Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/17636/2013
IA/17638/2013
IA/17639/2013
IA/17641/2013
IA/17644/2013
IA/17645/2013

THE IMMIGRATION ACTS

Heard at Field House

Oral determination given at hearing
On 11 July 2014

Determination Promulgated
On 22 August 2014

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

ZAFAR IQBAL
SHABNIA ZAFAR
USAMA ZAFAR RAJA
AHSAN ZAFAR RAJA
ADNAN ALI RAJA
HARIS ZAFAR RAJA

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Ms J Heybroek, Counsel instructed by Khans Solicitors
For the Respondent: Ms A Everett, Home Office Presenting Officer

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DETERMINATION AND REASONS

1. The appellants are all citizens of Pakistan. The first appellant is the husband of the second appellant and the remaining appellants are their children. The appellants were born on 25 August 1955, 8 April 1970, 25 July 1993, 28 April 1995, 29 May 1997 and 25 November 1999, respectively.

2. The first appellant arrived initially in the UK on 14 August 2007 with leave as a highly skilled migrant until 17 May 2009. His leave was extended as a Tier 1 (General) Migrant to 17 May 20012 and then again to 14 August 2012. The other appellants arrived in December 2009 and were granted leave to remain until 14 August 2012.

3. On 14 August 2012 an application was made by the first appellant, with the remaining appellants as dependants, for indefinite leave to remain. In a decision dated 30 April 2013 those applications were refused, the applications of the second and subsequent appellants refused in line with the refusal of the first appellant. Their appeals are entirely dependant on the appeal of the first appellant. The Immigration Rules that apply to the appellants' applications are principally paragraph 245AAA and 245CD(e).

4. At issue in this appeal is the question of periods of absence by the first appellant outside the UK which it is said mean that he is not able to establish the necessary five years' qualifying lawful residence sufficient to allow his application to succeed. In the decision letter in respect of the first appellant the periods of absence from the UK are said to mean that he is unable to succeed because of the periods spent abroad, those periods exceeding more than 180 days. Periods of 180 days or less are not considered under the Rules to break the continuity of residence.

5. The first appellant's written evidence, and subsequently oral evidence, before the First-tier Tribunal explain the periods of absences abroad and to which I shall return in this judgment.

6. The appeal of these appellants came before First-tier Tribunal Judge Greasley on 17 February 2014. In a generally careful and detailed determination, he concluded that the appellants were not able to meet the requirements of the Immigration Rules because of the periods of absence abroad by the first appellant but he allowed the appeals under Article 8 of the ECHR. The decision to allow the appeals under Article 8 was the subject of an application for permission to appeal by the Secretary of State. In turn there was an application for permission to appeal on behalf of the appellants concerning the First-tier Judge's dismissal of the appeal under the Immigration Rules. Ultimately, permission to appeal was granted to both parties.

7. The central issue in this appeal is whether the appellant's absence from the UK exceeded the permitted period of 180 days as set out in the Immigration Rules to which I have referred. Paragraph 245AAA(a) states that:

> "(a) "continuous period of 5 years lawfully in the UK" means…residence in the United Kingdom for an unbroken period with valid leave, and for these purposes a period shall not be considered to have been broken where:
>
> (i) the applicant has been absent from the UK for a period of 180 days or less in any of the five consecutive 12 month periods preceding the date of the application for leave to remain;"

8. I pause there to mention that before me the issue was canvassed as to whether the periods of absence by the appellant were for serious or compelling reasons which is provided for in paragraph 345AAA(b)(ii). It was ultimately agreed between the parties that that particular provision has no application to the issues that need to be determined before me.

9. What this case boils down to is whether the five years' continuous residence is to be determined at one of three different points: either (a) the date of 'application', or (b) the date of the Secretary of State's decision, or (c) the date of hearing. The date of application in this case as already indicated was 14 August 2012. The date of the decision was 30 April 2013. It is common ground that counting back five years from the date of the decision brings one to a date of 1 May 2008 and as that date the appellant had absence of 146 days, self-evidently less than the 180 days which would in other circumstances have broken the continuous period of five years

10. If the appellant is able to establish that the period of five years is to be counted back from the date of the decision, the application under the Immigration Rules would, and ought to have, succeeded. If, however, the period is counted back from the date of application he would not be able to succeed under the Immigration Rules. That is the competing issue between the parties.

11. I am grateful to both parties for the very helpful skeleton arguments that have been provided and for the oral submissions, all of which have helped to illuminate my deliberations today. Ms Everett's skeleton argument relies on the wording of paragraph 245AAA as I have already set out, and on the decision in Raju [2013] EWCA Civ 754, in particular at [23] and [24]. In those paragraphs the Court of Appeal gave consideration to when an application was 'made'. There is reference to paragraph 34G of the Immigration Rules which provides for when an application is made. Ms Everett relies on that paragraph of the Immigration Rules as well.

12. In Raju there was reference to the decision in AQ (Pakistan) [2011] EWCA Civ 833. That was a decision in which it was concluded, following a concession on behalf of the Secretary of State, that the relevant date for the assessment of evidence is the date of the Secretary of State's decision and not the date of application. It was concluded that the application is treated as continuing until the date of decision. In Raju the Court of Appeal concluded that in the case of the appeal that was before it, AQ (Pakistan) did not assist the respondents (appellants as they were before the First-tier Tribunal).

13. It is accepted on behalf of the respondent before me that the case of Raju concerned a points-based application which is not the type of application which is the subject matter of the appeal before me. It was agreed between the parties before me that this was not a point-based appeal although it did appear at first sight that it might have been. Even aside from the agreement between the parties, I am for my part satisfied that the appeal before me is not a points-based appeal.

14. Ms Everett relies on [13] of Raju which refers to analogous provisions in relation to dates of application, for example in terms of the minimum level of personal savings. At [5] of the respondent’s skeleton it contends that the policy behind the construction of the Rule, that is 245AAA, is to enable applicants to know how their applications will be considered. The skeleton argument goes on to state that if the relevant date when assessing the continuity of leave was the date of the decision, then an applicant may fall foul of the requirement without knowing it because the applicant would not know which period within twelve months would be looked at when assessing if he had been absent for more than 180 days. Thus, if the assessment is made going back twelve months from the date of application, the applicant in any given case knows how his absences will be assessed.

15. The argument on behalf of the respondent continues that on the appellant's construction of the law he could only succeed if his application was not dealt with swiftly. It follows that this appellant's application, so it is argued, was entirely speculative as it required the Home Office to delay in dealing with it. The primary submission on behalf of the appellant is that AQ (Pakistan) is support for the proposition that it is the date of the decision, putting aside for the moment arguments about date of hearing, that is the operative date. Paragraph 22 of AQ (Pakistan) is relied on behalf of the appellants. It is argued that paragraph 34G of the Immigration Rules is a paragraph that was incorporated into the Rules even at the date of the decision in AQ (Pakistan).

16. Whilst I see the force in Ms Everett’s arguments, I do not accept that the appellant's application was entirely speculative. It was, it seems to me, an application that was made on the basis that he thought he could succeed under the Rules at the date of application. He may, and probably was,

wrong about that on the basis of the agreed chronology but that does not necessarily detract from the force of the submission that it is in fact the date of the decision which is the operative date.

17. Having carefully considered the arguments advanced by both parties I am satisfied that the argument advanced on behalf of the appellants is to be preferred, having regard to the decision in AQ (Pakistan). The decision in Raju, it seems to me, was confined to some considerable extent to its own facts. I do not consider that there is any timeline that means that in the type of application which is the subject matter of this appeal, the application is required to be decided with reference to the date of application, as it does need to be in other cases, particularly points-based appeals.

18. In those circumstances, looking back from the date of the decision, it is clear that the appellant had established as at that date that he had continuous residence of five years as required by the Rules and did not conversely fall foul of the requirement not to have been absent for a period of more than 180 days.

19. It follows from that conclusion that the First-tier Tribunal erred in law in considering otherwise. In the light of that conclusion, the decision of the First-tier Tribunal requires to be set aside with the decision being re-made with the result that the appeals succeed under the Immigration Rules.

20. I do not consider it necessary in those circumstances to explore further the arguments advanced on behalf of the appellants in relation to AS (Afghanistan) [2009] EWCA Civ 1076 and the effect of a 'Section 120' notice. Those arguments relate to whether it was in fact the date of hearing which could be considered to be the operative date for considering the relevant time period. As I say, in light of the conclusions I have come to that is not an avenue which needs to be explored further.

21. So far as Article 8 of the ECHR is concerned, it does seem to me that there are deficiencies in the decision of the First-tier Tribunal as advanced in the grounds on behalf of the respondent. For example, there is no consideration within the Article 8 assessment of the applicable Immigration Rules. This was an application which it seems to me would have been governed by the 'new' Article 8 Immigration Rules, in view of the date of the application.

22. However, given that I have decided that the appeals are to be allowed under the Immigration Rules, no further consideration of Article 8 is required. If I had to make a decision about it I would have set aside the decision of the First-tier Tribunal in relation to the Article 8 ground but in consequence would have gone on to allow the appeal under Article 8 because it would not be in accordance with the law to remove appellants who had established a private life in the UK, and in circumstances where

they had established that they had an entitlement to remain under the Immigration Rules.

23. The appeals under the Immigration Rules are allowed.

Decision

The decision of the First-tier Tribunal involved the making of an error on a point of law. The decision of the First-tier Tribunal is set aside and the decision re-made, allowing the appeal of each appellant under the Immigration Rules.

Upper Tribunal Judge Kopieczek 17/08/14