Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/36349/2014
IA/36366/2014
IA/36370/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 4 May 2016	**On 27 May 2016**

Before

Mr H J E LATTER
DEPUTY UPPER TRIBUNAL JUDGE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

NAP
ANP
PP
(ANONYMITY DIRECTION MADE)

Respondents

Representation:

For the Appellant: Mr L Tarlow, Home Office Presenting Officer.
For the Respondents: Mr Z Malik, Counsel.

DECISION AND REASONS

1. This is an appeal against a decision of the First-tier Tribunal allowing the applicants' appeal against the Secretary of State's decision made on 4 September 2014 refusing their applications for further leave and to

remove them from the UK. In this decision I will refer to the parties as they were before the First-tier Tribunal, the applicants as the appellants and the Secretary of State as the respondent.

Background

2. The appellants are all citizens of India, husband, wife and child. The first appellant's date of birth is [ ] 1975, the second appellant, his wife, [ ] 1980 and their daughter, the third appellant, [ ] 2008. The first and second appellants arrived in the UK as visitors in June 2005 with leave to remain until 21 December 2005. They have remained since that date without leave. The third appellant was born in this country on 14 May 2008. On 31 May 2012 the appellants made an application for leave to remain on the basis of exceptional and compassionate circumstances for a purpose not covered by the Immigration Rules (see the letter dated 31 May 2012 from the appellants' representatives).

3. This application was refused for the reasons set out in the respondent's decision letter of 18 July 2013 on the basis that they could not meet the requirements of the Rules and there were no particular circumstances constituting exceptional circumstances justifying a grant of leave outside the Rules. Subsequently, the respondent agreed to reconsider the decision but it was maintained in the decision letter of 4 September 2014 and on the same day decisions were served refusing the application and indicating that a decision had been made to remove the appellants from the UK.

The Hearing Before the First-tier Tribunal Judge

4. At the hearing before the First-tier Tribunal on 5 October 2015 the first and second appellants gave oral evidence relying in substance on the witness statements filed in support of the appeal. In submissions both representatives referred to para EX.1 of Appendix FM, the Presenting Officer arguing that the appellants could not bring themselves within the Rules and there was nothing exceptional to go outside the Rules to justify further consideration under article 8. The appellants' representative based her submissions on the fact that the third appellant was a child who had always lived in the UK. She submitted that the requirements set out in para EX.1 had been met and that, taking into account s.55 of the Borders, Citizenship and Immigration Act 2009 and s.117B(6)of the Nationality, Immigration and Asylum Act 2002 as amended, the appeal should be allowed.

5. The judge was satisfied that at the date of hearing the third appellant met the requirements of para EX.1(a) and on that basis the appeal succeeded.

The Grounds and Submissions

6. The respondent's grounds argue that it was not open to the judge to allow the appeal on the basis of para EX.1 as this was not a freestanding provision of the Rules but a component part of requirements for leave to remain as a parent or partner. The grounds refer to Sabir (Appendix FM – EX.1 not freestanding) [2014] UKUT 0063 and argue that the judge erred in law by finding that the third appellant met the provisions of EX.1 without a proper consideration of Appendix FM.

7. Permission to appeal was granted by the First-tier Tribunal for the following reasons:

> "Given none of the appellants is a British national and that paragraph EX.1 is not freestanding (Sabir (Appendix FM – EX.1 not freestanding) [2014] UKUT 0063 (IAC)), and despite the third appellant being born in the UK over seven years prior to the hearing, it is arguable that Judge Wellesley-Cole may have materially erred in law in allowing the appeal under paragraph EX.1. That is because it is arguable that the requirements of the Rules for leave to remain as a parent or partner were not met and/or because insurmountable obstacles were not established."

8. Mr Tarlow relied on the grounds of appeal but conceded that the Upper Tribunal decision in Treebhawon and others (s.117B(6)) [2015] UKUT 674 raised issues which might well cast a different light on the respondent's grounds of appeal.

9. Mr Malik submitted that Treebhawon was for all practical purposes determinative of the appeal in the light of the fact that it held that s.117B(6) reflected the distinction which parliament had chosen to make between those who were and those who were not liable to deportation. In the former case, when the conditions set out in s.117B(6) were met, the public interest did not require removal.

Consideration of Whether There is an Error of Law

10. I accept, as Mr Malik submits, that the decision in Treebhawon is determinative of the outcome of the appeal as far as article 8 is concerned but this does not affect the issue of whether the judge erred in law by allowing the appeal under para EX.1. In Sabir the Tribunal held that para EX.1 was not a freestanding provision but only fell to be considered when permitted by the provisions of Appendix FM. Neither the first nor second appellant was able to meet the relationship requirements for leave to remain as a partner as the provisions of E-LTRP1.2 could not be met.

11. The provisions of para EX.1 only become applicable where the Rules so provide, for example the provisions of R-LTRP1.1 or E-LTRP.2.1. Similarly, in respect of leave to remain as a parent, the first and second appellants could not meet the relationship requirements and the subsequent rules do not provide a route through to para EX.1. Finally, the third appellant cannot meet the requirements of the Rules for leave to remain as a child as the relationship requirements under E-LTRC cannot be met.

12. I am therefore satisfied that the judge erred in law by dealing with the matter under para EX.1. In consequence the appeal could not be allowed under Appendix FM. Nonetheless, the judge in the course of considering para EX.1 accepted that as at the date of the hearing (as opposed to the decision) the first and second appellants had a genuine and subsisting parental relationship with a child who had lived in the UK continuously for at least seven years preceding the date of hearing if not the application and, more significantly, that it would not be reasonable to expect the child to leave the UK.

13. The wording of para EX.1 is reflected in the wording of s.117B(6) which is as follows:

> "(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where –
>
> (a) the person has a genuine and subsisting parental relationship with a qualifying child, and
>
> (b) it would not be reasonable to expect the child to leave the United Kingdom."

14. In [20] of Treebhawon the Tribunal said:

> "In section 117B(6), parliament has prescribed three conditions, namely:
>
> (a) the person concerned is not liable to deportation;
>
> (b) such person has a genuine and subsisting parental relationship with a qualifying child, namely a person who is under the age of 18 and is a British citizen or has lived in the United Kingdom for a continuous period of seven years or more; and
>
> (c) it would not be reasonable to expect the qualifying child to leave the United Kingdom.
>
> Within this discrete regime, the statute proclaims unequivocally that where these three conditions are satisfied the public interest does not require the removal of the parent from the United Kingdom. Ambiguity there is none."

15. As far as the third appellant was concerned this is not a case which could have been allowed under para 276ADE(1)(iv) because the provision refers to a person under the age of 18 living continuously in the UK for at least seven years calculated by reference to the date of application: on this issue see [8] of Treebhawon. However, as this was an in country appeal, article 8 fell to be assessed as at the date of hearing. On the basis of the judge's findings of fact taking into account the provisions of s.117B(6) it was clear that article 8 was engaged and that the only relevant issue was proportionality. That issue is resolved by the provisions of s.117B(6) as interpreted in Treebhawon.

16. Whilst I am satisfied that the judge erred in law in allowing the appeal on immigration grounds, for the reasons I have given, the appeal should have been allowed under article 8.

Decision

17. The First-tier Tribunal erred in law. I set aside the decision to allow the appeal under the Rules and substitute a decision allowing the appeal under article 8.

18. No application has been made to discharge or vary the anonymity order made by the First-tier Tribunal and that order accordingly remains in force.

Signed H J E Latter Date: 22 May 2016

Deputy Upper Tribunal Judge Latter