



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/09253/2015
IA/09260/2015
IA/09270/2015

THE IMMIGRATION ACTS

Heard at Field House
On 15 April 2016

Decision & Reasons Promulgated
On 26 April 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

The SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

Mr ASHITHA INDIKA JAYAWARDENA

First Respondent

Mrs WICKRAMAARACHIGE PRIYANKA SUWINI JAYAWARDENA

Second Respondent

Miss JANITHMA VINUGI JAYAWARDENA

Third Respondent

Representation:

For the Appellant: Mr D Clark, Senior Home Office Presenting Officer
For the Respondent: Mr K Wyn, Lyon Legal Ltd

DECISION AND REASONS

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of the Appellants. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.
2. The Secretary of State for the Home Department brings this appeal but in order to avoid confusion the parties are referred to as they were in the First-tier Tribunal. This is an appeal by the Secretary of State against a decision of First-tier Tribunal

Judge Oakley, promulgated on 29 September 2015, which allowed the Appellants' appeals.

Background

3. The Appellants are all members of the same family. The third appellant is the child of the first and second appellants. The first appellant was born on 3 April 1972. The second appellant was born on 27 February 1975. The third appellant was born on 18 November 2004. All three appellants are Sri Lankan nationals.

4. The first appellant entered the UK as a student in 2007, accompanied by the second appellant as his dependent spouse. They have remained in the UK since then. The third appellant was born in the UK. She has now completed her primary education and started at secondary school. On 19 February 2015 the Secretary of State refused the Appellants' applications for variation of leave to remain in the UK.

The Judge's Decision

5. The Appellants appealed to the First-tier Tribunal. First-tier Tribunal Judge Oakley ("the Judge") allowed the appeals against the Respondent's decision. Grounds of appeal were lodged and, on 23 February 2016, Judge Grimmett gave permission to appeal stating *inter alia*

"It is arguable that the Judge erred in the consideration of the child's position by dealing with her as being returned to Sri Lanka without taking into account that she would be following her parents to their country of origin."

The Hearing

6. Mr Clark, for the respondent, adopted the terms of the grounds of appeal. He told me that an error of law could clearly be seen at [33] and [34] of the decision. He told me that those paragraphs demonstrate that the Judge failed to take account of the guidance given in EV (Philippines) and Others v SSHD [2014] EWCA Civ 874 and PD and Others (Article 8 – conjoined family claims) Sri Lanka [2016] UKUT 00108 (IAC). He told me that the Judge's error is created by considering the third appellant's case before separately considering the cases of the first and second appellant; he told me that the Judge only allowed the first and second appellants cases because of his findings in relation to the third appellant, and that that is a material error in law.

(b) Mr Clark told me that the cases of EV (Philippines) and PD & Others make it clear that the tribunal must look at whether or not the first and second appellants could independently succeed under the immigration rules, and the Judge has not done that. He argued that there has been no meaningful assessment of the cases of the second & third appellants, but what the Judge has done is find that the third appellant's case is determinative of all three appeals. He argued that an holistic

approach taking account of the potential of the third appellant to return to Sri Lanka (with her parents) is the correct approach. He argued that there is a material error because the Judge's error of logic has significantly influenced the appeals. He urged me to set the decision aside.

7. Mr Wyn, for the appellant's, told me that the decision does not contain any errors of law, material or otherwise. He told me that the Judge has clearly followed the guidance set out in the case of PD and others, and has taken careful account of section 117B of the 2002 Act. He emphasised the findings of the expert report discussed in the Judge's findings between [27] and [32] of the decision. He told me that the Judge's decision is beyond criticism and should be allowed to stand.

Analysis

8. In PD and Others (Article 8 - conjoined family claims) Sri Lanka [2016] UKUT 00108 (IAC) it was held that when considering the conjoined Article 8 ECHR claims of multiple family members, decision-makers should first apply the Immigration Rules to each individual applicant and, if appropriate, then consider Article 8 outside the Rules. This exercise will typically entail the consideration and determination of all claims jointly, so as to ensure that all material facts and considerations are taken into account in each case.

9. The Judge clearly sets out, at the start of [34] the decision, that he reached the conclusion that the third appellant fulfils the requirements of the immigration rules before considering the cases of the first and second appellants. It is clear from what is said at [34] of the decision that the Judge's decision that the third appellant fulfils the requirements of the immigration rules is a factor which weighs heavily in his decision for the first and second appellants.

10. From the case of PD and others it is clear that any countervailing factors must be taken into account. It is not clear from [33] or [34] of the decision that the countervailing factors (that the first and second appellants probably could not succeed under the immigration rules if their cases are considered in isolation) have been taken into account. At [34] the Judge makes it clear that the factor that weighs most heavily in favour of the first and second appellants is that the third appellant meets the requirements of the immigration rules and should not be separated from her parents. Does that approach amount to a material error of law?

11. The grounds of appeal make it clear that the respondent does not accept third appellant should succeed under the immigration rules because, in accordance with EV (Philippines), the Judge has not asked whether or not it is reasonable to expect the third appellant to follow her parents to their country of origin.

12. Between [24] and [33] the Judge clearly considers the interests of the third appellant taking account of all of the evidence, including an expert report dated 10 December 2014. At [28] and [29] the Judge quotes from that expert report. At [32] the

Judge clearly relies on the expert's conclusions that return to Sri Lanka would have a detrimental effect of the third appellant's education and development.

13. The Judge does not, at any point in the decision, consider whether the third appellant would return to Sri Lanka alone. The Judge clearly considers that, because of the third appellant's age, she would return to Sri Lanka with her parents. It is against that background that the Judge reaches a conclusion that it is not reasonable for the appellant to be removed from the UK - and so finds that the third appellant fulfils the requirements of paragraph 276 ADE (iv) of the rules.

14. In reaching that conclusion, the Judge correctly directs himself in law and reaches a conclusion based on findings of fact which were open to the Judge on evidence placed before him. The decision reached by the Judge is in line with the case of EV (Philippines). The Judge's decision that the third appellant fulfils the requirements of the immigration rules is not tainted by an error of law.

15. The real challenge in this case is as to whether or not the decision in relation to the third appellant is determinative of the appeals of the first and second appellants.

16. The first sentence of [34] is probably not correct. It might be considered to be ambiguous for the Judge to say "*I then need to consider the situation with regard to the first and second appellants.....*" after he has concluded that the third appellant fulfils the requirements of the immigration rules. The problem with that sentence is it creates the impression that the focus in this case is almost entirely on the third appellant. That sentence could be interpreted as giving the impression that the Judge might have considered the appeal of the third appellant in isolation and effectively made the first and second appellants simply the dependents of the third appellant.

17. It is, however, wrong to place undue emphasis on that one solitary sentence. A fair reading of the decision as a whole makes it clear that the Judge considered all three appellants' cases jointly. What the judge did is entirely in keeping with the rubric to the case of PD others. The Judge has applied the immigration rules to each individual appellant. I find that his conclusion at [33] (that the third appellant fulfils the requirements of the immigration rules) is beyond challenge. At [34] (& throughout the determination) the Judge clearly considers countervailing factors - including the immigration status of the first and second appellants. The difference between this case and the facts and circumstances recorded at [41] of the case of PD and others is that the parents of the child in PD and others were unlawful overstayers. The first and second appellants have consistently benefited from grants of further leave to remain in the UK and made the application which was refused by the respondent before their leave to remain expired.

18. The result is that the Judge has considered the circumstances of each appellant against the immigration rules, and then consider the entirety of all claims jointly, so that all material facts and considerations are taken into account. The Judge first

applied the immigration rules, then considered article 8 ECHR out-with the rules separately. In doing so, the Judge adhered to the guidance given in PD and others.

19. The third appellant was born in the UK in 2004 and has lived in the UK all her life. She is a qualifying child in terms of s.117B of the 2002 Act. The first & second appellants are not liable to deportation and have a genuine parental relationship with the second appellant. The Judge takes account of the impact that removal is likely to have on the third appellant. The Judge's fact finding exercise is not flawless, however, as I have already indicated, he clearly identifies the crucial aspects of the established family and private life enjoyed by the appellants.

20. At [39] the Judge draws those findings of fact to a conclusion by applying the correct test in law. The Judge has regard to part 5A of the Nationality, Immigration and Asylum Act 2002. The Judge draws the conclusion that it would not be reasonable to expect the third appellant to leave the UK. That is the correct test in law. The decision contains sufficient findings of fact to support the conclusion that the Judge comes to. The correct test in law has manifestly been applied.

21. In Shizad (sufficiency of reasons: set aside) [2013] UKUT 85 (IAC) the Tribunal held that (i) Although there is a legal duty to give a brief explanation of the conclusions on the central issue on which an appeal is determined, those reasons need not be extensive if the decision as a whole makes sense, having regard to the material accepted by the judge; (ii) Although a decision may contain an error of law where the requirements to give adequate reasons are not met, the Upper Tribunal would not normally set aside a decision of the First-tier Tribunal where there has been no misdirection of law, the fact-finding process cannot be criticised and the relevant Country Guidance has been taken into account, unless the conclusions the judge draws from the primary data were not reasonably open to him or her.

22. In this case, there is no misdirection in law & the fact finding exercise is beyond criticism. The decision is not tainted by a material error of law.

23. I find that the Judge's decision, when read as a whole, sets out findings that are sustainable and sufficiently detailed and based on cogent reasoning.

CONCLUSION

24. No errors of law have been established. The Judge's decision stands.

DECISION

25. The appeal is dismissed. The decision of the First-tier Tribunal stands.

Signed

Date 18 April 2016

Deputy Upper Tribunal Judge Doyle