IAC-BFD- MD

Upper Tribunal (Immigration and Asylum Chamber)
IA/28676/2014
IA/28687/2014

Tribunals Service
Asylum and Immigration Tribunal

Appeal Number:

THE IMMIGRATION ACTS

Heard at Field House, London	**Decision & Reasons Promulgated**
On 9th September 2015	**On 23rd October 2015**

Before

UPPER TRIBUNAL JUDGE ROBERTS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

REV SANG PO PARK – FIRST RESPONDENT
MRS BO KYOUNG LEE – SECOND RESPONDENT
(ANONYMITY DIRECTION NOT MADE)

Respondents

Representation:
For the Appellant: Mr D Clark, Home Office Presenting Officer
For the Respondents: Mr M Mullins, of Counsel instructed by Gillman-Smith Lee Solicitors

DECISION AND REASONS

1. This is an appeal by the Secretary of State for the Home Department against the decision of the First-tier Tribunal allowing the appeals of Sang Po Park and his wife Bo Kyoung Lee, against her decision to remove them from the UK, following the refusal of their applications for leave to remain on account of their private/family life.

2. For the purposes of this decision I shall refer to the Secretary of State as "the Respondent" and to Sang Po Park and Bo Kyoung Lee as "the Appellants".

3. The Appellants are citizens of the Republic of South Korea born respectively on 28th June 1963 and 10th December 1968. They have two sons both of whom are also present in the United Kingdom; the eldest In Ha Park born 31st March 1994 and the youngest Seong Ha Park born 2nd November 1995. It will be seen from those dates of birth that they are now adults, but their history features in this decision.

Background

4. The first Appellant Sang Po Park entered the UK on 17th October 2003 as a student with a visa valid for twelve months. His wife and two sons entered as his dependants. His sons at that point were aged 9 and 7 years respectively.

5. Suffice to say for the purposes of this decision, the Appellant his wife and sons have remained in the UK since 2003, having been granted various extensions of leave, certainly up to 31st October 2009. On 31st October 2009 the first Appellant applied for leave to remain as a minister of religion. This was refused and by May 2010 that application was appeal rights exhausted. He remained in the UK with his family.

6. In July 2010 the family requested the Respondent to exercise her discretion outside the rules and grant them leave to remain. She refused this request and on March 2011 further refused to reconsider her refusal.

7. On 28th July 2012 the Appellants, once again, made application for leave to remain on account of the private/family life they had built up since 2003. They included their youngest son Seong Ha Park as a dependant upon their applications. Their eldest son, In Ha Park, by this time had attained the age of 18 years. He therefore made a separate application for leave under paragraph 276ADE.

8. On 2nd January 2014 In Ha Park was granted leave to remain under 276 ADE, for 30 months that leave expires in June 2016.

9. The applications of the Appellants and their youngest son were refused once more on the grounds that none of them could meet the relevant Immigration Rules. The date of refusal was 24th August 2013, that is the relevant date of refusal of the matter now before me.

10. Following a Judicial Review claim lodged on 21st November 2013 and a consent order in which the Respondent agreed to review her decisions, the Appellants' applications of 28th July 2012 were considered again by the Respondent and refused once more on 24th August 2014. The Respondent applied the Immigration Rules in force at that time, maintained the refusal and found there to be nothing of an exceptional nature resulting in unjustifiably harsh consequences should the Appellants be removed. At

the same time the Appellants' youngest son Seong Ha Park was granted limited leave to remain – that leave to expire on 25th December 2016.

11. The Appellants' appealed the Respondent's latest refusal to the First-tier Tribunal.

FtT Hearing

12. When the Appellants appeared in the FtT, their appeal came before Judge Aziz.

13. In a detailed decision promulgated on 19th March 2015 the Judge noted the competing arguments before him. The main argument put before him was on this basis. The Appellants' appeals ought to be allowed because through an historic injustice owing to a failure on the part of the Respondent, timorously to consider the circumstances of their sons who had been in the UK for well over 7 years, the Appellants had lost the 'opportunity' to apply for indefinite leave to remain, at a time when the requirements to be met under the Rules would have been more favourable to them. A full note of this proposition is set out in [57] to [61] of the Judge's decision and is reproduced here.

> "Although the appellants had been over-stayers, they had only ever over-stayed for one month and that was the result of poor legal advice. Apart from this error they had permission or leave to remain in the United Kingdom either through their visas or through awaiting the outcome of their immigration applications.
>
> If the respondent had properly considered their applications under the seven years long residence rules, all four members of the family would have been granted indefinite leave. The appellants had arrived in the United Kingdom in October 2003. There were two occasions when leave on this basis should have been granted.
>
> Firstly, on 31 October 2009, the first appellant had made his ill-fated Tier 2 application. The application was refused on 20 November 2010. However, if the Respondent had properly considered all of the circumstances of this family on that date, then they ought to have realised that as of the date of decision, the appellants' two children had now accrued seven years residence in the United Kingdom.
>
> A second opportunity occurred when their current application was made on 15 June 2012(sic). When the new rules were introduced on 9 July 2012, it merely required that a child had lived in the United Kingdom for at least 7 years at the date of application (discounting any period of imprisonment). But from 13 December 2012, a reasonableness requirement was added by HC 760. HC 760 contains transitional provisions which state:
>
> *"In respect of the other changes set out in this Statement, if an applicant has made an application for entry clearance or leave before 13 December 2012 and the application has not been decided before that date, it will be decided in accordance with the Rules in force on 12 December 2012."*
>
> In this particular case the appellants had two children who had accrued in excess of 7 years residence when the applications were submitted in June 2012(sic). Their applications should not be subject to any reasonableness

requirement. They ought to have been granted leave under the Rules if their applications had been properly considered by the respondent. Given this material oversight by the respondent, a decision to remove would be disproportionate."

14. The Judge went on to state clearly, that it was accepted that neither of the Appellants could not meet the Immigration Rules which were in force at the date of decision [79]. He then asked himself whether the circumstances of the Appellants history permitted him to consider their appeals outside the Rules, under Article 8.

15. He said this at [82];

> "Even taking into account all of the factors raised at paragraph 78 above, I would still find that there is no good reason to consider Article 8 outside of the Rules. However, the main ground upon which Mr Mullins argues that this application can been (sic) considered outside of the Rules, is on the basis that there has been 'conspicuous unfairness' arising from the respondent's failure to properly consider the appellants' June 2012 application (which eventually led to Judicial Review [proceedings and in turn, a High Court Consent Order requesting that the respondent reconsider the appellants' applications, the refusal of which is the subject of these appeals)."

16. Further at [87] and [88],

> "I find in the appellants favour that when the new Immigration Rules were introduced on 9 July 2012, it did merely require that a child had lived in the United Kingdom for at least 7 years at the date of application (discounting any period of imprisonment) for it to succeed under the long residence rules. This changed from 13 December 2012, when a reasonableness requirement was added by HC 760. HC 760 contains transitional provisions which state:
>
> *"In respect of the other changes set out in this Statement, if an applicant has made an application for entry clearance or leave before 13 December 2012 and the application has not been decided before that date, it will be decided in accordance with the Rules in force on 12 December 2012."*
>
> I am prepared to accept that in this case the appellants' youngest child has accrued well in excess of 7 years residence when his family's human rights application was submitted in June 2012(sic). He was still a minor at the date of the application. The respondent accepts that; i) there is a genuine parental relationship with their youngest child, ii) that he had resided in the United Kingdom continuously for over seven years with his parents and iii) he was still a minor when the June 2012 application was made (and therefore still under the care of his parents). On the findings I have made, there was a real possibility that this application would have succeeded and resulted in the appellants being granted indefinite leave."

17. Finally he allowed the appeals at [97],

> "This has not been an easy decision for the Tribunal to arrive at. However, I find that looking at all the matters in the round, the factors which I take into account on behalf of the appellants carry greater probative weight. The appellants are a couple who have, apart from a short two month period, sought to ensure that their residency in the United Kingdom has been lawful

> and with the permission of the Home Office. They have now been residing in the United Kingdom for almost 12 years. Most importantly, I find that they had been unfairly disadvantaged by the respondents' (sic) failure to properly consider a June 2012(sic) application on the basis that their children had been continuously resident in the United Kingdom for over seven years. Their failure did result in a real lost opportunity for the appellants to claim indefinite leave to remain through a recognisable route. I am just persuaded that proportionality should be exercised in the appellants' favour."

18. The Respondent sought permission to appeal the decision on the following grounds;

    - the FtT failed to give any or adequate reasons for its finding that the Appellants had "lost a real opportunity" to claim indefinite leave to remain, and
    - misdirected itself under Article 8; (i) by finding an unfair disadvantage had been caused to the Appellants by the SSHD's failure to properly consider their application was such that when weighed in the balance it weighed in their favour; (ii) failing to recognise that an entitlement to live in the UK on the basis of private life does not of itself establish that it would be contrary to the best interests of a child to remain in the family unit with their parents outside the UK; (iii) the weight to be afforded to the public interest was not properly engaged.

Error of Law/Consideration

19. It was argued in the First-tier Tribunal that the youngest son has lost an opportunity of obtaining leave to remain under paragraph 276 ADE as a child, without having to satisfy the test of whether it was reasonable for him to leave the United Kingdom having resided here for 7 years. That test was introduced on the 13th December 2012 by HC 760.

20. It appears now to be accepted by the Respondent that this was so.

21. The argument now is that the Judge failed to explain why, had the youngest child's application been dealt with properly in 2012, that would have led to the Appellants being granted indefinite leave to remain under the Rules.

22. Mr Mullins accepts that the Judge did not explain this, but argues that it is immaterial because in fact there was a recognised route – that route was under Section Ex.1 of Appendix FM of the Rules; namely, they were parents with a genuine parental relationship with a child who was and had been in the United Kingdom for at least 7 years and it would not be reasonable to expect that child to leave the UK.

23. He further argues that it would have been bizarre to suggest that it could be reasonable to expect the child to leave the UK, having just granted him leave to remain under paragraph 276 ADE, and therefore the Appellants

would have had a recognized route to a grant of leave to remain under the Rules.

24. This 'historic injustice' was an important factor that the judge was entitled to take into account when conducting the Article 8 balancing exercise. In any event the respondent could not say on one hand that she accepted that there were circumstances showing that the Appellant's youngest son merited a grant of leave, and on the other say as she did in the her RFRL that it was 'possible' for him to leave the UK along with his parents. sons especially the youngest.

25. I find force in this argument. I agree that whilst it is true that the Judge did not explain why the failure to deal with the child's application gave rise to a 'lost opportunity', this was immaterial given the fact that there was in fact a recognized route under the Rules for the Appellants to have acquired indefinite leave to remain.

26. In those circumstances, the error of law identified by the Secretary of State does not warrant the setting aside of the Judge's decision and this appeal is dismissed.

Notice of Decision

27. The appeal is dismissed.

No anonymity direction is made

Signature **Dated**
Judge of the Upper Tribunal

Fee Award

The F-t Tribunal made no fee award. That decision stands.

Signature **Dated**
Judge of the Upper Tribunal