IAC-AH-KEW/DN-V2

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/27732/2014
IA/30284/2014
IA/30288/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 25th September 2015	**On 9th November 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

MR MD IBRAHIM KHALIL (FIRST APPELLANT)
MRS JANNATUL FERDAUS DISHA (SECOND APPELLANT)
MASTER SNEBO IYAAD KHALIL (A MINOR) (THIRD APPELLANT)
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr G Davison, Counsel
For the Respondent: Mr N Bramble, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellants are citizens of Bangladesh born respectively on 5th June 1985, 10th June 1989 and 11th June 2010. The Second Appellant is the First Appellant's partner. The Third Appellant is the minor child of the First and Second Appellant. Unless specifically referred to herein all references refer to the First Appellant.

2. The Appellant's immigration history is set out in detail at paragraph 3 of the Notice of Refusal. The Appellant and his dependants seek leave to remain in the United Kingdom under Article 8 of the European Convention of Human Rights on the basis of family and private life. They claim that it will breach their human rights to return to Bangladesh. That application was considered by the Home Office and a Notice of Refusal was issued on 17th June 2014. The Appellant lodged Grounds of Appeal and the appeal came before Judge of the First-tier Tribunal Symes sitting at Richmond on 19th February 2015. In a determination promulgated on 18th March 2015 the Appellant's appeal was allowed.

3. On 23rd March 2015 the Secretary of State lodged Grounds of Appeal to the Upper Tribunal. Those grounds contended firstly that the judge's approach to Article 8 was arguably materially flawed and that the judge had arguably failed to properly apply the public interest factors particularised within Section 117B of the 2002 Act and secondly that the judge had failed to identify the relevant standard of proof.

4. On 8th May 2015 First-tier Tribunal Judge Parkes granted permission to appeal. Judge Parkes in granting permission noted that the appeals were allowed with the judge finding that the Appellants had been let down by the educational establishments attended by the First Appellant and that they would not be a burden on the tax payer. He noted that the first two Appellants had arrived in the UK in 2008 and that the Third Appellant had been born in 2010. Further he noted that the grounds argued that the judge had failed to apply the public interest properly and made findings that were open to him and that the First Appellant's applications had been refused three times for reasons within his control. He noted that the Secretary of State contended that one Sponsor may have lost a licence but there was no evidence to show other efforts to obtain a Sponsor and there was no assessment of proportionality. In such circumstances he considered that the Third Appellant's best interests had not been fully considered and attached undue weight to good character. He considered that the decision failed to take into account *Patel [2013] UKSC 72* and the limitations on the nature of Article 8 in addition to the facts that the Appellants were admitted with no expectation of being allowed to remain on any basis. No Rule 24 response appears to have been served by the Appellants.

5. It is on that basis that the appeal comes before me to determine whether or not there is no material error of law. The Secretary of State appears by her Home Office Presenting Officer Mr Bramble. The Appellants appear by their instructed Counsel Mr Davison. I note that this is an appeal by the Secretary of State but for the purpose of continuity throughout the appeal process Mr Khalil and his dependants are referred to herein as the Appellants and the Secretary of State as the Respondent.

Submissions/Discussions

6. Mr Bramble submits that the grounds are clear pointing out that the judge has referred to Mr Khalil originally being in the United Kingdom unlawfully until 18th August 2008 and that his stay being to some extent precarious. He submits that the judge failed to take into account the Appellant's stay in the United Kingdom having been unlawful for the purposes of Section 117B(4)(a) since August 2008 and that the judge had failed to properly take into account the public interest factors particularised within Section 117B(1) of the Immigration Rules. He takes me in particular to paragraphs 23 and 25 of the decision and whilst he notes that the judge has at paragraph 24 set out Rule 117B the question remains as to whether or not he has actually addressed it. He acknowledges that this decision is written against a background of the Home Office not appearing with a Home Office Presenting Officer. He submits that the reference in paragraph 25 whereby the judge found that the family's Article 8 rights have been built on a stay which is "to some extent precarious" is not a basis for due and proper consideration pursuant to paragraph 117B(4) pointing out that the Appellant's lawful leave ended in 2008 and the failure to address this is material. He claims the judge has failed to apply proportionality properly. Whilst noting that the judge has made reference to *EV (Philippines) and Others v The Secretary of State for the Home Department [2014] EWCA Civ 874* the judge has failed properly to address this authority. He notes that in paragraph 22 of the decision the judge has concluded that the Third Appellant's wellbeing could be compromised by leaving the school where he is established. He points out firstly that the judge erred in finding at the age of 5 that an Appellant could be established at school and secondly he has failed to give due and proper appropriate consideration to the relevant authorities.

7. He submits that there is an error in that the judge has treated *CDS (PBS "Available" Article 8) Brazil [2010] UKUT 305 (IAC)* as being decisive case law and then goes and stands aside from that pointing out that where there is evidence that an Appellant is midway through the course the factors set out in *CDS* have not been taken into account. Further he contends that the judge had failed to identify the relevant standard of proof and that he had failed to explicitly refer to the standard of proof required and that therefore in both of these aspects there were material errors of law. He asked me to set aside the decision of the First-tier Tribunal, for none of the findings of fact stand and to remit the matter back to the First-tier for re-hearing.

8. Mr Davison starts by reminding me that at paragraph 12 of the judge's decision he has emphasised that there was no representative in attendance on behalf of the Secretary of State, that there was no explanation given for the failure of the Secretary of State to attend and there was no application for an adjournment. He notes that the judge has taken account of the guidelines annexed to *MNM (Surendran Guidelines for Adjudicators) (Kenya) [2000] UKIAT 00005* namely that the

Respondent's case is consequently limited to that found in the refusal letter and that the judge should only raise further matters at his own instance where they are readily apparent on reading the papers. He consequently submits that this is exactly what the judge has done and therefore there is no error in law disclosed within the determination. He submits all the grounds are is an attempt to re-argue a decision. He points out that the judge has initially considered the Rules and has then gone on to consider the appeal outside the Rules. He asks me to note at paragraph 15 that the judge recognises that the failure of the appeal under the Rules tends to show that the public interest would not be served by the Appellants' remaining in the UK but that he has thereafter quite properly gone on to consider the appeal outside the Rules and the tests set out in *Nagre [2013] EWHC 720 (Admin)*. He submits that the judge has picked up a proper approach to this matter at paragraph 18 and directed himself in an appropriate manner and thereafter at paragraphs 18 to 21 has gone on to consider the issues thoroughly and particularly those with regard to the Third Appellant, has properly analysed the decision in *EV (Philippines)* and thereafter Rule 117B and made findings which he was perfectly entitled to and given his reasons. In such circumstances he submits that the appeal amounts to little more than disagreement and that it does not disclose any material error of law and he asks me to dismiss the appeal.

The Law

9. Areas of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial considerations, reaching irrational conclusions on fact or evaluation or to give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.

10. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue of argument. Disagreement with an Immigration Judge's factual conclusion, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence which was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because an Immigration Judge concludes that the story is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

Findings

11. I start by reminding myself that it is the role of the judge within the Upper Tribunal to determine whether or not the First-tier Tribunal Judge has erred in law in his decision. Unless I find that that is the case or that a decision is so perverse (which in itself would constitute an error of law) then the fact that I or another judge on another day may have come to a different conclusion is not a material factor. It is clear that the Secretary of State may well not have helped herself in this matter by failing to provide a Home Office Presenting Officer. That failure is addressed thoroughly at paragraph 12 by the judge within his determination. He has gone on to direct himself fully therein as to the approach that he needs to adopt and he cannot be criticised for this. The question remains as to whether he has in such circumstances actually followed the approach that he indicated he intended to. I am satisfied that he has.

12. Mr Bramble relies on two contentions. Firstly the judge has failed to properly apply the public interest factors particularised within Section 117B. This is a judge who has thoroughly examined the law within his approach. He has noted that the failure of the appeal under the Rules shows that the public interest would not be served by the Appellant's remaining here and has gone on to give due and full consideration to important and relevant authorities such as *Nagre*, *CDS Brazil* and *Nasim and Others (Article 8) [2014] UKUT 25 (IAC)*. He has thereafter directed himself quite properly by stating that the mere fact that a person may have come to this country and embarked on a course of studies does not necessarily mean that they will have established private life here, particularly once they finish their course, where the Immigration Rules do not make provisions for any further residence for them. He has set out how and why this case is distinguishable from the *Nasim* class of case and has thereafter gone on to consider the position of the Third Appellant. He has found at paragraph 21 that it is relatively rare for a young child of the Third Appellant's age to have any independent private life outside the family unit and has made findings at paragraph 21 and 22 relating to the Third Appellant socialising outside the family and to becoming established at school. As stated previously whether I or another judge would have come to that conclusion is a matter of conjecture but this is a judge who has heard the evidence and has given reasons for his findings. Those reasons are not so perverse as to be unsustainable and consequently just because the Secretary of State seeks to challenge them and disagree with them does not constitute a material error of law. If the judge has gone through the due and proper process and made findings which are not perverse as I am satisfied he has here then those conclusions do not constitute a material error of law.

13. Further however this judge has then gone on to give due and proper consideration to the question of proportionality and to give due and full consideration to paragraph 117B of the Immigration Rules. Whilst I can understand the use of the words to some extent "precarious" at paragraph 25 may well not have been the best phrase for a judge to have used the judge has at paragraph 25 analysed the First Appellant's position and made findings which were open to him. Further whilst the judge has not

specifically referred to the burden of proof I am satisfied that he has given due and full consideration and has not applied the wrong test. In such circumstances the decision discloses no material error of law. The Secretary of State disagrees with the decision. That is the Secretary of State's entitlement. However unless there is a material error of law disclosed in the decision then it is not for the Upper Tribunal to overturn that decision and consequently the appeal of the Secretary of State is dismissed and the decision of the First-tier Tribunal is maintained.

Notice of Decision

The decision of the First-tier Tribunal discloses no material error of law and the appeal of the Secretary of State is dismissed and the decision of the First-tier Tribunal is maintained.

No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge D N Harris

TO THE RESPONDENT
FEE AWARD

No application is made for a fee award and none is made.

Signed Date

Deputy Upper Tribunal Judge D N Harris