Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number:
UI-2021-000081 [HU/06647/2020]
UI-2021-000082 [HU/06649/2020]

THE IMMIGRATION ACTS

Decided on the papers

Decision & Reasons Promulgated
On 29th November 2022

Before

UPPER TRIBUNAL JUDGE SMITH
DEPUTY UPPER TRIBUNAL JUDGE ALIS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

-and-

(1) MRS SHAZIA WASIM
(2) MISS SABA WASIM

Respondents

DECISION AND REASONS

1. This is an appeal by the Secretary of State. For ease of reference, we refer to the parties as they were before the First-tier Tribunal. The Respondent appeals against the decision of First-tier Tribunal Judge Buckley promulgated on 17 May 2021 ("the Decision"). By the Decision, the Judge allowed the Appellants' appeals against the Respondent's decisions dated 23 July 2020, refusing their human rights claims (Article 8 ECHR). Those claims were made in the context of applications for indefinite leave to remain (ILR) in the UK.

2. The Appellants are Pakistani nationals. They are a mother and daughter. They came to the UK as the dependents of their husband/father (Mr Khan) in 2013. They were subsequently granted further leave to remain in 2017 as

the dependents of Mr Khan who was by then recognised as a Tier 1 migrant. Mr Khan was originally in the UK under the Highly Skilled Migrant Programme ("HSMP") route and his case was therefore affected by the litigation in that regard which culminated in the judgment of the Court of Appeal in R (on the application of HSMP Forum (UK) Ltd v Secretary of State for the Home Department [2009] EWHC 711 (Admin) ("HSMP Forum"). In short, the Appellants argued that the refusal to grant them ILR in 2020 was unlawful following the HSMP Forum case and the Respondent's guidance thereafter. Although Mr Khan was not granted ILR under the HSMP route, he was subsequently granted ILR as a Tier 1 migrant.

3. The Judge accepted the Appellants' arguments in relation to the HSMP Forum case and guidance. He found at [42] of the Decision that "the status of the Appellants as dependents should follow that of Mr Khan, the principal applicant". He also concluded at [44] of the Decision that "in accordance with the relevant case law …the decision made by the Respondent in relation to both Appellants is plainly unlawful, a breach of the guidance in HSMP Forum Limited and leave to remain should be granted." He determined that it was "unnecessary to make a determination in relation to the other issues" ([45]).

4. Of course, the only appeal before the Judge was on the ground that the Respondent's decisions breached the Appellants' human rights under Article 8 ECHR. This is not a judicial review. That was however recognised by the Judge at [46] of the Decision where he said that "having determined that the decision is unlawful, and refusal of both Appellants' claims is not proportionately justified" the appeals should be allowed.

5. The Respondent appealed the Decision on the ground that the Judge had misdirected himself in law by allowing the appeals on the basis of the guidance following HSMP Forum and failing to give adequate reasons for finding that the guidance was not followed. Reference is made to the fact that the Appellants were last granted leave as Tier 1 dependents and not as dependents under the HSMP guidance. It is asserted that the Appellants could have had no legitimate expectation that they would be recognised as dependents under the HSMP route once they had been granted a right to remain as Tier 1 dependents.

6. Permission to appeal was refused by First-tier Tribunal Judge Feeney on 12 July 2021 but granted by Upper Tribunal Judge Mandalia on 11 January 2022 in the following terms so far as relevant:

> "… 2. It is at least arguable that the Judge erred in allowing the appeal solely on the basis of the guidance set out in HSMP Forum (UK) Ltd v SSHD [2009] EWHC 711. The only ground of appeal available to the appellants was that the respondent's decisions were unlawful under s6 of the Human Rights Act 1998. The judgment of the Supreme Court in Ayarko v SSHD [2017] UKSC 11 confirms that the fact that the immigration rules cannot be met, does not absolve decision makers from carrying out a full merits-based assessment outside the rules under Article 8, where the ultimate issue is whether a fair balance has been struck between the individual and public interest, giving due weight to the provisions of the rules. By limiting the consideration of the appeal to whether there had been

> a breach of guidance or some 'legitimate expectation', the Judge arguably failed to carry out the merits-based assessment required or failed to adequately reason why the removal of the appellants is not proportionate."

7. The appeals were listed before us on Monday 10 October 2022 to determine whether the Decision contained an error of law and, if so, what course of action should follow. However, by email timed at 1803 hours on Friday 7 October 2022, Mr Alain Tan, Senior Home Office Presenting Officer, wrote to the Tribunal copied to the Appellants' representatives in the following terms:

> "The SSHD formally gives notice that she no longer seeks to rely on the grounds lodged in the application for permission to appeal, and no longer opposes the First-tier Tribunal's decision to allow the appeal."

8. We were not provided with any reason for this concession. It may be that the more appropriate course would have been a formal notice of withdrawal of the Respondent's case. It may be that this is what Mr Tan intended. Be that as it may and in light of the timing of the email and that the hearing did not for that reason take place on 10 October, we have decided that it is more appropriate to issue a short decision accepting the Respondent's concession, and indicating that it is no longer contended by the Respondent that there is an error of law in the Decision with the consequence that the Appellants' appeals remain allowed.

9. We emphasise as we have above that, on our reading of the Decision, Judge Buckley allowed the appeals on the only basis he could, namely that the Respondent's decisions refusing the Appellants' human rights claims were unlawful as contrary to section 6 Human Rights Act 1998 under Article 8 ECHR. It is of course a matter for the Respondent thereafter how she gives recognition to the allowing of the appeals on that basis. There is no longer any power for a Judge to give a direction for the Respondent to implement an appeal decision in any particular way or on any particular basis although of course the findings made (unchallenged as they now are) will be relevant in that regard.

CONCLUSION

10. The Respondent no longer contends that there is any error of law in the Decision. We accept that concession. Accordingly, we uphold the Decision with the consequence that the appeals remain allowed.

DECISION

The Decision of First-tier Tribunal Judge Buckley promulgated on 17 May 2021 does not involve the making of an error on a point of law. We therefore uphold the Decision with the consequence that the Appellants' appeals remain allowed.

Signed: L K Smith

Upper Tribunal Judge Smith Dated: 24 October 2022