Upper Tribunal
(Immigration and Asylum Chamber)

Azimi-Moayed and others (decisions affecting children; onward appeals) [2013] UKUT 00197(IAC)

THE IMMIGRATION ACTS

Heard at Phoenix House, Bradford	**Determination Promulgated**
On 26 March 2013	.....

Before

THE PRESIDENT, THE HON MR JUSTICE BLAKE

UPPER TRIBUNAL JUDGE TAYLOR

Between

HAMIDREZA AZIMI-MOAYED AND 3 OTHERS

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the Appellant: Mr T Hussain instructed by Parker Rhodes Hickmotts

For the Respondent: Mrs R Pettersen, Senior Home Office Presenting Officer

Decisions affecting children

(1) The case law of the Upper Tribunal has identified the following principles to assist in the determination of appeals where children are affected by the appealed decisions:

i) As a starting point it is in the best interests of children to be with both their parents and if both parents are being removed from the United Kingdom then the starting point suggests that so should dependent children who form part of their household unless there are reasons to the contrary.

ii) It is generally in the interests of children to have both stability and continuity of social and educational provision and the benefit of growing up in the cultural norms of the society to which they belong.

iii) Lengthy residence in a country other than the state of origin can lead to development of social cultural and educational ties that it would be inappropriate to disrupt, in the absence of compelling reason to the contrary. What amounts to lengthy residence is not clear cut but past and present policies have identified seven years as a relevant period.

iv) Apart from the terms of published policies and rules, the Tribunal notes that seven years from age four is likely to be more significant to a child that the first seven years of life. Very young children are focussed on their parents rather than their peers and are adaptable.

v) Short periods of residence, particularly ones without leave or the reasonable expectation of leave to enter or remain, while claims are promptly considered, are unlikely to give rise to private life deserving of respect in the absence of exceptional factors. In any event, protection of the economic well-being of society amply justifies removal in such cases.

Onward appeals

(2) Duties to have regard as a primary consideration to the best interests of a child are so well established that a judge should take the point for him or herself as an obvious point to be considered, where the issue arises on the evidence, irrespective of whether the appellants or the advocates have done so.

(3) Although in some cases this may require a judge to explore whether the duty requires further information to be obtained or inquiry to be made, the judge primarily acts on the evidence in the case. Where that evidence gives no hint of a suggestion that the welfare of the child is threatened by the immigration decision in question, or that the child's best interests are undermined thereby, there is no basis for any further judicial exploration or reasoned decision on the matter.

(4) Even if a decision of the First-tier Tribunal involves the making of an error on a point of law, in deciding whether to grant permission to appeal to the Upper Tribunal, it is relevant whether there are any reasonable prospects of that Tribunal exercising its powers to re-make the decision in a different way. The Upper Tribunal is unlikely to do so if the error was marginal and would not have made a difference to the outcome.

(5) It is incompatible with the overriding objective and the scheme of the Tribunal Procedure (Upper Tribunal) Rules 2008 to permit a rule 25 reply to open up fundamentally different grounds of appeal for which permission has not been granted.

DETERMINATION AND REASONS

1.
The first appellant is a national of Iran who entered the United Kingdom irregularly in January 2012 together with his wife and two children born in August 1998 and April 2007. He claimed asylum and the application were rejected with his credibility questioned. He appealed and on 30 March 2012 Judge Wilson sitting in the First-tier Tribunal heard his appeal and that of his dependants that he dismissed in a written decision signed 2 April 2012.

2.
The judge found the narrative account of the first appellant on which his claim to protection was founded was a false one. He noted at one point during the first appellant's evidence he had become emotional and was saying that the account he was giving was something that a friend had suggested to him.

3.
The judge rose and invited his counsel to have a word with the appellant to see if he was unwell. Counsel has subsequently confirmed that he had no reason to suspect that the appellant was unwell, although communication between them was limited as the appellant speaks Farsi and there was no private interpreter and counsel did not ask to use the court interpreter.

4.

On 25 April 2012, the same advocate settled grounds of appeal lodged by the appellants' solicitors on 27 April 2012. These grounds did not challenge the asylum decision or the fairness of the proceedings, but were simply directed to the secondary issue of whether the judge had given sufficient regard to the welfare of the third and fourth appellants. That was an ambitious submission considering that they had only been in the United Kingdom for 2 months at the date of the appeal.

5.
The judge had noted that the issues at the hearing were entirely confined to the asylum claim and no Article 8 submissions had been directed to him at all. Nevertheless, for completeness he undertook a structured Razgar analysis, and found unsurprisingly that there would be no interference with family life as the family would face removal together. Any interference that there may be with the private life of each of the appellants during their brief stay here whilst the asylum claim and appeal were processed with expedition was entirely proportionate and justified by the need to maintain a coherent system, of immigration control to promote the economic interest of society and the rights and freedoms of others.

6.
No evidence or submission about the welfare and the best interest of the children had been directed at the judge. The judge noted that a contention that the third appellant had lost her glasses in the course of the journey to Heathrow and suffered "blackspots" as a result was contradicted by photographic evidence.

7.
On 16 May 2012, First-tier Tribunal Judge Shaerf granted permission to appeal on the basis that s.55 UK Borders and Citizenship Act 2009 had not been expressly taken into account.

8.
In June 2012 the respondent issued a rule 24 response to the appeal opposing it. Standard directions were issued, to which the solicitors made response in June 2012, attaching a note by different counsel (Mr Hussain the advocate in the hearing before us) to which further reference will be made below.

9.
When the appeal came on before us, Mr Hussain was unable to develop the ground on which permission to appeal had been drafted, save to repeat that the determination made no reference to s. 55.

10.
We are not surprised by the brevity of the submission. In our judgment, there was no obligation on the First-tier Judge in this case to do more than he had done, and in any event any failure to explain that no welfare issue arose was incapable of amounting to an error of law that might lead to the decision being re-made.

11.
We reach this conclusion notwithstanding the clear principles of law reflected in the jurisprudence of the Upper Tribunal and the higher courts:-

i)
In any administrative action, including any immigration decision to remove a child or a carer of a child from the jurisdiction, the best interests of that child are a primary consideration, to which regard must be had.

ii)
The duty under the UN Convention on the Rights of the Child is a critical part of any Article 8 ECHR evaluation of a case where an immigration action is challenged on appeal.

iii)
There is a parallel statutory duty that the discharge of any immigration function has regard to the need to safeguard and promote the welfare of children who are in the United Kingdom (s.55 BCIA 2009).

iv)
These duties are so well established that a judge should take the point for him or herself as an obvious point to be considered, wherever the issue arises on the evidence, irrespective of whether the appellants or the advocates have done so.

12.
Although, judges of either Immigration and Asylum Chamber must be alert to ensure that these duties are met and in some cases may need to explore whether the duty requires further information to be obtained or inquiry to be made, the judge primarily acts on the evidence in the case. Where that evidence gives no hint of a suggestion that the welfare of the child is threatened by the immigration decision in question, or that the best interests of the child are undermined by such action, there is simply no basis for any further judicial exploration or reasoned decision on the question. Here the children were aged 14 and 4 at the time of the appeal and had been resident with their parents in the UK pending the determination of the asylum claim for two months.

13.
It is not the case that the best interests principle means that it is automatically in the interests of any child to be permitted to remain in the United Kingdom, irrespective of age, length of stay, family background or other circumstances. The case law of the Upper Tribunal has identified the following principles to assist in the determination of appeals where children are affected by the decisions:

i)
As a starting point it is in the best interests of children to be with both their parents and if both parents are being removed from the United Kingdom then the starting point suggests that so should dependent children who form part of their household unless there are reasons to the contrary.

ii)
It is generally in the interests of children to have both stability and continuity of social and educational provision and the benefit of growing up in the cultural norms of the society to which they belong.

iii)
Lengthy residence in a country other than the state of origin can lead to development of social cultural and educational ties that it would be inappropriate to disrupt, in the absence of compelling reason to the contrary. What amounts to lengthy residence is not clear cut but past and present policies have identified seven years as a relevant period.

iv)
Apart from the terms of published policies and rules, the Tribunal notes that seven years from age four is likely to be more significant to a child that the first seven years of life. Very young children are focussed on their parents rather than their peers and are adaptable.

v)
Short periods of residence, particularly ones without leave or the reasonable expectation of leave to enter or remain, while claims are promptly considered, are unlikely to give rise to private life deserving of respect in the absence of exceptional factors. In any event, protection of the economic well being of society amply justifies removal in such cases.

14.
There was no error of law in this case. The judge was not obliged to do more and there was only one conceivable outcome in this case. We would further point out that the UT's task on appeal is three fold:-

i)
identifying whether the decision of the First-tier judge involves the making of an error on a point of law (Tribunals, Courts and Enforcement Act 2007 s.11(1) and s.12(1));

ii)
if so, whether it is a case where the Tribunal should exercise its powers to re-make the case, although it is not obliged to (s.12(2)(a) TCEA 2007);

iii)
if so, how such a decision should be remade (s. 12(2)(b) TCEA 2007).

Even if the decision involved the making of an error on a point of law it would be a relevant consideration for the judge considering permission to appeal to also take into consideration whether there were any reasonable prospects of the UT exercising its powers to remake the decision in a different way. The UT is unlikely to do so if any error was marginal and would not have made any difference to the outcome of the appeal.

15.
On 24 March 2013 following an exchange between his solicitors and the Tribunal, Mr Hussain applied to amend the notice of appeal to include the matters raised by counsel in his note of 12 June 2012. Essentially these were:-

i)
The first appellant was dissatisfied with the service provided by counsel and had informed his solicitors of this in a letter dated 26 April 2012. He detailed those concerns in a letter dated 11 June 2012 sent to counsel whose reply of 24 June 2012 was included

ii)
A medical report from the Locala Community Partnership dated 11 June 2012 said that the first appellant was depressed and counsel should have sought an adjournment or at least asked to take instructions through the official interpreter.

iii)
There was accordingly a procedural flaw in the hearing for which the first appellant was not responsible.

16.
We refused this application to amend the grounds. Our reasons are as follows:-

i)

The Tribunal Procedure (Upper Tribunal) Rules 2007 (the Procedure Rules) rule 22(2)(b) and 23(1A), the Senior President's Practice Statements and the standard directions issued by the Tribunal contemplate that the notice of appeal will form the basis of the appeal in the absence of any further document such as a skeleton argument amplifying the contentions in the notice.

ii)
The Tribunal must send a copy of the written notice granting permission and of the reasons for any limitations or conditions on permission to each party (rule 22(2)(a) and 23(6)).

iii)
The respondent may provide a response to a notice of appeal within one month (rule 24) [1] and an appellant may reply to the response within one month (rule 25(2A)) or five days before the hearing whichever is the earlier.

iv)
There is a general power in the Procedure Rules rule 5(3)(c) to permit amendment of a document but the Tribunal's case management powers must be exercised to promote the over-riding objective including the prevention of delay (rule 2(2)).

v)
It would be incompatible with the overriding objective and the scheme of the Procedure Rules outlined above, to permit a rule 25 reply to open up fundamentally different grounds of appeal for which permission has not been granted and indeed to challenge a different decision on appeal than that contained in the notice of appeal.

vi)
What should have happened in this case, is that if the appellant wanted to fundamentally depart from the grounds of appeal on which permission was obtained he should have lodged an application to amend the notice of appeal in good time and secured that a copy of such a notice was served on the respondent.

vii)
Bearing in mind that an application for permission to appeal is normally required to be made within the relevant period set out in rule 21(3), any application to fundamentally change the grounds should be made as soon as practicable with some explanation of why a legally assisted person did not include the amended grounds in the original notice.

viii)
Although counsel's note was dated 12 June 2012, the application was not made until 24 March 2013 shortly before the hearing. It was both made late and had not been served on the respondent who therefore had had no chance to consider it.

ix)
Although the hearing of the appeal in the First-tier was 30 March 2012, it was only on 26 April 2012 that the first appellant raised concerns about the handling of his appeal. A genuine complaint should have been made promptly. If valid it could have formed the basis of the application for permission to appeal. Further the medical report relied on was only obtained in June 2012 and therefore is of little assistance as to the first appellant's state at the time of the hearing.

x)

The amended grounds do not criticise the judge for his handling of the case, and reveal no basis for doing so. Although it is an error of law if there has been no fair hearing, it will normally be through disputed decisions of the judge that a complaint of unfairness arises.

xi)
Although we do not rule out that unfairness could be established through the incompetence of the advocate, there is a high threshold to establish. It is not sufficient that the advocate exercised forensic judgment that the appellant now disagrees with or has subsequently proven to be unfortunate. Some regard may be relevant to the test in the Court of Appeal Criminal Division where conduct by the advocate is relied on as a ground to challenge the safety of the conviction (see Archbold 2012 7-83). Although the criminal courts are now concerned primarily with the impact of the failure of the advocate on the trial process, there must be demonstrated incompetence such as a course of action that no reasonable advocate would have taken. The allegations against counsel appearing on 30 March nowhere reached that standard.

xii)
Just as in criminal appeals, if the appellant mounts criticism of a representative, legal privilege must be expressly waived and draft statements and conference notes relevant to the case should be disclosed. This was not done in the present case. We have no explanation for the differences in account and why the appellant behaved as he did at the appeal and what he intended to say if any different from what the judge recorded him as saying. In any event, where credibility is in issue his complaint may not carry weight if it is evidentially unsupported.

xiii)
Where fresh evidence such as medical evidence comes to light after the hearing, this should normally be the basis of fresh representations rather than support an error of law in an otherwise properly determined appeal.

xiv)
The medical evidence before us does not support any suggestion that the appellant was not fit to give evidence at the appeal, or that medical problems could explain the remarks he made to the judge.

17.
In summary, in addition to being raised late and in an unsatisfactory way none of the issues raised in the amended grounds demonstrate an arguable error of law that would result in the decision being remade.

18.
Accordingly this appeal is dismissed.

Signed

Chamber President

Date 10 April 2013

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[1] Subject to any direction under rule 5(3)(a) shortening this time.