IAC-AH-KEW-V1

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/30411/2013
IA/30410/2013
IA/30409/2013

THE IMMIGRATION ACTS

Heard at Field House

On 20 November 2014

Determination Promulgated
On 26 November 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE SHAERF

Between

UL AEIN QURAT (FIRST APPELLANT)
ZAHEER HUSSAIN (SECOND APPELLANT)
MD. KHIZAR (THIRD APPELLANT)
(ANONYMITY ORDER NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: None
For the Respondent: Mr T Melvin of the Specialist Appeals Team

DETERMINATION AND REASONS

The Appellants

1. The Appellants are husband and wife born respectively in 1967 and 1980 with their minor child born in 2006. They are all citizens of Pakistan.

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2. On 14 September 2010 the wife arrived with leave to enter as a Tier 4 (General) Student Migrant expiring on 15 September 2011. Her child came with her as her dependant. Later, on 14 May 2011 the husband arrived with leave as dependent spouse. The leave of each Appellant was subsequently extended to 15 May 2012.

3. On 14 May 2012 each Appellant applied for further leave to remain outside the Immigration Rules (IRs). On 1 July 2013 the Respondent refused each of those applications and made decisions to remove the Appellants to Pakistan by way of directions under Section 47 of the Immigration, Asylum and Nationality Act 2006.

4. The Appellants appealed, asserting claims under the European Convention because on return to Pakistan they faced ill-treatment on account of the fact the marriage of the husband and wife had been against the wishes of the husband's family and the wife had been attacked on numerous occasions. Additionally, it was asserted that since the application had been made in May 2012, the Respondent should not have considered it by way of reference to paragraph 276ADE of the IRs.

5. At the hearing on 14 May none of the Appellants attended nor was there any legal representation. Judge of the First-tier Tribunal Webb noted by the mid-afternoon that there was no appearance by or for any of the Appellants and decided to proceed in their absence. The Respondent produced a letter to show that the wife had been asked to attend an interview on 22 July 2014 in connection with her asylum claim but had failed to attend. The Judge went on to dismiss the appeals on all grounds in a determination promulgated on 24 September 2014.

6. On 2 October the Appellants sought permission to appeal. On 13 October 2014 Judge of the First-tier Tribunal Shimmin granted permission to appeal stating that the grounds were inordinately prolix; a comment which is more than fully justified. The representatives who drafted the grounds for permission to appeal should have regard to what was said in *VHR (Unmeritorious Grounds) Jamaica [2014] UKUT 00367*.

7. In his reasons Judge Shimmin distilled the grounds to nine assertions that the Judge had erred in law.

   (1) These applications had the benefit of the transitional provisions in the IRs and should have been decided on the basis of the pre-9 July IRs and not the 2014 IRs.

   (2) Paragraph 245AA (evidential flexibility) of the IRs should have been considered.

   (3) The Judge failed to deal with the original grounds of appeal.

   (4) The Judge relied on speculation.

(5) He failed to adopt the correct approach to the ties of the Appellants to Pakistan.

(6) The Judge's approach was irrational, "pre-judgmental" and perverse.

(7) He failed to consider the provisions of Section 117 of the Nationality, Immigration and Asylum Act 2002 as amended by Section 19 of the Immigration Act 2014.

(8) The Judge's approach to the claim under Article 3 was incorrect and

(9) He failed to consider the best interests of the child Appellant.

The Upper Tribunal Hearing

8. The hearing was set for 20 November. On 19 November the wife wrote to the Upper Tribunal requesting an adjournment on account of her being 21 weeks' pregnant and having a suspected urinary tract infection. In support of the application she enclosed a National Health Service prescription dated 19 November and a statutory sick pay certificate of the same date stating that she was not fit for work.

9. I considered the application which Mr Melvin for the Respondent opposed. The Appellants had not supplied any documentation subsequent to the hearing before Judge Webb other than the application for permission to appeal and the adjournment request. I did not consider the statutory sick pay certificate was proper evidence the Appellant was unfit to attend court. It simply stated she was unfit for work. There was no explanation why a urinary tract infection which from the description would appear to have been being treated by medication should cause the Appellant not to be able to attend court. I was satisfied proper notice of the place, date and time set for the hearing had been given in accordance with Procedure Rule 36. Having regard to the overriding objective in Rule 2 of the Tribunal Procedure (Upper Tribunal) Rules 2008 as amended I was satisfied it was just to proceed in the absence of the Appellants or any representative for them, at least so far as the consideration whether the First-tier Tribunal's determination contained an error of law

10. For ease of reference I shall use the same numbering as used by Judge Shimmin in the grant of permission to appeal.

(1) The applications made by the Appellants were for further leave outside the Rules. The Judge made reference to the judgment in *Edgehill & Another v SSHD [2014] EWCA Civ 402* at paragraph 37.

(2) Paragraph 245AA of the Immigration Rules applies to Points-Based System applications. These were applications for leave outside the Rules.

(3) The Judge dealt fully with the matters raised in the original grounds of appeal at paragraphs 31-35 of his determination.

(4) The grounds for appeal did not identify any instance of speculation and none is evident from a reading of the determination. Having decided it was appropriate to proceed in the absence of the Appellants or any representative the Judge had only the limited evidence which was in the Tribunal file before him on which to base his determination. There was no indication the Appellants proposed to rely on any additional and as yet unfiled evidence.

(5) The grounds for appeal fail to identify any specific or particular irrationality, prejudice or perversity.

(6) The determination does not expressly address the matters referred to in Section 117 of the 2002 Act as amended which was in force at the date of the hearing.

(7) The Judge's approach to the claim under Article 3 in paragraphs 32 and 33 together with the lack of evidence in the file is sustainable fro the reasons given.

(8) At paragraphs 42 and 43 the Judge considered the position of the minor Appellant. Paragraph 42 expressly referred to the Upper Tribunal's jurisprudence on how to consider the best interests of children.

11. The Appellants' applications were for leave outside the Immigration Rules. There was no claim that the Judge had wrongly applied the jurisprudence in *Edgehill*.

12. The Judge did not expressly mention the provisions of Section 117 of the 2002 Act. This was an error of law. There was no evidence before the First-tier Tribunal that the husband could speak English, that the Appellants were financially independent or that the husband and wife had a parental relationship with a qualifying child as defined by Section 117D. Even if the Judge had expressly addressed the factors listed in Section 117B, there was no evidence other than of the wife's ability to speak English (by virtue of her educational achievements) that the Appellants had shown that the factors listed were in their circumstances favourable to them. Consequently the Judge's failure expressly to take into account Section 117B of the 2002 Act was not a material error such as to vitiate his determination. There is no real prospect that a differently constituted Tribunal would have reached any other conclusion. Accordingly the determination shall stand.

<u>Anonymity</u>

13. There was no request for the First-tier Tribunal for an anonymity order and having considered the papers I see no reason why an anonymity direction was made in the first place or that it should be continued.

<u>DECISION</u>

The determination of the First-tier Tribunal did not contain an error of law and shall stand with the effect that the appeals of the Appellants are dismissed and the decisions of the Secretary of State are upheld.

Signed/Official Crest Date 26. xi. 2014

Designated Judge Shaerf
A Deputy Judge of the Upper Tribunal