



**Upper Tribunal
(Immigration and Asylum Chamber)
IA/00232/2016**

Appeal Numbers:

IA/08545/2015

IA/08241/2015

THE IMMIGRATION ACTS

Heard at Rolls Building, London

**Decision & Reasons
Promulgated**

On 13 February 2018

On 19 February 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE MCCARTHY

Between

**AMANDEEP KAUR SARN (1)
RAJ KUMAR KUMAR (2)
AA (3)
(ANONYMITY ORDER NOT MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr P Richardson, instructed by Asher & Tomar Solicitors
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellants are a family group. The first two appellants are wife and husband, and they are the parents of the third appellant. They appeal, with permission, against the decision and reasons statement of FtT Judges Chohan and Boylan-Kemp (the panel), promulgated on 2 May 2017.

2. After considering all the written arguments and hearing the submissions of Mr Richardson and Mr Melvin, I indicated at the end of the hearing that I found no material legal error in the panel's decision. I gave brief reasons at that time, but reserved my full reasons, which I now give.
3. The first issue was whether the panel erred by considering the appeal under the new appeal regime (that is the regime introduced by s.19 of the Immigration Act 2014 that came fully into effect from 6 April 2015) rather than under the old appeal regime. It is evident from paragraphs 3 to 6 that the panel relied on the new appeal regime. It is also obvious from the date of the refusal decision recorded in paragraph 2 (6 February 2015) that the new appeal regime did not apply.
4. This is an obvious legal error. The panel wrongly self-directed itself as to the legal framework in which the appeal was to be considered. The error is compounded because it is evident from the original grounds of appeal (settled on 23 February 2015) that the appellants did not rely on human rights grounds. As such, it is reasonable to infer that the panel did not look at the actual grounds of appeal, namely whether the decision was not in accordance with the immigration rules or otherwise not in accordance with the law.
5. The question arises as to whether this error was material. I do not find it is material, but to explain why I must look at the other grounds of appeal to the Upper Tribunal.
6. The second issue relates to whether the panel wrongly applied the burden of proof when deciding that discretion has been properly exercised when the respondent decided to curtail the leave granted to the appellants. The reasons for curtailment were that the appellants had recourse to child benefit and child tax credit during their period of leave. They were not entitled to public funds, and at the hearing below conceded that they were not so entitled.
7. The question arises as to who had the burden of proof in relation to paragraph 323 of the immigration rules. The respondent curtailed the first appellant's leave under paragraph 323(i) and the leave of the second and third appellants under paragraph 323(iii). The first appellant's leave was curtailed because she had failed to comply with one of the conditions attached to the grant of leave. The second and third appellants' leave was curtailed because they were dependent on the first appellant.
8. It is established law that where the respondent invokes the provisions under part 9 of the immigration rules, the burden of proof lies on the respondent (see *JC (Part 9 HC395, burden of proof) China* [2007] UKAIT 00027). But in this case the appellants admit to having breached one of the conditions attached to their leave. This admission means there was no need for the panel to make a finding as to whether the appellants had failed to comply with the public funds restriction on their leave. The admission meant the respondent had nothing to prove.
9. The next question relates to whether discretion should have been exercised in favour of the appellants given their explanation of innocently

claiming the public funds. This explanation was not before the decision-maker and therefore there was no exercise of discretion in favour of the appellant. The argument was presented to the panel, who at paragraph 10 decided the explanation was not credible. The question for me is whether the panel erred by shifting the burden of proof on to the appellants.

10. I have considered two interrelated factors. First, the exercise of discretion requires a holistic approach to the evidence and arguments and is not a question of finding facts per se. Second, it is the responsibility of a migrant subject to conditions to know what those conditions are and to stick to them. Ignorance is not a defence. These two factors would have to be considered when deciding whether to exercise discretion. To this extent, the findings at paragraph 10 are relevant to the exercise of discretion. These findings underpin the conclusion at paragraph 11 that discretion should not be exercised differently.
11. Although the panel approached the issue of discretion within an article 8 framework, it must be remembered that such a framework requires the assessment of proportionality. The exercise of discretion is an element that is part of such an assessment; judges must consider whether the personal circumstances are sufficient to depart from the strictures of the immigration rules. It is unsurprising therefore that the panel examined the issue of discretion even though they thought they did not have jurisdiction to look at the immigration rules directly.
12. I conclude, therefore, that the panel properly considered the issue of exercising discretion differently and gave reasons for deciding not to do so even though they relied on the wrong legal framework.
13. No other grounds have been pursued. In light of the findings I have made, although there is an obvious legal error in the panel's approach, it is immaterial to the outcome for the reasons I have given.

Decision

The appeal to the Upper Tribunal fails.

Although FtT Judges Chohan and Boylan-Kemp's decision contains an error on a point of law, it is immaterial to the outcome and therefore their decision is upheld.

Signed

Date

13 February 2018

Judge McCarthy
Deputy Judge of the Upper Tribunal