Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: IA/18763/2015
IA/18546/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 22 March 2019	**On 02 April 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE PEART

Between

RAMESH [R] (FIRST APPELLANT)
BASANTEE [R] (SECOND APPELLANT)
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr Wilford of Counsel
For the Respondent: Mr Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

1. In a decision promulgated on 26 January 2017, Judge Gandhi (the judge) dismissed the appeals under the Immigration Rules but allowed them under Article 8.

2. The grounds claim the judge failed to give adequate reasons for findings, made material misdirections in law and made irrational findings. The grounds claim that the judge failed to adequately reason what the compelling circumstances were that warranted consideration of the

appellants' circumstances outside of the Rules. The grounds submitted that the appellants' sadness at missing their adult children and a possibility that the first appellant's diabetes might deteriorate were not compelling reasons for considering the appeals outside the Rules. The grounds further claimed that the judge's *"almost disregard"* to S.117 of the Immigration Rules showed inadequate reasoning and a misdirection in law. It was clear from the Court of Appeal in **Rhuppiah** that an ability to speak English was no more than a neutral factor and given the fact that the appellants were not supporting themselves and were living off the charity of friends, was a very important issue in the balancing exercise.

3. It was unclear from the decision why the judge was adopting a reasonableness test at [94] and [108] when any test was confined to children who were settled here and the adult sons of the appellants were neither. Further, whilst acknowledging that the appellants had overstayed since 2007 and the first appellant had a criminal record, the judge appeared to place no weight on those facts when he balanced proportionality leading to a clear misdirection in law.

4. The reasons given for finding compelling circumstances, the misdirection as to the reasonableness test and failing to consider the immigration history of the parents was such that the judge's decision was irrational and did not stand up to scrutiny.

5. Judge Mark Davies granted permission on 31 July 2017. He said inter alia:

> *"2. It is arguable that the judge's findings that there are compelling circumstances to enable a freestanding Article 8 claim to be considered are flawed and based on a misunderstanding of the law.*
>
> *3. It is arguable that the judge did not apply correctly the 'public interest' considerations set out in S.117B.*
>
> *4. The grounds and the decision do disclose an arguable error of law."*

6. There was no Rule 24 response, however, Mr Wilford handed up a skeleton dated 21 March 2019 in lieu.

Submissions on Error of Law

7. Mr Wilford submitted that there was no definition of "compelling" in terms of the circumstances that warranted consideration outside the Rules. The judge had identified the following: the sons had never lived apart from their parents, interdependency between members of the family, cultural practices, the parents' anxiety and depression and impact of removal on their mental health and the first appellant's medical condition.

8. The respondent had claimed that the judge's decision showed an almost disregard to Section 117. Mr Wilford submitted that the judge had considered S.117 at [69] and [70].

9. As regards the judge's adoption of a "reasonableness" test, the issue was whether or not the interference was disproportionate bearing in mind the public interest. The judge's reasoning was consistent with **Huang** and **Agyarko**.

10. The Secretary of State asserted that the judge appeared to place no weight upon overstaying and criminality whereas it was apparent that she had taken account of the appellants' poor immigration history at [37].

11. Mr Wilford submitted that the judge might have been generous, but she was not irrational. It might be that another judge would have reached a different conclusion, however, the judge's decision displayed no error of law.

12. Mr Melvin relied upon the grounds.

Conclusion on Error of Law

13. The appellants could not meet the requirements of the Immigration Rules.

14. Compelling reasons were required to go outside the Rules. See **Garzon [2018] EWCA Civ 1225**.

15. I find the judge materially erred in her approach to the appellants' circumstances. Her decision was irrational for the reasons set out in the grounds; I need not repeat them here. The judge quotes case law but fails to engage with the principles. The judge placed inadequate weight upon the appellants' poor immigration history and the fact that the first appellant had a criminal record. The judge's analysis under S.117B was inadequate.

Notice of Decision

16. The judge materially erred. I set aside her decision and remit the appeal to the First-tier Tribunal for a de novo hearing.

No anonymity direction is made.

Signed Date 28 March 2019

Deputy Upper Tribunal Judge Peart