Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/19728/2014
IA/19741/2014
IA/19735/2014
IA/19752/2014

THE IMMIGRATION ACTS

Heard at Manchester	**Determination Promulgated**
On 2nd February 2015	**On 2nd March 2015**

Before

UPPER TRIBUNAL JUDGE COKER

Between

RAMAK DARVISHI
MOHAMMADHOSSEIN AKHLAGI ESFAHANI
ARIA AKHLAGI ESFAHANI
ARAD AKHLAGHI ESFAHANI

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms S Lee of Salam & Co
For the Respondent: Mr P Diwyncz, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. On 11th November 2014 I found an error of law in the determination of the First-tier Tribunal dismissing the appeal of Ramak Darvishi against a decision of the respondent to refuse her leave to remain as a Tier 4 (General) student migrant

and to remove her and her dependant husband and children under s47 Nationality, Immigration and Asylum Act 2006, in the following terms:

i. The appellants appeal the decision of the First-tier Tribunal to dismiss the appeal of Ramak Darvishi against a decision of the respondent to refuse her leave to remain as a Tier 4 (general) Student Migrant and to remove her under s47 Nationality Immigration and Asylum Act 2006. The other appellants are her husband and children and their applications were as her dependants; they were refused in line with her.

ii. There was no challenge to the decision by the First-tier Tribunal to dismiss the appeal under paragraph 245ZX (ha) of the Immigration Rules. The challenge, and the basis upon which permission to appeal has been granted, was to the decision to refuse to grant leave to remain under article 8. It was pleaded that the children, who fell to be considered under 276ADE of the Immigration Rules and the family as a whole under Article 8, should have succeeded in their appeals. Permission was granted on the grounds that it was arguable that the judge had failed to have adequate regard to material considerations as to the best interests of the children, the circumstances to which they would be returning in Iran and had failed to follow or distinguish EV (Philippines) [2014] EWCA Civ 874 and Zoumbas [2013] UKSC 74.

iii. It appears that the appellants had not made an application for leave to remain on the basis of their private life such as to bring them within paragraph 276ADE of the Immigration Rules. In the event this is however technical because the decision of the judge to dismiss the appeals on Article 8 grounds was limited to consideration of the immigration status of the main appellant and that the appeals of the other three appellants were subsumed within her immigration status which had always been of a temporary nature. The First-tier Tribunal judge found that there were no circumstances such as to merit a separate inclusive determination of Article 8 and although mention was made of s55 and the best interests of the children this was in the context only that the children should remain with the parents and that given they were going so should the children.

iv. There was no engagement by the First-tier Tribunal judge with the length of time the children had been lawfully in the UK; where they had spent their formative years; the stage at which they were in their education; their language; the financial and economic situation of the parents; the medical condition of the youngest child and availability of treatment in Iran and the conditions to which they would return to live as a family. Furthermore, although submissions were made to that effect, the judge failed to reach a decision under s117 Nationality, Immigration and Asylum Act 2002, which was in force on the date of the hearing before the First-tier Tribunal.

v. The failure to even begin to engage with the situation of the children and thus the family as a whole and the failure to give any reasons for reaching a decision that removal was proportionate, amounts to an error of law.

2. I made the following directions:

    1. Mr Diwyncz not objecting, I granted leave to the appellants to file and serve such other documentary evidence as advised; such documents to be served upon the respondent no later than 5 working days before the resumed hearing;

    2. Updating witness statements to be filed and served; to stand as evidence in chief and to be served upon the respondent no later than 5 working days before the resumed hearing;

    3. The appellants to file and serve a skeleton argument.

    4. No interpreter will be booked.

3. Ramak Darvishi, her husband and her two children arrived in the UK on 20th March 2005. On that date Aria was aged 7 and Arad was aged 3; they are now aged 16 and 10 respectively. In the light of the documentary evidence produced it was accepted that the children have each been in the UK in excess of 7 years. S117A and s117B and s117D Nationality Immigration and Asylum Act 2002 applies to the determination of these appeals on human rights grounds against removal. These read, in so far as relevant to this appeal, as follows:

> 117A Application of this Part
>
> (1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts -
>
> (a) breaches a person's right to respect for private and family life under Article 8, and
>
> (b) as a result would be unlawful under section 6 of the Human Rights Act 1998.
>
> (2) In considering the public interest question, the court or tribunal must (in particular) have regard -
>
> (a) in all cases, to the considerations listed in section 117B, and
>
> (b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.
>
> (3) In subsection (2), "the public interest question" means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).
>
> 117B Article 8: public interest considerations applicable in all cases
>
> (1) The maintenance of effective immigration controls is in the public interest.
>
> (2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English -

(a) are less of a burden on taxpayers, and

(b) are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons -

(a) are not a burden on taxpayers, and

(b) are better able to integrate into society.

(4) Little weight should be given to -

(a) a private life, or

(b) a relationship formed with a qualifying partner,

that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where -

(a) the person has a genuine and subsisting parental relationship with a qualifying child, and

(b) it would not be reasonable to expect the child to leave the United Kingdom.

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117D Interpretation of this Part

(1) In this Part -

"Article 8" means Article 8 of the European Convention on Human Rights;

"qualifying child" means a person who is under the age of 18 and who -

(a) is a British citizen, or

(b) has lived in the United Kingdom for a continuous period of seven years or more;

"qualifying partner" means a partner who -

(a) is a British citizen, or

(b) who is settled in the United Kingdom (within the meaning of the Immigration Act 1971 - see section 33(2A) of that Act).

4. Both parties agreed that the two children are qualifying children as defined by s117D NIAA 2002. I asked Mr Diwyncz what submissions he wished to make as regards "reasonableness" with regard to s117B(6) and the public interest. He submitted that no one would consider it unreasonable for children to follow their parents to their country of origin. In terms of the public interest question he referred to the children having been educated at public expense and that this had

arisen because of their parents presence in the UK and the UK requirement that they be educated rather than because they had come here as students. He relied upon no other submissions.

5. Ms Lee submitted that on the contrary it would be unreasonable for the children to be removed from the UK. The family, including the children, have been present in the UK just a few weeks short of 10 years and have been in the UK since the ages of 7 and 3 respectively. These are amongst the most formative years of childhood and are of great significance. Both children are no longer solely dependant upon their parents for their private life. They have established social and community ties, as evidenced by the documentary evidence. At the date of the decision the older child was within three months of sitting public exams and the respondent had failed to take this into account when reaching her decision, contrary to her own published policy. Now he was due to sit his A levels in May. The younger child is at the stage of choosing GCSE options. Both children have done and are doing well at school. Neither child speaks more than a few words of Farsi and neither speaks Arabic, a requirement for Koranic studies. They have not been brought up in a religious household in the UK. The parents have raised the issue of the children's personal safety in Iran given their "Britishness" and lack of language although it is not being submitted that these concerns reach the level of risk required under the Refugee Convention of Article 3. Similarly although the youngest child has health problems these are not raised as significant issues that meet the threshold for Article 3 but that these are additional factors that need to be considered and taken into account. She submitted that the parents (and the children) speak fluent English. The uncontested financial evidence supports the submission that the family are not and will not be a burden to the state; Mr Esfahani has been employed by the same employer for the last 8 years. She submitted that the respondent had manifestly failed to consider s55 and the welfare of the children.

6. Although not specifically referred to by Mr Diwyncz, the appellants had not been granted entry clearance and leave to remain in the UK on anything other than a temporary basis with no expectation that their status would lead to permanent residence. The maintenance of immigration control through the enactment of legislation and the setting out of Rules and policies. Nevertheless they were granted extensions of leave to remain and the fact of residence in excess of seven years for a child is a factor that is specifically recognised both in paragraph 276ADE and in s117B NIAA 2002 as meeting specific and different consideration to cases where, for example, children have not been residence for such a lengthy period. The Rules reflect the public interest considerations in s117B NIAA 2002.

7. The question of whether it is reasonable for these children to leave the UK has to be considered in the real and practical world. Although they have been resident for a considerable number of years that is not the end of the consideration. Their circumstances, and those of their parents, have to be considered as a whole and in the round taking into account the adverse factors which are that the parents came to the UK with no expectation of being able to remain permanently and the requirement to maintain immigration control along with all the other factors set out briefly above. It is plain that if the parents were forced to leave the UK, the children

would leave as well. The impact on them given their age and ties over and above those they have with their parents and the length of time they have been in the UK and the other factors as set out above does not, in this instance, result it in being reasonable to expect the children to leave the UK. It is therefore plain that it is NOT in the public interest for the children to leave the UK.

8. That however does not answer the public interest question and it was for that reason that I asked Mr Diwyncz if there were any other factors over and above those which have already been taken into account in determining whether t was reasonable to expect the children to leave the UK. He was unable to identify any thing at all significant.

9. Taking full account of all factors including the other elements set out in s117B and their relevance as referred to above, I am satisfied that the decision the subject of challenge before me breaches the appellants right to respect for their family and private life.

10. I allow all the appeals on human rights grounds.

Conclusions:

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

I set aside the decisions

I re-make the decisions in the appeals by allowing them

Anonymity

The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. There was no request for such an order to be made and I see no reason for one to be made.

Upper Tribunal Judge Coker Date 27th February 2015