Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number:
HU/13070/2017

HU/13085/2017
HU/13086/2017
HU/13088/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 17th December 2018	**On 11th January 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE PARKES

Between

T K
M S
S K
J K
(ANONYMITY DIRECTION MADE)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Mr A Malik (Counsel, instructed by Ashfield Solicitors)
For the Respondent: Mr L Tarlow (Home Office Presenting Officer)

DETERMINATION AND REASONS

1. The Appellants' applications for LTR on the basis of their private and family life in the UK were refused. Their appeals were heard by First-tier Tribunal

Judge Hussain at Hatton Cross on the 16th of July 2018 and dismissed for the reasons given in the decision promulgated on the 20th of September 2018. The Appellants had entered the UK in November 2010, their full history is set out in the decision. Subject to the application under consideration substantive leave had been curtailed from June 2016.

2. The Judge found that the Appellants could not meet the Immigration Rules and that there were no compelling circumstances that would justify a grant of leave under article 8 outside the rules having regard to the best interests of the children. Permission to appeal to the Upper Tribunal was granted by the First-tier Tribunal on the basis that the Judge arguably had not properly considered article 8 and the best interests of the younger child in the light of the misdirection.

3. Between the grant of permission and the Upper Tribunal hearing the decision in KO (Nigeria) [2018] UKSC 53 was promulgated. The decision in the appeal of NS (Sri Lanka) in the same judgment is particularly relevant. That was raised at the start of the hearing before me.

4. In submissions it was argued that the Judge had applied the wrong test in paragraph 20 and in paragraph 23 had incorrectly referred to insurmountable obstacles instead of the correct test of very significant difficulties. It was also submitted that the Judge had not made clear findings on section 55, there was evidence before the Judge in the letter from Miss Wright at ages 28-29 and the Judge had not engaged with that evidence. It was also said that the proportionality assessment was inadequate, at this point Mr Malik referred to a supplementary bundle but I pointed out that that was irrelevant to the question of whether the Judge had made an error as it was not before him. In paragraph 29 the emphasis was on education.

5. For the Home Office it was submitted that the decision taken as a whole contained no material error. In practical terms there was no difference between insurmountable obstacles and very significant difficulties. The Judge had noted the immigration history and that the children benefitted from support and in paragraph 29 made findings in relation to South Korea.

6. There is guidance from the Court of Appeal on the approach of reviewing courts to the approach to be taken but which also contains observations on First-tier Tribunal decisions. Burnett LJ in EA v SSHD [2017] EWCA Civ 10 at paragraph 27 gave made the following observations: “Decisions of tribunals should not become formulaic and rarely benefit from copious citation of authority. Arguments that reduce to the proposition that the F-tT has failed to mention *dicta* from a series of cases in the Court of Appeal or elsewhere will rarely prosper. Similarly, as Lord Hoffmann said in *Piglowska v Piglowski* [1999] 1 WLR 1360, 1372, "reasons should be read on the assumption that, unless he has demonstrated the contrary, the judge knew how he should perform his functions and which matters he

should take into account". He added that an "appellate court should resist the temptation to subvert the principle that they should not substitute their own discretion for that of the judge by a narrow textual analysis which enables them to claim that he misdirected himself". Moreover, some principles are so firmly embedded in judicial thinking that they do not need to be recited. For example, it would be surprising to see in every civil judgment a paragraph dealing with the burden and standard of proof; or in every running down action a treatise, however short, on the law of negligence. That said, the reader of any judicial decision must be reassured from its content that the court or tribunal has applied the correct legal test to any question it is deciding."

7. In paragraph 276ADE the test is whether there are very significant difficulties to reintegration. In paragraph EX.1 of Appendix FM the phrase insurmountable obstacles is used in the EX.1(1)(b) and defined in paragraph EX.2 as "very significant difficulties". Given that the Immigration Rules definition of the term matches the term used by the Judge there is no practical difference. The Judge focussed on relevant issues and there is no error.

8. Paragraph 20 is a bald statement of the burden and standard of proof. There is no reference to the balancing exercise in the proportionality assessment but as a statement of where the burden lies and how an Appellant is to discharge it is correct. In paragraph 8 the Judge referred to the best interests of the children, how that is generally met and section 55. The Judge observations on the Appellants' length of residence at paragraphs 24 and 25 is accurate.

9. Whilst the Judge did not refer directly to the letter from Miss Wright in the Appellant's bundle it was considerably out of date and the Judge correctly observed that there was evidence that the Third Appellant had received support but also that there was no evidence that that he was still receiving support and no evidence that the support needed would not be available in South Korea. In those observations it is clear that the Appellants had not provided evidence to show that there were facts which supported their application to remain in the UK.

10. How the Appellants come to be in the UK without leave is not a relevant consideration. The fact is that the family do not meet the Immigration Rules. To succeed outside the rules the Appellants would have to show that there were compelling circumstances not adequately addressed by the rules that justified such a grant.

11. The grounds effectively rely on a narrow textual analysis of the sort deprecated by the Court of Appeal. Reading the decision as a whole, without being unduly formulaic and having regard to the approach now approved I am satisfied that the Judge considered all relevant factors. The Judge clearly had in mind the best interests of the children and properly considered the circumstances at the date of the hearing with regard to

whether there was continuing treatment available and whether there would be treatment in South Korea. Whilst it may have been better to have avoided using the word “exceptional” in the circumstances the criticisms of the decision are unjustified.

12. The decision of Judge Hussain was a sufficient consideration of the evidence presented in the context of the Appellants overall immigration history and the applicable Immigration Rules. The Judge was justified in finding that the evidence did not show that the Appellants' circumstances were such that a grant of leave under article 8 outside the rules would have been justified. On that basis the decision did not contain an error of law and stands as the disposal of the Appellants' appeals.

CONCLUSIONS

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

I do not set aside the decision.

Anonymity

The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and I make no order.

Fee Award

In dismissing this appeal I make no fee award.

Signed:
Deputy Judge of the Upper Tribunal (IAC)

Dated: 27th December 2018