Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number:
IA/48474/2013
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THE IMMIGRATION ACTS

Determination Promulgated

Heard at Field House
On 18 June 2014

On 2 July 2014

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL CHANA

Between

MRS FARZANA YEASMIN`
MR ABDUL ILHAM JALIL
MISS FATIMAH JAILIL
MASTER MOHAMMD ABDUL JALIL
(Anonymity directions not made)

Appellant

and

THE SECRETARY Of STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the appellant: Ms J B Herwood, Senior Presenting Officer
For the respondent: Mr M.I. Hossain, Counsel

DETERMINATION AND REASONS

1. The appellant is the Secretary of State and the respondents are citizens of Bangladesh born on 30 July 1983, 15 October 1975, 18

August 2006 and 16 February 2011 respectively. They are mother, father and their two children. I shall however, for the sake of convenience, refer to the Secretary of State as the respondent and the appellants as the appellants which are the designations they had before the first-tier Tribunal.

2. They appellants appealed against the decision of the respondent dated 6 November 2013 to refuse to vary their leave to remain in the United Kingdom on the basis of private and family life pursuant to paragraph 276B of the Immigration Rules. First-tier Tribunal Judge Moore dismissed the appellant's appeal pursuant to the Immigration Rules but allowed the appellant's appeal pursuant to Article 8 in a determination promulgated on 28 April 2014. Judge Saffer of the First-tier Tribunal gave the respondent permission to appeal and said that it is arguable that the Judge may have misapplied paragraph 276ADE of the Statement of Changes in Immigration Rules HX395 as indicated in the grounds of appeal.

Findings of the First-tier Tribunal Judge

3. The First-Tier Tribunal found the following.

I. The first appellant entered the United Kingdom on 1 July 2006 as a student with leave to enter, valid until 30 July 2007. Her husband, the second appellant joined her on 21 February 2007. They have continued to live in this country and were granted further leave to remain on several occasions, the last leave to remain being valid until 12 October 2013.

II. On 18 August 2006, the third appellant was born six weeks after the first appellant entered the United Kingdom. The fourth appellant was born in the United Kingdom on 16 February 2011.

III. On 9 October 2013 an application was made which was based on the third appellant having lived in the United Kingdom continuously for more than seven years and in the circumstances has met the requirements of paragraph 276 ADE (iv) of the Immigration Rules. As a consequence the three other appellants should also be granted leave to remain in line with the third appellant's leave as they have demonstrated that they have a genuine and subsisting relationship with the third appellant.

IV. The case turns on the issue in relation to the third appellant who was born on 18 August 2006 and is now approaching eight years of age. The fourth appellant is just three years of age and has yet to start nursery school.

V. The third appellant who has lived in this country for seven years and was born in the United Kingdom in August 2006 would appear to satisfy the requirements of leave for him to remain in the United Kingdom on the grounds of private life by reference to paragraph 276 ADE (iv) of the Immigration Rules.

VI. It is the best interests of the third appellant to remain with his parents, wherever they may be. Indeed it was never the intention of the respondent in the decision for anything other than the family to return to Bangladesh as a family unit.

VII. It is clear from the judgement of **ZH Tanzania** that the best interests of the child is an issue which has to be addressed first and is a distinct stage of the enquiry. Consideration should be given to a variety of individual circumstances, such as the age of the child, the level of maturity of the child, the presence or absence of parents, the child's environment and experiences, (guidelines on determining the best interests of the child UNHCR May 2008) and the comments of Baroness Hale in **ZH Tanzania**.

VIII. The appellant now appears to be doing particularly well at school having made a number of school friends and demonstrating excellent progress and clearly removing him from this environment would not only disrupt such educational progress, it would inevitably cause the breakdown of relationships made at school and would be likely to substantially hinder educational progress and future prospects in terms of job or career. The third appellant clearly satisfies the immigration rules under paragraph 276 ADE (iv).

IX. In considering particular circumstances which constitute exceptional circumstances contained in Article 8 of the EEC HR, the third appellant's education will be disrupted and this would lead to long-term disruption to the third appellant's life. The evidence from his mother, the first appellant was that they no longer have any family in Bangladesh or any cultural and religious links to that country.

X. There is a genuine and subsisting parental relationship between the third appellant and his parents and it would be unreasonable to expect the child to leave the United Kingdom. He has never visited Bangladesh and there is no evidence of any existing family or social ties with that country. He has never attended school in Bangladesh and whilst he can converse occasionally with his father in Bengali, he does not read or write in that language. The third appellant would not be likely to integrate readily into Bangladesh. The guidance recognises that after seven years, children start putting roots

and integrate into life in the United Kingdom and requiring the third appellant to leave the country would be unreasonable.

XI. All four appellant have lived in the United Kingdom lawfully and there is no issue of criminal conduct of they have not had recourse to public funds in order to maintain and accommodate themselves.

XII. The respondent's decision is an interference with the exercise of the third appellant's right to respect for his private life and that interference is of such gravity as to potentially engage Article 8. It would also be disproportionate to the third appellant to leave the United Kingdom in order that the respondent's legitimate aim and right to regulate and control immigration should be maintained.

XIII. The parents of the third appellant also get the benefit from the third appellant's right to pirate life.

The respondent's grounds of appeal

4. The respondent in her grounds of appeal states the following which I summarise. Paragraphs 276 ADE (iv) allows an applicant to succeed under the Rules if he, is under the age of 18 years and has lived continuously in the United Kingdom for at least seven years (discounting any period of imprisonment) and it would not be reasonable to expect the applicant to leave the United Kingdom. The Rule therefore has two limbs, the first is that the child must have lived continuously in the United Kingdom for seven years *and* it cannot be reasonable for him to leave the United Kingdom. The Judge found that it is not disputed that the third appellant has lived in the United Kingdom continuously for more than seven years, having been born in the United Kingdom in August 2006. In those circumstances, the third appellant would appear to satisfy the requirements of leave to remain in the United Kingdom on the grounds of private life by reference to paragraph 276 ADE (iv) of the Immigration Rules.

5. The Judge however failed to properly to consider the second limb which is the reasonableness of the third appellant leaving the United Kingdom in light of his age. In **Azimi-Moayed [2013] UKUT**, the Upper Tribunal held that the connection which are established by a child from birth to age 7 are less significant than those established in the seven year period later in a child's minority.

6. The third appellant can be removed from the United Kingdom with his parents and younger sibling. The Judge found that contrary to his parent's evidence, the third appellant did understand and conversion Bengali with his parents. In **EA (article 8-best interests of the child) (Nigeria) [2011] UKUT (IAC)** it was held by the Upper

Tribunal at paragraph 46 stated that "equally we do not conclude that the fact that the children had lived in the UK for most of their lives who are being expected to move to a country they do not yet know does not makes that disproportionate. There must be individual consideration and assessment of best interests in each and every case. By contrast with ZH Tanzania, the move to Nigeria in that case from the United Kingdom does not involve separation from a carer or the country of nationality. These decisions to not interfere with the enjoyment of family life on the part of any of the appellant's".

7. The Judge failed to consider the effect of the third appellant being removed with this family unit upon his private as distinct from family life is a further factor tending towards the reasonableness of the third appellant's removal. The Judge also failed to consider the third appellant's parent's temporary student migrant status when assessing the reasonableness of the third appellant's removal. In **EA** at paragraph 43 it is stated that it is important to recall that all of the appellants may all have been here lawfully but they came to the United Kingdom for temporary purposes with no expectation of being able to remain in the UK. The third appellant happened to be born in the United Kingdom whilst his parents were here for a temporary purpose. The expectation was that they would all return to Nigeria once the first appellant studies were completed. Those who have their families with them during a period of study in the United Kingdom must do so in the light of that expectation of return."

8. The Judge allowed the appellant's appeal under Article 8 rather than paragraph 276ADE holding that the appeal in respect of all appellants should also be allowed in line with the third appellant on human rights grounds. By allowing the third appellant's appeal under article 8 rather than the Immigration Rules the Judge materially erred by failing to identify in the third appellant's case, compelling circumstances not sufficiently recognised under the Immigration Rules of the sort required to ground an arguable case for consideration outside the Immigration Rules in accordance with the case of **Rv Ngare versus SS HD [2013] (admin).** The Judge also erred by failing to have regard to the requirements of paragraph 276 ADE is a relevant consideration in the proportionality evaluation. He also materially erred in failing to have regard to the public interest in firm immigration control. Therefore if the decision in relation to the third appellant is erroneous, the decision in respect of the other appellants must fall with it.

The hearing and the parties' submissions

9. At the hearing, Miss Isherwood on behalf of the respondent stated that the appellant's family came to this country in a temporary capacity. They waited until the third appellant was seven years old before making an application for the entire family to live in this

country. The Judge failed to consider why the child should not go back with his parents to Bangladesh. There are two elements to paragraph 276ADE. The judge stopped at the first one. There was no identification of the compelling circumstances in the appellant's case for why he cannot return with his family as a family unit. The only exceptional circumstances identified by the Judge was that the third appellant does not speak Bengali and that he has never been to Bangladesh. The third appellant has been to school for four years and as such his needs and social interests is based on his family unit. Even though the education system may be better in the United Kingdom, the third appellant is not a British citizen so he is not entitled to be educated in the United Kingdom. Family units of non-British nationals has not been considered by the judge.

10. The Judge states that the appellant should remain with his parents wherever they may be. Paragraph 29 of **ZH Tanzania** referrers and the Judge failed to engage with Article 8 as to the compelling circumstances in this case. The appellants could have no expectation that they would be allowed to live in this country for ever. There are also no evidence of difficulties that the family would encounter on their return to Bangladesh.

11. Mr Hossain made the following submissions. Paragraph 26 states that the third appellant has lived in the United Kingdom and it is not reasonable for him to leave this country. The Judge at paragraph 30 mentions exceptional circumstances and therefore has considered the second limb of the immigration rule.

12. Ms Isherwood said that the appellant's representative is indicating today that the third appellant's appeal should be allowed under the Immigration Rules which was not in the appellant's grounds of appeal. There was an error of law and the decision should be set aside.

Did the determination of the First-tier Tribunal involve the making of an error of law?

13. I have considered the determination of First-tier Tribunal Judge, the skeleton argument and the submissions made by the parties as to whether there is an error of law in the determination. Having considered the determination as a whole, I find Judge Moore's consideration of the appellant's appeal in respect of the Immigration Rules and Article 8 of the European Convention on Human Rights is materially flawed.

14. I agree with the respondent that the Judge did not give sufficient reasons for why the third appellant who has just passed the age of seven should not return to Bangladesh with the rest of his family who are in this country on a temporary basis or why it would be

unreasonable for him to do so. The agreed facts are that the first appellant, the mother, came to this country in 2006 on a student visa. The first appellant was born very soon after she came to this country. The fourth appellant was also born in this country but the Judge did not take into account they are all nationals of Bangladesh and not British citizens and therefore did not make our fact specific evaluation.

15. The Judge failed to recognise that the Immigration Rules are Article 8 compliant and that it will only be in exceptional circumstances where the appellant should succeed under Article 8 when he cannot succeed under the Immigration Rules. The Judge found that the exceptional circumstances in the appellant's case consist of the appellant not to being able to speak Bangladeshi and the fact that he has never visited Bangladesh and that his education will be fatally compromised. The evidence that the Judge recognised was that the third appellant's father and mother do not speak English or very limited English and converse with the third appellant in Bengali. The Judge failed to take into account that the appellant who has just passed the age of seven years and that his cultural and social identity is derived from his parents and their community. He also failed to take into account at eight years old, his ties to this country are less relevant at this stage of his life.

16. The Judge also took into account irrelevant factors such as the appellant's education would be hindered if he had to return to Bangladesh and that this would ruin his future prospects. He failed to take into account that Bangladesh has educational facilities for children who live in Bangladesh. He also failed to take into account that a non-British child is not entitled or should not have a reasonable expectation that he will be educated to British standards.

17. Although the Judge cited all the relevant case law in respect of the interests of children in the United Kingdom, he failed to take into consideration that he must conduct an individual consideration and assessment of the best interests of the appellant's particular circumstances. He failed to take into account that the appellant's exclusion from the United Kingdom and for him to return to Bangladesh with his family does not involve separation from his parents or siblings which has been held to be the starting point as to the best interests of the children that is to be with both parents and that dependent children will form part of their household will be removed unless there is some reason to the contrary. The judge failed to give cogent reasons for why the third dependent child should not return to Bangladesh with his family. The Judge failed to consider that being removed with his family unit is a factor which goes towards the reasonableness of the third appellant's removal with all his family members.

18. The Judge also failed to consider that the appellants were granted leave to remain in the United Kingdom on a temporary basis and could not have had any legitimate expectation that they could live in this country on a permanent bases unless they complied with the Immigration Rules for further leave to remain. The Judge failed to consider that non-nationals who come to this country to study with their families must know that they will have to return to their home country with their children after the completion of their studies.

19. Finally, the Judge did not allow the appeal under the Immigration Rules but pursuant to Article 8. The grounds of appeal do not seek to challenge his finding that the appellants do not meet the requirements of the Immigration Rules.

20. I find there is a material error of law in the determination and I set it aside in its entirety. The appeal to be reheard in the Upper Tribunal.

DECISION

Appeal allowed

Signed by

A Deputy Judge of the Upper Tribunal
Mrs S Chana

Dated this 1st day of July 2014