Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/25097/2014
IA/25102/2014
IA/25108/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 28th October 2015	**On 23rd November 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE SAINI

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR PRAVEEN KUMAR MANUKONDA
MISS JEENA MANUKONDA
MISS PRAISE MARVEL MANUKONDA

Claimants

Representation:
For the Appellant: Mr S Kotas, Senior Presenting Officer
For the Claimant: Ms R Qureshi, Counsel; instructed by Legend Solicitors

DECISION AND REASONS

1. The Secretary of State appeals with permission against the decision of First-tier Tribunal Judge Gandhi allowing the Claimants' appeal on human rights grounds outwith the Immigration Rules pursuant to Article 8 ECHR.

2. In Refusal Letters dated 27 May 2014, the Secretary of State refused the Claimant's applications for leave to remain as the dependent family of a

Tier 4 (General) student including consideration under section 55 of the Borders, Citizenship and Immigration Act 2009 and incorporating removal directions under section 47 of the Immigration, Asylum and Nationality Act 2006 set for the Claimants' country of origin, India. The Claimants appealed against that decision and the First-tier Tribunal promulgated its decision allowing the Claimant's appeal against that decision on 2 July 2015.

3. The Appellant appealed against that decision. The grounds may be summarised as follows:

   (i) The judge erred in failing to have regard to the public interest and the starting point being the appellants do not meet the rules pursuant to *SSHD v SS (Congo) & Ors* [2015] EWCA Civ 387; and the appellants have not shown how they would meet the immigration rules for entry clearance pursuant to *Chikwamba v SSHD* [2009] UKHL 41.

4. The Appellant was granted permission to appeal by First-tier Tribunal Judge Colyer.

5. I was not provided with a Rule 24 response from the Claimants but was addressed in oral submissions by their counsel.

No Error of Law

6. At the close of submissions, I indicated that I would reserve my decision, which I shall now give. I do not find that there was an error of law in the decision such that it should be set aside. My reasons for so finding are as follows.

7. In relation to the first issue, that the judge failed to have regard to the public interest, that statement is simply incorrect. In the judgment of Underhill, LJ at [44] of *SSHD v SS (Congo) & Ors* [2015] EWCA Civ 387 it is stated that the proper approach should be to identify the substantive content of the relevant rules first and then, if the applicant does not satisfy them, go on to consider Article 8 rights if there is a reasonably arguable case not already sufficiently dealt with under the Rules. It is this ratio that the Appellant seeks to rely on. However, with respect, the Appellant is reading that paragraph far too literally for reasons I shall explain. It is important to recall the context in which this appeal was heard. I was reminded by Ms Qureshi of counsel, whom also represented the Claimants at the First-tier Tribunal, that the appeal arose because the refusal only took issue with the fact that the Claimants could not switch from their previous status of dependents of a Tier 1 (Post-Study Work) migrant, to that of dependents of a Tier 4 (General) student migrant. Therefore, whilst the first Claimant's wife was permitted to switch from a Tier 1 category, to that of a Tier 4 category, her dependents could not. This is because they should go back to India to apply for entry clearance. Aside from that basis of refusal pursuant to paragraphs 319C(i) and 319H(i) (for the first Claimant and remaining Claimants respectively), the Appellant did not

seek to take issue with other matters. This is further confirmed by paragraph 9 of the judge's Determination where it is stated that the Claimants accepted that they did not satisfy the Immigration Rules because dependents could not switch categories I country, but needed to return to apply for entry clearance in particular categories. This is again fortified by the confirmation at paragraph 13 of the Determination, that both parties agreed that the only basis for consideration of the appeal was outwith the Immigration Rules under Article 8 ECHR.

8. In that light, notwithstanding my other findings, it is discourteous and contradictory for the Appellant to complain that the judge did not engage in an Immigration Rule-based assessment when she explicitly agreed that the judge should only consider the appeal outwith the Rules.

9. With those facts in mind, given that the judge was aware to what extent the rules were met, in other words, the rules were substantively met but for the non-switching provision, and given that the Claimants did not take contend they could succeed under the Rules, there is nothing in this analysis that the Appellant is entitled to take issue with. First, the judge was aware of the extent to which the public interest was met under the rules governing leave to remain. Second, the judge was not obliged or required to perform an analysis of the rules given that the Claimants did not pursue their success under the rules as a basis upon which the appeal should succeed. In that light, the judge was entitled to commence her substantive assessment of the remaining issue on appeal at paragraph 10, by starting with an assessment outwith the Immigration Rules, having carefully audited that the appeal could not succeed under the Rules.

10. In my opinion, it was not the intention of Lord Justice Richards to compel judges in all appeals to undertake an assessment under the Rules where it is not contended by an appellant that that the assessment under the Rules was wrong. It may be that even in such circumstances, an assessment of an individual's failure to meet the rules could be performed for the purpose of determining the weight to be given to the public interest in removal under the Rules and gauging proportionality outwith the Rules, pursuant to *SSHD v SS (Congo) & Ors* [2015] EWCA Civ 387 at [56] and *Patel & Ors v SSHD* [2013] UKSC 72 at [55]. However, to my mind, such an assessment would not normally take place unless a party were to explicitly raise such an argument in submissions and address the weight to be given to the public interest in a particular context. Nonetheless, this is not that case.

11. In the instant appeal, I do not find that the failure to perform such an assessment is of consequence given my findings above, and in any event, had such an assessment been performed, it would not alter the result that the judge reached, and in fact, may support the findings that she reached, given that the margin by which the Rules were not met was a matter of technicality and form, and the public interest in removing a person because switching in-country is not permitted for certain categories does

not appear to have a rational basis pursuant to the decision in *Shuai Zhang, R v SSHD* [2013] EWHC 891 (Admin) which the judge rightly gave consideration to as persuasive authority on this specific issue. Such a matter could rightly feature in an Article 8 assessment outwith the Rules in gauging proportionality in a variety of contexts, but particularly in the present.

12. For the reasons given above, and given that Mr Kotas did not highlight any material difference between the assessment of the Claimant's application for further leave as a dependent in an entry clearance context, as opposed to applying for further leave to remain, I do not find that there is any merit in the contention that the assessment of hypothetical entry clearance outwith the Rules was lacking in any way.

13. Furthermore, as submitted by Ms Qureshi, the public interest was assessed appropriately as the Claimants were applying for further leave, not settlement, and it was noted that the Claimants did not intend to settle and indicated they may return to India in March 2016 (although that is a matter for them, given that the Rules do not compel them to leave once their leave expires). The judge specifically considers the public interest throughout her assessment from paragraphs 25 to 28 of her Determination.

14. Further still, in an assessment outwith the Rules, the weight to be given to the public interest is given statutory voice in the form of section 117B(1) for all Article 8 matters arising before the Tribunal. At paragraph 27 of the Determination, the judge explicitly considered the statutory form of public interest as she as mandated to do and considered the relevant factors before her and her decision is compliant with the observation in *Dube (ss.117A-117D)* [2015] UKUT 90 (IAC) that not every subsection of section 117B need be examined explicitly in turn, as what matters is substance not form.

15. Consequently, given my findings above, the grounds do not reveal an error of law such that the decision should be set aside.

Decision

16. The appeal to the Upper Tribunal is dismissed.

17. The decision of the First-tier Tribunal is affirmed.

Signed Date

Deputy Upper Tribunal Judge Saini