IAC-AH-SAR-V1

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/34759/2013
IA/34762/2013
IA/34771/2013
IA/34789/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 9 February 2015	**On 20 February 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

I I
G J
N I
J I
(ANONYMITY DIRECTION MADE)

Respondents/Claimants

Representation:
For the Appellant: Mr C Avery, Specialist Appeals Team
For the Respondents/ Claimants: Mr S Karim, Counsel instructed by Khans Solicitors

DECISION AND REASONS

1. The Secretary of State appeals to the Upper Tribunal from the decision of the First-tier Tribunal allowing the claimants' appeals against the decision by the Secretary of State to refuse to grant them discretionary leave to remain outside the Rules on Article 8 grounds, and against her concomitant decision to make directions for their removal pursuant to Section 47 of the 2006 Act. The First-tier Tribunal did not make an anonymity direction, and I do not consider that it is necessary for the claimants to be accorded anonymity in these proceedings before the Upper Tribunal.

2. The claimants are all nationals of Pakistan. The first claimant is married to the second claimant, and the third and fourth claimants are their two children. The third claimant N I was born in the UK on 28 May 2011, and the fourth claimant J I was born in Pakistan on 29 May 2007. As the first claimant is the principal claimant in these appeals, I shall hereafter refer to him simply as the claimant, save where the context otherwise requires.

3. The claimant first entered the UK on 17 February 2004 with leave to enter as a student. The claimant successfully extended his stay in the United Kingdom as a student on a number of occasions, culminating in a last grant of leave to remain in the UK as a Tier 4 Student Migrant which was valid until 28 June 2013. One of his earlier extensions for stay was under the International Graduate Scheme (until 20 May 2009). His wife and eldest child J I joined him in the United Kingdom as dependants on 24 November 2007.

4. On 24 June 2013 the claimant applied for further leave to remain outside the Rules on compassionate grounds, with the remaining claimants as his dependants. In a covering letter, his solicitors said that the claimant had been in gainful employment as a postman for the Royal Mail in order to subsidise himself and to avoid being a burden on society. He had been working in accordance of the terms of his student visa, but if granted leave to remain the Royal Mail was in a position to offer him permanent full-time employment. He had nothing to return to in Pakistan. He had no home, no business, and no social connections there. J I was over 6 years of age, and attending primary school. He was currently in year 2 and was achieving pleasing progress.

5. On 10 August 2013 the Secretary of State gave her reasons for refusing the application. The claimant did not qualify under the partner route, as his partner was not a British citizen, nor was she present and settled in the UK; nor was she in the UK with refugee leave or as a person with humanitarian protection. He also did not qualify under the parent route, as his children were not British citizens, they were not settled in the UK, and neither of them had lived in the UK for at least seven years preceding the date of his application. Whilst it was acknowledged he had a genuine and subsisting parental relationship with his children, his application fell for refusal under the eligibility requirements of the Rules. As he had failed to meet those eligibility requirements, he could not benefit from the criteria set out in EX.1. Having spent 26 years in his home country, and in the absence of any evidence to the contrary, it was not accepted that in the period of time he had been in the UK he had

lost ties to his home country, and so he did not meet the requirements of Rule 276ADE(vi).

6. The Secretary of State gave separate consideration to each of the remaining claimants, and refused their applications in line with the refusal of the claimant's application.

7. The accompanying notices of immigration decision contained a One-Stop Warning which stated *inter alia* that, if at a later date the reasons why they thought they should be allowed to stay in this country changed, or new reasons arose, they must tell the Home Office as soon as possible. The ongoing requirement to state their reasons as to why they should be allowed to stay in the country was made under Section 120 of the Nationality, Immigration and Asylum Act 2002.

8. The claimants' appeals were originally scheduled to be heard in January 2014, but the appeals were adjourned because of the claimant's illness. This was also the reason why the hearing scheduled for the beginning of February 2015 was adjourned. The appeals were relisted for hearing in May 2014. By that time the claimant's new solicitors had served a Statement of Additional Grounds relying on the fact that the claimant had now accrued over ten years' continuous lawful residence in the UK, as he had enjoyed 3C leave since making the application for discretionary leave to remain, which he made before the expiry of his last period of student leave. Judge Scott-Baker adjourned the hearing to give the Secretary of State the opportunity to consider this new ground of appeal.

The Hearing Before, and the Decision of, the First-tier Tribunal

9. The claimants' appeals eventually came before Judge Beach sitting at Taylor House on 8 October 2014. Both parties were represented by Counsel. In her subsequent decision, Judge Beach found at paragraph [24] that the claimant had shown that he had remained lawfully in the UK for over ten years. He therefore fulfilled the requirements of the Rules.

10. The judge observed at paragraph [25] that the remaining claimants could not meet the requirements of the long residency Rules, and that the long residency Rules do not allow for dependants to be considered as part of the application. But they had a family connection to the claimant. In the circumstances she held there were compelling reasons why consideration should be given as to whether the second to fourth claimants should be granted leave to remain outside the Rules. The judge set out the five point **Razgar** test, and found at paragraph [28] that the claimant could not return to Pakistan with the rest of his family. Later, at paragraph [32] the judge found the second to fourth claimants would be returning to a country to which they had not returned on a regular or frequent basis. There was a family home there, and so they would have a home to which they could return. They also spoke some Urdu, and so they would not have language problems. But, the second to fourth claimants would be returning to Pakistan without the first claimant, and it would not be

reasonable to expect them to be separated, given that the first claimant fulfilled the requirements of the Rules regarding long residency.

11. At paragraph 39 she said that, taking into account all the circumstances and relevant case law including **Gulshan** and **Shahzad**, there were compelling reasons why the second to fourth claimants should be granted leave outside the Rules. She proceeded to allow the first claimant's appeal under the Rules, and the appeals of the remaining claimants on human rights grounds outside the Rules.

The Grant of Permission

12. On 22 December 2014 Judge Pooler granted permission to appeal for the following reasons:

> It is arguable that the judge failed to give reasons for finding that the successful claimant would not return to Pakistan with his wife and children and failed to consider whether it would be reasonable for him to choose to remain in the UK. She arguably failed to consider the principles considered in **Azimi-Moayed and Others ("decisions affecting children" onward appeals) [2013] UKUT 00197 (IAC)**.

The Hearing in the Upper Tribunal

13. At the hearing before me, Mr Karim, who did not appear below, mounted a stout defence of the judge's decision. But having listened carefully to the submissions of both representatives, I was persuaded that a material error of law was made out. I gave my reasons for so finding in short form, and my extended reasons are set out below.

14. For the purposes of remaking the decision, I received oral evidence from the claimant on the topic of returning with his family to Pakistan.

15. Mr Karim submitted that the claimant's case was strengthened by two developments since the date of the hearing before the First-tier Tribunal. The first was that the claimant's eldest son had now accrued over seven years' residence in the United Kingdom, and the second was that, in the light of the unchallenged finding of the First-tier Tribunal that the claimant qualified for ILR under paragraph 276B, the claimant's younger son could apply for registration as a British national. These factors combined to tip the scales in the wider proportionality assessment decisively in favour of none of the claimants being required to leave the United Kingdom.

Reasons for Finding an Error of Law

16. There was no challenge by the Secretary of State to the finding of Judge Beach that the claimant qualified for ILR on the grounds that he had accrued ten years' lawful residence. But she was wrong to plunge into a freewheeling Article 8 assessment without first considering the position of the remaining family members under Appendix FM.

17. When the Secretary of State considered the position under Appendix FM, the criteria in EX.1 did not fall for consideration as the claimant did not meet the eligibility requirements. In the light of the judge's finding that the claimant now qualified for ILR, the claimant now also satisfied the eligibility requirements for his case and those of his dependants to be considered under EX.1. In short, the central issue now became whether there were insurmountable obstacles to the claimant carrying on family life with his wife in Pakistan.

18. The judge needed to address this question as a necessary precursor to an evaluation of whether, assuming the answer was no (as on the evidence it plainly was), to an evaluation of whether there were compelling circumstances "not sufficiently recognised" by Appendix FM such as to justify a grant of leave to remain outside the Rules.

19. The upshot of the judge bypassing the two stage approach required by the **Nagre**/**Gulshan** line of authority was that her approach to assessment of the claim outside the Rules was fatally flawed. Most egregiously, in her assessment of whether it was reasonable for the claimant's dependants to return to Pakistan, she failed to direct herself that there were not insurmountable obstacles to the return of the entire family.

20. In addition, there was a separate error on the part of the judge in failing to give adequate reasons as to *why* the claimant would not return to Pakistan with his dependants; and, if this was the case, whether that was a reasonable position for the claimant to adopt in all the circumstances.

21. The claimant's witness statement at the hearing of the First-tier Tribunal contained nothing about any difficulties which the family would encounter on return to Pakistan, nor did it contain a declaration by the claimant that he would not return to Pakistan with the rest of his family. Her manuscript Record of Proceedings shows that the claimant was cross-examined about the difficulties which the family might face on return. He is not recorded as saying that he would not return with his family.

22. But even if he had given such evidence, the judge would have been wrong to treat his declared position as being decisive. Going back to first principles, Article 8 does not confer on a married couple the right to choose where they live. It was a matter of choice for the claimant whether he gave priority to enjoying family life with his dependants in Pakistan or to taking advantage of the fact that he was now able to secure his own status in the United Kingdom.

23. Accordingly, for the reasons given above, the decision of the First-tier Tribunal contained an error of law, such that it should be set aside and remade.

The Remaking of the Decision

24. In his oral evidence before me, the claimant said he was not willing to go back to Pakistan as there were more opportunities here. In cross-examination, he was asked

what prevented him from going back. He answered that he had a good job here and it was a good environment in which to bring up his children. He knew that he could raise his kids better here than in Pakistan. It was put to him that he had come to the United Kingdom to gain qualifications which would enhance his employability in Pakistan. The claimant agreed, but said the market was totally different now. He knew a lot of graduates who were struggling to obtain jobs in their native country. Mr Avery asked him whether he had tried to look for a job in Pakistan, and he said no.

25. In answer to questions for clarification purposes from me, the claimant said he was currently working as a postman for the Royal Mail at an annual salary of £24,000. But this figure did not include overtime.

26. The evidence which I received from the claimant does not change the landscape with regard to whether the criteria in EX.1(a) are met. Having regard to the definition of insurmountable obstacles contained in EX.2, I consider that the evidence falls well short of establishing that there are insurmountable obstacles to the claimant enjoying family life with his wife (and children) in Pakistan.

27. However, there are compelling reasons not sufficiently recognised under the Rules for the second to fourth claimants to be granted Article 8 relief in respect of their impending removal. Firstly, J I is now a qualifying child under Section 117B(6) of the 2002 Act. The definition of a qualifying child under the statute does not include a requirement that the child in question should have accrued seven years at the date of application. It is simply enough that the child has accrued seven years' residence at the date of assessment. So on a freestanding proportionality assessment outside the Rules, the claims of the dependants are much stronger than they have been hitherto. It is not disputed that J I's mother has a genuine and subsisting parental relationship with J I, and the burden of establishing that it is not reasonable to expect J I to leave the United Kingdom is not as onerous as proving that there are insurmountable obstacles to the family returning as a unit to Pakistan.

28. Another and more important consideration in the proportionality assessment is the application of **Chikwamba** principles. The claimant is now eligible to support an application by his dependants for leave to remain under the Rules, relying on the fact that they are able to demonstrate compliance with the financial requirements. The required financial threshold for a spouse and two children is an annual income of £24,800. On the basis of the claimant's oral evidence it is likely that his annual salary reaches this threshold, when overtime is taken into account.

29. If the claimant or his wife had a poor immigration history, it might be reasonable to require the dependants to return to Pakistan in order to apply for entry clearance. But neither the claimant nor his wife has an adverse immigration history, and requiring the dependants to go back to Pakistan to apply for entry clearance would be unnecessarily disruptive, and would be plainly contrary to the best interests of J I.

30. For the above reasons, I reach the conclusion that the interference consequential upon the removal of the second, third and fourth claimants is disproportionate to the legitimate public end sought to be achieved, namely the maintenance of firm and effective immigration controls.

Notice of Decision

The decision of the First-tier Tribunal allowing the first claimant's appeal under the Rules did not contain an error of law, and accordingly that decision stands. The decision of the First-tier Tribunal allowing the appeals of the second to fourth claimants on Article 8 grounds outside the Rules contained an error of law, and accordingly the following decision is substituted: the appeals of the second to fourth claimants against removal are allowed on Article 8 grounds outside the Rules.

Signed Date **9 February 2015**

Deputy Upper Tribunal Judge Monson