Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/14052/2014
IA/14053/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 27th August 2015	**On 29th September 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE LEVER

Between

MR MOHAMAD FAISAL AHMAD ZAIBIN (FIRST APPELLANT)
MRS SITI ROSMIZA ABD RAHMAN (SECOND APPELLANT)
(ANONYMITY NOT RETAINED)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr Gilbert of Counsel
For the Respondent: Mr Tarlow

DECISION AND REASONS

Introduction

1. The Appellants born on 12th February 1971 and 29th August 1971 are both citizens of Malaysia and are husband and wife. The Appellants are represented by Mr Gilbert of Counsel. The Respondent was represented by Mr Tarlow a Presenting Officer.

Substantive Issues under Appeal

2. The Appellants had made application for leave to remain in the United Kingdom and this had been refused by the Respondent. The Appellants had appealed that decision and their appeal was heard by First-tier Tribunal Judge Andrew sitting at Birmingham on 9th October 2014. The judge dismissed their appeals under the Immigration Rules.

3. The Appellants made application for permission to appeal which was initially refused but permission was granted by the Upper Tribunal. It was said that it was arguable that the judge had not necessarily considered all of the evidence to show the nature of the business trips made by the first Appellant and that it was arguable that the Article 8 decision was dependent upon the outcome of the application under the Immigration Rules. Directions were issued directing the Upper Tribunal firstly to decide whether an error of law had been made in this case or not. The matter comes before me in accordance with those directions.

Submissions on Behalf of the Appellants

4. It was submitted that the judge had failed to look at Article 8 in this case particularly in circumstances where the Immigration Rules were a strict code and it was submitted there were compelling or good reasons to consider the matter outside of the Rules and I was referred to the case of **SS Congo**.

Submissions on Behalf of the Respondent

5. Mr Tarlow accepted, in my view fairly and properly, that there had been a failure on the part of the judge to consider Article 8 in circumstances where it did need to be examined outside of the Rules and he accepted that a material error of law had been made in those circumstances.

6. It was further agreed between the representatives that in terms of remaking a decision I had before me all the documents that were necessary and that there was no requirement for any further evidence to be considered and therefore the matter could proceed by way of submissions only. I agreed and heard those submissions and have provided my decision below.

Decision

7. I find that a material error of law was made by the judge in this case and set aside the decision of the First-tier Tribunal and now remake that decision having considered all the documentary evidence available and submissions raised by both parties.

Decision and Reasons

8. The first Appellant had made application on 5th February 2014 for indefinite leave to remain in the UK as a Tier 2 (General) Migrant. The second Appellant was a dependent upon that claim. The case had been considered under paragraph 245HF of the Immigration Rules. This allowed the first Appellant to succeed if he had spent a continuous period of five years in the UK in any combination set out at paragraph

245HF(c). However paragraph 245AAA(a) defined "continuous period" to mean that a period of 180 days or less spent outside the UK in any one of the preceding five years would not break the concept of continuous period. The Respondent found that in the period February 2010 to February 2011 the first Appellant on his own admission had spent 214 days outside of the UK albeit on business related activities. It was for that single reason the Respondent had refused the application and the refusal had been upheld by the First-tier Tribunal.

9. Further the Respondent at page 2 of the refusal letter appears to have looked outside of the Rules but found the statement from the first Appellant's employer that he was on business purposes not sufficiently compelling to waive the requirement.

10. There was some discussion at the error of law stage as to what documents the First-tier Tribunal Judge had seen. The employer letter referred to by the Respondent in the refusal letter was a letter dated 29th January 2014. That merely listed the dates in 2010 to 2011 when the first Appellant had been to Saudi Arabia for "business purposes". There was however a later letter dated 11th September 2014 from the employer which provided rather more detail as to the valuable work being done by the first Appellant on business in Saudi Arabia and the contribution to the UK from his involvement. That letter could not have been seen by the Respondent as it postdates their refusal letter. It was in my view seen by the judge (see paragraph 2 decision) although unfortunately he did not specifically refer or deal with that letter. It is possible, had the Respondent seen that letter that may have changed his view on discretion although I accept that is speculative.

11. I have looked at the Home Office policy guidelines in terms of ILR calculating continuous periods. This appears at pages 88 to 118 of the Appellants' bundle. It is not sadly the clearest written document. However, save and except for compassionate reasons it does appear that the period of 180 days in any twelve month period over the past five years, calculating a twelve month period from date of application backwards, is the ceiling. Accordingly in one of those five years the Appellant had 214 days although that was almost wholly connected with his job based in the UK. It is enough however to mean the Appellant did not meet the requirements of the Immigration Rules.

12. Given that those Rules are essentially black and white and given the Respondent herself looked at the matter discretionally it is appropriate to consider whether the Appellants' case needs to be examined outside of the Rules. In this regard whilst there is a plethora of case law I have taken as a useful and recent guide the case of **SS Congo [2015]**, which in turn refers back to other relevant cases including **Nagre**. The test, where a person is not subject to deportation or unlawfully/precariously in the UK is whether there are compelling reasons to look outside of the Rules. I find there are compelling reasons in this case for two specific reasons.

13. However I make it clear at the outset that I accept that Article 8 of the ECHR cannot be used simply in a "near miss case". That is not its function.

14. The first reason is as follows. There are many cases where it is necessary to have looked at all of the first Appellant's relevant personal circumstances to decide in the

first instance whether an Appellant falls within or without of the Immigration Rules. If he does not fall within the Rules then an examination separately under Article 8 of the ECHR is in many respects simply rehashing the same debate on the same set of facts which have already been examined. Such an exercise in my view is far less likely to provide compelling reasons for deciding the case needs to be examined outside of the Rules. That however is not the situation before me. Essentially the only relevant factor in the first Appellant's circumstances that was, or needed to be examined for the purposes of these Immigration Rules, was whether he had or had not spent more than 180 days outside of the UK in any twelve months of the previous five year period. Nothing else about the first Appellant's case was in reality considered. In those circumstances it becomes somewhat more compelling to go to a second stage (outside of Rules) to enable all the first Appellant's relevant circumstances to be considered essentially for the first time.

15. Secondly there are in this case several reasons why the specific circumstances compel a proper review of his case. Indeed the First-tier Tribunal Judge at paragraph 13 of his decision had raised some of those factors. Broadly the following points can be noted:

> "(1) The fact that it was only in one of the five years and the earliest in time that the Appellant went over the 180 days.
>
> (2) That excess period was wholly as a result of a specific job he was undertaking for his employers in the UK, work for which he was granted a visa.
>
> (3) That work was providing a valuable contribution to the UK economy."

16. For all of the above reasons I find compelling reasons for an examination of the first Appellant's (and dependent wife's) case outside of the Rules. In any such examination outside of the Rules the test is one of proportionality as set out in the five stage test in **Razgar**. I find the first four stages met in **Razgar** and accordingly move to that examination of proportionality at the final stage. In assessing proportionality the starting point is to have full and careful regard to Section 117B of the 2002 Act set out in statutory form, the public interest. The public interest in such cases is of great importance when conducting a proportionality exercise, and its rendition in statue is a reminder of such. Further all aspects need to be considered (**Dube [2015]**).

17. Section 117B(i) reminds one that immigration control is in the public interest. Section 117B(ii) refers to the ability to speak English for good reasons that are further set out in (ii)(a) and (b). The first Appellant and his wife speak good English. They have integrated within society and are not a burden. Indeed they are valuable net contributors. Section 117B(iii) refers to financial independence. It is clear that in this case both the Appellants work. The first Appellant works for Aecom and the second Appellant works as a property consultant with CBRE Ltd. Further both Appellants have been working continuously for the seven years that they have lived in the UK. Section 117B(iv) and (v) rightly refer to little weight being given to private life if developed when in the UK unlawfully or precariously. That sentiment is echoed in

SS Congo where the requirement for consideration of such a person under Article 8, is exceptional rather than the test of compelling in other circumstances. In this case both Appellants have at all times lawfully been within the UK and they are entitled therefore to have their private life examined with care and due regard. Finally Section 117B(vi) does not apply.

18. Thus an examination of the public interest demonstrates that it is important, that these Appellants do not fit into any category which underscores the importance and raison d'être behind the public interest and it cannot be said therefore that the balance of proportionality obviously tilts towards the Respondent.

19. The Appellants have spent seven lawful years in the UK, where they have both completely integrated into society and both have been in continuous employment contributing to the UK economy in a valuable and positive way. It is clear that that will continue in both their cases. The first Appellant has in four of the five year periods including the latest four periods been out of the UK for substantially less than the 180 days allowed. The year he went beyond by twenty or so days was solely because he was sent to Saudi Arabia by his company to perform a job that they believed he was, for a variety of reasons, best suited to, and which was part of a project worth seven billion US dollars. The first Appellant further is a higher rate taxpayer.

20. In summary the Appellants have resided here for some time lawfully and have made and continue to make a worthy and valuable contribution to the UK and therefore to the public interest. I find that a removal is not in the pubic interest and would be disproportionate in the circumstances of this case.

21. Finally I would observe the perhaps obvious point that there are no doubt many hundreds more worthy cases for consideration of removal by the Home Office and the utilisation of their resources in that respect.

Decision

22. In remaking this decision I dismiss the appeal under the Immigration Rules but allow the appeal under Article 8 of the ECHR.

23. No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge Lever

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make a whole fee award

Signed Date

Deputy Upper Tribunal Judge Lever