Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/24695/2018
HU/24709/2018
HU/24713/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 15th August 2019	**On 11th September 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE J G MACDONALD

Between

SHILPI [B] (FIRST APPELLANT)
[AAR] (SECOND APPELLANT)
[AR] (THIRD APPELLANT)
(ANONYMITY ORDERS NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M K Islam, Legal Representative instructed by Taj Solicitors
For the Respondent: Mr L Tarlow, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The first Appellant is a citizen of Bangladesh and the second and third Appellants are her children. Her appeal to be permitted to remain in the United Kingdom was

dismissed by First-tier Tribunal Judge Pears in a decision promulgated in a decision dated 5th May 2019.

2. Grounds of application were lodged, the main ground being that there was procedural unfairness going beyond the scope of the refusal letter dated 28th November 2018.

3. Permission to appeal was initially refused but granted by Upper Tribunal Judge O'Callaghan in a decision dated 9th July 2019.

4. Judge O'Callaghan said that it was arguable that following an initial discussion of issues to be considered at the hearing the Appellants' representative was left with a clear and unambiguous understanding from the judge that the genuine nature of a NHS card was accepted and so the decision of the judge to subsequently reject the genuineness of the document without prior notice of such intention was arguably procedurally unfair. It was said that the Appellant would be aware whether an unambiguous observation was made and whether there was procedural unfairness would be considered by the Tribunal in the error of law hearing.

5. Judge O'Callaghan made a direction that the Appellant and the Respondent were to endeavour and file and serve witness statements from the representatives who attended the hearing before the judge, namely Mr T Shah and Mr M Sartorius, exhibiting any contemporaneous notes of the hearing no later than seven days before the hearing.

6. What I have is a witness statement of Mr Shah for the Appellant dated 9th August 2019. He refers to well-known case law, namely that justice must not only be done but must be seen to be done. He refers to his Record of Proceedings which is lodged. He explained the legal issues to the judge. The judge had stated to the representatives that the first good evidence of the length of time the first Appellant had been here was an NHS card issued on 30 November 2000. The representative (Mr Shah) replied that he could not go beyond this available document and the judge ruled in open court, that he proceeded on the basis that the Appellant had official documents from 30th November 2000. The judge clearly indicated the issue was resolved at the outset.

7. There was no document lodged on behalf of the Home Office namely from Mr Sartorius, with Mr Tarlow explaining that there had not been sufficient time to obtain a document from him.

8. Mr Islam in his submission said that the judge had indicated he was not going behind the NHS document at the start of the hearing but had then given reasons why he had rejected that approach. Furthermore, he had made no findings on the length of residence that the Appellant had enjoyed in the United Kingdom. Rather oddly in paragraph 43, the judge had said that he made no findings on when the first Appellant had arrived in the UK and he had also said he would "observe" and not conclude that she seemed to have been in the UK from about 2011. These findings

were inadequate. It was up to the judge who had the evidence placed before him, to make a finding of when the first Appellant arrived in the UK and that was important to the outcome of the case under Article 8.

9. I was asked to set the decision aside and remit the appeal to the First-tier Tribunal.

10. For the Home Office Mr Tarlow relied on what the judge had said. The judge had dealt with the NHS residence card and those findings were open to him. However, if I was against him on that and the findings were not adequate then the matter should be remitted to the First-tier Tribunal.

11. I reserved my decision.

Conclusions

12. What I have in this case is an assurance from Mr Shah that the issue of the NHS medical card was dealt with at the beginning of the hearing and the judge was invited and seems to have said he accepted that this was proper evidence that indicated when the first Appellant arrived in the UK. That is not what he said in paragraph 43 where he explained that he had reservations about the card because of the name, date of birth and address on it. Those discrepancies that seemed apparent to him were not explained in the first Appellant's statement. He then said he made no findings of when the first Appellant arrived in the UK, which is an undoubtedly inadequate finding to make because it was up to the judge to make a clear finding on when the first Appellant did arrive as this went very much into the scales of whether or not the Appellant's appeal should be allowed under Article 8 ECHR outside the Rules. It follows that not to make a clear factual finding on this point was an error in law. It was also a rather unusual and unhelpful finding to say that he "would observe" but not conclude that she seemed to have been in the UK from about 2011.

13. Unfortunately, the judge's findings give the impression that there has been a procedural mishap in this case. Has the judge said nothing at all about the NHS medical card in his preliminary observations before the evidence was given then it might be that the judge could have simply made the findings about the NHS medical card that he did make when he wrote his decision. However, to give the impression to the Appellant that this card stood for what it said it stood, was arguably unfair on the Appellant in that the judge did not give the Appellant the opportunity to argue that the medical card should be regarded as a sound document. It therefore seems to me that there has been unfairness to the Appellant in view of the later findings of the judge that the medical card was not a document which could be relied on. That was a material finding by the judge which would go a long way towards determining whether the appeal under Article 8 should have been allowed or dismissed.

14. It therefore seems to me that the decision of the First-tier Tribunal is not safe and it must be set aside. I have concluded that because further fact-finding is necessary that the matter should be remitted to the First-tier Tribunal to be heard by a judge other than Judge Pears.

15. The decision of the First-tier Tribunal is therefore set aside in its entirety. No findings of the First-tier Tribunal are to stand. Under Section 12(2)(b)(i) of the 2007 Act and the practice statement 7.2 the nature and extent of the judicial fact-finding necessary for the decision to be remade is such that it is appropriate to remit the case to the First-tier Tribunal.

Notice of Decision

16. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

17. I set aside the decision.

18. I remit the appeal to the First-tier Tribunal.

19. No anonymity order is made.

Signed *JG Macdonald* Date 3rd September 2019

Deputy Upper Tribunal Judge J G Macdonald