IAC-FH-NL-V1

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/35839/2014
IA/35840/2014
IA/35870/2014

THE IMMIGRATION ACTS

Heard at Bradford	**Decision & Reasons Promulgated**
On 19th February 2015	**On 25th February 2015**

Before

UPPER TRIBUNAL JUDGE D E TAYLOR

Between

NICOL NICOLETTE SWABY
ANTHONY NORMAL GARVEY
ZARA KATHERINE GARVEY
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr M Ali, instructed by Callisters Solicitors
For the Respondent: Mr A McVeety, Home Office Presenting Officer

DECISION AND REASONS

1. This is the Appellants' appeal against the decision of Judge Caswell made following a hearing at Bradford on 6th November 2014.

Background

2. The Appellants are Jamaican nationals born on 21st November 1974, 10th October 1968 and 24th December 2007 respectively. The first Appellant entered the UK as a student on 14th March 2002 and was granted successively leave to remain until February 2007. She applied for further leave to remain and was refused in August 2007 but only a limited right of appeal was given. She took no action.

3. On 3rd July 2013 all three Appellants applied for leave to remain on Article 8 grounds. The application was refused on 9th August 2013 with no right of appeal but, as a result of judicial review proceedings in June 2014, the Respondent agreed to reconsider the application and to make an appealable decision.

4. On 24th August 2014 the Respondent refused the applications on Article 8 grounds and made a decision to direct the Appellants' removal. Her position was that the Appellants were in the UK illegally, valid leave having expired in 2007 for the first Appellant and earlier (2005) for the second.

5. The judge relied on CHH (Notices Regulations – right of appeal – leave to remain) Jamaica [2011] UKUT 00121 and held that there was no time limit on raising a human rights claim after a restricted notice of decision. The first Appellant had invoked her limited right of appeal by informing the Respondent on 21st October 2014 that the decision of the 13th August 2007 breached her human rights under Article 8. The Respondent was under a duty to re-serve the decision with the relevant appeal form and until such re-service, the Appellant was still lawfully in the UK by reason of Section 3C(2)(b) of the 1971 Act.

6. The judge concluded that the first Appellant was lawfully in the UK. There is no appeal against that aspect of her decision. She then went on to consider the merits of the human rights grounds and dismissed the appeal.

The Grounds of Application

7. The Appellant sought permission to appeal on the grounds that the judge had erred in law. In finding that the first Appellant was lawfully in the UK, the decision of the Respondent dated 24th August 2014 could not have been in accordance with the law, since it was based upon the Respondent's assumption that the Appellant had overstayed her leave in the UK and her presence in the UK was unlawful.

8. Secondly, the judge had erred in rejecting the submission that the appeal should be allowed under paragraph 276B grounds which creates a presumption that once the first Appellant has been continuously and lawfully residing in the UK for ten years, having regard to all the circumstances, leave will normally be granted unless it is shown that there are reasons having regard to the public interest why it would be undesirable to do so. At the date of the hearing the first Appellant

satisfied paragraph 276A(i) of the Immigration Rules. Furthermore she erred in her consideration of the Article 8 claim.

9. Permission to appeal was granted by Judge Landes on 12th January 2015 for the reasons stated in the grounds.

10. On 16th January 2015 the Respondent served a reply reserving her position.

Findings and conclusions

11. At the hearing Mr McVeety conceded that the decision of 24th August 2014 was unlawful because it was made on the mistaken premise that the first Appellant's leave had expired on 18th February 2007 whereas in fact it was continuing. He agreed that the proper course was for the matter to be remitted back to the Secretary of State so that a lawful decision could be made. Mr Ali agreed that that was the correct course of action.

12. The judge erred in law because, having found that the first Appellant was lawfully in this country she then went on to dismiss the appeal on the basis of a decision which was not lawfully made.

Notice of Decision

13. The original judge erred in law. The decision is set aside. The following decision is substituted. The Secretary of State's decision is not in accordance with the law and accordingly the appeal is allowed insofar as it is remitted back to her to make a lawful decision.

No anonymity direction is made.

Signed Date **24th February 2015**

Upper Tribunal Judge Taylor