Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number:**
HU/02647/2018

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THE IMMIGRATION ACTS

Heard at Field House **Decision & Reasons Promulgated**

On 17 April 2019 **On 1st May 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

Mrs DARSHANABEN VISHAL PATEL
Mr VISHAL DINESHKUMAR PATEL
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Rehman (Counsel) instructed by London Imperial Immigration Services
For the Respondent: Mr S Walker, Senior Home Office Presenting Officer

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 this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. This is an appeal by the Appellants against the decision of First-tier Tribunal Judge Connor promulgated on 09/01/2019, which dismissed the Appellants' appeal.

Background

3. The second Appellant is the first appellant's husband. The first appellant was born on 15/05/1985. The second appellant was born on 02/07/1984. Both appellants are Indian nationals. On 02/01/2018 the Secretary of State refused the Appellants' applications for leave to remain on the basis of long residence in the UK.

The Judge's Decision

4. The Appellants appealed to the First-tier Tribunal. First-tier Tribunal Judge Connor ("the Judge") dismissed the appeal against the Respondent's decision.

5. Grounds of appeal were lodged and on 22/03/2019 Upper Tribunal Judge Dr H H Storey gave permission to appeal stating

> "It is arguable that the Judge, although referring to KO and to MA(Pakistan) failed to apply guidance given in MA(Pakistan) in respect of children resident for (more) than 7 years, required when assessing reasonableness or strong reasons to be shown for requiring them to leave"

The Hearing

6. For the appellants, Mr Rehman moved the grounds of appeal. He took me straight to page 57 of the appellant's bundle, which is a copy of the grant of leave to remain which the respondent has now made in favour of the appellant's son, who was born on 18 November 2010. The respondent is satisfied that the appellant's son meets the requirements of paragraph 276 ADE(1) of the rules.

7. Mr Walker immediately told me that the appeal is no longer resisted. He told me that the decision contains a material error of law because the Judge did not correctly consider the circumstances of the appellant's child. He asked me to set the decision aside and substitute my own decision allowing the appeal.

Analysis

8. The Judge's findings of fact start at [32] of the decision. The Judge finds that neither of the appellants can succeed under the immigration rules. At [46] the Judge starts to consider the position of the appellant's son. At [48] the Judge finds that, at the date of hearing the appellant's son

was seven years and 10 months old, and correctly identifies that he must assess whether or not it is reasonable to expect him to leave the UK.

9. At [55] the Judge finds that is reasonable for the appellant's son to leave the UK with his parents. At [57] the Judge says that he finds that

> "The decision is in accordance with the law."

That is an irrelevant finding because it does not relate to a competent ground of appeal.

10. The Judge's findings are based almost entirely on the fact that the appellants and their son need not be separated. The Judge conflates separate tests of the child's best interests with the question of reasonableness of return. That is a material error of law. I set the decision aside. I am able to substitute my own decision.

My findings of fact.

11. The appellants are husband-and-wife. They have one child, who was born on 18 November 2010 in the UK. The first appellant entered the UK on 26 October 2009 as a student. Leave to remain has been extended until 28 September 2016. The second appellant has been granted leave to remain as the first appellant's dependent. The grants of leave to remain (for both appellants) were curtailed by the respondent to expire on 5 June 2016.

12. On 4 June 2016 the first appellant submitted an application for leave to remain as a tier 1 highly skilled entrepreneur. The second appellant submitted an application as the dependent of the first appellant. Both of those applications were refused on 18 October 2016. Applications were submitted for administrative review which concluded on 30 November 2016, when the respondent adhered to the original decision. On 17 December 2016 both appellants submitted an application on article 8 ECHR grounds, which resulted in the respondent's decision dated 2 January 2018, against which the appellant's appeal.

13. On 2 April 2019 the appellant's son made his own application for leave to remain in the UK. On 4 April 2019 the respondent granted that application. The appellant's son now has limited leave to remain in the UK for 30 months from 4 April 2019. The respondent has told the appellant's son that he has now embarked on a 10-year-old route to settlement in the UK.

The Immigration Rules

14. The appellant's son meets the requirements of paragraph 276ADE(1)(iv) of the immigration rules which says

> '276ADE (1). The requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that at the date of application, the applicant:

> (iv) is under the age of 18 years and has lived continuously in the UK for at least 7 years (discounting any period of imprisonment) and it would not be reasonable to expect the applicant to leave the UK; or …'

15. The appellants cannot meet the requirements of appendix FM of the immigration rules because neither of them is either a British citizen or settled in the UK. Because of their age and the length of time that they had been in the UK, neither of the appellants can meet the requirements of paragraph 276 ADE(1)(i) to (v) of the rules. There is no evidence placed before me of very significant obstacles to integration, so that the appellants fail to discharge the burden of proving that they meet the requirements of paragraph 276ADE(1)(vi) of the rules.

16. There is no reliable evidence before me to indicate that either of the appellants meet the requirements of the immigration rules.

Article 8 ECHR

17. In Hesham Ali (Iraq) v SSHD [2016] UKSC 60 it was made clear that (even in a deport case) the Rules are not a complete code. Lord Reed at paragraphs 47 to 50 endorsed the structured approach to proportionality (to be found in Razgar) and said "what has now become the established method of analysis can therefore continue to be followed…" In Agyarko [2017] UKSC 11**,** Lord Reed (when explaining how a court or tribunal should consider whether a refusal of leave to remain was compatible with Article 8) made clear that the critical issue was generally whether, giving due weight to the strength of the public interest in removal, the article 8 claim was sufficiently strong to outweigh it. There is no suggestion of any threshold to be overcome before proportionality can be fully considered.

18. I have to determine the following separate questions:

(i) Does family life, private life, home or correspondence exist within the meaning of Article 8

(ii) If so, has the right to respect for this been interfered with

(iii) If so, was the interference in accordance with the law

(iv) If so, was the interference in pursuit of one of the legitimate aims set out in Article 8(2); and

(v) If so, is the interference proportionate to the pursuit of the legitimate aim?

19. Article 8 family life exists for the appellant in the UK. On 4 April 2019 their only son was granted leave to remain in the UK for 30 months. The respondent decided it was not reasonable for the appellants' son to leave the UK.

20. Section 117 B6 of the 2000 and to act says

> '(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.'

21. It is beyond dispute that the appellants' son is a qualifying child. The public interest in immigration control is outweighed by the respondent's concession that it is not reasonable to expect the appellants' child to leave the UK. It is beyond dispute that the appellants have a genuine and subsisting relationship with their son.

22. Things have moved on since the Judge's decision was promulgated on 9 January 2019. The change in circumstances makes the proportionality assessment for me much simpler. The proportionality assessment is informed entirely by statutory provision. The public interest in immigration control is outweighed because the respondent accepts that it is not reasonable to expect the appellants' qualifying son to leave the UK.

23. The appellants have established family life. The grant of leave to remain to the appellants' son combined with the terms of section 117B of the 2002 Act make it clear that the interference with the right to respect for family life is disproportionate.

24. Th article 8 ECHR grounds.

CONCL

25. Th ibunal promulgated on 9 Januar[illegible] ror of law. I set it aside.

26. I substitute my own decision.

27. The appeals are allowed on article 8 ECHR grounds.

Signed Date 25 April 2019
Deputy Upper Tribunal Judge Doyle