Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/29986/2013
IA/29964/2013
IA/30011/2013
IA/30000/2013

THE IMMIGRATION ACTS

Heard at Glasgow
on 22nd July 2014

Determination promulgated
on 25th July 2014

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

DILIP UPRETI (FIRST APPELLANT)
PARBATA SITAULA UPRETI (SECOND APPELLANT)
DIPSHIKHA UPRETI (THIRD APPELLANT)
DARSHAN UPRETI (FOURTH APPELLANT)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellants: Mrs J Moore, of Drummond Miller, Solicitors
For the Respondent: Mrs S Saddiq, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellants are father, mother and two children, all citizens of Nepal. On or around 29th November 2012 they applied for leave to remain in the UK, apparently on the basis only of their family and private life here. The respondent refused all four applications by letters and notices all dated on or around 20th June 2013. First-tier Tribunal Judge Fox dismissed the appellants' appeals against those decisions by determination promulgated on 24th February 2014.

2. The appellants' grounds of appeal to the Upper Tribunal may be summarised as follows:

   (1) Absence of consideration of section 55 of the 2009 Act (best interests of children) and, in respect of the third appellant, lack of consideration of paragraph 276ADE(1)(iv) of the Rules.

   (2) Lack of reasoning why on proper consideration of section 55 and of paragraph 276ADE(1)(iv) the appellants were not entitled to succeed on Article 8 grounds.

   (3) Lack of consideration of paragraph 276ADE(1)(iv) and why the third appellant's appeal should not succeed under the Rules.

   (4) & (5) Inadequate consideration of the Article 8 case, it being insisted that the third Appellant speaks only English and that the children have little connection with Nepal, have no understanding of the language and cannot be expected to relocate there.

3. These grounds were prepared by previous representatives. It can be observed at the outset that grounds 1, 2 and 3 overlap considerably and that 4 and 5 are no more than repetition of and insistence upon the case. They exaggerate the difficulties for the children, in particular on a linguistic basis, beyond anything justified by the evidence or by the judge's findings.

4. A judge of the First-tier Tribunal granted permission to appeal on the view that as the third appellant had lived in the UK for seven years she "potentially" met the requirements of the Immigration Rules, but the judge made no finding on that point and in consequence gave no consideration to the extent which that might impact upon the cases of the other appellants.

5. Mrs Moore submitted that there was a "glaring error" of failure to analyse why the third appellant's case did not succeed under the Rules. She referred to the refusal letter addressed to the second appellant which sets out the requirements of E-LTRPT.2.2 in respect of a child of an applicant. The third appellant in terms of sub-paragraph (d) had lived in the UK continuously for over seven years up to the date of application. Paragraph EX.1 applied. The Home Office considered that [and refused the applications also on that basis] but the judge mentioned it only briefly at paragraph 13: "… common case … that the appellants cannot meet the requirements of the Rules save for the Third Appellant meeting the seven year requirement".

6. Mrs Moore (who of course did not appear in the First-tier Tribunal) was unable to say whether any argument had been developed along the lines that the third appellant met the requirements of the Rules and that not only hers but all the other appeals should have succeeded in consequence. Nevertheless, she said that the determination showed that the point was at least mentioned and was before the judge to resolve.

7. I observed that it is not axiomatic that seven years residence as a child leads to a grant of leave. One of the conditions of paragraph EX.1 is that "it would not be reasonable to expect the child to leave the UK". It did not appear that there had been any submissions on the issue of reasonableness in the First-tier Tribunal, other than in the overall context of the proportionality assessment. That would explain why there was no separate conclusion.

8. Mrs Moore submitted that a decision on proportionality issue could not be equated to the reasonability question within the Rules. She said that it is established that it is never reasonable to remove a child who has had seven years' residence. That would become enshrined in statute within a few days of the present hearing, when section 117B of the 2002 Act would be brought into force.

9. I observed that section 117B(6)(b) also includes the criterion of whether it would be reasonable to expect the child to leave the UK. Mrs Moore submitted again that it was clear that there is nothing to weigh on the side of the public interest in such a case, and that it is already axiomatic and would be put beyond doubt that no child with seven years' residence can be expected to leave the UK, that being the intention of Parliament as well as the effect of the Article 8 jurisprudence to date.

10. I indicated that I was unable to uphold that submission. It would have been simple for Parliament to enact that no child with seven years' residence could ever be required or reasonably expected to leave the UK. Parliament has not enacted a prohibition, but has applied a reasonability criterion.

11. Mrs Moore relied upon Azimi-Moayed [2013] UKUT 197 for the proposition of the greater significance of seven years' residence from age 4 than the first seven years of live. She pointed out that this child at the date of the First-tier Tribunal hearing had been here for about eight years from the age of 2. She had reached an age when she had become less dependent on her parents, and was more focused on her peers. She said this was not simply re-argument, but disclosed error of law through the absence of a clear finding under the Immigration Rules. She accepted that factors relevant to the reasonability (if that were an issue) of expecting a child to leave might be similar to factors relevant to proportionality, but she maintained that did not avoid the difficulty. Lack of reasoning for an outcome under the Rules could not be made good by findings under Article 8. Those were two different issues. She was unable to point me to any comparative definitions of the criteria of reasonability and proportionality which might assist. She said that it could not be read into the determination that the judge considered it reasonable to expect the child to leave with the rest of her family. The judge failed to look at the distinct situation of the third appellant under the Rules and did not specifically take account of the best interests of the children. If error were to be found, Mrs Moore sought to introduce further evidence.

12. Before dealing with possible further procedure, I heard from the Presenting Officer on the error of law issue.

13. Mrs Saddiq submitted that fundamentally the appellants disagreed only with the judge's assessment and did not disclose any material errors of law. The determination was plainly based primarily on considering the best interests of the children. There was no need to refer specifically to section 55 of the 2007 Act. At paragraph 15, for example, the judge said that "the best interests of the children must always be considered within [the] family unit". Any question of the reasonability of expecting the third appellant to leave the UK was subsumed into the overall balancing exercise, which was what would have to be done anyway. Even if the judge had not explicitly stated the reasonableness test under paragraph EX.1, that criterion was the implicit basis of his entire determination. His conclusion at paragraph 36 that the interference was proportionate was in effect also a conclusion in terms of EX.1. The case had not been put to the judge as turning firstly on the situation of the third appellant, and the others then hanging the case on hers. This appeal was an attempt to re-state the case with a different emphasis although it had been presented thoroughly by competent counsel in the first instance. The judge had considered the whole circumstances and primarily those affecting the children. Azimi Moayed was not authority that seven years' residence for a child was a factor overriding all other considerations. There is no rule in that case or anywhere else that once a child has been here for seven years, she and her family have, without anything more to be said, acquired a right to stay. There was no material error and the determination should stand.

14. Mrs Moore in reply reiterated her point that the judge did not make a specific decision under the Rules nor state any reasons and that was inadequate because an appellant should not to be left to guess at what the reasons might have been for failure of the case under the Rules. The resolution under Article 8 did not remove that difficulty. There might not have been a need for any lengthy separate discussion of reasonableness and paragraph EX.1, but some reason had to be given.

15. I intimated that I found no error of law and that the determination of the First-tier Tribunal would stand. The judge did not deal separately with the outcome under paragraph EX.1, but I had little doubt that this was because the case was not put to him on the basis that the third appellant's case hinged on the criterion of reasonableness in that paragraph, nor had the argument been put that her case should be considered firstly and all the other cases then hung on that. The case had plainly been put as one of the overall reasonableness and proportionality of removal of the family as a unit. That was the correct approach. The question of reasonableness was a judgment for the judge to make, having assessed all the evidence before him, and treating the interests of the children as a primary but not overriding consideration. It appeared to me that was exactly what he did and that any error was one of form only and not of substance. The submission for the appellants (at times) was that seven years' residence by a child entitles her and her entire family to remain in the UK indefinitely, without any consideration of reasonableness. There is no such rule, nor will it be introduced by section 117B.

16. Since indicating the outcome, as above, at the hearing, I have given some further consideration to what the difference might be between a reasonableness and a proportionality test. Although the appellant's case turned in large part upon there being some meaningful distinction, I was not pointed to any authority.

17. The discussion in *Macdonald's Immigration Law & Practice*, 8th ed, vol 1 at ¶8.20 appears to be in point:

> The proportionality test is clearly more rigorous, objective and intrusive (in demanding a greater degree of justification) than the *Wednesbury* test whose borders, even in a human rights case, are set by mere rationality. The European Court of Human Rights has repeatedly made clear that in determining whether a breach of the ECHR can be justified under Articles 8(2) or 10(2), the court's supervision goes beyond ascertaining whether discretion has been exercised reasonably, carefully or in good faith, and requires it to determine whether it was "proportionate to a legitimate aim pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient".

18. Article 8 outside the Rules cannot of course come into play until Article 8 so far as subsumed within the Rules has been exhausted. In terms of distinction between the two tests, the judge's progression to the second question was not adverse to the appellants.

19. Any error by the judge is on a minor matter of form on a point not put to him as being particularly material to the outcome. It is now given an emphasis previously lacking, but for all practical purposes the reasonableness criterion within paragraph EX.1 is subsumed into the overall proportionality assessment. Indeed, on a strictly correct approach it might well have been said that having decided the case within the Rules, the judge would be left with no good reason to look outside them.

20. The only sensible reading of the determination is that the judge considered it reasonable, in all the circumstances, to expect the third appellant to leave with the rest of her family. That assessment was open to him, and no error of legal approach of any significance is shown, so it decides the case. The determination of the First-tier Tribunal shall stand.

21. No order for anonymity has been requested or made.

24 July 2014
Upper Tribunal Judge Macleman