Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/37781/2014
IA/37783/2014
IA/37784/2014
IA/37786/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 6 August 2015	**On 12 August 2015**

Before

Deputy Upper Tribunal Judge MANUELL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

(1) Mr KULWANT SINGH
(2) Mrs MANJIT KAUR
(3) MASTER ARUNDEEP SINGH
(4) MASTER KARNJIT SINGH
(ANONYMITY DIRECTION NOT MADE)

Respondents

Representation:
For the Appellant: Mr E Tufan, Home Office Presenting Officer
For the Respondents: Mr R Sharma, Counsel (instructed by Hanson Young)

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DETERMINATION AND REASONS

Introduction

1. The Appellant (the Secretary of State) appealed with permission granted by First-tier Tribunal Judge Heynes on 16 June 2015 against the decision and reasons of First-tier Tribunal Judge Colvin who had allowed the Respondents' appeals against the Appellant's decision dated 6 August 2014 to refuse to grant the Respondents leave to remain under paragraph 276ADE of the Immigration Rules and/or under Article 8 ECHR and to remove them from the United Kingdom. The decision and reasons was promulgated on 17 April 2015.

2. The Respondents, a family, are nationals of India, parents and minor children, all born there save for the Fourth Respondent who was born in the United Kingdom. None proved lawful entry to the United Kingdom. Their immigration history is set out in Judge Colvin's decision and reasons. The present appeals were against the Removal Directions dated 6 August 2014 issued under section 10 of the Immigration and Asylum Act 1999, following refusal of the Respondents' applications made on 6 July 2012 for leave to remain on the basis that the First Respondent had lived in the United Kingdom for more than 14 years.

3. Judge Colvin dismissed the long residence appeal under the Immigration Rules and the parents' Article 8 ECHR private life appeal. The judge found that the First the Respondent had been in the United Kingdom continuously since at least June 2000, i.e., over 14 years and that his application was accepted to have been made on 6 July 2012, prior to the new Immigration Rules which came into force on 9 July 2012. The judge found that the Third and Fourth Respondents were minors who had lived in the United Kingdom for 11 and 10 years respectively. Working on the basis that the information about the correct version of paragraph 276ADE (1) (iv) cited to her by the Respondent's counsel was accurate (see [17] and [18] of the determination) the judge found that the minor Respondents' private life claim succeeded, and that they should not be separated from their parents, either under Appendix FM (section EX.1) or under Article 8 ECHR, having regard to section 117B(6) of the Nationality, Immigration and Asylum Act 2002: see [20] of the determination. The appeals were allowed on that basis. The judge appears to have rejected the submission made in the skeleton argument (see paragraph 7) that the First Respondent's appeal succeeded under paragraph 276B of the Immigration

Rules as it stood at the date of his application: see [14] of the determination.

4. Permission to appeal to the Upper Tribunal as sought by the Appellant (the Secretary of State) was granted by Judge Heynes because he considered that it was arguable that the judge had applied an incorrect version of paragraph 276ADE(1)(iv), and that the judge had thus omitted to consider whether or not it would not be reasonable to expect the children to leave the United Kingdom.

5. Standard directions were made by the Upper Tribunal and the appeal was listed for an error of law hearing. No rule 24 notice was filed by the Respondents.

Late application for permission to cross appeal

6. Mr Sharma, who had appeared below, was now instructed by new solicitors on behalf of the Respondents. He informed the tribunal that he had only been re-instructed in the last few days and had not seen the determination until them. He submitted that [14] of the determination revealed an obvious and arguable error of law over the long residence rule, paragraph 276B, and that permission to cross appeal should be granted to the Respondents.

7. Mr Tufan for the Secretary of State did not oppose the application and indicated that he agreed that there was at least probably a material error of law, which could be described as obvious.

8. So far as it were necessary to do so, the Upper Tribunal reconstituted itself as the First-tier Tribunal for the purposes of extending time (as the Deputy Upper Tribunal Judge is also a Designated Judge of the First-tier Tribunal) and granting the original Appellants permission to appeal to the Upper Tribunal. The First-tier Tribunal dispensed with all formalities set out in rule 33 of the Tribunal Procedure Rules 2014, pursuant to rules 2, 6 and 36 of those rules. The delay on the original Appellants' part had not been such as to have caused prejudice to the Secretary of State, particularly as the Secretary of State's permission to appeal application had not been determined until 16 June 2015 and the Secretary of State was effectively already contending that the determination was flawed and should be set aside. The formal title of the Upper Tribunal proceedings should remain unchanged.

Submissions – error of law

9. It was convenient to deal with the cross appeal first. Mr Sharma for the Respondents/Appellants submitted that Singh [2015] EWCA Civ 74 which he had cited to Judge Colvin showed at [45] thereof that the pre 9 July 2012 version of paragraph 276B of the Immigration Rules applied where a valid application had been made prior to that cut off date. Here it was accepted (as the reasons for refusal letter dated 21 August 2014 stated) that the original First Appellant had made his 14 year application on 6 July 2012. If paragraph 276B were not satisfied, then the Article 8 ECHR considerations set out in Appendix FM and paragraphs 276ADE to 276DH applied. The judge had been confused about that.

10. Mr Tufan for the Secretary of State accepted very fairly that Judge Colvin had misdirected herself and had failed to apply the transitional provisions relevant to the 14 year rule. There was no challenge to Judge Colvin's findings of fact and no application to amend the permission to appeal application. Her determination would have to be set aside because of the material error of law in question.

The error of law finding

11. At the conclusion of submissions, the tribunal indicated that accepted Mr Sharma's submissions and found that the judge had fallen into material error of law, as both sides now accepted. The decision and reasons would be set aside and the appeal reheard immediately.

Discussion and fresh decision

12. For clarity the tribunal will now refer to the parties by their designations in the First-tier Tribunal. No formal rehearing was needed and the tribunal continued in helpful dialogue with both advocates. The First Appellant's application was made just prior to the sweeping changes to the Immigration Rules which came into force on 9 July 2012, and so fall to be considered under the old rules, which were as follows:

Long residence in the United Kingdom

276A. For the purposes of paragraphs 276B to 276D:

(a) "continuous residence" means residence in the United Kingdom for an unbroken period, and for these purposes a period shall not be considered to have been broken where an applicant is absent from the United Kingdom for a period of 6 months or less at any one time, provided that the applicant in question has existing limited leave to enter or remain upon their departure and return, but shall be considered to have been broken if the applicant:

(i) has been removed under Schedule 2 of the 1971 Act, section 10 of the 1999 Act, has been deported or has left the United Kingdom having been refused leave to enter or remain here; or

(ii) has left the United Kingdom and, on doing so, evidenced a clear intention not to return; or

(iii) left the United Kingdom in circumstances in which he could have had no reasonable expectation at the time of leaving that he would lawfully be able to return; or

(iv) has been convicted of an offence and was sentenced to a period of imprisonment or was directed to be detained in an institution other than a prison (including, in particular, a hospital or an institution for young offenders), provided that the sentence in question was not a suspended sentence; or

(v) has spent a total of more than 18 months absent from the United Kingdom during the period in question.

(b) "lawful residence" means residence which is continuous residence pursuant to:

(i) existing leave to enter or remain; or

(ii) temporary admission within section 11 of the 1971 Act where leave to enter or remain is subsequently granted; or

(iii) an exemption from immigration control, including where an exemption ceases to apply if it is immediately followed by a grant of leave to enter or remain.

Requirements for indefinite leave to remain on the ground of long residence in the United Kingdom

276B. The requirements to be met by an applicant for indefinite leave to remain on the ground of long residence in the United Kingdom are that:

(i) (a) he has had at least 10 years continuous lawful residence in the United Kingdom; or

(b) he has had at least 14 years continuous residence in the United Kingdom, excluding any period spent in the United Kingdom following service of notice of liability to removal or notice of a decision to remove by way of directions under paragraphs 8 to 10A, or 12 to 14, of Schedule 2 to the Immigration Act 1971 or section 10 of the Immigration and Asylum Act 1999 Act, or of a notice of intention to deport him from the United Kingdom; and

(ii) having regard to the public interest there are no reasons why it would be undesirable for him to be given indefinite leave to remain on the ground of long residence, taking into account his:

(a) age; and

(b) strength of connections in the United Kingdom; and

(c) personal history, including character, conduct, associations and employment record; and

(d) domestic circumstances; and

(e) previous criminal record and the nature of any offence of which the person has been convicted; and

(f) compassionate circumstances; and

(g) any representations received on the person's behalf; and

(iii) the applicant has sufficient knowledge of the English language and sufficient knowledge about life in the United Kingdom, unless he is under the age of 18 or aged 65 or over at the time he makes his application.

13. It is plain that paragraph 276B(b)(ii) contains a discretion, which should normally first be exercised by the Secretary of State. There was no challenge to Judge Colvin's finding that the First Appellant had lived in the United Kingdom continuously for more than 14 years, which finding stands.

14. That finding fundamentally changed the position of the remaining Appellants, which had not been considered by the Secretary of State on the basis of his entitlement to settlement. The relevant decisions for his family members are accordingly defective having been reached on a mistaken view of the facts and thus were not in accordance with the law. The tribunal so finds.

15. Mr Sharma drew the tribunal's attention to a further relevant development, namely that an application had been made on the Fourth Appellant's behalf for British Citizenship, pursuant to section 1(4) of the

British Nationality Act 1981. This matter was raised at paragraph 23 of his skeleton argument as submitted to the First-tier Tribunal. The application was acknowledged by Home Office on 19 June 2015. This matter is of obvious relevance to the new decisions which must be taken, although it was not suggested that the Secretary of State ought to have or indeed could have considered section 1(4) previously.

16. Mr Sharma also mentioned that he reserved his position as to whether or not the judge had materially erred in law on the issue of whether or not it would not be reasonable to expect the children to leave the United Kingdom.

17. The tribunal indicated that it was not disposed to hear argument on that point, in view of its finding that the First Appellant's appeal succeeded on the 14 year rule to the extent that all of the relevant decisions would have to be made again by the Secretary of State. The "reasonableness" point would be more conveniently examined by the Upper Tribunal when the President had considered which judge(s) might sit for that purpose. No useful purpose would be served by examining the Secretary of State's appeal further. It is treated as withdrawn with the tribunal's approval.

18. The original Appellants' appeals accordingly succeed to the limited extent that the Secretary of State's decisions must be remade. The Secretary of State may find it of some assistance to refer to the original Appellants' counsel's skeleton argument, which if possible will be appended to this determination.

DECISION

The making of the previous decision involved the making of an error on a point of law. The tribunal allows the onwards appeals by the original Appellants to the Upper Tribunal, sets aside the original decision and remakes the original decision of the First-tier Tribunal as follows:

The First Appellant's appeal is allowed to the extent that the decision on his application dated 6 July 2012 is to be made in accordance with Judge Colvin's finding that he has been in the United Kingdom continuously for 14 years.

The remaining appeals are allowed to the extent that the related decisions concerning the First Appellant's family members should be remade so as to

reflect the First Appellant's entitlement under paragraph 276B of the Immigration Rules as at 6 July 2012, as well as any other relevant matters as at the date of the fresh decisions.

Signed **Dated**

Deputy Upper Tribunal Judge Manuell

TO THE RESPONDENT
FEE AWARD

No appeal fees were paid so there can be no fee awards

Signed **Dated**

Deputy Upper Tribunal Judge Manuell