Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/47886/2013
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IA/47890/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision Promulgated**
On 26 January 2015	**On 02 February 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE BIRRELL

Between

ANTHONY DAVID IVIENAGBOR
KEHINDE RAFAT IVIENAGBOR
AYOMIDE GIDEON IVIENAGBOR
ANJOLAOLUWA IVIENAGBOR
OMOTENIOLA ESTHER IVIENAGBOR
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M Izebizua of Leslie Charles Solicitors
For the Respondent: Mr A Mc Vitie Senior Home Office Presenting Officer

DECISION AND REASONS

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Introduction

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. The Secretary of State for the Home Department brings this appeal but in order to avoid confusion the parties are referred to as they were in the First-tier Tribunal. This is an appeal by the Secretary of State against a decision of First-tier Tribunal Judge D Harris promulgated on 2 May 2014 which dismissed the appeal under the Immigration Rules but allowed the Appellants appeal under Article 8 .

Background

3. The Appellants are a husband and wife and their three children. The first Appellant arrived in the United Kingdom on 13 October 2007 with Entry Clearance as a highly skilled migrant. The leave was extended until 24 December 2012. On 17 October 2012 an application was made for indefinite leave to remain and this was refused in July 2013. The decision was remitted back to the Respondent to consider s 55 of the Borders, Citizenship and Immigration Act 2009 and the decision was maintained and a refusal notice was issued on 23 October 2013. The application was considered by reference to paragraph 245 CD of the Immigration Rules and refused the Appellants could not demonstrate a five year period of continuous leave because there was a gap in the Appellants lawful leave between September 2009 and December 2009 when an application had been made and rejected as invalid as payment of the fees had been declined by the Appellants bank. The application was also considered under paragraph 276ADE of the Immigration Rules and the Appellants were found not to meet those requirements.

The Judge's Decision

4. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge D Harris ("the Judge") allowed the appeal under Article 8 having accepted that they could not meet the requirements of the rules. The Judge found that the first and second Appellants were liable and credible witnesses; he accepted that there was a gap in their lawful residence and therefore they could not meet the requirements of the Rules; the Home Office Presenting Officer conceded that it was appropriate to look at the Appellants case under Article 8 as this was one of the grounds of appeal and the Judge assessed the circumstances of the whole family and concluded that theirs was one of the rare cases where the family's removal was not proportionate and allowed the appeal.

5. Grounds of appeal were lodged arguing that the Judge had materially misdirected himself in finding that the circumstances of the gap in their lawful residence amounted to a near miss argument and that his assessment under Article 8 was flawed. On 20 may 2014 Designated First-tier Tribunal Judge French gave permission to appeal stating both grounds were arguable.

6. At the hearing I heard submissions from Mr Mc Vitie on behalf of the Respondent that he relied on the grounds of appeal.

7. On behalf of the Appellants Mr Izebizua relied on the bundle that was before the First-tier Judge.

Finding on Material Error

8. Having heard those submissions I reached the conclusion that the Tribunal made no material errors of law.

9. In relation to the first ground I am satisfied that the suggestion that the Judge misdirected himself and accepted what amounts to a near miss argument mischaracterises what the Judge said in his decision. As part of the overall assessment of the case the Judge heard evidence as to how the brief gap occurred in the period of lawful residence. Evidence was given that an application had been rejected due to the non clearance of a £50 application fee out of a £1750 total payment. The Respondent accepted there was nothing to suggest that the first Appellant did not have sufficient funds in his bank at the time of the application. A further application had been rejected because the children had provided thumbprints instead of signatures.

10. The Judge acknowledged at paragraph 5 that the time for appealing those decisions had long passed. He properly directed himself at paragraph 24 of the decision that the Rules 'do not accommodate a "near miss scenario". However the factual background that underpinned the Appellants life in the United Kingdom which included their explanation as to how the gap in their lawful residence arose was simply one of a number of factors that the Judge was entitled to take into account in his assessment of the proportionality of the decsion .I am satisfied that this approach was one that was open to the Judge: the Supreme Court in Patel and other v Secretary of State for the Home Department [2013] UKSC 72 while in essence finding that there is no near miss argument as such also held that all facts have to be taken into account and considered in context.

11. In relation to the challenge to the Judge's Article 8 assessment this seems to me to be simply a disagreement with the weight the Judge gave to the various factors underpinning their claim which the Judge set out in careful detail at paragraphs 22-26 of his decision. The Judge also took into account the relevant caselaw (paragraph 25). There is no suggestion that the decision was irrational or perverse or that any factor has been overlooked but the grounds simply disagree with the weight the Judge gave to the various pieces of evidence.

12. I am therefore satisfied that the Judge's determination when read as a whole set out findings that were sustainable and sufficiently detailed and based on cogent reasoning.

CONCLUSION

13. **I therefore found that no errors of law have been established and that the Judge's determination should stand.**

DECISION

14. **The appeal is dismissed.**

Signed Date **26 January 2015**

Deputy Upper Tribunal Judge Birrell