IAC-YW-LM-V4

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/13728/2014
IA/11244/2014
IA/11240/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 16 June 2015	**On 22 July 2015**
Prepared 16 June 2015	

Before

DEPUTY UPPER TRIBUNAL JUDGE DAVEY

Between

GURWINDER SINGH (A1)
GURJIT KAUR (A2)
GURNOOR SINGH (A3)
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr E Macdonald, Counsel, instructed by RM Legal Solicitors LLP
For the Respondent: Miss A Brocklesby-Weller, Senior Presenting Officer

DECISION AND REASONS

1. The Appellants, nationals of India born on 5 July 1985, 26 March 1984, and 13 August 2011, appealed against decisions made by the Respondent to refuse their applications for leave to remain and to make removal directions under Section 47 of the IANA 2006. A1 had applied on 15 May 2012 for leave to remain on the basis of family and private life. His wife, A2, had applied on a like basis and an application was made on behalf of A3 on a like basis.

2. The refusal was with reference to Appendix FM and paragraph 276ADE of the Immigration Rules (the Rules). The matter came before First-tier Tribunal Judge Judge Woolley (the Judge) who, on 29 September 2014, dismissed the appeals under Appendix FM, paragraph 276ADE of the Immigration Rules and under the Human Rights Act 1998.

3. The Judge did not formally deal with the removal directions but no issue is taken upon that and an inevitable consequence of the decision made by the Judge for each Appellant was that the removal decisions would stand.

4. Permission to appeal that decision was refused by First-tier Tribunal Judge Chambers on 27 October 2014. On identical grounds, but redated, R M Legal Solicitors sought to make a renewed application which was granted by Deputy Upper Tribunal Judge Bruce on 16 February 2015 in which she stated as follows:

> "1. This is a determination that contains a thorough and reasoned proportionality balancing exercise. It is however arguable – just – that the First-tier Tribunal (and indeed the parties) have conflated the test in paragraph 276ADE1(iv) of 'very significant obstacles' to integration with that of 'insurmountable obstacles'. It is further arguable that up-to-date evidence concerning the third Appellant's fitness to fly was not given adequate consideration."

5. The grounds to the First-tier and to the Upper Tribunal as renewed assert that A3 "has been advised by a medical professional that he should not have long haul flight at his critical condition" in the background paragraph numbered 1. In Ground 1, A3's condition was described as "acute". Ground 2 asserted that the Judge had failed to consider why A3's life would not be endangered if he was to travel to India "in such an acute medical condition". Ground 3 asserted that A3's GP had given a prognosis that "long haul flight may almost certainly be fatal". Ground 4 asserted risk if A3 had to remove, for which a report was needed. Similarly Ground 5 asserted that A3 is in a frail condition and a long haul flight could be fatal.

6. In fact the documentation referred to as if it were three exhibits, is in fact only two. The first exhibit, GKGSGS01, a letter from a GP's surgery dated 13 November 2014, describes the health complications A3 was born with, those which have been treated and monitored, and where A3 is under further investigation regarding a persistent cough with a lung problem and shortness of breath. The letter dated 13 November 2014 from Dr Ahmad of the GP surgery in Southampton says this:

> "... He is suffering with similar problems which are affecting his condition. Long journey and especially long haul flights may be harful [sic] to him as can affect his lungs condition with can be very serious."

The letter was not before the Judge and he could never have considered it, Ground 1 of the application for permission was carelessly, and seemingly deliberately, misleading.

7. The second letter, dated 3 November 2014 (GKGSGS02), related to A3's condition and was a solicitor's letter in response to a potential negligence claim against a hospital and was not any assessment of risk to A3 undertaking a flight. The third letter, the representatives were agreed, did not exist. Therefore there was nothing in the evidence to show that a flight could be "fatal", let alone "almost certainly be fatal".

8. In these circumstances I find the core claim Ground 1, upon which permission was given by Deputy Upper Tribunal Judge Bruce, was grossly misleading and simply completely unsupported by the evidence. In addition to this, the Judge's decision was dated 29 September 2014 and the GP surgery letter was not even written at that date: It is dated 13 November 2014. How it could therefore be said the Judge erred in failing to properly consider the evidence of such risk as claimed is inexplicable. Such criticism was wholly unsustainable and deliberately misleading, to repeat the criticisms in the renewed grounds was to compound the grave errors made.

9. I find that the settling of these grounds by RM, solicitors, dated 18 November 2014, as indeed those of 8 October 2014, were grossly misleading and an abuse of the appeals process. The criticism made in Ground 3 that the Judge had not properly directed himself on the issue of insurmountable obstacles let alone conflated those with the provisions under the Rules was ultimately meaningless. The fact was that the Judge properly assessed those issues and was not misdirecting himself either as to the effect of obstacles that might arise within the terms of the Immigration Rules let alone obstacles of another kind outside of the Rules. In either case the Judge was not raising the standard of proof to some higher level and no example is given of such an error in the decision by the Judge.

10. The medical evidence before the Judge was extremely limited and has been repeated in the Appellants' bundle (AB). At page 135 (AB) there is a letter, dated 21 May 2014, which recited some of the health problems faced through the pregnancy and birth of A3. The letter from Dr Vollmer, consultant paediatric neurologist, simply described earlier problems and the need for long term input from the developmental medicine, paediatric neurology and therapy services. At AB page 136 there is a letter of 17 April 2014 which described, at AB page 136, early health problems that A3 encountered and recommended renal examination and assessment on a regular basis.

11. A letter of 6 March 2014, AB page 138, referred to the need for further monitoring and observation. A letter of 29 September 2013, AB page 139, simply identified historical ill health of A3 and the then continuing need for regular outpatient follow

up. AB page 141 is simply an appointment letter of 15 April 2013. AB page 142 is an undated health visitor letter speaking of a period of ill health within the period up to about two months after A3 was born.

12. The letter of 27 April 2012 (AB page 143) does not say more than evidence the earlier health problems of A3. Similarly the letters at page 144 and 145 speak to health problems A3 had as a baby and are dated 22 February 2012 and 9 February 2012.

13. There was also correspondence in 2011 relating to the health of A3.

14. A letter from Dr Vollmer dated 16 May 2012 makes reference to A3, the extent of developmental progress he was making and identified that A3 has some mild to moderate global development delay: However a formal psychometric assessment had not yet been performed and A3 continued to have mild to moderate muscular hypertonic and intermittent abnormal development progress but the ophthalmological findings had improved considerably.

15. There was clearly other evidence which related to a period in May 2015 which of course was not before the Judge.

16. There was a further letter from Dr Ahmad at the GP surgery of 21 May 2015. The letter is a bare repetition of his 13 November 2014 letter and repeated with the same spelling error on the issue that long haul flights may be, I infer, harmful to A3.

17. These letters in part at different stages refer to the stress upon A3's mother (A2) and the family caused by A3's ill health.

18. There was no assessment of the available facilities in India, their presence or lack of, the need to monitor A3 either in terms of paediatric considerations or by a neurologist or a nephrologist or consultant ophthalmologist.

19. There is indeed no evidence that necessary facilities cannot be obtained so as to pose life threatening consequences for A3. Nor is there evidence to suggest that his renal problems cannot be addressed in India. If A1 and A2 live some distance from a suitable hospital then it will be their choice where to move to in India to obtain such services if they wish.

20. The Judge considered these matters and gave particular consideration to the submissions made in his analysis of the health case under Article 3 and Article 8.

21. There is therefore no evidence of which it is said the Judge omitted from consideration or irrationally discounted or was perverse in not taking into account to show material harm likely to arise to A3 on return to India.

22. It is clear that the care in the NHS in the United Kingdom may be different from that available in India but that does not entitle either A3 or his anxious parents to remain for chosen treatment in the United Kingdom. There was no sensible case being

advanced that A3 could remain on his own or that A2 and A1 would not return to India with him, for their removal was as a family.

23. The Judge at paragraph 36 of the decision considered the issue of the proximity of hospital treatment and for reasons he gave concluded that the removal of A3 with his parents would not breach his or their rights under Article 3 or indeed Article 8 ECHR.

24. Mr Macdonald's skeleton argument ultimately setting out the documents that were before the Judge to consider does not show that there was a failure to properly consider the medical evidence.

25. Rather it seemed to me since the Judge could not have had the 13 November 2014 letter from the GP surgery the matters relied upon in that letter do not demonstrate any arguable error of law in the consideration the Judge gave to the issue of A3's health.

26. Mr Macdonald sought to rely upon evidence produced by the hospital concerning the medical ill health A3 faced arising from his birth and the processes thereof.

27. Quite simply the detail into which those matters go, which may be pertinent to a negligence claim against the hospital or the doctors, was neither here nor there for the Judge could not resolve those issues, nor did he have the evidence to do so, nor was such evidence of negligence relevant to the issue of risk in removal or on return to India. I therefore reject the claim that refusing to allow A1, A2 and A3 to remain is in any way material to the outcome of such litigation, if it ever occurs.

28. For the avoidance of doubt I do not accept that the Tribunal in considering the issue of A3's health and its impact on his parents was applying a high threshold in terms of the standard of proof. It seemed to me somewhat unfair to criticise the Judge on those matters when there was no report provided at the hearing addressing either the real risks to the Appellant through removal or indeed risk on return thereafter, given his various health conditions or the circumstances he might come to live in India. I address the adjournment request issue later at paragraph 34.

29. Accordingly, I reject the criticisms of the Judge in connection with the assessment of the evidence.

30. I find that the third ground simply is a development of an argument more founded in linguistic sophistry than in substance. It is clear that as a matter of approach insurmountable obstacles do not in this context mean that they are truly insurmountable so much as very significant. Whether those are "difficulties" or "obstacles" matters not for these purposes.

31. In the circumstances the factors relied upon as significant obstacles or very significant, or indeed even were they to be described as insurmountable obstacles, really do not merit argument. The fact was that the Appellants still have family in

India, A1 was employed and has been employed before he came from India, the length of time that they have been in the United Kingdom and their community and social ties here were not really evidenced by anything significant to be given weight. I find they have a supporting network left in India. It may be there are other countervailing factors but the fact of the matter was that there were not, through A3's health, serious issues relating to his removal and there were, as the Judge found, effectively no very serious obstacles.

32. In the circumstances I do not accept that there was any substance in the assertion that the Judge has applied, not least by reference to its outcome, anything erroneous in relation to the consideration of paragraphs 276ADE. On a fair reading of the decision it is clear that the Judge had regard to the relevant evidence. If it was a criticism that there was more about A3's health than needed to be considered then it appeared to me to lie with the Appellants and the limited scope of the evidence they produced. It was not said, for example, that they could not afford to or were unable to obtain appropriate evidence, relating to risk on return, if they had wanted to.

33. The other elements of those grounds advanced on Ground 3 are essentially disagreements with adverse findings and appear to have approached the assessment of the decision on a nitpicking basis rather than one founded upon the evidence advanced as a whole.

34. The issue of whether there should have been an adjournment by the Judge was not a matter upon which permission to appeal was given. Nevertheless, I heard the submissions made and I am bound to say that they too have no substance. Plainly, as Nwaigwe [2014] UKUT 418 (IAC) recited the decision of the President (UTIAC) on the general principles upon which adjournments may be sought and granted, there was nothing on the face of it to show that at the time the application was heard any attempt had actually been made to obtain a medical report summarising A3's case and needs. Rather, there was no expert appointed to consider it, nor was there any timetable in which such a report might come to be presented, and nor was there any indication as to what, at the very least, the potential outcome of such a report might be. There was, therefore, nothing before the Judge to show that such evidence might make a material difference to the outcome of the appeal. It was thus an entirely speculative application for an adjournment in the hope that something might come forward to support the claim.

35. In connection with the adjournment request, under the Asylum and Immigration Tribunal (Procedure) Rules 2005 then in force Regulation 21, the party applying for an adjournment must, if practicable, notify all other parties of the application, show good reason why adjournment is necessary and produce evidence of any fact or matter relied upon in support of the application. The Tribunal must not adjourn a hearing on the application of a party unless satisfied the appeal cannot be justly determined. Under paragraph 21(3) the Tribunal must not in particular adjourn a hearing on the application of a party in order to allow the party more time to produce evidence, unless satisfied that: (a) the evidence relates to a matter in dispute

in the appeal; (b) it will be unjust to determine the appeal without permitting the party a further opportunity to produce the evidence. It is clear that there was non-compliance with the directions given by notice of 9 May 2013 for the hearing on 19 September 2013 and there was no satisfactory explanation for that failure ever advanced, even before me.

36. In these circumstances it seemed to me absolutely clear that there was no proper basis for the adjournment application and it was wholly speculative as to what might be the outcome of any report written. There was no unfairness and, applying the overriding objective in Regulation 4 of the 2005 Rules, the outcome of such an application would have only been to further delay and waste hearing time allocated within the system of appeals.

37. Even now Mr Macdonald was unable to identify any unfairness nor can he identify because of his instructions, anything that any specialist or expert might have said concerning the issues relating to A3's health or the impact upon A1 and A2 of A3's health condition.

38. In these circumstances I find that there was no Robinson obvious miscarriage of justice through the wrongful denial of the adjournment request.

39. The Original Tribunal made no error of law. The Original Tribunal's decision stands.

NOTICE OF DECISION

The appeal is dismissed on asylum grounds.

No anonymity direction is made.

Signed Date 21 July 2015

Deputy Upper Tribunal Judge Davey