



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/06662/2018
HU/10201/2018
HU/10204/2018

THE IMMIGRATION ACTS

Heard at Field House
On February 12, 2019

Decision & Reasons Promulgated
On February 19, 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

Between

IHSAM [U]
AFSHAN [I]
[S U]

(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Gajjar, Counsel, instructed by Ilford Law Chambers
For the Respondent: Mr Avery, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The first-named appellant entered the United Kingdom as a student on February 17,

2007 with leave to remain until November 30, 2009. His leave was subsequently extended to remain both as a student and as a Tier 4 student until July 31, 2010. On July 30, 2010 the appellant was granted leave to remain as a Tier 1 Highly Skilled (Post-Study Worker) migrant until July 30, 2012 and his leave was extended until June 20, 2016 by subsequent applications.

2. On June 16, 2016 the first-named appellant applied for indefinite leave to remain as a Tier 1 (General) migrant but subsequently varied this application on March 30, 2017 to leave to remain based on 10 years continuous long residence.
3. The second and third-named appellants originally joined the first-named appellant as his dependants on March 1, 2008 before returning to Pakistan in 2011 albeit they then returned to be with the appellant in the United Kingdom. Their leave has been extended in line with the first-named appellant leave.
4. The respondent refused their applications on March 9, 2018 (first-named appellant) and April 18, 2018 (remaining appellants) respectively. The appellants appealed their decisions on May 8, 2018 under section 82(1) Nationality, Immigration and Asylum Act 2002 arguing the decisions were flawed and that the decision to reject the first-named appellant's application under paragraph 322(5) HC 395 was wrong.
5. Their appeals came before Judge of the First-tier Tribunal White on October 11, 2018 and in a decision promulgated on November 23, 2018 the Judge refused their appeals. The appellant appealed those decisions on December 6, 2018 raising procedural unfairness, improper application of the burden of proof irrational findings and a failure to consider material facts and failing to properly consider the best interests of the child.
6. Judge of the First-tier Tribunal Parkes granted permission to appeal on the basis it was arguable there had been procedural unfairness. Permission to appeal was granted on all grounds although Judge of the First-tier Tribunal Parkes observed that the remaining grounds had "considerably less merit" as the Judge had properly directed himself as to the correct burden of proof and the guidance issued by the Tribunal in KO (Nigeria) [2018] UKSC 53.

SUBMISSIONS

7. Mr Gajjar adopted the grounds of appeal and submitted there had been a material error. He argued that at the original hearing the representatives indicated to the Judge that there were no questions to be put to the appellant by either party. By drawing adverse findings on the appellant's failure to give evidence and address concerns that the Judge had, there had been procedural unfairness. The Tribunal in AM (fair hearing) Sudan [2015] UKUT 00656 stated that "fairness may require a Tribunal to canvas an issue which has not been ventilated by the parties or their representatives, in fulfilment of each party's right to a fair hearing." His findings at paragraph 12 amount to an error in law because by not raising his concerns with either the appellant or the representative there had been procedural unfairness

especially as the Judge had allowed the appellant to clarify another matter with his representative during the hearing.

8. Mr Gajjar further argued that the Judge had materially erred in finding the appellant's family left the United Kingdom on March 1, 2012 when in fact she had left later. The Judge had also made irrational findings in relation the appellant's mental health or make adequate findings on the issue of his first tax return. Finally, he submitted the Judge's article 8 assessment was flawed and he had failed to properly consider the best interests of the child.
9. Mr Avery opposed the application. He submitted there was no procedural irregularity because the appellant had never been called to give evidence. The respondent was relying on the decision letter and had no questions to put to the appellant. It was a matter for counsel whether to tender the appellant to the Tribunal or not. The findings in paragraph 20 had been especially following the decision in Khan [2018] UKUT 384. The actual date was not material to the case in hand and following the decision in KO (Nigeria) [2018] UKSC 53 the Judge had reached findings that were open to him on where it was proportionate to require the appellants to leave the United Kingdom.
10. I reserved my decision.

FINDINGS

11. In granting permission to appeal the Judge primarily found it arguable there had been procedural unfairness when the Judge made adverse findings without giving the first-named appellant an opportunity to address those concerns.
12. In SSHD v Balasingham Maheshwaran [2002] EWCA Civ 173 the Court of Appeal said that it was going too far to say that, if the Secretary of State does not challenge an assertion of fact made by the appellant and if the adjudicator does not raise with the appellant any doubts about his veracity, then the adjudicator is bound to accept that assertion as true, although fairness may sometimes require the adjudicator to put an inconsistency to the appellant - for example if an adjudicator had in mind to go behind an express concession.
13. How the appellant presented his case was ultimately a matter for him and his legal advisers. At the hearing before me I expressed the view that it is good practice for a party to call the appellant as a witness to adopt a statement and make himself available for questions. When this case came before the First-tier Tribunal it appears that following a discussion between the two representatives, counsel for the appellant took the decision not to call the appellant on the basis that the respondent had no questions for the witness. There does not appear to have been any discussion with the First-tier Judge over whether he may have had questions for witness.
14. Mr Avery submitted the decision not to call the appellant to give oral evidence was not through any intervention by the Judge but was a decision taken by the appellant and his counsel. The Judge should not be criticised for not asking questions in

circumstances where he has demonstrated that he had engaged with the relevant factors in the case and then made findings that were open to him.

15. Neither the Court of Appeal in SSHID v Balasingham Maheshwaran nor the Tribunal in AM require the Judge to specifically ask questions in circumstances where the respondent relied on the content of the decision letter in closing submissions but both decisions stressed the need to put inconsistencies to witnesses where necessary.
16. I accept Mr Gajjar's submission that by failing to take up either with the appellant or his representative matters which clearly played a significant role in the Judge's decision there was an element of procedural unfairness. It is possible that if the Judge had received answers to those areas of evidence where he had concerns that his ultimate findings with regard to the appellant's tax affairs may have been different. The decision to make a finding under paragraph 322(5) HC 395 directly affected the decision under paragraph 276B HC 395.
17. The other grounds advanced in respect of matters other than "best interests of the children" do not add anything to the above finding.
18. In finding an error in law, I am satisfied that this case will require a de novo hearing and it would be inappropriate, in such circumstances, to retain any of the findings with regard to article 8.
19. I therefore remit this matter back to the First-tier Tribunal under section 12(1) of the Tribunals, Courts and Enforcement Act 2007

Notice of Decision

There is an error in law. I set aside the original decision.

No anonymity direction is made.

Signed

Date 13/02/2019



Deputy Upper Tribunal Judge Alis