Upper Tribunal

(Immigration and Asylum Chamber) **Appeal Number: IA/04809/2015**

IA/07107/2015

IA/07108/2015

IA/07109/2015

IA/07110/2015

THE IMMIGRATION ACTS

Heard at Manchester Piccadilly	**Decision & Reasons Promulgated**
On 14 March 2016	**On 1 April 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE BIRRELL

Between

MUHAMMAD ISHAQ MAST

GHULAM KUBRA

ALI HUSSAIN

[A I]

(ANONYMITY DIRECTION NOT MADE)

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr G Brown counsel instructed by Rasools Law

For the Respondent: Mr Duffy 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. In order to avoid confusion, the parties are referred to as they were in the First-tier Tribunal.
3. This is an appeal by the Appellants against the decision of First-tier Tribunal Judge Caswell promulgated on 1 May 2015 which dismissed the Appellants appeals against decisions to remove them from the UK following refusal of their applications for further leave to remain as a Tier 2 Migrant and his dependents.

Background

4. The Appellants are a husband and wife and their 3 children.
5. They were born respectively on 5 May 1969, 17 June 1974, 23 November 1996, 7 November 1998 and [ ] 2000. They are all nationals of Pakistan.
6. Mr Mast ('the Appellant') arrived in the UK on 16 March 2009 as a work permit holder and his family followed soon after as his dependents.
7. The Appellant was granted further leave from 25 April 2013to 18 May 2014 as a Tier 2 Migrant. On 23 March 2014 he applied for further leave to remain. His application was refused on 27 January 2015 and those of his wife and children on 4 February 2015.
8. The refusal letter in respect of the Appellant gave a number of reasons:
   (a) The application was considered under paragraph 245HF of the Rules and he could not meet the requirements as he fell for refusal under the general grounds for refusal (paragraph 322) as he was working in breach of the terms of his visa)
   (b) He also failed under paragraph 245AAA in that for the purpose of being granted indefinite leave to remain he was required to show a continuous period of 5 years lawfully in the UK and the Appellant had been absent from the UK for more than 180 days in one of the consecutive 12 month periods in the 5 years preceding the application.
9. The refusal letter in respect of his wife and children gave a number of reasons :
   (a) The main Appellant had not been granted leave as a points based migrant.

(b) The applications were considered under the family and private life requirements of Appendix FM and paragraph 276ADE(1).

(c) The mother could not succeed under the Rules as a partner as her husband was not a British citizen

(d) The mother could not succeed under EX.1 because none of the children had been in the UK for 7 years prior to the date of the application.

(e) The requirements of paragraph 276ADE(1) were considered and neither the mother nor the children met the requirements. All the children were under 18 at the time of the application but none had lived in the UK for 7 years prior to the date of application. Given they would return as a family and the chronology there were no significant obstacles to reintegration into the country of which they were nationals and had spent the majority of their lives.

The Judge's Decision

10. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Caswell ("the Judge") dismissed the appeals against the Respondent's decision. The Judge :

(a) Set out the Appellants case at paragraphs 3-8.

(b) Set out the law and the evidence before her at 9-11.

(c) Set out the Respondents case at 12-16 identifying that none of the family could meet Appendix FM or paragraph 276ADE given the period they had lived in the UK prior to the date of the application and their background. Any interference was proportionate.

(d) In her findings she noted that the Appellants Representative conceded that the Appellant could not meet the Rules as a Tier 2 Migrant.

(e) She accepted that the Appellant had not been dishonest himself in his application although false documents were used in support of the application.

(f) At paragraph 22 she noted that the Appellants Representative did not argue that any of the Appellants met the terms of paragraph 276ADE and set out her findings as to why they had ties to Pakistan.

(g) At paragraph 23 she set out the test in Razgar [2004] UKHL 27. She found that this was a private life appeal as family life was not engaged as the family would return to Pakistan together.

(h) She addressed their private life in paragraph 24.

(i) She addressed the argument that the Appellant had been misled by his employer and found there were no compelling reasons for them to stay taking into account the provisions of section 117A and B of the Nationality Immigration and Asylum Act 2002 setting out all the relevant provisions.

11. Grounds of appeal were lodged arguing that :

(a) The Judge placed too much weight on the Appellants illegal employment.

12. Permission was refused on 8 July 2015 and the application was renewed with further grounds of appeal which argued:

(a) There was no consideration of the best interests of the children.

(b) The assessment under paragraph 276ADE(1)(iv) was flawed arguing that 'the trigger for assessment is not always the 7 year period, as arguably periods of less than 7 years will suffice.'

(c) The assessment of reasonableness under Article 8 outside the Rules did not take into account the guidance in Azimi-Moayed [2013] UKUT 197 (IAC)

(d) The Judge failed to properly direct herself as to the meaning of 'ties' by reference to Ogundimu (Article 8-new rules) Nigeria [2013] UKUT60 (IAC) in paragraph 276ADE(1)(vi).

13. On 11 September 2015 Deputy Upper Tribunal Judge Chapman gave permission to appeal.

14. At the hearing I heard submissions from Mr Brown on behalf of the Appellants that :

(a) There was no reference to the duty of care under section 55 of the Borders, Citizenship and Immigration Act 2009.

(b) Paragraph 22 was wrong in that there were two children under 18 at the time of the application.

(c) Given that the father had been misled about his work circumstances there should have been engagement with where the best interests of the children law.

15. On behalf of the Respondent Mr Duffy submitted that :

(a) The best interests of the children were addressed within the Rules and in paragraph 24 the Judge considered them within the context of Article 8 outside the Rules.

(b) The assessment was a matter of substance not form.

16. In reply Mr Brown on behalf of the Appellants submitted:

(a) The Judge apparently overlooked in her assessment of paragraph 276ADE that there were two children under 18 although he accepted that at paragraph 24 it was clear she was aware of the children's ages.

(b) The Judge did not do enough for the Tribunal to be comfortable that section55 had been considered.

The Law

17. Errors of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial considerations, reaching irrational conclusions on facts or evaluation or giving legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.

18. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue under argument. Disagreement with an Immigrations Judge's factual conclusions, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment

of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence that was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because an Immigration judge concludes that the story told is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

19. In relation to whether a failure to specifically mention the best interests of the children constitutes an error of law I have reminded myself of SS (Sri Lanka) v Secretary of State for the Home Department [2012] EWCA Civ 945 (11 July 2012) neither the appellant nor the respondent made any reference to the best interests of the children. The Judge did not expressly consider the best interests of the children which did involve a serious error of law. However, the Court of Appeal held that it could not affect the outcome of the appeal. There was no evidence before the Tribunal to suggest the children had put down roots of any sort or established any significant private life that would be disrupted by their return to Sri Lanka. In those circumstances their best interests would be served by living with their mother. It was difficult to see how the children's best interests would be adversely affected by their removal together with the appellant to Sri Lanka. Even if the Tribunal had considered the best interests of the children there was no basis upon which it could have concluded that those interests would be so much better served by allowing the appellant to remain in the UK that they outweighed all other considerations. In AJ (India) v Secretary of State for the Home Department; SP (India) v Secretary of State for the Home Department; EJ (Nigeria) v Secretary of State for the Home Department [2011] EWCA Civ 1191 the Court of Appeal held that provided that the substance of the decision makes it clear that the interests of the child has been treated as a primary consideration then absence of specific reference to section 55 is not fatal.

Finding on Material Error

20. Having heard those submissions, I reached the conclusion that the Tribunal made no material errors of law.

21. I will address the two sets of grounds that were advanced in support of these appeals.

22. In the first set of grounds it was argued that the Judge had placed too much weight in her assessment of the illegal employment of the first Appellant. Such an argument is both misconceived and unfairly categorises what is a balanced and detailed assessment of all of the circumstances in this case as they related to both the adult and child Appellants. The weight placed on any individual matter is for the Judge to determine and while accepting that the Appellant had been deceived by his employer it was nevertheless open to the Judge to find that there was a strong public interest, particularly in cases where leave was based on employment, in applicants having employment which is legal.

23. In the grounds drafted by Mr Brown and argued before me it was argued that the

(a)Judge failed to make specific reference to section 55 of the Borders Act 2009 (paragraphs 3-8 of the grounds) and

(b)that her assessment of paragraph 276ADE(1) was flawed because she overlooked the fact that there were two children under 18 years of age for the purpose of paragraph 276ADE(1)(iv) (paragraph 9)

(c)and that her assessment of Article 8 outside the Rules failed to assess the reasonableness of the children's return by reference to relevant caselaw (paragraph 10- 12)

(d)The assessment under 276ADE (vi) was flawed as the Judge failed to properly assess the concept of ties as required by Ogundimu (paragraph 13-14)

24. In relation to the argument that the Judge failed to specifically refer to section 55 I am satisfied that the assessment of the children's best interests is a matter of substance not form as argued by Mr Duffy and provided that it is clear from the decision that they have been taken into account as a primary consideration that is enough. I am satisfied that when read as a whole, particularly given the Judge's focus on the children in paragraph 24, that the Judge has considered the best interests of the children. There was certainly no evidence before the Judge to suggest that the welfare of these children would be threatened by the removal decision given that it is in the best interests of children to remain with their parents and they would be removed with their parents to their country of nationality where they could resume their education and have family support after a period of time in the UK that did not meet the requirements of the Rules.

25. I will deal with both arguments that relate to paragraph 276ADE(1). I note of course that before the first-tier the Appellants were represented by Mr Reyaz a solicitor from Rasools Law who now instruct Mr Brown. I note that the Judge recorded at paragraph 22 that Mr Reyas (sic) did not seek to argue that the Appellants met the requirements of paragraph 276 ADE and I have checked the record of proceedings to confirm this. His argument was that the case should succeed under Article 8 outside the Rules. I am satisfied that this concession was a matter for the solicitor but it was open to the Judge to accept it on the evidence before her. Mr Browns argument that the Judge overlooked one of the children in relation to Paragraph 276ADE(iv) is entirely misconceived as it is clear from a reading of the whole decision and references to both children that the Judge was aware of them and their ages. The fundamental problem for Mr Brown is that neither child could meet the Rule because at the time of the application neither had lived in the UK for more than 7 years: I do not accept Mr Brown's argument that a period of less than 7 years meets this Rule because that is simply not what is said in the Rule.

26. I am satisfied that the only conceivable requirement of paragraph 276ADE(1) that all of the Appellants could have met was subsection (vi) and the Rule at that time was not as Mr Brown argued as to them losing' ties 'with Pakistan but there being

'very significant obstacles' to the applicant's integration into the country to which he would have to go if required to leave the UK. Having noted Mr Reyas's concession the Judge nevertheless went on to consider whether there were insurmountable obstacles to the family reintegrating into their country of nationality given the factual and undisputed background that they would return as a family, all of the family had been born there and the children arrived in the UK aged 13.12 and 9 respectively so had been exposed to their home country's local norms and begun their education there. She noted at paragraph 22 that they had close family members with whom they maintained contact, speak the language and none of them had lived in the UK for more than 6 years. I am satisfied it was therefore open to the Judge to accept that Mr Reyas's concession had been properly made.

27. In relation to the argument that the Judge failed to consider the reasonableness of the children's return in her Article 8 assessment outside the Rules I am satisfied that again, when read as a whole, the Judge has properly assessed all of those factors that were relevant to the issue of reasonableness and did not have to repeat those findings that she made at paragraph 22 and 24 .I also note that there appears to have been no argument advanced before the first tier tribunal in relation to the reasonableness of return for the children but rather a focus on the argument of compelling circumstances arising out of the father's employment. No additional factor in relation to the children that had not already been addressed under the Rules was advanced before either the first-tier or before me that the Judge had failed to take into account that could have impacted on the outcome of her decision. She properly directed herself as to the relevant guidance in Razgar and considered whether there were any compelling circumstances that warranted a grant of leave outside the Rules and found there were none. Given that there was no challenge in the grounds to the Judge's conclusion that this was a private life appeal and s117B required the Judge to give little weight to private life established while leave was precarious I am satisfied that the decision she made was well reasoned and entirely open to her.

CONCLUSION

28. **I therefore found that no errors of law have been established and that the Judge's determination should stand.**

DECISION

29. **The appeal is dismissed.**

Signed Date 29.3.2016

Deputy Upper Tribunal Judge Birrell