Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: HU/10140/2018
HU/10395/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 15 February 2019	**On 11 March 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE ESHUN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MUHAMMAD [F] (FIRST APPELLANT)
IRAM [S] (SECOND APPELLANT)
(ANONYMITY DIRECTION NOT MADE)

Respondents

Representation:
For the Appellant: Ms L Kenny
For the Respondents: Ms S Iengar, Counsel

DECISION AND REASONS

1. The Secretary of State has been granted permission to appeal the decision of First-tier Tribunal Judge S C Clarke allowing the appeals of the respondents on human rights grounds.

2. The respondents will from now on be referred to as applicants for ease of reference.

3. The applicants are citizens of Pakistan. The first appellant whose date of birth is 24 February 1979 is the husband of the second appellant, Mrs Iram [S] whose date of birth is 15 August 1984. They have a daughter called [SS] born in the United Kingdom on 9 September 2013.

4. The first applicant entered the UK on 5 September 2006 with entry clearance valid from 4 September 2006 to 30 November 2007. He made a number of successful in time applications for leave to remain in the UK. On 24 June 2016 the first applicant applied for a T1 HS General Migrant Visa and on 5 May 2017 varied that application to an application for indefinite leave to remain on the basis of ten years' lawful residence in the UK. This application was refused on 18 April 2018.

5. The second applicant was granted leave to enter the UK as the PBS dependent spouse of the first applicant on 10 February 2012 valid until 25 May 2013 and on 2 July 2013, valid until 2 July 2016. She made an application for leave to remain on 13 June 2017 which was refused on 30 April 2018. It is their appeals against the Secretary of State's refusals that were allowed by FtTJ Clarke.

6. The Secretary of State refused the first applicant's application for indefinite leave to remain under paragraph 276B(ii)(c) of the Immigration Rules on the basis that his conduct fell for refusal under paragraph 322(5) of the Immigration Rules as a general discretionary ground for refusal. It was stated that the first applicant had been dishonest or deceitful in his dealings with HMRC/UKVI.

7. The judge found otherwise. The judge found that there was no persuasive or cogent evidence before her that the first applicant had been either deceitful or dishonest in his tax dealings. The mere fact that the first applicant is responsible for his own tax affairs, which have required some amendment, does not lead to the inexorable conclusion that he has been dishonest. The judge therefore found that the first applicant met the requirements of the Immigration Rules.

8. With regard to the second applicant's application which the judge said was made for leave to remain on the basis that the first applicant's application would be successful, the judge found that there was ample evidence that the second applicant met the financial requirement of Appendix FMSE and that evidence was before the respondent.

9. However, the judge found that the second applicant did not meet the requirements of the Immigration Rules because she did not meet the English language requirement, although that was through no fault of her own. The respondent refused to release her passport to undertake the relevant test and the test provider refused to accept the certified copy of the passport provided by the Home Office.

10. On the evidence before her the judge was not satisfied that there would be very significant obstacles to the second applicant being reintegrated into her country of origin. Therefore, the second applicant did not qualify for leave to remain under paragraph 276ADE(vi).

11. As the judge did not find that the second applicant qualified for leave to remain under the Immigration Rules, the judge considered Article 8 outside the Immigration Rules as to whether there were any compelling circumstances in this case.

12. The judge accepted that the applicants have a private and family life together with their daughter in the UK. In these circumstances the decision of the Secretary of State amounted to an interference with the applicants' right to respect for family and private life. The judge was also satisfied that such interference would have consequences of such gravity to engage the operation of Article 8.

13. The judge considered whether such interference was proportionate to the legitimate public end sought to be achieved, namely effective immigration controls. Having conducted a balancing exercise with the public interest in the maintenance of immigration control, the judge found that the Secretary of State's decision was not proportionate and therefore not a justified interference with the first and second applicants' family and private life.

14. The judge's reasons were that the first applicant met the requirements of the relevant Immigration Rules at the date of the respondent's decision and continued to do so. Both first and second applicants have complied with the Immigration Rules since their respective entry into the UK. They are not a burden to the tax payer.

15. The judge found that both applicants speak good English. The first applicant studied at De Montfort University. Having accepted that the second applicant does not meet the English language requirement, the judge noted that the second applicant had passed the IELT test to the required standard in 2011, the life in the UK test in May 2017 and she gave her evidence during the hearing without the need for an interpreter.

16. The judge noted that the first applicant works in the UK and earns a good income to support his family. She accepted that the applicants' private life in the UK was established at a time when their immigration status was precarious. However, the judge balanced that with the fact that the majority of the applicants' relationship with each other was formed when they were lawfully living in the UK. They are both Pakistani nationals who have spent their formative years in Pakistan. However, the first applicant has lived lawfully in the UK for a continuous period of ten years. He has set up a business and has an income, family and friends and a home in the UK.

17. The judge considered the provisions of Section 55 of the Borders, Citizenship and Immigration Act 2009 and the guidance given in **ZH (Tanzania) v SSHD [2011] UKSC 4,** which is that the welfare of a child is a primary consideration.

18. The judge found that the applicants and their daughter form a tight family unit which is fully integrated into the local community. Their daughter is now 5 years of age and has lived in the UK. She suffers from undiagnosed genetic condition. The judge said there was a considerable number of letters from Consultants in Oxford, Slough and Leicester Hospitals confirming the investigations that have already taken place. They are in the first applicant's bundle at pages 141 to 174. The judge said that their daughter has been accepted onto the 100,000 genomes project at the department of genetics in Leicester which will require several years of tests involving both the applicants and [SS] and follow up investigations. The programme is not available in Pakistan.

19. In all the circumstances the judge found that it was in [SS]'s best interests to remain in the UK and be supported by both parents.

20. Permission to appeal the judge's decision was granted by Designated Judge McClure of the First-tier Tribunal. To the argument put forward by the Secretary of State that the judge has wrongly determined that the applicants had not acted dishonestly, Judge McClure held that the judge carefully analysed the facts in paragraph 18 and 19 and found in paragraph 20 that there was no evidence of the applicant being dishonest.

21. I found that Judge McClure had determined the first complaint made by the Secretary of State. Both parties agreed that in the light of the fact that the Secretary of State had conceded that the first applicant has ten years' continuous lawful residence in the United Kingdom, coupled with the finding made by Judge McClure, the first applicant succeeds in his application for indefinite leave to remain. This means that the first applicant is entitled to indefinite leave to remain.

22. I now turn to the second applicant. Ms Kenny submitted that the judge had found that the second applicant does not meet the requirements of the Immigration Rules but she argued that there was no proper assessment by the judge of the family remaining in the UK. The judge did not conduct an adequate assessment of the best interests of the child. The judge did not consider any factors other than the child was participating in a genome programme. There was no undisclosed medical diagnosis of the child's medical condition. She submitted that the judge's decision lacked a proportionality assessment which considered all the factors.

23. The judge found that the second applicant could not meet the requirements of the Immigration Rules through no fault of her own. She had previously passed the IELT test to the required standard in 2011. That

test had expired. The relevant test centre would not accept the certified copy of the passport provided by the Home Office and consequently she has been unable to retake the English language test. Despite this, the judge found that the second applicant had passed the life in the UK test in May 2017 and had given evidence during the hearing without the need for an interpreter. I find that this is good evidence that she is able to speak English to the required standard.

24. It has been accepted that the first applicant succeeds in his appeal. He, therefore, has acquired indefinite leave to remain following ten years' lawful residence in the UK. I accept Ms Iengar's submission that in accordance with **Agyarko** (paragraph 54) no public interest will be required in the second applicant having to leave the UK and make an entry clearance application to join her husband in the UK. The only obstacle to her appeal succeeding is the English language test.

25. I accept Ms Iengar's submission that paragraph EX.1 which applies the insurmountable obstacle test, rescues the second applicant because of her daughter's profound medical needs. The judge said that the daughter suffers from an undisclosed genetic condition. Evidence of the daughter's medical condition is contained in a considerable number of letters from consultants in Oxford, Slough and Leicester Hospitals confirming the investigations that have already taken place. Indeed, the medical evidence states that the daughter presents with a clinical picture of diplegic cerebral palsy. There is medical evidence that the daughter has been accepted onto the 100,000 genomes project at the department of genetics in Leicester which will require several years of tests involving both the applicants and [SS] and follow up investigations. I find that the second applicant will need to be in the UK to support her daughter.

26. I find that the judge properly conducted an Article 8 balancing exercise, balancing the public interest in the maintenance of immigration control against the circumstances of the family. The judge also gave full consideration to Section 55. I find that the judge's finding that it is in [SS]'s best interests to remain in the UK and be supported by both parents discloses an arguable error of law.

27. Accordingly, the judge's decision allowing the appeals of the applicants on human rights grounds shall stand.

Notice of Decision

The appeal is allowed on human rights grounds.

No anonymity direction is made.

Signed Date: 7 March 2019

Deputy Upper Tribunal Judge Eshun