Neutral Citation Number: [2016] EWCA Civ 552

Case No: C4/2015/0254

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)
DEPUTY JUDGES McCARTHY AND ROBERTSON
IA/04622/2014

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/06/2016

Before :

LORD JUSTICE ELIAS
LORD JUSTICE UNDERHILL
and
MR JUSTICE PETER JACKSON

Between :

ABDUL SALEEM KOORI & ORS	**Appellant**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
- -

Mr Zane Malik and **Mr Darryl Balroop** (instructed by **MLC Solicitors**) for the **Appellant**
Mr Andrew Sharland and **Ms Holly Stout** (instructed by the **Government Legal Department)** for the **Respondent**

Hearing date: 17 May 2016
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Judgment

Lord Justice Elias :

1. The five appellants in this appeal are the parents and three minor children of an Indian family. They applied for leave to remain in the UK on 27 September 2012 on the basis of the connections they had developed within the UK and the fact that the children had been resident in the UK for over seven years. The Secretary of State refused to grant leave to remain on 27 September 2013 exactly a year to the day after their application. That was not an appealable decision but judicial review proceedings were instituted to challenge it. That action was settled on the basis that the Secretary of State would make a fresh decision, which she did on 3 January 2014. She rejected their human rights claims and made an order for their removal. That was an appealable decision. There was an appeal to the First Tier Tribunal ("FTT") which was dismissed by Judge JS Pacey on 19 June 2014. Permission to appeal to the UpperTribunal ("the UT") was granted but the UT dismissed the appeal in a determination promulgated on 24 September 2014. We are now hearing the appeal from that decision.

Legislation

2. The relevant legislation in issue, and which was in force at the date of the Secretary of State's decision, is paragraph 276ADE of the Immigration Rules which is as follows:

> "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, the applicant:
>
> > (i) does not fall for refusal under any of the grounds in Section S-LTR 1.2 to S-LTR 2.3 and S-LTR.3.1 to S-LTR.4.4.in Appendix FM; and
> >
> > (ii) has made a valid application for leave to remain on the grounds of private life in the UK; and
> >
> > (iii) has lived continuously in the UK for at least 20 years (discounting any period of imprisonment); or
> >
> > (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
> >
> > (v) is aged 18 years or above and under 25 years and has spent at least half of his life living continuously in the UK (discounting any period of imprisonment); or
> >
> > (vi) subject to sub-paragraph (2), is aged 18 years or above, has lived continuously in the UK for less than 20 years (discounting any period of imprisonment) but there would be very significant obstacles to the applicant's integration into the

Sub-paragraph (iv) relates to applications made by minors whereas sub-paragraphs (iii), (v) and (vi) relate to applications made by adults. I will call the requirement in sub-paragraph (iv) that the applicant should have lived continuously in the UK for seven years "the seven year rule". It is important to note, and is highly material in this case, that the seven years must be calculated as at the date of the application and not the date of decision.

3. Another material feature of this case is that sub-paragraph (iv) changed with effect from the 13 December 2012 (which was after the applications for leave to remain had been made.) Until that time the phrase "and it would not be reasonable to require the applicant to leave the UK" (which I shall call "the reasonableness test") was not part of the rule. It only appears in the later amended version.

The background

4. The father of the family, the first appellant, came to the UK on 4 April 2003 with a visa exemption to work at the Consulate General of India. His family, which at that time was his wife and two children, followed him to the UK on 22 October 2005, also with visa exemptions. He left his post in December of that year and thereafter remained in the UK without leave. A third child was born in the UK on 1 June 2007.

5. Each member of the family applied under article 8 for leave to remain in the UK. The application did not suggest that the children satisfied the seven year rule. On the contrary, the original application said that they had lived in the UK "for almost seven years". The Secretary of State rejected the applications but following a pre-action protocol letter dated 2 December 2013, she agreed to reconsider the matter. Again, it is pertinent to note that although the pre-action letter stated that the two older children had been resident in the UK for over seven years, it did not suggest that para.276ADE was applicable. Somewhat confusingly, the letter said, as one of the complaints relating to the original decision, that the Secretary of State "has not applied the spirit of DP 396 to the facts of the case". DP 396 was the predecessor of paragraph 276ADE and was no longer in force when the letter was written. The reference to the "spirit" of the rule is a clear recognition that the rule was not strictly applicable. It suggests that since the applicants had almost reached seven years at the date of the application, and had done so by the date of the decision, the Secretary of State ought at least to have approached the matter with the seven year rule in mind.

6. Curiously, in the reconsideration decision dated 3 January 2014, the Secretary of State stated, in the context of considering paragraph 276ADE, that the two older children had been present for seven years. She went on to find, however, that it was reasonable to expect them to leave the UK. So she applied the later version of the paragraph 276ADE. It is now common ground that this was in fact the version which ought to have been applied.

7. It is part of the case advanced by Mr Malik, counsel for the appellants, that the Secretary of State had conceded that the seven year rule was satisfied. He says that she must have known that strictly it had not been, but was prepared to act as though it had. This was a conscious executive decision, by which she was bound, to treat the seven year rule as satisfied. It is always open to the Secretary of State to allow someone to stay outside the rules (see section 3(1) of the Immigration Act 1971) and this includes treating a conditional element of a rule as satisfied when in fact it is not.

8. I do not think that on the facts of this case it is a sustainable inference that the seven year rule requirement was deliberately waived. In my judgment it is clear from an earlier part of the decision that the Secretary of State had simply failed to take on board the fact that the relevant time for determining the seven year rule was the date of application and not the date of decision. She said this with respect to an identically worded provision in Paragraph EX.1 of Appendix FM which also applies the seven year rule from the date of application:

> "In your case it is accepted that you and your wife enjoy a family life with your children and that the older children have resided in the United Kingdom for a period of seven years *at the date of the decision.* Therefore as a family unit you would meet the requirements of EX 1(a)(i) of Appendix FM." (emphasis added.)

9. That was plainly an error. The requirements of EX.1 were not satisfied and the Secretary of State was in error in saying that they were. She failed to appreciate that the focus should have been on the date of application and not the date of decision. In my judgment the obvious inference is that she made exactly the same mistake with respect to paragraph 276ADE(iv).

10. In the course of argument, Underhill LJ raised the possibility that the Secretary of State might be agreeing to waive compliance with the seven year rule requirement on the grounds that if the two older children were to lodge a fresh application, they would satisfy it, and she may have thought that this would be a pointless exercise. However, there is no general policy for waiving the requirement in that way, and it would undermine the requirement in the rule that time should be assessed as at the date of application were such a policy to be applied as a matter of course. Moreover, if she were intending to make a particular concession at odds with the terms of the rule in this particular case, in circumstances where there was no obvious reason why she should pick out this particular family for special treatment, I would have expected her to state that she was intending to do this and why. In my view there can be no doubt that this was simply a mistake properly to apply the law to the facts of the case.

The case before the FTT

11. In the appeal to the FTT, the father, the first appellant, said that he had lost contact with his wider family in India and his wife also claimed to have severed contact with her family. He gave a convoluted account to explain why he had not returned to India after leaving the Consulate. He claimed that he had no home, property or job in India and that his family was now settled in England. The children had adapted to British culture, had English friends and had settled happily in their schools.

12. The FTT considered whether the appellants qualified for leave <u>both</u> first under the terms of paragraph 276ADE and then, having rejected that claim, under article 8 outside the rules. I will take them out of order and deal with the latter first.

13. The judge considered the article 8 claim in some detail and rejected it. She cited the case of *Haleemudeen v Secretary of State for the Home Department* [2014] EWCA Civ 558 to the effect that an article 8 claim outside the rules could only succeed if there were compelling circumstances. The judge did not find the father credible in his account of how the family came to stay in the UK and she concluded that he had lied

when saying that he had lost contact with his parents in India. The judge considered that the family could return to India notwithstanding what she recognised would be the upheaval which would be caused to the children. She placed emphasis on the precarious nature of the parents' immigration status in the UK. Overall she was not satisfied that the order to remove the family to India would infringe their article 8 rights.

14. The judge also dismissed, in summary terms, a submission that the conditions in paragraph 276ADE were satisfied. The argument advanced by the appellant's then representative, Mr Mahmood, with respect to that paragraph was as follows (para 44):

> "In his oral submissions Mr Mahmood argued that the eldest child had been in the UK for 7 years and hence the appeals should succeed on that basis. The transitional arrangements in force before the change in the Rules on 13.3.13 should apply. If the new rules were applicable, he argued, then the circumstances were exceptional since the Appellants had been living in the UK for 8 years and the children were heavily involved in their schools and community."

15. The succinct - perhaps too succinct - response of the FTT was this (para 47):

> "Paragraph 276ADE is not satisfied on age or length of stay grounds. For reasons of credibility I do not accept that the Appellants have no family ties to India (set out below). I accept that the children have spent most (in one case, all) of their lives in the UK. However, they are not UK citizens and live with their Indian national parents and must reasonably be taken to have cultural ties to India."

16. We heard submissions as to how to interpret this somewhat Delphic paragraph. Mr Malik submitted that the judge had not by these words intended to say that the seven year rule was not satisfied by the children. This ingenious argument was advanced as follows:

a) The Secretary of State had on any view acted on the assumption that the seven year rule had been satisfied and the representative for the Secretary of State had not contended otherwise before the FTT. So there was no reason for the FTT judge to consider this point or reach a decision in disagreement with the Secretary of State on it.

b) The reference to paragraph 276ADE was not to sub-paragraph (iv) relating to an application by the child but was a reference to other sub-paragraphs relating to applications by the parents where the seven year rule is not a relevant condition although other time requirements are.

c) The remaining part of paragraph 47 is a very brief summary of the judge's analysis of the reasonableness test. It was considered precisely because the judge had accepted that the seven year rule was satisfied.

17. I am not able to accept that submission. The only aspect of paragraph 276ADE to which the applicant's representative referred was sub-paragraph (iv). In my judgment the only proper inference is that the judge's conclusion with respect to age and length

of stay grounds must at least have included sub-paragraph (iv) even if it was intended to apply to other sub-paragraphs also. In my view, the judge will have appreciated – although it would have been better had she spelt it out – that the question was not whether the children had been resident in the UK for seven years at the date of the decision, but whether they had been so resident at the date of the application. The judge would have been obliged to take this point, once aware of it, whether or not the representatives had drawn it to her attention. I do not accept that the fact that the judge then made observations which seem to be directed to the reasonableness test undermines that analysis. That is consistent with a judge simply referring, albeit very briefly, to an additional reason why the claim should fail under sub-paragraph (iv).

18. It follows that in my view the FTT reached what is unarguably the correct conclusion that paragraph 276ADE (iv) could not be relied upon by these children.

The UT decision

19. There were three grounds of appeal. Two related to the article 8 claims outside the rules. It was said that the FTT had not taken proper account of the best interests of the children and had reached a perverse conclusion in finding that the removal of the family would constitute a justified interference with the article 8 rights. The UT rejected the article 8 grounds and although a further appeal was lodged to the Court of Appeal with respect to this aspect of the case, Underhill LJ did not give leave to pursue the point and I say no more about it.

The paragraph 276ADE ground

20. The third ground of appeal related to paragraph 276ADE. It was said that the FTT had erred in applying the later version of the paragraph when the earlier version, without the reasonableness test, had been in force at the material time.

21. There appears to have been considerable confusion about the way in which this ground was dealt with in the UT. First, for some reason neither the parties' then legal representatives, not Mr Malik or Mr Sharland, nor the UT itself appear to have noticed that the seven year rule was not satisfied, notwithstanding that the FTT had said so – albeit in somewhat cryptic terms - and that it was in any event obvious from the undisputed chronology. So all parties failed to notice that paragraph 276ADE could not apply, and that was so whichever version of the paragraph was in play because in both versions it is a condition for establishing the right to remain that the seven year rule is satisfied at the date of application.

22. Second, when determining which version of sub-paragraph (iv) was applicable, the UT erred in two ways. First, it was told that there were relevant transitional provisions contained in Statement of Changes in Immigration Rules (HC 760). Neither party provided this document to the court, but the UT considered those provisions and concluded that the original version should apply. Construing these transitional provisions, they were satisfied that the amendment to paragraph 276ADE(iv) should not apply to applications pending on 12 December 2012, as this one was. That is in my view the correct interpretation of HC760 and no-one has suggested otherwise.

23. What was unbeknown to the UT - and indeed to the parties until the appeal to this court - was that HC760 had itself been modified before it had even come into force by new transitional provisions contained in a new Statement of Changes in Immigration Rules (HC 820). That makes it plain, and indeed it is common ground, that the new version of paragraph 276ADE was to apply to all applications decided after 13 December 2013, as this one was. This new Statement was therefore putting into reverse the previous policy, at least with respect to paragraph 276ADE. It may have been fortuitous but both the Secretary of State and the FTT had therefore applied the right version.

24. However, notwithstanding that the UT did not appreciate the true effect of the transitional provision in force, it also reached the conclusion that the later version was applicable, but by a totally different route. It held that the relevant decision of the Secretary of State was a decision to remove the applicant from the UK and not a decision concerning the application for leave to remain. On that basis the relevant time for determining which body of rules were in force was the date of the removal decision and on any view the second version of paragraph 276ADE(iv) which contained the reasonableness test, was in force by then. It was on this basis that the UT held that the FTT judge had in fact applied the right version of the paragraph, albeit for the wrong reason.

The grounds of appeal

25. The appellants contend that the UT had wrongly concluded that the new version of paragraph 276ADE was applicable whereas it ought to have applied the old version which, because it did not include the reasonableness test, was much more favourable to the appellant. Mr. Malik submits, and Mr Sharland, counsel for the Secretary of State concedes, that the distinction drawn by the UT between the removal decision and the decision to refuse leave to remain is not a legitimate one. They agree that it is artificial to treat the removal decision as distinct from the rejection of the human rights claim because the two decisions are inextricably linked. It is only once the human rights' claim has been rejected that removal can lawfully be undertaken. Mr Malik asserts that there are decisions of this court, including *ZH (Bangladesh) v Secretary of State for the Home Department* [2009] EWCA Civ 8 and *Mirza v Secretary of State for the Home Department* [2011] EWCA Civ 159, which could not have been decided the way they were if the approach of the UT were correct. My provisional view is that the argument is right, but given that the Secretary of State had conceded the point, the court did not explore the merits of this argument in any detail.

26. On the approach of the UT, therefore, the effect of overturning this aspect of the reasoning was that the old version of paragraph 276ADE would apply and on the face of it, assuming that the children had been here for seven years at the date of application, which was indeed the assumption the UT made, they would qualify for leave to remain.

27. However, in a skeleton argument in response to the appeal, Ms Stout, then counsel for the Secretary of State, submitted that it would be wrong to reach that result for two reasons. First, the children had not satisfied the seven year rule and the UT was in error in assuming, without argument, that they had. Second, she drew attention at that stage to the existence of HC820 which demonstrated that on a proper application of the transitional rules, the later version was the one in force at the material time.

28. Mr Malik does not dispute that this is indeed the true position. So the following statements are indisputably correct:

    a) The child appellants never did satisfy paragraph 276ADE because they did not have seven years' residence by the date of the application.

    b) The new version of paragraph 276ADE was in fact the appropriate one to apply. It was in fact applied by all relevant decision makers.

    c) Although the UT had erred in law in reaching its conclusion that the later version of paragraph 276ADE applied, that error was not material and could not be said to have disadvantaged the appellants in any way since the application of the proper legal principles must have led to the same result.

29. Mr Malik has submitted that even on the premise that there has been no error which has in fact disadvantaged the appellants, the court should allow the appeal and require the Secretary of State to decide the application on the assumption both that the children did satisfy the seven year rule and that the old version of paragraph 276ADE applied. He submitted that the Secretary of State had conceded that the seven year rule applied in two ways. There was a concession by the Secretary of State when she reached her own decision on 3 January 2014. Furthermore, counsel for the Secretary of State must again be taken to have conceded the point, if indeed it had not already been conceded, because she failed to take it before the UT.

30. Similarly, counsel had failed to draw the attention of the UT to HC 820 and ought not now to be allowed to invoke it on appeal. The Secretary of State should not be permitted to resile from the assumptions which were the basis on which the UT reached its decision.

Discussion

31. I reject Mr Malik's submissions on these points. I have already indicated why I do not accept that the Secretary of State had made a concession that the seven year condition was satisfied. The better view is that she simply failed to appreciate that the date for making the determination was the date of the application and not the date of the decision. I would accept that if there had been a considered and lawful decision to deem the seven year rule to be satisfied, the Secretary of State should not be allowed to resile from that decision. An administrative body cannot keep revisiting decisions which affect individual rights: there must be finality, at least unless there is a powerful public interest to the contrary: see *Re 56 Denton Road, Twickenham* [1953] Ch.51, 56 per Vaisey J. Mr Malik relied upon a decision of the Upper Tribunal in *Kishver and others v Secretary of State for the Home Department* [2011] UKUT 410 (IAC) where the Tribunal held that a concession that an application was a valid application could not be withdrawn. But that is not this case. Where a decision has been made on a mistaken premise, the decision can be revisited so that the law is properly applied, unless it would be unfair to allow this such as where there has been reliance to the detriment of the individual: see *R v Department of Education and Employment ex parte Begbie* [2000] 1 WLR 1115 para.6 per Peter Gibson LJ, followed in *R (on the application of Capital Care Services UK Ltd) v Secretary of State for the Home Department* [2012] EWCA Civ 1151 para.16 per Laws LJ.

32. Nor do I accept that there was any concession to that effect by the Secretary of State's representative before the UT. It is very surprising that neither the parties nor the court had appreciated that the seven year rule was not satisfied, particularly given what the FTT had said about this. But a failure by the representative to appreciate a matter in his client's favour does not amount to a concession.

33. That is equally true of the failure to appreciate that the relevant transitional provisions were HC 820. I accept that it is not unreasonable to expect the Secretary of State to ensure that the tribunals are made acquainted with the relevant law in force bearing upon the issues in dispute. After all, she is, in general at least, in a much better position than the appellant to do so. But failure to draw attention to the proper law in force is not a concession that the law is other than it is. Moreover, it must be remembered that it was the appellant before the UT who were contending that the FTT had applied the wrong version of the rule. It was strictly for them to produce the legal material to make good their case and in that context they could not refer to HC 670 and knowingly fail to refer to HC820. Both parties were innocently misleading the court by failing to refer to the appropriate transitional provisions.

34. In my judgment, the only question which arises now is whether we should allow the Secretary of State to remedy these mistakes on appeal. Should she be allowed to raise the two new fresh grounds to save the decision of the UT, having failed to draw attention to them below? Mr Malik submits that she should not. It was the duty of the Secretary of State to present her arguments in the court below. Finality requires that she should not thereafter seek to invoke arguments which she could have raised but did not.

35. There will be many circumstances where that argument should succeed. But in my view it ought not to do so here, for the following reasons. First, this is not a case where the fresh ground of appeal will lead to a remission and further fact finding by the lower tribunal. I would agree that this would almost certainly make it inappropriate to allow the point to be raised now: see *Jones v MBNA Bank* [2000] EWCA Civ 514 para. 38 per Peter Gibson LJ. It is simply a matter of applying the correct law to the undisputed facts. Second, there is in my judgment no unfairness to the appellants in allowing these two grounds to be advanced now; they are not disadvantaged by the mistakes being corrected. They would not have conducted their cases any differently nor have they acted in any other way to their detriment. The plain fact is that they could never have successfully invoked paragraph 276ADE. They may feel disappointed that the Secretary of State has late in the day relied on these points to their detriment, but it is not unfair for the Secretary of State to do so. Third, paragraph 276ADE is designed to strike a balance between competing interests and to identify when the public interest in proper immigration control should give way to the demands of private and family life. The courts should not readily allow mistakes by the Secretary of State or her representatives to distort the proper application of the public interest as reflected in the immigration rules. The wider public interest is likely to weigh more heavily in public law cases than it does in private law disputes. In my view there would need to be some powerful countervailing interest, such as obvious unfairness to the applicant, if the court is to deny giving the Secretary of State the opportunity to correct the mistakes in issue here.

36. Mr Malik did suggest that his client would suffer a disadvantage if HC820 could now be relied upon. He referred us to an explanatory memorandum issued with the transitional provisions in which the Secretary of State said that she would not apply the reasonableness test to those who had made applications under paragraph 276ADE(iv) without first giving them an opportunity to make representations on the reasonableness question. Mr Malik submits that the Secretary of State did not do that before reaching her decision.

37. I do not accept that submission. It must be remembered that the Secretary of State made her decision in January 2014 following her agreement to reconsider the original decision after having received a pre-action protocol from the appellants. They had asked her to reconsider the decision in the light of the representations already made. These did in fact contain a wealth of material bearing upon the wider article 8 issues, including the position of the children and the reasonableness of their being sent back to India. I have no doubt that they would have appreciated that they could have submitted further material to the Secretary of State had they wished to do so. There was in my view no breach of the explanatory document and no unfairness in the way the application was handled.

Disposal

38. I would dismiss the appeal. The UT decision was made in error, but it was not a material one, it caused no unfairness to the appellants, and in substance the decision was correct. For the reasons I have set out, it would in my judgment be wrong to set aside the UT's dismissal of the appeal against the FTT decision.

Lord Justice Underhill:

39. I agree that this appeal should be dismissed for the reasons given by Elias LJ. The multiple errors on the part of both parties which have made the case so complicated are very regrettable, but I would like to express my concern in particular about the failure of both parties' representatives below (not Mr Malik or Mr Sharland) to ensure that the Tribunals were aware of what transitional provisions were in force as regards the changes to the "seven-year rule". In particular, in the Upper Tribunal, although it was clear that there was an issue about the effect of HC 760 on pending applications, neither the Appellants' former counsel nor the Senior Home Office Presenting Officer below brought a copy to the hearing, and the UT records that "both representatives agreed that we should examine the law for ourselves". That is not good enough: tribunals are entitled to expect to be referred at the hearing to the relevant law and to hear submissions on it. As it turns out, HC 760 had in fact been superseded in the relevant respect by HC 820, but the Tribunal was not told that even after the hearing: it reserved its decision, so there was the chance for the common error to be put right if the position had been checked. I have to say that although both representatives were at fault, in my view the greater responsibility must lie on the Presenting Officer. It is notoriously difficult for those practising in this field to keep up with the constant changes to the Immigration Rules. The one institution which ought always to be expected to have a good grasp of the applicable current law is the Home Office, as the author of the Rules, and the Presenting Officer is its representative. I have thought it worth making this point not out of schoolmasterliness but because this is only the most recent of several occasions on which I have become aware of problems caused by tribunals not being referred to the current versions of the Rules (or other recent

developments in the law). I do not wish to be critical of individual Presenting Officers. The problem may well be that the Home Office's procedures for disseminating "current awareness" are not good enough. I hope some lessons can be learnt from what went wrong in this case.

Mr Justice Peter Jackson:

40. I agree with both judgments.