Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers:
IA/26810/2012

IA/26822/2012
IA/26828/2012
IA/26837/2012
IA/26842/2012

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 4 July 2013	**On 10 July 2013**

Before

UPPER TRIBUNAL JUDGE MOULDEN

Between

MRS E V
MR A
MISS B
MASTER C
MISS D
(ANONYMITY DIRECTION MADE)

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms S Pinder of counsel instructed by Equalisers Limited
For the Respondent: Mrs M Tanner a Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The first appellant is a citizen of the Philippines who was born on 4 January 1970. I will refer to her as the appellant. The second appellant (A) is her husband who was born in 1971. I will refer to him as the husband. The third, fourth and fifth appellants (B, C and D) are their children born in 2001, 2004 and 2007. I will refer to them either by one of these initials or collectively as the children. The appellants have been given permission to appeal the determination of First-Tier Tribunal Judge R G Walters who dismissed their appeals against the respondent's decisions of 6 November 2012 to refuse them further leave to remain in the United Kingdom as, in the case of the first appellant, a Tier 2 Migrant under the Points-based System and, in the case of the other appellants, as her husband or children and to make decisions to remove them from the UK by way of directions under section 47 of the Immigration and Asylum and Nationality Act 2006.

2. One matter can be disposed of immediately. No doubt in line with the authorities culminating in Adamally and Jaferi (section 47 removal decisions: Tribunal Procedures) [2012] UKUT 00414 (IAC) the judge found that the s 47 decisions were not in accordance with the law and he allowed the appeals to that extent. It is common ground that that was the correct decision.

3. The respondent's refusals were made on the basis that the appellant was not entitled to the required points for sponsorship or appropriate salary. She was entitled to the required points for English language skills and maintenance (funds). The other appellants were refused in line with her. The respondent also considered the Article 8 human rights grounds and the provisions of s 55 of the Borders, Citizenship and Immigration Act 2009.

4. The appellants appealed and the judge heard the appeals on 12 April 2013. Both parties were represented. The judge heard evidence from the appellant, the husband and four other witnesses. The appellants' representative, Mr Turner, who is still acting for them and whose firm instructed counsel before me, appeared for the appellants. He made an important concession which the judge recorded in paragraph 5 of the determination in the following terms; "Mr Turner conceded that the appellant's appeal against the respondent's refusal of further leave to remain as a Tier 2 (General) Migrant could not succeed. He also conceded that the appellant's Article 8 appeal could not succeed under the Immigration Rules version of Article 8. He said that the appeal will be argued under the "Strasbourg and domestic courts Article 8" and Section 55 of the Borders Act."

5. The judge went on to consider the appeals on Article 8 human rights grounds before concluding that the removal of the appellants would be a proportionate interference with their Article 8 human rights. He dismissed the appeals against the refusal of leave to remain as a

Tier 2 (General) Migrant and on human rights grounds but allowed the appeals against the s 47 decisions.

6. The appellants applied for and were granted permission to appeal by a judge in the First-Tier Tribunal. The judge considered that there was no real merit in the substantive grounds attacking the Article 8 reasoning and conclusions, although permission was given for them to be argued. However, the judge thought that the appeals and the respondent's decision-making process could "best be described as a mess", a sentiment with which I agree.

7. In order to understand this I need to give a brief summary of the appeals and decision-making process. Much of the information now available in a bundle prepared by the appellants' solicitors and submitted at the hearing before me was not available to the First-Tier Tribunal Judge.

8. On 7 February 2011 the appellants made their in time applications for variation of leave. On 8 March 2011 the respondent rejected the applications as invalid. The appellant say that this was incorrect and she was not entitled to do so. The applications were resubmitted on 25 March 2011 and, on 15 July 2011, the respondent refused the applications with no right of appeal. On 25 July 2011 the appellants lodged notice of appeal disputing the allegation that there was no right of appeal. The first hearing took place on 31 August 2011 but had to be adjourned because the respondent did not attend. It was adjourned again on 18 October 2011 for the same reason. The appellants' representatives submitted a letter with further representations on 7 December 2011. On 14 November 2011 and for the third time the respondent did not attend. The respondent sent a representative on 10 February 2012 but without a file. The appellants' representatives wrote to the respondent on 13 February and 18 March 2012 complaining about the respondent's failure to comply with directions.

9. On 26 March 2012 First-Tier Tribunal Judge Herlihy issued a notice/decision that the respondent had not served an immigration decision carrying a right of appeal. However she urged the respondent to consider the appellants' representations and issue fresh decisions. She referred to the repeated failure by the respondent to comply with directions issued by the Tribunal. On 18 July 2012 the respondent issued a decision refusing the appellants' Article 8 claims and serving them with notices of decisions which carried a right of appeal. I have only seen the decision in relation to the appellant although it has not been suggested that there were not similar decisions in relation to the other appellants.

10. On 10 September 2012 the appellants' appeals were heard by First-Tier Tribunal Judge Turkington. In his determination he allowed the appeals to the extent that they were referred back to the respondent for decisions to be made on the relevant issues. These

were whether the respondent had made appropriate enquiries about the children, whether the respondent had considered the claims that the first applications were unlawfully rejected and if so the consequences including whether the appellants would have had continuing leave and the weight to be attached to a potential claim by the appellants against their former representatives for negligence.

11. The next step taken by the respondent was to issue the decisions of 6 November 2012.

12. As well as the new bundle from the appellant's representatives I have written submissions prepared by Ms Pinder. I invited the representatives to address me on the preliminary issue of whether the appellants should be permitted to go behind the concession recorded by the judge in paragraph 5 of the determination which I have set out above. On instructions Ms Pinder accepted that the concession was made and is correctly recorded. In her written submissions she argues that the appellants' original applications were improperly rejected, remain outstanding and must be dealt with by the respondent. For this purpose she asked me to find that the respondent's latest decision was not in accordance with the law and that I should allow the appeal to this extent so that the respondent could make a valid decision in relation to the original applications. In support of this she argues that the latest decision refers to the application of 25 March 2011 rather than the application of 7 February 2011.

13. Mrs Tanner argued that this should not be permitted. The point had not been raised until the hearing today and there was no suggestion that the concession had not been made or was incorrectly recorded.

14. In the skeleton argument before the judge it is argued that the respondent's decision is unlawful but only in relation to the s 47 directions. It is said that "the tribunal can make a finding under Article 8 without having to refer that back to the respondent" and "the tribunal is urged to allow these appeals under Article 8 and to award costs". The only attempt have it both ways is in the sentence; "only if the tribunal is against the family under Article 8 and section 55 should the matter be referred back to the respondent for a lawful decision to be made". This appears to be a reference back to an alleged failure by the respondent to comply with directions of First-Tier Tribunal Judge Turkington.

15. I find that there has not been any application to withdraw the concession made by the appellant's representatives recorded by the judge in paragraph 5. In my judgement this was an entirely sensible and appropriate concession limiting the issues to those on which the appellants had some prospect of success. It has not been suggested that it was made without informed instructions. Whilst I note that the

decisions of 6 November 2012 refer to the appellants' applications made on 25 March 2011 rather than what the appellants claimed to be their original in time and valid applications made on 7 February 2011, I cannot see that this has made any difference or would make any difference if the latest decisions were reconsidered by the respondent. The respondent has not treated the applications as being out of time, has considered them on their merits both under the Immigration Rules relating to Tier 2 (General) Migrants and on Article 8 human rights grounds, has addressed the section 55 factors, has accepted that there are rights of appeal and has not alleged that the appellants remained in this country without leave.

16. I find that the judge was not asked to find that the original applications were outstanding or that the appeals should be allowed to the extent that the decision should be reconsidered by the respondent. There can be no failure to deal with a point which was not raised and was not remotely obvious. In any event and whatever was said in the grounds or any skeleton the concession made by the appellants' representative at the hearing properly limited the issues before the judge and excluded this line of argument. Furthermore, there was no merit in the point which I find would not have succeeded even if it had been raised. In this regard there is no error of law.

17. The judge who granted permission to appeal thought that the substantive Article 8 grounds had no real merit. I find that they are, in substance, no more than disagreements with conclusions properly reached by the judge. There is no disagreement with the judge's conclusion that as the family would remain together in this country or the Philippines there would be no interference with their rights to family life. Their removal would be an interference with their private lives. The judge applied the appropriate step-by-step Razgar tests with the final assessment turning on proportionality.

18. The judge's assessment and reasoning in relation to the Article 8 grounds is set out between paragraphs 30 and 59 of the determination. I find this to be a clear, careful and properly reasoned assessment. I can find no indication that the judge failed to follow the correct approach. It is clear that he treated the interests of the children as a primary consideration. In paragraph 47 he said; "as Mr Turner correctly submits, under section 55 the best interests of the children must be a primary consideration." and in paragraph 53; "I found that it is in the best interests of the children that their education in the UK not to be disrupted. I treated that as a primary consideration." I find that the judge did take this as his starting point. He was entitled to conclude that "in the light of all the evidence in the round" the maintenance of effective immigration control was "another primary consideration" which prevailed in the assessment of proportionality.

19. I accept that the judge does not refer to the appeal process history or any failures or delays by the respondent in the assessment of the Article 8 grounds. In paragraph 57 he does address the question of whether the appellants had been let down by incompetent lawyers but finds that he cannot reach a conclusion about this for lack of documentary evidence or of any formal complaint made to the OISC. The skeleton argument before him did refer to the claimed failure by the respondent to comply with directions but the position at that stage was, as the judge who granted permission to appeal said, "a mess" and I find that the appeal and decision making history and the responsibility for it was not as clear at the time of the hearing before the judge as, hopefully, it is now in the light of the further documentary evidence submitted by the appellant's representatives which was not available to the judge. In any event the evidence before me including the evidence which was not before the judge does not persuade me that the appellants have established that their original applications, rejected by the respondent in the letter of 8 March 2011, were improperly rejected. The appellants had complained that they were let down by incompetent representatives, including at this stage.

20. If the appellants' original applications were properly rejected, as they may have been, then their persistence and the pressure they have applied has had one benefit at least, that of making the respondent reach a fresh decision in relation to all their grounds and giving them a right of appeal which they might not otherwise have had. It is difficult to assess how much sooner a full decision could have been reached and the appellants appeals decided had there not been delays by the respondent. However, even if I had reached the conclusion that the judge erred in law by failing to take delay into account, I find that it would not be a material error. It would not have made a difference to the outcome of the Article 8 grounds.

21. I have made an anonymity direction in order to protect the interests of the children.

22. I find that the judge did not err in law and I uphold his determination.

Direction regarding anonymity

Unless and until a tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

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Signed Date 5 July 2013

Upper Tribunal Judge Moulden