



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/08496/2014
IA/08497/2014
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IA/08499/2014

THE IMMIGRATION ACTS

Heard at Manchester
On 24th July 2018

Decision & Reasons Promulgated
On 16th August 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

MR FAKHIR IKRAM (FIRST APPELLANT)
MRS SAIMA MUSHTAQ (SECOND APPELLANT)
H F (A MINOR) (THIRD APPELLANT)
E F (A MINOR) (FOURTH APPELLANT)
(NO ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr G Brown of Counsel
For the Respondent: Mr Diwnycz, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellants are citizens of Pakistan. The First Appellant was born on 16th December 1972. The Second Appellant is his wife and the Third and Fourth Appellants his minor children. On 5th April 2013 the First Appellant made a combined application

for leave to remain in the United Kingdom as a Tier 1 (Entrepreneur) Migrant under the points-based system and for a biometric residence card. He had previously been granted leave to enter the United Kingdom as a Tier 4 (General) Student on 10th March 2011 and his application was made in time. The application was refused by the Secretary of State by notice dated 30th January 2014.

2. The Appellant appealed. The Appellant's appeal did not get heard until August 2017 when on the papers it was determined by Judge of the First-tier Tribunal Ross at Taylor House. Judge Ross noted that the reason for refusal had been that the Respondent was not satisfied that the Appellant was genuinely intending and able to take over or become a director of one or more businesses within the next six months or that he genuinely intended to invest the money referred to in the application in his business. In the Appellant's application he had submitted a letter from a firm called Profectus Venture Capital offering to invest £5,000 in the business. The proposal to utilise such funds were addressed by the First-tier Tribunal Judge when considering the Notice of Refusal at paragraph 4.
3. The delay in the hearing of the appeal was subject to the appeals being considered by the Upper Tribunal in the case of *Arshad and Others (Tier 1 applicants – funding availability) [2016] UKUT 0034*. The First-tier Tribunal Judge noticed that the Tribunal had given notice of its intention to decide the Appellant's appeal without a hearing pursuant to Rule 25(1)(g) of the Procedure Rules. Judge Ross noted the Tribunal must not decide the appeal without a hearing unless it has provided the parties with a notice of its intention to do so and an opportunity to make written representations whether there should be a hearing.
4. Following the Notice of Refusal, Grounds of Appeal were lodged at the Upper Tribunal. Those grounds contended that the Appellant had not been given the opportunity of being able to put forward oral argument as to why removal might give rise to a breach of the Appellant's protected Article 8 private and family life rights. Permission to appeal was refused by First-tier Tribunal Judge Grimmett on 15th February 2018. Renewed Grounds of Appeal were lodged to the Upper Tribunal on 12th March 2018.
5. On 31st May 2018 Upper Tribunal Judge Reeds granted permission to appeal. Judge Reeds considered that the thrust of the grounds related to the issue of procedural irregularity giving rise to arguable unfairness. In this case it was asserted that following the directions sent out on 9th September 2015 and repeated on 11th August 2016, the solicitors sent a letter dated 8th September 2016 and a further letter dated 24th October 2016 making written representations for the appeals to be heard by way of an oral hearing.
6. Judge Reeds considered that the letter of 8th September 2016 was on the court file but not the letter of 24th October, but that it was arguable that the decision made on 27th July and acted upon by the First-tier Tribunal Judge to hear the case on the papers did not take into account the written representations and this affected the fairness of the

proceedings as the judge proceeded without hearing evidence from the Appellants. In granting permission to appeal Judge Reeds considered that the Appellants' representatives would be expected to provide evidence that the letter was sent to the Tribunal and it would be for them to demonstrate that an oral hearing would have led to a different outcome. She noted that whilst the grounds refer to the children as "qualifying children" according to the date of entry in 2011 as the date of hearing was in 2017, they would have been in the UK for six years.

7. It is on that basis that the appeal comes before me to determine whether or not there is a material error of law in the decision of the First-tier Tribunal Judge. The Appellants appear by their instructed Counsel, Mr Brown. Mr Brown is familiar with this matter in that he is the author of the Grounds of Appeal. The Secretary of State appears by her Home Office Presenting Officer Mr Diwnycz.

Submissions/Discussion

8. Mr Brown indicates that this was a case where the Appellants had sought an oral hearing on appeal from the First-tier Tribunal Judge. He refers me to the correspondence requesting that appeal. He appreciates that Judge Reeds appears to have been unable to find on the court file a copy of the letter of 24th October 2016. I am referred to the bundle provided for today's hearing. This is of course an updated bundle. I am unaware as to whether or not it contains documents that were exclusively before the First-tier Tribunal or whether it updates that bundle. However, it is clear that at documents A54 and A55 copies of that letter are attached. The letter makes it clear that the Appellants' instructed solicitors request an oral hearing. That letter is also faxed to the court. It is headed as being sent by special delivery and by fax.
9. Mr Diwnycz queries the fax number as being one that he has not heard of but accepts that there is a letter in the file.
10. Mr Brown goes on to submit that it is appropriate for there to be an oral hearing when the rights of children are involved and that this case is one that will turn very much on the evidence that is produced. I anticipate the basis of the Appellant's case may well vary somewhat in that whilst this case was put originally on the basis that the Appellant wished to remain in the country as an entrepreneur migrant, the rights of two young children who have been in this country now for a considerable number of years also now needs to be considered.

The Law

11. Areas of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial considerations, reaching irrational conclusions on fact or evaluation or to give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.

12. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue of argument. Disagreement with an Immigration Judge's factual conclusion, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence which was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because an Immigration Judge concludes that the story is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

Findings on Error of Law

13. It is clear that in October 2016 a request was made for an oral hearing. Whilst Judge Reeds indicated it is for the Appellant to show proof that the letter was written, I am of the view that his instructed solicitors can do no more than to produce a copy of the letter faxed, the fax report, and a hard copy of the original letter. Despite Mr Diwnycz's submission I do not consider the failure of the instructed solicitors to produce proof of service by way of a delivery note precludes me from drawing a conclusion that such a request was made.
14. The issues before the Tribunal were held up originally whilst this along with a number of cases awaited the decision in *Arshad*. Even now it has taken a considerable period of time for the matter thereafter to appear before the Upper Tribunal. There are issues here of young children who have lived in this country for the vast majority (if not the whole) of their lives. It is only a matter of fairness that the Appellant should be entitled to have his case heard. It is not a criticism of Judge Ross that appropriate documentation appears not to have been before him. On what was put to him he dealt with the matter on the papers. However it is clear that he may have come to a different decision had he had the benefit of oral testimony. In such circumstances the correct approach is to find that there is a material error of law in the decision of the First-tier Tribunal Judge, to set aside that decision and to remit the matter back to the First-tier Tribunal for re-hearing. Due to the delay there has been to the hearing of any initial appeal in this matter, I would recommend despite the substantial case load that is before the First-tier Tribunal that this matter be expedited.

Decision and Directions

1. The decision of the First-tier Tribunal contains a material error of law and is set aside. None of the findings of fact stand.

2. The matter is remitted to the First-tier Tribunal sitting at Manchester to be heard on the first available date 28 days hence with an ELH of two hours. The hearing is to be before any Judge of the First-tier Tribunal other than Judge D. Ross.
3. That there be leave to either party to file and serve an updated bundle of evidence upon which they seek to rely at least fourteen days prior to the restored hearing.
4. That so far as it is possible for the First-tier Tribunal it is ordered that the remittal hearing herein be expedited, and the matter be referred to the Designated Judge in Manchester to consider listing directions.
5. That an Urdu interpreter do attend the restored hearing.

No anonymity direction is made.

Signed

Date 15 August 2018

Deputy Upper Tribunal Judge D N Harris

**TO THE RESPONDENT
FEE AWARD**

No application is made for a fee award and none is made.

Signed

Date 15 August 2018

Deputy Upper Tribunal Judge D N Harris