



IAC-FH-CK-V1

**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Numbers: IA/45599/2014
IA/00827/2015

THE IMMIGRATION ACTS

**Heard at Field House
On 21 December 2015
Extempore**

**Decision & Reasons Promulgated
On 14 January 2016**

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MR QAISER SHAHIN
MISS NAILA SHAHIN
(ANONYMITY DIRECTION NOT MADE)**

Respondents

Representation:

For the Appellant: Mr C Avery, Home Office Presenting Officer

For the Respondents: Mr I Ali, Counsel instructed by Tennyson Monroe
Solicitors

DECISION AND REASONS

1. The Secretary of State appeals with permission against the decision of First-tier Tribunal Judge Lagunju promulgated on 19 June 2015 whereby she allowed the appeals of Mr Qaiser Shahin and Miss Naila Shahin on the basis that the decisions made by the Secretary of State were not in accordance with the law.

2. It is, I think, important to set out first of all the factual background to this case, which is, as both representatives accept, somewhat complicated. Mr Shahin and Miss Shahin, whom I will refer to as the claimants, are siblings. They are nationals of Pakistan. They applied for entry clearance with their mother and another brother to join their British father in the United Kingdom as long ago as 25 November 2010. Although those applications were initially refused in February 2011 there was a successful appeal against that decision. It is at that point that the matter becomes complex.
3. The first claimant, Qaiser, was granted entry clearance from 29 February 2012 until 29 May 2014. His mother and sister were, however, granted leave from 24 February 2012 until 24 May 2014. For reasons that are not entirely clear the other brother was later granted indefinite leave to enter some months later. The claimants and their mother then travelled to the United Kingdom and lived here with the father but an application for leave to remain for the mother and the two claimants was not made until 29 May 2014. The explanation for the delay is that the family had assumed, wrongly as it turned out, that everyone had been granted leave to remain until 29 May 2014.
4. The result of this was that the application made in respect of the mother and the sister were made when they did not have extant leave to remain in the United Kingdom but the application made by Qaiser was in fact made within time and thus he had a right of appeal under the Immigration Rules against the decision to refuse to vary leave. The other claimant was issued with removal directions which again gave rise to a right of appeal.
5. When the matter came before First-tier Tribunal Judge Lagunju, the Secretary of State and the claimants were both represented, Mr Ali representing the claimants below as he does before me today. The judge does note the factual circumstances which gave rise to the difference in the rights of appeal and states at 14:

“On careful consideration of the circumstances and the various inconsistencies in this case, I find it may suggest that anxious scrutiny has not been applied in relation to the appellants’ cases. The respondent has failed to either acknowledge or explain the disparity in the respondent’s approach to the various family members in this case. Neither does she appear to consider what impact this has on the outcome of the appellants’ cases. The lack of parity between the cases when the circumstances of each party are so similar, may suggest a degree of unfairness.”

On that basis the judge concluded that the decision was not in accordance with the law and stated that it was remitted to the respondent for further consideration.

6. The respondent sought permission to appeal against the decision. The grounds are relatively short and there is no need to repeat them.
7. Mr Avery for the respondent submits that there is a clear error on the part of the judge here in that the apparent inconsistencies in how the members

of the family have been treated flow from the different circumstances in which both of the claimants and indeed their mother arrived, and from the applications by the mother and daughter being out of time. He asked me to note that in the case of the mother there was no right of appeal and although the decision to refuse her leave was challenged by way of judicial review, that had been unsuccessful. He submitted that in the circumstances the judge was clearly wrong and that there was no proper error of law identified by the First-tier Tribunal judge.

8. Mr Ali makes two principal points in his skeleton argument, first that it is unfair for the Secretary of State to raise this issue now, having not made any submissions to that effect in the First-tier, and second that there was in this case a clear error of law on the part of the Secretary of State in the inconsistencies with which she had treated the various members of the family who should have been treated as a unit rather than separately. The full submissions are set out in the skeleton argument produced by Mr Ali for which I am most grateful.
9. Dealing with the first point, I do not consider that it can properly be argued that the Secretary of State is stopped from now saying that the judge's decision was not in accordance with the law. There is no indication that there was any concession made on the part of the Secretary of State in the First-tier Tribunal. It was for the claimants to show that the decision was not in accordance with the law.
10. Turning to the substance of the decision of the First-tier Tribunal Judge, as Mr Ali accepted, for there to be an error of law or rather for the decisions of the Secretary of State not to be in accordance with the law, it would necessarily have to be shown that there was a public law error on the part of the Secretary of State. That is to say it would have to be shown in conventional terms that the Secretary of State's decisions were irrational or otherwise unlawful.
11. There is a conceptual difficulty with the judge's decision. What is said at paragraph 14, to which I have already referred, does not in reality identify any particular error. It is said that it may suggest that there has not been anxious scrutiny. It is said that it may suggest a degree of unfairness. That is a considerable distance from a finding that there has been unfairness or that there has been inconsistency or that there has been some other error of law. There is thus no proper finding of a public law error.
12. Further, it is clear that the various members of this family have been treated differently but why that is so flows from the different positions they were in at the relevant time. For whatever reason, Naila Shahin did not have leave to remain when the application was made whereas her brother Qaiser did. It cannot be said that the Secretary of State acted irrationally in treating either of those parties differently, not least as it appears that there was subsequent to the application by Naila Shahin an issue as to whether there had been a proper application for leave owing to

an absence of the correct fee being paid. Similarly the mother had no leave, and while the other son was granted indefinite leave to enter, that does not appear to be inconsistent with the application of paragraph 297 (i) of the Immigration Rules.

13. It is difficult to see that the situation of the mother could properly be taken into account in these proceedings given that that was correctly dealt with by way of an application for judicial review but again I do not consider that it could be argued that there was any irrationality on the part of the Secretary of State and it is instructive that the decision of Judge Lagunju does not appear to come anywhere near identifying that there was a rationality or unlawfulness on the part of the Secretary of State. On that basis the, decision to allow the appeal involved the making of an error of law, and I set it aside.
14. As there has been no consideration of the substance of the appeals, it is appropriate to remit the decision to the First-tier Tribunal for a fresh determination on all issues.

SUMMARY OF CONCLUSIONS

1. The decision of the First-tier Tribunal involved the making of an error of law and I set it aside.
2. I remit the appeal to the First-tier Tribunal for a fresh decision on all issues.
3. No anonymity direction is made.

Signed

Date: 14 January 2016



Upper Tribunal Judge Rintoul