IAC-FH-AR-V1

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/08712/2014
IA/08713/2014
IA/08714/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decisions & Reasons Promulgated**
On 25 November 2014	**On 31 December 2014**
Oral judgment	

Before

THE HON. LORD BURNS
UPPER TRIBUNAL JUDGE HANSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SHAD ISMAIL NASFIR ABDUL RAHMAN
MOHAMED BELAL ABDUL RAHMAN
SHENAZ BIBI KHODABUX
(Anonymity direction not made)

Respondents

Representation:
For the Appellant: Mr E Tufan, Home Office Presenting Officer
For the Respondents: Mr De Sousa

DETERMINATION AND REASONS

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1. This is a hearing of an application by the Secretary of State who seeks to challenge the determination of First-tier Tribunal Judge Rhys-Davies promulgated following a hearing at Richmond Magistrates Court on 27 May 2014.

2. There are three appellants, all nationals of Mauritius who are a mother, father and their now adult son. The Judge allowed the appeal of the adult son, the second appellant, on the basis that, on the facts the Judge found, he was able to satisfy the requirements of paragraph 276ADE(iv)(v)(vi) and was therefore entitled to leave to remain in the United Kingdom.

3. That decision was not challenged in the grounds seeking permission to appeal although Mr Tufan has raised before us today the possibility that that decision was in fact infected by an error of law as the Judge may have assessed the period of time in the United Kingdom from the wrong starting point i.e. that at the date of decision the requisite period of time had not been earned rather than the position as at the date of the hearing. There is no application for leave to amend the pleadings late or for an adjournment to allow the Secretary of State to consider her position. She has the option of making an application to challenge the decision at a later date, in which case she would have to justify permission being granted considerably out of time.

3. The decisions that are the subject of challenge relate to those of the first and third appellants, the mother and father of the second appellant. The Judge considered the evidence made available and in paragraph 31 refers to the five stage test in the case of **Razgar**. In paragraph 36 the Judge reminds himself that when assessing proportionality, he must bear in mind that the first and third appellants do not satisfy the Immigration Rules and that the public interest in maintaining effective immigration control is as set out in Section 117B of the 2002 Act.

4. The Judge purports to note in that respect that the first and third appellants have to speak English and finds they do so, although he also finds they are not entirely at ease. That finding is not challenged by way of a cross-appeal. The Judge also finds that the first and third appellants are not financially independent as they rely on the assistance of friends from time to time.

5. While they otherwise appear to be a good, law abiding family the appellants have remained without leave in the United Kingdom and are overstayers. Their immigration history is a factor that should have been properly considered and factored into the equation by the Judge although in his findings he appears to make very little mention of it.

6. The Judge concluded that the proportionality exercise fell in favour of the appellants because the second appellant was permitted to stay and his status will be rendered academic if his mother and father have to leave, as he remain dependent upon them within their family unit. That does

appear to have been the case up to a point within the evidence, namely when the second appellant was at school and achieving a substantial level of achievement to his credit. He would therefore have been a young person attending school and dependent upon his parents.

7. The evidence before the Judge, however, indicates that the second appellant's tertiary education had in fact concluded. He had achieved considerable attainment and wished to go to university. There appears no analysis within the determination of the factual situation as it was before the Judge so far as the second appellant's future is concerned that could allow us to find that adequate consideration was given to this material element of the appeal.

8. In paragraph 38 the Judge states that in all the circumstances he finds that the situation of the appellants is not sufficiently recognised under the Immigration Rules. That combined with the finding in paragraph 36 that the first and third appellants could not satisfy the Immigration Rules indicates that it must have been accepted that they were unable to succeed not only under any of the ancillary provisions that may or may not have been applicable to them but also in relation to the provisions relating to family and private life in the United Kingdom, including the provisions in the Rules relating to applications for leave to remain as parents or as partners.

9. The Judge then proceeds to state that the proposed removal of the first and third appellants, which will mean the second appellant also having to leave, is disproportionate and would have unduly harsh and unjustifiable consequences for the second appellant. What the Judge failed to do was adequately to analyse the consequences or to set out what weight he thought it was appropriate to give to the fact that the appellants could not succeed under the Immigration Rules or what those harsh consequences were.

10. This is quite important post-July 2012 where, under the margin of appreciation given to the Secretary of State she has set out how she believes Article 8 should be interpreted within the provisions of the Rules and now within statutory provisions. Such statutory provisions may have the effect of negating a lot of the earlier case law.

11. The Judge appears to make no reference to the basic principles of Article 8 which it was necessary to apply if conducting a proportionality exercise. These include the fact that Article 8 does not allow individuals to choose the place where they are going to live or wish to live. They also include the fact that it is necessary, in a dependency case, properly to analyse and set out the nature of that dependency and properly to analyse and set out the consequences of the proposed action. Many foreign students enter the UK to study at university without their parents and the reality appears to be that the second appellant is of an age where he is starting to forge a life of his own, albeit initially in education.

12. It goes without saying that when assessing proportionality, harshness or unjustifiable consequences, it is necessary to look at the end result and analyse and give reasons for such a finding. The Judge has found that the son would remain in the UK and his parents would have to leave. It followed, therefore, that the son might choose to follow them. But, standing that it was accepted that the appellants could not succeed under the Rules, we can find no analysis in this determination setting out an adequate basis to allow us to find that a properly conducted Article 8 assessment outside the Rules, has been undertaken.

13. For that reason we find that the Judge has materially erred in law to the extent that the findings in relation to the first and third appellants must be set aside but only so far as the human rights grounds are concerned.

14. The following directions shall apply to the future management of this appeal:

    i. The appeal in relation to Article 8 ECHR outside the Rules only shall be remitted to the First-tier Tribunal sitting at Hatton Cross to be heard by a salaried judge of that tribunal nominated by the Resident Judge on the 6th May2015. Time estimate 2 hours.

    ii. The Appellants must file and serve a consolidated indexed and paginated bundle containing all the evidence they intend to rely upon no later than 22nd April 2015. Witness statements in the bundle must be signed, dated, and contain a statement of truth and shall stand as the evidence in chief of the maker.

    iii. A French (patois) interpreter shall be provided by the Tribunal.

No anonymity order made

Signed Date **25 November 2014**

Upper Tribunal Judge Hanson