IAC-YW-LM-V1

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/12789/2014
IA/12800/2014
IA/12803/2014
IA/12816/2014
IA/12857/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 27 January 2015	**On 2 February 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE APPLEYARD

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

PARVIN AKTHAR	First Respondent
MALIHA MAHEK HAQUE	Second Respondent
SANGITA HAQUE	Third Respondent
YASIN HAQUE	Fourth Respondent
AMINUL HAQUE	Fifth Respondent

(ANONYMITY ORDER NOT MADE)

Representation:
For the Appellant: Mr N Bramble, Home Office Presenting Officer
For the Respondents: Ms Akhter, Counsel

DECISION AND REASONS

1. No application has been made for an anonymity order in these proceedings and no reason was put before me today why such an order should be made.

2. The appellant in this case is the Secretary of State for the Home Department. However, for the sake of clarity, I shall use the titles by which the parties were known before the First-tier Tribunal.

3. The appellants are all citizens of Bangladesh. The first and fifth appellants are husband and wife and the parents of the second, third and fourth appellants.

4. The first, third and fifth appellants arrived in the United Kingdom on 25 November 2005 as visitors. They have remained in the United Kingdom since that date. The second and fourth appellants were born in the United Kingdom. In 2011 and 2013 the family applied for leave to remain in the United Kingdom on the basis of their life in the United Kingdom and once their eldest child, Mahek, had completed seven years' residence. Decisions to remove the appellants were served on 25 February 2014. The appellants appealed those decisions. Their appeals were heard at Hatton Cross Hearing Centre by Judge of the First-tier Tribunal L K Gibbs who in a decision promulgated on 3 November 2014 allowed their appeals. The third appellant's appeal was allowed under the Immigration Rules and the other appellants under Article 8 of the ECHR.

5. At the hearing in the First-tier the judge heard evidence from the first, third and fifth appellants as well as the first appellant's mother and brother.

6. The judge first gave consideration to paragraph 276ADE of the Immigration Rules HC 395 (as amended). It was submitted on behalf of the third appellant that she met the requirements of paragraph 276ADE(iv) which at the time of the decision stated:-

> *"(iv) is under the age of 18 years and has lived continuously in the UK for at least seven years (discounting any period of imprisonment) and it would not be reasonable to expect the applicant to leave the UK; or ..."*

7. The HOPO submitted that there was insufficient evidence to satisfy the judge that it would be unreasonable for the third appellant to leave the United Kingdom and that there was contradictory evidence regarding her ability to speak Bengali and no evidence to say that she could not resume her studies in Bangladesh. Further, it was highlighted that in entering the United Kingdom as visitors to circumvent the Immigration Rules the first and fifth appellants had never intended to leave the United Kingdom and that their immigration conduct was something the judge should take into account. The judge took this into account and was satisfied that the conduct of the first and fifth appellants was as submitted by the HOPO. Moreover, although not utilising public funds, the first and fifth appellants accessed the NHS services and state education. The judge construed paragraph 276ADE(iv) to mean that her focus must be on the third appellant, notwithstanding the conduct of the first and fifth appellants.

8. The judge acknowledged that the third appellant's best interests were a primary concern for her and relied on the guidance in **Azimi-Moayed and Others (decisions affecting children; onward appeals) Iran [2013] UKUT 197 (IAC)** in coming to her conclusion.

9. I set out paragraph 1 of the headnote to **Azimi-Moayed** here:-

> *"(1) The case law of the Upper Tribunal has identified the following principles to assist in the determination of appeals where children are affected by the appealed decisions:*
>
> *i) As a starting point it is in the best interests of children to be with both their parents and if both parents are being removed from the United Kingdom then the starting point suggests that so should dependent children who form part of their household unless there are reasons to the contrary.*
>
> *ii) It is generally in the interests of children to have both stability and continuity of social and educational provision and the benefit of growing up in the cultural norms of the society to which they belong.*
>
> *iii) Lengthy residence in a country other than the state of origin can lead to development of social cultural and educational ties that it would be inappropriate to disrupt, in the absence of compelling reason to the contrary. What amounts to lengthy residence is not clear cut but past and present policies have identified seven years as a relevant period.*
>
> *iv) Apart from the terms of published policies and rules, the Tribunal notes that seven years from age four is likely to be more significant to a child that the first seven years of life. Very young children are focussed on their parents rather than their peers and are adaptable.*
>
> *v) Short periods of residence, particularly ones without leave or the reasonable expectation of leave to enter or remain, while claims are promptly considered, are unlikely to give rise to private life deserving of respect in the absence of exceptional factors. In any event, protection of the economic well-being of society amply justifies removal in such cases.*

10. The judge found from that authority that it was clear that cultural continuity is important as well as social and educational provision. For the third appellant she found that Bangladesh would not represent a break in her cultural experience because she speaks Bengali to family members and is close to her extended family members, all of whom are of Bangladeshi origin. Further, having regard to the photos and letters of support from the family it appears that a great deal of the family's time is spent with people of a similar background. However, the judge found that the facts nonetheless remain that the third appellant has been living in the United Kingdom for nearly nine years and this time started when she was 4 years of age. While satisfied that she remains in touch with her Bangladeshi culture it is more

probable than not, in the judge's findings, that she is equally comfortable with United Kingdom culture and the judge placed weight on the fact that she speaks fluent English and has had her entire schooling within the United Kingdom. The judge also found that the third appellant was settled at school, achieving excellent results at primary school and, according to the documentary evidence before her, settling in well to secondary school where she has an excellent attendance and academic record. The judge concluded by finding that the third appellant "is integrated in the UK".

11. The judge noted that seven years has long been a yardstick by which the residence of a child has been measured when assessing the impact of having to leave the United Kingdom and that the third appellant arrived in the United Kingdom aged 4, which when applying the principles detailed in **Azimi-Moayed** would be a significant time. She also took into account and acknowledged that the third appellant's return to Bangladesh would be within her family unit but when looking at the position in the round found that the length of time the third appellant had lived in the United Kingdom led to a conclusion that it would not be reasonable for her to leave the United Kingdom. She found therefore that the third appellant met the requirements of paragraph 276ADE(iv) of the Immigration Rules HC 395 (as amended).

12. At paragraph 19 of her decision the judge records that the third appellant of course could not remain in the United Kingdom without her parents and siblings and it would not be in her best interests to suggest that she could. The judge found that the first, second, fourth and fifth appellants should also be allowed to remain in the United Kingdom. She acknowledged the first and fifth appellants would now satisfy Appendix FM, specifically R-LTRPT, were they to make a valid application for leave to remain as parents but that she was unable to allow the appeals on that basis as no such application had been submitted. Therefore she went on to consider the situation of the remaining four family members under Article 8 of the ECHR. She considered appropriate authorities including **Razgar [2004] UKHL 27** and took into account, as she was obliged to, Section 117 of the Nationality, Immigration and Asylum Act 2002 (as amended). In light of her findings in relation to the third appellant the judge in considering paragraph 117B(6) applied and consequently, notwithstanding the conduct of the first and fifth appellants, the public interest does not require their removal. A decision to remove the remaining family members would, the judge found, be a disproportionate one.

13. The respondent sought permission to appeal and in giving his reasons for granting it Judge of the First-tier Tribunal Cruthers identified the crux of the respondent's grounds in the second of his three reasons. They state:-

> "1. By a decision promulgated on 3 November 2014, First-tier Tribunal Judge LK Gibbs allowed these appeals. The first and fifth appellants are a wife and husband, the other three appellants are their children (paragraph 1 of the judge's decision). It was the judge's assessment that the appeal of the oldest child of the family, Mahek, succeeded by reference to the criteria in

paragraph 276ADE of the immigration rules, HC 395. Having reached that conclusion (in her paragraph 18) the judge went on to allow the appeals of the other four appellants by reference to article 8 of the European Convention on Human Rights.

2. The crux of the grounds on which the respondent seeks permission to appeal is that the judge's reasoning as to it not being reasonable to expect Mahek to leave the United Kingdom is flawed – especially in the light of authorities such as **Zoumbas [2013] UKSC 0074, 27 November 2013** and **EV (Philippines) [2014] EWCA Civ 874**. Asserting that it is reasonable to expect Mahek to relocate to Bangladesh as part of her family unit, the respondent further asserts that none of these five appeals should have been allowed.

3. The grounds are arguable – especially in the light of the immigration history of the two adult appellants, and the judge's findings in relation to that immigration history (her paragraphs 13 and 14)."

14. Today Mr Bramble relied on the grounds seeking permission to appeal. He argued that, whilst accepting that seven years is a relevant period of time insofar as it is the requisite period under paragraph 276ADE(iv) of the Immigration Rules HC 395 (as amended) to engage that provision, the accrual of seven years is not, in itself, enough to be determinative. The judge has materially erred in concluding that this is a determinative factor. Further, the fact that the third appellant has strong ties to the Bangladeshi community within the United Kingdom is a weighty factor in favour of the reasonableness of refusal and the fact that she is "equally comfortable" within the culture of the United Kingdom does not establish that it would be unreasonable for her to leave the United Kingdom with her family. Whilst natural that the third appellant would be engaged, to some extent, in the community in which she lives, it remains material that she has retained equal ties to her Bangladeshi culture. Moreover, the reliance on the third appellant's education is a further misdirection in the assessment of reasonableness and it must be remembered that she could have no "future right" to access services in the United Kingdom, nor could her family members.

15. I was referred to the authority of **Zoumbas v SSHD [2013] UKSC 74**, and in particular the following from paragraph 24:-

> "... No doubt it would have been possible to have stated that, other things being equal, it was in the best interests of the children that they and their parents stayed in the United Kingdom so that they could obtain such benefits as health care and education which the decision-maker recognised might be of a higher standard than would be available in the Congo. But other things were not equal. They were not British citizens. They had no right to future education and health care in this country. ..."

16. He also relied on **EV (Philippines) and Others v SSHD [2014] EWCA Civ 874** with regards to entitlement and in particular paragraphs 59, 60 and 61 which state:-

> 59. On the facts of *ZH* it was not reasonable to expect the children to follow their mother to Tanzania, not least because the family would be separated and the children would be deprived of the right to grow up in the country of which they were citizens.
>
> 60. That is a long way from the facts of our case. In our case none of the family is a British citizen. None has the right to remain in this country. If the mother is removed, the father has no independent right to remain. If the parents are removed, then it is entirely reasonable to expect the children to go with them. As the immigration judge found it is obviously in their best interests to remain with their parents. Although it is, of course a question of fact for the tribunal, I cannot see that the desirability of being educated at public expense in the UK can outweigh the benefit to the children of remaining with their parents. Just as we cannot provide medical treatment for the world, so we cannot educate the world.
>
> 61. In fact the immigration judge weighed the best interests of the children as a primary consideration, and set against it the economic well-being of the country. As Maurice Kay LJ pointed out in *AE (Algeria) v Secretary of State for the Home Department [2014] EWCA Civ 653* at [9] in conducting that exercise it would have been appropriate to consider the cost to the public purse in providing education to these children. In fact that was not something that the immigration judge explicitly considered. If anything, therefore, the immigration judge adopted an approach too favourable to the appellant."

17. He contended that on the facts of this appeal it was entirely reasonable for the third appellant to accompany her family to Bangladesh and, whilst there might be an initial period of disruption, such interference is pursuant to the public interest and proportionate in line with the legitimate aims pursued.

18. As to Article 8 he submitted that, for the reasons in relation to the third appellant argued earlier, it was reasonable for her to go with her family and therefore the decision to allow the appeals on Article 8 grounds in respect of the other family members fell away. It was open to all the appellants to maintain contact with their UK based ties through modern communicational means and visits. Article 8 does not confer a choice of domicile and is not a general dispensing power.

19. Ms Akhter resisted all of Mr Bramble's arguments. She focused on whether the judge had erred in law and argued that she had not and there was no material error within her decision. She maintains that the respondent's position before me is no more than a disagreement with the findings of the judge who had properly assessed the totality of the evidence. Further, the authorities of **Zoumbas** and **EV**

(Philippines) did not assist the respondent. In Zoumbas, unlike here, the appellants were in the United Kingdom illegally and in **EV (Philippines)** the children had nowhere near the seven year period required under paragraph 276ADE.

20. I have carefully considered the decision of the judge along with the submissions of both representatives and the authorities that were handed to me. In particular, I note that **Zoumbas** sets out the principles applicable where the best interests of a child must be assessed. I recognise the Section 55 duty of the Borders, Citizenship and Immigration Act 2009 to have regard to the need to safeguard and promote the welfare of children in the United Kingdom. Judges have to make an assessment of a child's best interests as part of the overall assessment, be it under Article 8 or otherwise. Those best interests are an integral part of the proportionality assessment and the best interests of a child are a primary consideration, but not necessarily the only one and they do not amount in themselves to the paramount consideration. The best interests of a child can be outweighed by other factors. On my reading of the judge's decision that is the approach she has adopted. In so doing she has recognised and taken into account the guidance set out regarding the best interest assessment in **EV (Philippines)**. To the extent that those two cases can be distinguished from that before me, as asserted by Ms Akhter, I accept that that is the position. Nonetheless they are important cases which guide judges in these matters and which, without mentioning them, Judge Gibbs's decision does not veer from.

21. The judge has also taken account of **Azimi-Moayed** and the guidance therein. In so doing she has recognised that the starting point is the best interests of the children to be with both their parents and has considered in the round the stability and continuity of social and educational provision so far as it relates to the third appellant. There is no overemphasis in this. It was an integral part of the evidence in relation to the third appellant and upon which the judge was entitled to attach weight.

22. The judge has rightly given consideration to the time the third appellant has been in the United Kingdom. It is in excess of seven years. The judge rightly attaches weight to the fact that it runs from the third appellant being aged 4 years.

23. The judge was entitled to come to the decision that she did in relation to the third appellant meeting the Immigration Rules, just as she was entitled to find that as a consequence the other appellants' appeals succeeded under Article 8.

24. Further, the judge has looked at all she was expected to, including the provisions of Section 117 of the Nationality, Immigration and Asylum Act 2002, and was entitled to come to the conclusions that she did, in particular in relation to Section 117B(6).

25. On the totality of the evidence, and in the context of a well reasoned decision, the judge was entitled to come to the conclusions that she did and in so doing has not materially erred.

26. I find that the grounds put forward by the respondent essentially amount to an argument with findings and reasoning which are legally adequate and which take proper account of both law and evidence.

27. The conclusions of the judge were open to her to be made in all the circumstances.

Conclusion

The making of the previous decision involved the making of no error on a point of law and I do not set aside the decision but order that it shall stand.

Signed Date 2 February 2015.

Deputy Upper Tribunal Judge Appleyard