



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/17352/2016
HU/17367/2016
HU/17371/2016

THE IMMIGRATION ACTS

Heard at Bradford
On 31 July 2018
2018

Decision and Reasons promulgated
On 29 August

Before

UPPER TRIBUNAL JUDGE HANSON

Between

SPS
PE
JS
(anonymity direction made)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Cleghorn instructed by Hallmark Solicitors

For the Respondent: Mr Diwnycz - Senior Home Office Presenting Officer.

ERROR OF LAW FINDING AND REASONS

1. The appellant's appeal with permission a decision of First-tier Tribunal Judge Turnock who in a decision promulgated on 26 July 2017 dismissed the appeals of this family unit, composed of a husband, wife and their son, all citizens of India, against the refusal of an application for leave to remain in the United Kingdom on human rights grounds.

Background

2. The first appellant was born on 10 June 1974, the second appellant on 22 July 1975 and the third appellant on 10 June 1974.
3. The Judge sets out the immigration history of the family unit at [2 - 13] of the decision under challenge.
4. Having considered the evidence the Judge sets out findings from [32] of the decision under challenge noting that there was no real dispute in relation to the chronology or the immigration history.
5. The Judge finds neither the first nor second appellant can meet the requirements of the Immigration Rules under the 'partner' route as neither are British citizens nor present and settled in the United Kingdom or in the United Kingdom with refugee leave or as a person with humanitarian protection. It was found neither the first nor second appellant could meet the requirements of the Rules with regard to their private life.
6. In terms of the duration of time spent in the United Kingdom the Judge finds:
 - "44. The Respondent noted that, as at the date of his first entry to the United Kingdom, the First Appellant was 43 years of age and had therefore spent all his formative years in his home country, been employed there, was married and had children there. It was noted that he had spent eight years in the United Kingdom but had entered as a student and gained further leave under routes which were not intended to be permanent routes to settlement. He therefore could have had no expectation that he would be allowed to remain in the United Kingdom or to educate his family in that belief. It was noted that he would be returning to India with the Second Appellant and Third Appellant. It was further noted that the Appellants had previously left the United Kingdom to return to India when the First Appellant became unemployed and that they had received support from their family in India.
 45. With regard to the Second Appellant, it was noted that she entered the UK on 11 August 2009, and as at the date of application was 40 years old. She had lived in the United Kingdom for six years five months and had spent 34 years in India prior to her entry into the UK and that she had married and had had children in India. She had returned to India on 22 April 2013 for over five months with her family and was supported there by family and friends.
 46. The Third Appellant entered the UK on 11 August 2009 and remained until 22 April 2013 which is a total of 3 years 8 months and 11 days. He then returned on 8 October 2013 and remains in the UK. At the date of hearing that is a total of 3 years 9 months and 2 days. Whilst he has, therefore been in the UK for a period in excess of 7 years, he has not lived here for a continuous period of 7 years and so does not meet the requirements of the Immigration Rules."
7. Outside the Immigration Rules the Judge undertook a structured assessment in accordance with the guidance provided by the House of Lords in Razgar [2004]

UKHL 27, including considering section 55 the Borders, Citizenship and Immigration Act 2009 and the best interests of the child.

8. The Judge finds at [58] that the Third Appellant has not lived in the UK for a continuous period of seven years and so does not meet the definition of a “qualifying child”. The Judge, however, accepted that the Third Appellant had been in the UK for a significant period of time and that whilst he has been here he has had the benefit of the UK education system, completed his GCSE examinations and now wish to progress to the next level of education which he ultimately hopes will lead to his qualification as a dentist.
9. In considering the fifth of the ‘Razgar’ questions the Judge writes:

“68. There is clearly a strong public interest in the maintenance of effective immigration control and significant weight must be given to that consideration. In this case none of the Appellants are British Citizens and none have the right to remain in the UK. It is true that the Appellants all speak English and immigration history is not poor. However, the Appellants have family connections in India from whom they can gain support and they are familiar with the culture of that country. I did not accept that the Third Appellant would face any significant difficulty in accessing education in India. He has completed his GCSE examinations and can commence the next stage of his education in India. I conclude that the public interest considerations outweigh the interests of the Appellants and that there are no compelling reasons to reach a different conclusion outside the Rules than that reached when applying the Rules.”
10. The appellant sought permission to appeal which was granted by another judge of the First-tier Tribunal on 11 January 2018.

Error of law

Submissions

11. In her submissions Ms Cleghorn accepted that neither of the adult appellants could succeed and that any prospect of success for them depended wholly upon the success or otherwise of the third appellant’s appeal.
12. It was argued that the period in which the third appellant had been in the United Kingdom exceeded the seven-year period required by the Rules which refers to 7 years in any capacity. It was argued that that period had been exceeded and that the third appellant was therefore a “qualifying child”. The Judge erred in failing to treat the child as such and in failing to consider the merits of the third appellant’s appeal under the Rules and relevant statutory provisions on that basis.
13. It was argued the seven-year period is the period relevant to the establishing of roots and that its purpose is to protect children from unwarranted interference. The third appellant attended primary school and is now studying for A-levels and the Rules should recognise the way he has developed during his time in the United Kingdom, which is relevant to the best interest’s assessment.
14. In relation to the Judge’s findings it is accepted the first appellants leave was curtailed but also that it was reinstated and that he only left the United Kingdom as he was asked to do so; and so there should be no arguable breach in the first

appellant's period of lawful leave in the United Kingdom. It is argued the decision did not look at the facts accurately or these specific facts and inadequately reasoned the decision outside the Rules.

15. On behalf the Secretary of State Mr Diwnycz submitted the appellant's curtailment argument is wrong. The first appellant had leave which was curtailed on 8 October 2013 to expire on 27 December 2014 but that the first appellant left the United Kingdom on 27 April 2013 due to a lack of employment opportunities.
16. It is not accepted that the Judge erred in relation to the assessment of the time the third appellant has been in the United Kingdom and whether he satisfy the definition of a "qualifying child".

Discussion

17. In relation to the argument the Judge erred in assessing the period of leave the first appellant had in the United Kingdom specific reference is made to [3 - 10] of the decision under challenge in which the Judge writes:
 3. The Second and Third Appellants entered the UK on 11 August 2009, with leave valid from 7 August 2009 until 23 March 2011, in line with the leave granted to the First Appellant, on 23 March 2009. The Appellants were accompanied by HKS, who is the eldest son of the First and Second Appellants.
 4. The Appellants were next granted leave, as Tier 2 SW General Migrants, with leave valid from 5 May 2011 until 23 March 2014.
 5. The above grant of leave was curtailed on 8 October 2013, to expire on 7 December 2014 but the Appellants left the UK on 22 April 2013 to return to India because the First Appellant had lost his employment.
 6. The First Appellant return to the UK, on 17 August 2013, and the Second and Third Appellants returned on 8 October 2013.
 7. However, the curtailed leave was reinstated on 2 January 2014 following a Home Office review. The leave of the appellants was, therefore, to expire on 23 March 2014.
 8. The Appellants were next granted leave to remain, as Tier 2 SW Migrants, with leave valid from 27 March 2014 until 6 April 2017.
 9. An application was raised, on 20 February 2015, to curtail the Appellants leave because the First Appellant had left his employment. The leave was curtailed on 15 June 2015 to expire on 17 August 2015 with no right of appeal.
 10. On 15 August 2015, the Appellants raised a further application for leave to remain outside the rules which was refused with no right of appeal on 16 October 2015."
18. The respondent's submission is therefore arguably correct in that the first appellant did not leave the United Kingdom with his family as a result of his leave being curtailed, as that leave was curtailed to expire on 7 December 2014, yet the family had left and returned to India as a result of employment issues before this date. The Judge provides a more detailed chronology at [34] in relation to this period. At [35] the Judge notes first appellant's new employment came to an end on 12 February 2015 when he was dismissed for gross misconduct in relation to allegations made against him by a colleague of sexual misconduct. Regulatory proceedings were subsequently taken by his Regulator, the Health and Care

Professions Council and following a hearing, which concluded on 13 June 2017, the first appellant's name was removed from the relevant Register.

19. In relation to the third appellant, the Judge was considering the exceptions to the specified requirements contained in Appendix FM for an individual to remain in the United Kingdom, found in paragraph EX.1. That paragraph applies if the third appellant is a British citizen or has lived in the UK continuously for at least seven years immediately preceding the date of the application and (ii) it would not be reasonable to expect the child to leave the UK. A similar form of wording is used in paragraph 276ADE(1)(iv) which contains a requirement that the applicant is "under the age of 18 years and has lived continuously in the UK for at least seven years (discounting any period of imprisonment) and it would not be reasonable to expect the applicant to leave the UK. Section 117B of the Nationality, Immigration and Asylum Act 2002, which the Judge considered as part of the proportionality exercise, states at subsection (6) that in the case of a person who is not liable to deportation, the public interest does not require the person's removal where - (a) the person has a genuine and subsisting parental relationship with a qualifying child, and (b) it would not be reasonable to expect the child to leave the United Kingdom. Section 117D provides that a "qualifying child" means a person who is under the age of 18 and who - (a) is a British citizen, or (b) has lived in the United Kingdom for a continuous period of seven years or more.
20. What is clear, whichever of the above provisions is considered, is that the specific wording is common to all and that the outcome should be the same irrespective of whether the decision has been taken under the Rules or outside the Rules by reference to the statutory provisions.
21. My first finding is that the submission by Ms Cleghorn that the Judge erred as the wording permits a child who has lived in the United Kingdom for a period of seven years to succeed, without more, is factually incorrect. As shown above, the wording specifically states that to be a "qualifying child" the child must have lived in the United Kingdom for a continuous period of seven years or more. The inclusion of the word 'continuous' is clearly not a slip of the draughtsman's pen requiring something more in addition to merely being in the United Kingdom for seven years. The definition of 'continuous' is 'forming an unbroken whole; without interruption'. The intention of the above provision is therefore to only recognise as a "qualifying child" a person who has lived in the United Kingdom for an unbroken period of seven years, without interruption. This is clearly the interpretation the Judge applied to the relevant provisions and it cannot be said his conclusion that the third appellant, who had not lived in the UK for a continuous period of seven years and therefore did not meet the definition of a "qualifying child", is in any way irrational or contrary to the provisions the Judge considered.
22. Ms Cleghorn has not referred this tribunal to any decision to the contrary and bases her submission on the fact the period of time that the third appellant has been in the United Kingdom warranted far greater consideration than that given by the Judge.

23. The significance of the “qualifying child” definition is that if a person is a qualifying child then it is necessary to consider whether it was reasonable for that child to leave the United Kingdom. The ability to satisfy the definition effectively enables a person to establish that they will have a settled private life in the United Kingdom established over the requisite period, depending upon age and ties to the family and the wider community including education, and that it would have to be established that it was reasonable to interfere with the same as part of the proportionality assessment. A period of residence in excess of seven years is not, however, determinative of the ability of an individual to remain.
24. There is no scope in law for a “near miss” argument on the basis that the requisite period was satisfied if one ignores the period the family returned to India before re-entering the United Kingdom.
25. If a person is not able to satisfy the definition of a “qualifying child” they will still have the ability to argue a family or private life case that it is not proportionate to interfere with pursuant to article 8 ECHR. The Judge took into account the evidence relied upon by the third appellant including the submission that he has put down significant roots in the United Kingdom. The Judge accepted the third appellant had been in the UK for a significant period of time and that the best interests of the third appellant are for him to remain with his parents within a family unit and that, although it was in the third appellant’s best interest to complete his education in the UK, no compelling reason had been advanced as to why he could not complete his education in India [61].
26. The Judge clearly factored immigration history and practical arrangements enjoyed by this family unit in the United Kingdom as part of the assessment and weighed these against the competing arguments relied upon by the Secretary State. As a result of conducting that balancing exercise the Judge concluded that the Secretary of State had discharged the burden of proof upon him to the required standard to show that the decision to refuse the application for leave and remove was proportionate to the legitimate interest relied upon. It has not been made out that the child’s interest in remaining in the United Kingdom outweighed the considerations on which the decision-maker relied in striking the balance in the proportionality exercise.
27. When a judge conducts a properly structured proportionality exercise, having taken into account all relevant aspects and competing interests, an appeal court should be very slow to interfere with the decision unless it is made out there is arguable public law error, such as irrationality or perversity in the decision. No such element has been made out in the manner in which the Judge undertook the assessment, or the conclusions reached sufficient to warrant a finding that the Judge erred in law in a manner material to the decision to dismiss the appeal. It is not made out this decision is not within the range of those reasonably available to the Judge on the evidence.

Decision

28. **There is no material error of law in the Immigration Judge’s decision. The determination shall stand.**

Anonymity.

29. The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed.....
Upper Tribunal Judge Hanson

Dated the 17 August 2018