Upper Tribunal

(Immigration and Asylum Chamber)

Appeal Number

IA/48395/2013

IA/48396/2013

IA/48397/2013

IA/48398/2013

THE IMMIGRATION ACTS

Heard at Field House

On 14 May 2014

Determination promulgated

On 9 June 2014

Before

Deputy Judge of the Upper Tribunal I. A. Lewis

Between

Secretary of State for the Home Department

Appellant

and

(1) Shameem Begum
(2) Abdul Kadar Shahul Hameed
(3) Iqra Tanzeal Shahul
(4) Arshad Muhammad Shahul

(Anonymity directions not made)

Respondents

Representation

For the Appellant:	Mr. S. Whitwell, Home Office Presenting Officer.
For the Respondent:	Ms. D. Qureshi of Counsel instructed by Bukhari Chambers Solicitors.

DETERMINATION AND REASONS

1. These are linked appeals against the decisions of First-tier Tribunal Judge Napthine promulgated on 18 March 2014, allowing the appeals of Ms Shameem Begum, his husband and children against the Secretary of State's decisions dated 29 October 2013 to refuse leave to remain and to remove them from the UK.

2. Although in the proceedings before me the Secretary of State is the appellant, and Ms Begum and her family are the respondents, for the sake of consistency with the proceedings before the First-tier Tribunal I shall hereafter refer to Ms Begum and her family as the Appellants and the Secretary of State as the Respondent.

Background

3. The Appellants are a family: the First and Second Appellants are married; the Third and Fourth Appellants are their daughter and son, born on 16 February 2004 and 27 November 2011 respectively. They are citizens of India.

4. The First and Second Appellants entered the UK on 9 November 2002 with visit visas valid until 12 December 2002. They overstayed. They made no attempt to regularise their immigration position until an application was made on 5 August 2011 for leave to remain pleading Article 8 of the ECHR. The Third and Fourth Appellants were born in the UK.

5. The application of 5 August 2011 (which pre-dated the birth of the Fourth Appellant) was refused. A further application was made and refused on 15 May 2013. Judicial review proceedings followed, which were settled upon the Respondent undertaking to reconsider the application in light of section 55 of the Borders, Citizenship and Immigration Act 2009 and the changes to the Immigration Rules made on 9 July 2012. This culminated in the decisions set out in a 'reasons for refusal' letter ('RFRL') dated 29 October 2013, and the removal decisions that are the subject of the proceedings herein.

6. The Appellants appealed to the IAC.

7. The First-tier Tribunal Judge allowed the appeals for reasons set out in his determination. Essentially, he found that the Third Appellant met the requirements of paragraph 276ADE of the Immigration Rules (paragraphs 24–32), and that it would be a disproportionate interference with the Article 8 rights of the First, Second, and Fourth Appellants if they were to be removed from the UK in consequence of the Respondent's decisions (paragraphs 33–42).

8. The Respondent sought permission to appeal to the Upper Tribunal which was granted on 7 April 2014 by First-tier Tribunal Judge Robertson.

<u>Change of Circumstance</u>

9. It was a feature of the Third Appellants case that at the date of the hearing before the First-tier Tribunal she had an outstanding application for British citizenship, pursuant to section 1(4) of the British Nationality Act 1981. The First-tier Tribunal Judge referred to this at paragraph 32 of the determination. Although the Respondent did not seek to make any issue in this regard in the grounds in support of the application for permission to appeal, Judge Robertson in granting permission observed "*as A3's application for British citizenship is not in fact confirmation that citizenship will be granted, it is arguable that the Judge has not specifically stated why it would be unreasonable for A3 to relocate to India with her family unit….*".

10. The Appellants' solicitors have written to the Upper Tribunal (letter dated 22 April 2014) confirming that the Third Appellant has now been granted British citizenship and enclosing a Certificate of Registration dated 18 March 2014 (the date of promulgation of the determination).

11. In recognition of this circumstance Mr Whitwell indicated that he had sought instructions as to the possibility of reaching "*a pragmatic solution*" to the appeal. However, he was unable to obtain any such instructions and in the circumstances indicated that he wished to proceed with the challenge to the First-tier Tribunal's decisions.

12. For the avoidance of any doubt, in considering the issue of error of law I have proceeded on the basis that the Third Appellant had not at the date of the hearing before the First-tier Tribunal received confirmation of her citizenship. I discuss this matter in more detail below.

Consideration of the Issues

13. The principal basis of the Respondent's challenge in respect of the Third Appellant is that the First-tier Tribunal Judge misdirected himself by failing to have regard to the 'reasonableness test' under paragraph 276ADE(iv). Further in this context it was pleaded that the Judge had "*not given any consideration to the Third Appellant's position if she were relocated to India with the remainder of the family unit*".

14. The substance of the challenge to the decision in respect of the Third Appellant was repeated by way of challenge to the decisions of the other Appellants, it being pleaded that inadequate reasons had been given as to why the family unit could not relocate to India.

15. Mr Whitwell relied upon, and amplified, these Grounds.

16. The Judge considered the position of the Third Appellant first. This was appropriate given that the best interests of children are a primary consideration.

17. The Judge appropriately identified that the Respondent had not given consideration to the Third Appellant's case under paragraph 276ADE(iv) as a minor who had lived continuously in the UK for at least 7 years. However, at paragraph 25 the Judge sets out an incomplete version of paragraph 276ADE(iv) leaving out the wording added to the Rule by an amendment made on 13 December 2012. The Judge omitted the 'reasonableness test': "*and it would not be reasonable to expect the applicant to leave the UK*".

18. On the face of it this appears to be a misdirection in law.

19. Ms Qureshi argues, however, that the Judge nonetheless must have had regard to reasonableness because otherwise the matters set out at paragraphs 28–32 are otiose. In the alternative, by

reference to the matters set out at paragraphs 28-32, Ms Qureshi submits that the Judge would have in any event reached the same conclusion, and so any error is immaterial.

20. I note the following:

(i) If the Judge was confining himself to an interpretation of paragraph 276ADE(iv) that only relied upon fulfilling the specified period of residence, he could have concluded his considerations at the end of paragraph 26.

(ii) Instead the Judge concludes at paragraph 27, not that the Appellant met the requirements of the Rule, but that the Respondent's decision was wrong in law because of the failure "*to consider the Third Appellant's rights under paragraph 276ADE*".

(iii) In such circumstances, contextually paragraphs 24–27 may be read as addressing the first limb of paragraph 276ADE(iv), which is a necessary premise, before going on to consider the second limb of reasonableness.

(iv) The considerations at paragraphs 28, 29, 30, and 32 are not directly relevant to the first limb, but are relevant matters in considering reasonableness.

(v) The Judge directed himself to the case of **<u>Azimi-Moayed</u> [2013] UKUT 00197 (IAC)** (see paragraph 29). **<u>Azimi-Moayed</u>** is exactly concerned with the reasonableness test – as indeed is indicated by Judge Napthine's use of the word "*undesirable*". If there was no reasonableness test, and the ambit of paragraph 276ADE(iv) was limited to a consideration of the period of time spent in the UK, there would be no need to consider issues of desirability/undesirability.

21. It is unfortunate that the Judge was not more careful and clearer in properly identifying the full terms of paragraph 276ADE(iv), and was not more precise in identifying that he was considering the reasonableness test. Nonetheless, in my judgement, I am persuaded that that is, in substance, what he did.

22. As regards the specifics of paragraph 32, and with the observations of Judge Robertson in mind, I note that there is no discretionary element to section 1(4) of the British Nationality Act 1981. A person born in the UK who does not otherwise become a British citizen by virtue of that birth "*shall be entitled*" on

application for registration made after attaining the age of 10, to be registered as a British citizen, providing they meet the residential requirements set out in the subsection. Judge Napthine found as a fact that the Appellant did meet those requirements, and I do not understand that to have ever been in issue. Whilst Judge Robertson may have been accurate in stating that an application was not confirmation, on the facts as found by Judge Napthine the Appellant was nonetheless entitled to British citizenship.

23. In my judgement this is significant because it is in effect a particularly significant element in answering the reasonableness test. Save in very exceptional circumstances it cannot be said to be reasonable to remove an individual who is entitled to British citizenship and is merely awaiting the formal confirmation of such, given that a British citizen is not subject to immigration control and cannot be removed.

24. This is particularly significant in the context of a child whose parents have a poor immigration history – as here. I make the following observations:

(i) As is evident from its heading and its opening sentence – paragraph 276ADE is concerned with private life, not family life (which is covered by Appendix FM). In this context it is not apparent that the concept of reasonableness is any different from the concept of proportionality.

(ii) The first limb of 276ADE(iv), and in particular the qualifying period of seven years, is a continuation of earlier policies (eg DP5/96), and reflects jurisprudence pursuant to those policies – and again most recently reflected in **Azimi-Moayed**. Indeed the different considerations that apply to children are expressly recognised in that the Rules preserve a distinction by requiring an adult generally to show longer periods of living in the UK. The first limb of 276ADE(iv) gives effect to the widely recognised and understood principle that generally a child who has been continuously living in the UK for a period of seven years will have established ties; the second limb – the reasonableness test – is essentially a recognition that as with any Article 8 assessment - a proportionality analysis is required i.e. there may be countervailing features.

(iii) In my judgement the fact that a child applicant may be returned to the country of their parents' origin or nationality in the company of their parents is not such a countervailing feature in itself. The fact of return in the company of parents does not diminish the extent of the interference with the child’s own private life (as distinct from family life): the level of disruption to the ties that the child has developed in the UK over the preceding seven years or more will be the same irrespective of the child being in the company of a parent. It is those ties outside the family – the ties of private life – that paragraph 276ADE(iv) seeks to protect pursuant to the State’s obligation under Article 8.

(iv) However, that is not to say that the conduct of a parent or parents may not be a relevant feature. It has always been the case that the policies that preceded 276ADE(iv) sought to strike a balance between safeguarding the interests of children who have established close connections with the UK over a significant period of time, and the need to ensure that no incentive is provided to parents to seek to circumvent and abuse the system of immigration control. As such whilst significant weight was to be accorded to a period of residence of seven years – to an extent that such a period of residence would mean that enforcement action would not normally proceed - it was a common theme that the presence of countervailing factors meant that the ‘normal’ or ‘usual’ expectation would not be followed. Thus, where a parent had an appalling immigration history it might be said that enforcement action should be taken against a parent, notwithstanding that this would involve the removal of a child with 7 years residence and the disruption of the child’s ties to the UK.

(v) Necessarily a stronger countervailing factor or factors will be requisite where a child has been resident for 10 years rather than 7 years.

(vi) On the particular facts of this case the Judge recognised the countervailing factor of the parents’ poor immigration history at paragraph 41. However, he also noted that there were no aggravating or egregious circumstances.

25. This in effect means that even if Judge Napthine had not expressly turned his mind to the reasonableness test, his observations and conclusions at paragraphs 32 and 41 indicate that he would only have come to a favourable decision in respect of the Third Appellant under paragraph 276ADE(iv).

26. As regards the challenge to the decisions in respect of the other Appellants under Article 8 of the ECHR, this is essentially pleaded as a ‘reasons’ challenge, and relies upon the challenge in respect of the Third Appellant – which I have rejected.

27. Although not formulated this way by the Respondent, for my own part I found the approach adopted by the Judge as indicated by paragraphs 40 and 42 troubling. The Judge appears to have approached the parents' cases on the basis that if they were not allowed to remain in the UK, there would be a family separation. This is a wholly unrealistic hypothesis and not founded on evidence. Plainly, in the absence of any evidence to the contrary, the likelihood would be that if the parents were not permitted to stay in the UK the whole family would leave together notwithstanding that one of the children was able to establish a basis to remain (whether through 276ADE or her impending grant of citizenship). The parents' case to remain is not grounded on avoiding splitting the family, but on the basis that if they themselves are not allowed to remain the Third Appellant would have to leave the UK with them, and that would involve a disproportionate interference with her private life established in the UK - as recognised by the finding that she met the requirements of 276ADE(iv).

28. The removal of the parents with the concomitant constructive removal of the Third Appellant would be an interference with the private life of the Third Appellant. It is clear – pursuant to paragraph 41 - that the Judge did not consider there existed such significant countervailing factors to make this justifiable. On this basis it seems to me that had the Judge posed himself the right question it is inevitable that he would have concluded that removal of the parents would have involved a disproportionate interference with the Article 8 rights of the Third Appellant. Pursuant to the principle in **Beoku-Betts** this renders any decision to remove the parents to be contrary to the UK's obligations under the ECHR. The position of the Fourth Appellant – still very much an infant - inevitably in turn follows that of his parents.

29. Accordingly, in as much as I consider there may have been an error of approach in this regard, it seems to me that it was immaterial because the outcome would have been the same in any event.

30. In all of the circumstances I reject the Respondent's challenge to the decisions of the First-tier Tribunal. There was no material error of law and the determination of First-tier Tribunal Judge Napthine stands.

Decisions

31. The First-tier Tribunal Judge made no material error of law, and his decisions stand. The appeals remain allowed.

Deputy Judge of the Upper Tribunal I. A. Lewis 6 June 2013