and the fact that the claimants cannot meet the requirements of the Rules.
15. With respect to the mandatory refusal under paragraph 322(1A) the judge seems to have been acting under the misapprehension that there was a higher burden on the Secretary of State to show dishonesty than that of the balance of probabilities and in any event referred to a different rule than that under consideration.
16. Accordingly the decision is set aside.

Further Hearing

17. The second Appellant gave oral evidence. He was asked why he had ticked 'no' on the form when he knew that he had a conviction and he said that he had spoken to an old friend who had told him that because the conviction was over a year old it was spent and he did not have to declare it. He had known the lady for three to four years and she had lived in the UK for a long time. He accepted that he had filled out the form and he was aware of what the section on criminal convictions said. When asked why the form did not refer to convictions being spent he said that he trusted his friend because he had known her for a while and she was the best person to take advice from. He did not contact either the Home Office or his solicitor and was anxious about his father finding out about the conviction because he had given the form to a family member who would have read it before giving it to the solicitor and then would have told his father.

Further Submissions

18. Ms Horsley submitted that the second Appellant had been vague about what had happened after he had filled in the form and had not been frank with the Tribunal. He was an adult who would have been aware that the information should have been disclosed. She accepted that he may have been attempting to conceal the information from his father but in doing so he had deceived the Secretary of State which attracted a mandatory refusal. She said that his attitude had been cavalier.
19. With respect to Article 8 she said that it should not be used to circumvent the Rules which the Appellants could not meet because they were not allowed to switch from discretionary leave to leave under the points-based system. Neither could they meet the requirements of paragraph 276ADE. The Rules and the Immigration Directorate Instructions were a complete code and she relied on the decision in Nagre (R) on the application of v SSHD [2013] EWHC 720.
20. Mr Ahmed submitted that the explanation by the second Appellant ought to be accepted. He had panicked about the possibility of the information reaching his father and turned to an older adult for advice. He asked the Tribunal to find that the claimant had acted honestly.

21. With respect to Article 8 the evidence showed that the claimants lived at home with their parents and younger siblings and that the family were entirely inter-dependent. The rights of all members of the family ought to be considered. They had been together in the UK for some eight years and removal would be disproportionate.

Findings and Conclusions

The 322(1A) Issue

22. In order for the refusal under paragraph 322(1A) to be maintained the Secretary of State has the burden of showing that the claimant acted dishonestly. He has given two reasons for not mentioning the conviction in his application form. One is that he did not want his parents to know about the conviction and the second is that he was told that the conviction was spent and he did not have to disclose it. The Secretary of State relies on the first reason and the claimant on the second.
23. I bear in mind that the claimant was a young adult when he filled in the form. He would naturally seek guidance from an older person. I suspect that he was looking for a reason not to have to declare the conviction because he did not want his father to know of it but am satisfied that he did seek advice and was happy to act on it and not to declare the conviction. He probably did not want to make further enquiry because he was pleased with the advice that he had received. His actions in my view fall short of the Secretary of State establishing that he acted dishonestly.
24. With respect to Article 8 it is not argued by the Appellants that they can meet the requirements of Rule 276ADE and nor do they fall within EX1 or the exceptional circumstances set out in paragraph 3.2.8 of the IDIs. That is not the end of the matter because, although Ms Horsley relied on the decision of MF for the proposition that the Rules and the IDIs taken together are a complete code, the Secretary of State in Nagre (R) accepted that:

“The consideration of possible Article 8 claims arising outside the new Rules involves broader consideration of cases by reference to the general factors and approach set out in the new guidance on her residual discretion set out above.”
25. It was not argued that the new Rules fully accommodate the requirements of Article 8 in all cases. It was accepted that a foreign national may have a good claim for leave to remain under Article 8 when in relation to both Section EX1 (family life) and paragraph 276ADE (private life) it was possible to envisage cases where they would not.
26. However clearly the fact that the claimants do not meet the requirements of the Rules is a weighty argument in favour of the proportionality of removal.
27. The claimants are at college and no argument has been made by the Secretary of State that they are not dependent on their parents. They all live together as a family and I accept that family life exists even though the claimants are both young adults.

28. They have been in the UK since 2005 and removal would be a clear interference with their rights to family and private life in the UK. It would however be lawful since they do not meet the requirements of the Rules and in pursuit of a legitimate aim, namely that of the maintenance of immigration control.
29. On the claimant's behalf it is argued that they have been in the UK for a lengthy period of time, with their family, that they were granted discretionary leave in the past and their ties here have only strengthened since then and they have family life not only with their parents but with their younger siblings. The Respondent argues that they are young adults who could reasonably be expected to return home given that they cannot meet the requirements of the Rules.
30. The crucial factor here is that the rest of the family are not settled. The father only has leave until February 2016. Any separation of the family would therefore be temporary until the parents and younger siblings go back to Pakistan, where no doubt there is a support structure from the wider family and where, with the benefits which they have accrued in the UK, they could reasonably be expected to support themselves. In the meantime they could keep in contact with the family in the UK through visits and other means.

Decision

31. The judge erred in law and his decision has been set aside. It is re-made as follows. The appeal in respect of paragraph 322(1A) is allowed.
32. The appeals are dismissed on Article 8 grounds.

Signed

Date

Upper Tribunal Judge Taylor