Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/25195/2013,
IA/32799/2013
IA/32800/2013
IA/32801/2013

THE IMMIGRATION ACTS

Heard at Field House
On 14 February 2014

Promulgated on
On 13 March 2014

Before

THE HON. MR JUSTICE R W JAY
UPPER TRIBUNAL JUDGE RINTOUL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

and

PRITHIVEESING GOPALA (1)
SHARMILA GOPALA (2)
NIVERDITE GOPALA (3)
KAPIL GOPALA (4)

Claimants

Representation:

For the Respondent: Ms A Holmes, Senior Home Office Presenting Officer
For the Respondent: Mr D Seddon, Counsel, instructed by Farani Javid Taylor Solicitors

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DETERMINATION AND REASONS

1. The Secretary of State appeals with permission against the determination of First-tier Tribunal Judge Lagunju promulgated on 3 December 2013 in which she allowed the appeals of Mr Prithiveesing Gopala, Mrs Sharmila Gopala, Miss Nivedeita Gopala and Kapil Gopalad ("the claimants") against the decisions made on 3 June 2013 to refuse to grant them leave to remain on human rights grounds.

2. The first claimant was born on 5 May 1964, and the second claimant was born on 15 May 1972. They are married and are the parents of the third and fourth claimants born on 25 August 1996 and 13 July 1999 respectively. All of them are citizens of Mauritius. The first claimant arrived in the United Kingdom on 27 August 2005 and was granted leave to enter as a visitor. He applied for further leave to remain as a student on 17 February 2006, but that application was refused on 13 March 2006. On 23 November 2006, the second to fourth claimants entered the United Kingdom to join him. The claimants have remained in the United Kingdom since.

3. On 31 March 2010 an application was made for further leave to remain on human rights grounds. That application was refused on 28 January 2011. Further representations were made, but the decision was maintained and removal directions were made. The subsequent appeal to the First-tier tribunal was dismissed on 30 April 2012. There was no onward appeal.

4. On 7 August 2012, a further request that the matter be reconsidered was made. It is the claimant's case that the children have attended school, have become accustomed to life here, and that, given they have seven years of their life here at a period of central importance to their development and the ties they have developed to this country, that it would not be reasonable nor in their best interests to require them to return to Mauritius. It is also argued that their parents should in consequence, and as a result of the ties they have developed to this country, also be permitted to remain.

5. The respondent treated the letter of 7 August 2012 as an application for further leave to remain, and on 3 June 2013, refused it. She considered that:

    (i) the first and second claimants were not entitled to leave to remain as partners (E-LTRP) as both are citizens of Mauritius and neither have leave to remain;

    (ii) the first and second claimants were not entitled to leave to remain as parents (E-LTRPT and EX. 1) as their children were not British Citizens and had not been living in the United Kingdom continuously for the seven years preceding the date of application, or preceding the decision.

    (iii) none of the claimants met the requirements of paragraph 276 ADE of the immigration rules;

(iv) Although time had passed since the determination of their appeal in 2012, the removal of the claimants would be proportionate, even given the interference with the private lives of all the claimants, it being noted that they had all remained here unlawfully; that the first claimant had worked unlawfully and appeared not to have paid tax or NI, and, had taken advantage of state-funded education for his children;

(v) there were no exceptional circumstances such that removal of the claimants was no longer appropriate.

6. The claimants appealed against these decisions, electing not to have an oral hearing, but submitting a bundle of witness statements and supporting documents of 339 pages in length. In accordance with normal practice within the First-tier Tribunal, on 2 October 2013 all parties were notified that the appellant had requested that the appeal be decided without a hearing. It is not suggested that the respondent was unaware of or sought to object to this proposed course of action.

7. The appeals then came before First-tier Tribunal Judge Lagunju who allowed the appeals under the immigration rules, and on Human Rights Grounds, finding that:

(i) the second claimant did not meet the requirements of E-LTRP of appendix FM and EX 1.1 did not apply [11];

(ii) at the date of application, neither of the third or fourth claimants had achieved 7 years continuous residence [10] and that therefore neither the first or second claimants could meet the requirements of E-LTRPT;

(iii) the first claimant did not meet the requirements of paragraph 276 ADE of the immigration rules [12];

(iv) as at the date of hearing, the third and fourth claimants had both been in the United Kingdom for seven years [13] and have established significant private lives here; and, that it was not reasonable to expect them to leave the UK [17], given the need to promote the welfare and best interests of a child who has lived here for 7 years;

(v) as the third and fourth claimants meet the requirements of paragraph 276 ADE of the immigration rules [13], they should remain in the UK with their parents;

(vi) the claimants have established a significant private lives in the UK, and that their removal would be a disproportionate interference with their rights to respect for that [18];

8. The respondent sought permission to appeal against that decision on the grounds that:

(i) Decisions pursuant to the lawful operation of immigration control will be proportionate in all save a small minority of exceptional cases, identifiable on a case by case basis, as confirmed by **MF (Nigeria)** [2013] EWCA Civ 1192 and **R (Nagre v SSHD** [2013] EWHC 720 [1];

(ii) The judge had failed to identify any exceptional circumstances which would result in an unjustifiably harsh outcome, given that they cannot meet the immigration rules [1 e)], there being no disruption to family life [1.b)], the children not being denied the opportunity to grow up in their country of nationality [1 d)];

9. On 20 December 2013, Designated First-tier Tribunal Judge Appleyard granted permission to appeal to the Upper Tribunal.

The hearing on 12 February 2014

10. The grounds of appeal to the Upper Tribunal challenge only the judge's finding that the appeal was to be allowed on human rights grounds; there is no challenge to her allowing the appeal under the immigration rules.

11. Paragraph 276 ADE of the immigration rules provides, so far as is relevant,

> 276ADE (1). The requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that *at the date of application* [emphasis added], the applicant:
>
> …
>
> (iv) is under the age of 18 years and has lived continuously in the UK for at least 7 years (discounting any period of imprisonment) and it would not be reasonable to expect the applicant to leave the UK; or …

12. We drew the attention of both representatives to the judge's finding that the third and fourth claimants met the requirements of paragraph 276 ADE proceeds from a finding that as at the date of determining the appeal [13] they had accrued 7 year's residence, although she had noted [10] that as at the date of application, they had not done so. The finding that the requirements of the immigration rules were met was thus based on an error of law.

13. Ms Holmes sought permission to amend the grounds of appeal to reflect this. Mr Seddon did not resist this application, despite it being raised only at the last minute, accepting that the error we had identified was readily apparent. We therefore permitted the grounds of appeal to be amended to include the following ground:

> That the judge erred in failing properly to apply the provisions of 276 ADE. Although she had directed herself correctly regarding 276 ADE at paragraphs [9] and [10], she misdirected herself at paragraphs [12][,[16] of the decision.

14. We find that ground of appeal is made out. On a proper application of paragraph 276 ADE the third and fourth claimant could not come within that provision as they had

not accrued 7 years' residence before the date of application; they had arrived here on 25 November 2006 and the application was made on 7 August 2013. The appeals could not therefore have been allowed under the immigration rules.

15. Ms Holmes sought to persuade us that this error was material as the judge should not have allowed the appeal on human rights grounds. She submitted that the judge had, in effect, not attached proper weight to the public interest, and had failed to identify what circumstances applied to the claimants such that exceptionally, they succeeded under article 8 although not meeting the requirements of the rules.

16. Mr Seddon, relying on his skeleton argument, submitted that as the judge had directed herself in line with **Azimi-Moayed and others** [2013] UKUT 00197 (IAC) [16] and as to the need to balance public interest considerations, including the maintenance of immigration control [17], it could not properly be argued that she had misdirected herself as to the law, and that her conclusions with respect to the children's best interests were a sufficient basis on which she was entitled to allow the appeal.

17. It is established by **Gulshan** and **Nagre** that if it is necessary for a judge to go on to consider article 8, the fact that the rules have not been met is a factor to which significant weight must be attached when assessing proportionality; we do not understand Mr Seddon to be submitting to the contrary.

18. In this case the judge proceeded on the basis that the requirements of the rules had been met. We are therefore drawn inevitably to the conclusion that in assessing article 8, the judge did not attach weight to the claimants' failure to meet the requirements of the rules, and on that basis, she erred in law.

19. While Mr Seddon submitted that the decision to allow the appeal on human rights grounds was one open to the judge, and that the challenge of the secretary of state is simply a "reasons" challenge, we are not persuaded that is so. The judge's error is material as the her analysis of proportionality was inevitably flawed, given that she cannot have attached weight to the inability of the claimants to meet the requirements of the rules. Accordingly, we consider that the decision of the First-tier Tribunal is to be remade.

20. We are satisfied that as the claimants will now be giving oral evidence, it will be necessary to undertake a further, judicial-fact finding of all relevant matters in order for the decision in the appeal to be re-made. Having regard to the overriding objective in rule 2 and Senior President of the Tribunals' Practice Statement of 25th September 2012, we consider that it is appropriate to remit the case to the First-tier Tribunal for determination of the claimant's appeal.

Directions

1. The determination of the First-tier Tribunal is set aside.

2. The appeal is remitted to the First-tier Tribunal for a fresh determination on all the issues.

Signed Date: 11 March 2014

Upper Tribunal Judge Rintoul