IN THE UPPER TRIBUNAL

(Immigration and Asylum Chamber)

R (on the application of HRP and Others) v Secretary of State for the Home Department IJR [2015] UKUT 00351(IAC)

Heard at Field House

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

Before

UPPER TRIBUNAL JUDGE O'CONNOR

Between

THE QUEEN

on the application of

(1) HRP

(2) BHP

(3) THP (a minor)

Applicants

-and-

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the Applicants: Mr Z. Malik, instructed by Malik Law solicitors

For the Respondent: Ms H Stout, instructed by the Treasury Solicitor

JUDGMENT

Handed down on 14 April 2015

Judge O'Connor:

Introduction

1.
The first Applicant ("A1") and the second Applicant ("A2") are husband and wife, and are nationals of India. The third Applicant ("A3") is their child, born in the United Kingdom on 29 January 2010. Anonymity has been granted pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 in respect of A3.

2.

This is the Applicants' application for judicial review of decisions made by the Secretary of State for the Home Department ("SSHD") on 23 October 2013 ("2013 Decisions").

3.
On 11 February 2015 the Respondent issued a further single decision (2015 Decision) relating to each of the Applicants; refusing each of them leave to remain in the United Kingdom. The Applicants have not sought permission to amend their Claim Form or grounds to bring a discrete challenge to this further decision.

The Issues

4.
Although the Applicants originally sought to bring challenge to the 2013 Decisions on four bases, only the following grounds are now pursued:

(i) The Respondent's consideration of paragraph 276ADE(vi) of the Immigration Rules is unlawful;

(ii) The Respondent's consideration of whether to exercise her discretion to grant leave outside the Immigration Rules breaches her obligations under section 55 of the Borders, Citizenship and Immigration Act 2009 ("section 55").

The Background

5.
The underlying factual circumstances are not in dispute. The Applicants are citizens of India. A1 and A2 arrived in the United Kingdom on 9 October 2002 with entry clearance as visitors – leave to enter being conferred until 17 March 2003. They subsequently overstayed. On 3 May 2011 the Applicants applied for leave to remain on Article 8 ECHR grounds. This application was refused on 29 June 2011.

6.
The Applicants made a further application for leave to remain on 30 September 2013. The covering letter to these applications asserted, inter alia , that: (i) the Applicants meet the requirements of paragraph 276ADE of the Immigration Rules; (ii) their removal would breach Article 8 ECHR; and that consequently, (iii) leave should be granted to them outside of the Rules. This letter also invited the Secretary of State to "pay particular attention" to section 55 and was accompanied by a lengthy Statement of Truth, signed by A1.

7.
The application of 30 September 2013 was refused in the 2013 Decisions under challenge in these proceedings.

8.
On 25 October 2014 Upper Tribunal Judge Gleeson granted permission to apply for judicial review.

9.
Subsequently, the Respondent wrote to the Applicants on 1 December 2014 indicating that she was; "prepared to settle this matter on the terms set out in the enclosed consent order" . The 'enclosed consent order' provided for the Applicants to have permission to withdraw their judicial review application:

"UPON the Respondent agreeing to reconsider the decisions refusing leave to remain dated 23 October 2014 issued to [A1], [A2] and [A3] and to issue new decisions in due course"

10.
The Applicants refused to sign this order, indicating a wish to proceed with the judicial review proceedings. Undeterred by this, on the 21 January 2015 the Respondent once again invited the Applicants to withdraw their judicial review applications on the same basis, although with the additional incentive on this occasion of her agreeing to pay the Applicants' costs of the proceedings. Once again, however, the Applicants refused to sign the order.

Respondent's Decisions

Decisions of 23 October 2013

11.
In her decision of 23 October 2013 made in relation to A1, the Respondent concluded that:

(i)
A1 does not meet the requirements of paragraph E-LTRP 1.2 of Appendix FM to the Immigration Rules and is, consequently, not entitled to leave to remain under the Partner Route in the Rules;

(ii)
A1 does not meet the requirements of paragraphs E-LTRPT 2.2 and 2.3 of Appendix FM to the Rules and is not, therefore, entitled to leave to remain under the Parent Route in the Rules;

(iii)
A1 does not meet the requirements of paragraph 267ADE of the Rules (private life); and,

(iv)
A1's application does not contain any exceptional circumstances that might warrant consideration of a grant of leave to remain outside the requirements of the Immigration Rules.

12.
As to A2's application, the Respondent concluded that:

(i)
A2 does not meet the requirements of the Partner Route under the Rules;

(ii)
A2 does not meet the requirements of the Parent Route under the Rules.

13.
Finally, in relation to the child, A3, the Respondent found:

(i)
A3 does not meet the requirements of paragraph E-LTRC 1.6 to Appendix FM of the Rules because her parents have been refused leave to remain; and,

(ii)
A3's application does not contain any exceptional circumstances that might warrant consideration of a grant of leave to remain outside the requirements of the Immigration Rules.

Decision of 11 February 2015

14.

The 2015 Decision identifies that it is: " written in response to [the Applicants] application for judicial review" and is also stated to be supplemental to the decisions of 23 October 2013.

15.
Paragraph 2 of this decision details that it:

"[i]s intended to give further consideration to the question of whether [the Applicant] should be granted leave to remain outside the Rules and, in particular to [the Applicant's] submissions relating to section 55 of the Borders, Citizenship and Immigration Act 2009 and Article 8 of the ECHR. The decision letter should be read in conjunction with our letter of 23 October 2013."

16.
The decision then:

(i)
Identifies that the Applicant's application was correctly refused under the Family Life and Private Life provisions of the Immigration Rules, as detailed in the decision of 23 October 2013;

(ii)
Gives consideration to the need to have regard to the need to safeguard and promote the welfare of children pursuant to section 55 - it being concluded that it is in the best interests of A3 to remain in the United Kingdom; and,

(iii)
Concludes that the Applicants have not provided any evidence to warrant discretion being exercised to grant them leave outside of the Rules.

Submissions

17.
Mr Malik observed that in her 2013 Decisions made in relation to A2 and A3, the Respondent failed to give any consideration to the application of paragraph 276ADE of the Rules.

18.
As to the Respondent's consideration of this Rule in the decision letter relating to A1, it was submitted that the reasons given therein are inadequate, in particular in light of the evidence given by A1 in his Statement of Truth. Furthermore, the Respondent failed to undertake a rounded assessment of A1's circumstances, as commended in the decision of the Upper Tribunal in Ogundimu (Article 8 – new rules) Nigeria [2013] UKUT 60 (IAC), recently approved by the Court of Appeal in YM (Uganda) –and- Secretary of State for the Home Department [2014] EWCA Civ 1292 at [50]-[52].

19.
The Respondent has not rectified the aforementioned failings in her 2015 Decision.

20.
As to the second ground, Mr Malik contended that the Respondent had failed, in her 2013 Decisions, to have regard to her statutory duties under section 55 when considering whether to exercise her residual discretion to grant the Applicants leave to remain outside of the Rules.

21.
Reliance was placed on the decision of Holman J in R(SM and Others) v Secretary of State for the Home Department [2013] EWHC 1144 (Admin), in support of a submission that the failure of the

Respondent to consider her section 55 duties in the 2013 Decisions could not be rectified by a consideration of such duties in a later supplemental decision i.e. the 2015 Decision. The 2015 Decision had, he submitted, been drafted through the prism of the subsisting judicial review claim and amounted to no more than an after the event attempt to demonstrate a reasoning process that the Respondent was required to have undertaken, but did not undertake, at the time of the making of the 2013 Decisions.

22.
In response Ms Stout submitted that in her 2013 Decisions the Respondent had: (i) undertaken a rounded assessment of the Applicants' ties to their homeland when considering whether the requirements of paragraph 276ADE(vi) of the Rules had been met; (ii) came to a conclusion on this issue that was open to her, given the limited evidence and information that had been put before her by the Applicants; and, (iii) given adequate reasons for doing so. In any event, she said, the 2015 Decision considered this issue fully in relation to all of the Applicants.

23.
In response to Mr Malik's submission that the 2013 Decisions relating to A2 and A3 made no reference to paragraph 276ADE, Ms Stout asserted that the decision letters of the three Applicants had to be read as a whole and that the consideration given to this paragraph of the Rules in the 2013 Decision relating to A1 should be read across into the decisions made in relation to A2 and A3.

24.
As to the claimed failure of the Respondent to consider her section 55 duties in the 2013 Decisions this submission, it was said, is misconceived because the Respondent had complied with her section 55 duties by applying the Immigration Rules; as to which see paragraph GEN 1.1 of Appendix FM to the Rules. Furthermore, there is nothing in the Applicants' circumstances not encompassed by a consideration under the Rules.

25.
If, contrary to the Respondent's view, the 2013 Decisions are unlawful because of a failure to consider section 55, relief should not be granted because the Respondent has now undertaken a fresh consideration of the Applicants' cases, reflected in the 2015 Decision. That decision clearly shows that the Respondent has complied with her section 55 duties.

Decision and Reasons

Paragraph 276ADE of the Rules

26.
To be entitled to leave to remain under Paragraph 276ADE of the Rules the Applicants must satisfy the requirements of sub-paragraphs (i) and (ii) therein and, either of subparagraphs (iii), (iv), (v) or (vi). It is not in dispute that each of the Applicants meets the requirements of sub-paragraphs (i) and (ii) and that none of them meet the requirements of sub-paragraphs (iii), (iv) or (v).

27.
Paragraph 276ADE (vi) requires that an Applicant, at the relevant date:

"Is aged 18 years or above, has lived continuously in the UK for less than 20 years (discounting any period of imprisonment) but has no ties (including social, cultural or family) with the country to which he would have to go if required to leave the UK."

28.
In Ogundimu the Upper Tribunal (Blake J and Judge O'Connor) stated, in relation to the meaning of the word 'ties':

"[123] The natural and ordinary meaning of the word 'ties' imports, we think, a concept involving something more than merely remote and abstract links to the country of proposed deportation or removal. It involves there being a continued connection to life in that country; something that ties a claimant to his or her country of origin. If this were not the case then it would appear that a person's nationality of the country of proposed deportation could of itself lead to a failure to meet the requirements of the rule. This would render the application of the rule, given the context within which it operates, entirely meaningless.

[124] We recognise that the text under the rules is an exacting one. Consideration of whether a person has 'no ties' to such country must involve a rounded assessment of all the relevant circumstances and is not to be limited to 'social, cultural and family' circumstances."

29.
The onus is on the Applicants to demonstrate that they have lost ties to India since their arrival in the United Kingdom. Both A1 and A2 were born in India and, respectively, spent the first 25 years and 22 years of their lives there. By the time of the Respondent's 2013 Decisions they had each spent in excess of 11 years continuously living in the United Kingdom.

30.
In his Statement of Truth of the 6 September 2013 A1 asserted, inter alia :

"We have slowly eroded all our ties with our country of origin and have formed associations with friends and people in the UK and we cannot return to India where we have no prospect of a future…

I would no doubt face extreme hardship if returned to India. I do not have a job there, and if I return, I shall no longer have a home or a livelihood. My personal circumstances back home do not make it possible for me to return and enjoying (sic) my family life. My wife has been suffering harsh treatment from her in laws because they refuse to accept her as their daughter-in-law. We cannot go back as we have no home there…

It would be cruel to expect us to return to a country we have no connections with."

31.
The Respondent did not give any consideration to paragraph 276ADE in her 2013 Decisions relating to A2 or A3. In her 2013 decision drawn in relation to A1 the Respondent said as follows:

"Having spent 25 years in your home country and in the absence of any evidence to the contrary, it is not accepted that in the period of time that you have been in the UK you have lost ties to your home country and therefore the Secretary of State is not satisfied that you can meet the requirements of Rule 276ADE (vi)."

32.
Contrary to the Respondent's assertions in her 2013 Decision made in relation to A1, A1 did provide evidence in his Statement of Truth which related directly to the requirements of Paragraph 276ADE(vi) of the Rules. Whilst decisions of this type do not need to be overly detailed in their consideration of an applicant's claim, they must demonstrate that the salient features of such claim have been considered and tested against the requirements of the Rules, in order to ascertain whether

the requirements of the Rules have been fulfilled. This may only require the briefest of references to the factual assertions made by an applicant but, in the instant case, the Respondent failed to make any reference to nature of the A1's claim; indeed, the terms of the 2013 Decision support A1's contention that the Respondent failed to turn her mind to the evidence provided in this regard in his Statement of Truth.

33.
For these reasons I am satisfied that the Respondent's decision of 23 October 2013 made in relation to A1 is unlawful.

34.
As to the Respondent's decision made in relation to A2, this makes no reference, and fails to give consideration, to paragraph 276ADE; a failure that I am satisfied also renders this decision unlawful.

35.
Even if I were to accept Ms Stout's submission that the conclusions reached by the Respondent in relation to A1 should be "read across" into the decision made in relation to A2, which I do not - A2 undoubtedly being entitled to an individual consideration of her case - this cannot avail the Respondent given my conclusion that her consideration of paragraph 276ADE of the Rules in relation to A1's claim was unlawful.

36.
The failure of the Respondent to lawfully consider whether A1 and A2 meet the requirements of paragraph 276ADE renders the 2013 Decision made in relation to their child, A3, unlawful; the Respondent relying in part therein on the fact that A3's parents do not meet the requirements of the Rules.

37.
This, though, is not where the Respondent's case rests on this issue, it being asserted; (i) that any failing in the 2013 Decisions is rendered academic by the further decision taken in 2015 and, in any event, (ii) the Applicants' claims are so weak that they cannot succeed on a reconsideration. Consequently, it is said, the Tribunal should not exercise its discretion to quash the 2013 Decisions even if they are found to be unlawful.

38.
In her 2015 Decision, which relates to all of the Applicants, the Respondent states:

"[15] Your client was refused correctly under (sic) clear assessment of the private life rules under Paragraph 276ADE of Appendix FM. He failed to satisfy Paragraph 276CE with reference to Paragraph 276ADE (iii) - (vi) of HC 395 (as amended) and detailed in the refusal letter of 23 October 2013."

39.
Insofar as the 2015 Decision identifies that the Respondent has given consideration to Paragraph 276ADE it does so in terms that do no more than adopt the conclusions and reasoning found in the unlawful 2013 Decision made in relation A1. In such circumstances - even putting to one side consideration of the Applicants' general submission that the Respondent should not be entitled to place reliance on the 2015 Decision because it constitutes no more than an ex post facto rationalisation of the 2013 Decisions – it is plain that the 2015 Decision cannot render academic the aforementioned failings in the 2013 Decisions.

40.
Turning to the second of the points raised by Ms Stout, whilst it is difficult to categorise the Applicants' underlying claims as strong, neither can it be said, in my view that the Respondent has demonstrated that they are so weak that they must necessarily fail.

41.
The Applicants are entitled to a lawful consideration of their applications and they have not yet had that. In such circumstances, and for the reasons given above, I quash the Respondent's decisions of 23 October 2013. Mr Malik did not seek an order quashing the 2015 Decision and, consequently, I make no such order.

Consideration of Section 55

42.
The second issue of whether the Respondent has lawfully discharged her duties under section 55 is academic given that I have quashed the 2013 Decisions for other reasons. Nevertheless, for the sake of completeness I will set out my conclusions in relation to this issue.

43.
Section 55 sets out the duty imposed on the Respondent to have regard to the welfare of children when making her decisions:

"Duty regarding the welfare of children

(1)
The Secretary of State must make arrangements for ensuring that–

(a)
the functions mentioned in subsection (2) are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom…

(2)
The functions referred to in sub-section (1) are –

(a)
any function of the Secretary of State in relation to immigration, asylum and nationality…

(3) A person exercising any of those functions must, in exercising the function, have regard to any guidance given to the person by the Secretary of State for the purpose of sub-section (1)."

44.
The guidance referred to in section 55(3) is titled "Every Child Matters: Change For Children" and, inter alia , sets out a series of obligations imposed on the Secretary of State. The application of those obligations has generated a significant stream of case law, but it is trite that a decision maker must treat the best interests of a child as a primary consideration in the decision making process (Zoumbas v Secretary of State for the Home Department [2013] 1 WLR 3690 – per Lord Hodge)

45.
The Applicants contend that when coming to her conclusions set out in the 2013 Decisions the Respondent unlawfully failed to give consideration to her section 55 duties and, in particular, to the best interests of A3.

46.

Ms Stout accepts that no explicit consideration was given to section 55 in these decision letters but submits that this was unnecessary given that the Immigration Rules: “take into account the need to safeguard and promote the welfare of children in the UK, in line with the Secretary of State’s duty under section 55…”. Thus, it is said, by giving consideration to the Immigration Rules the Respondent has discharged her section 55 duties in relation to the instant Applicants.

47.
I reject Ms Stouts’ submission for two reasons. First, even if, as a general proposition, she is correct to contend that the Respondent can, in any given case, discharge her section 55 duties by simply giving to consideration to whether an applicant meets the requirements of the Immigration Rules, this must as a minimum require the Respondent to undertake such task lawfully. In the instant case I have found the Respondent’s consideration of whether the Applicants meet the requirements of the Rules to be unlawful.

48.
In any event, I do not accept that Ms Stout is correct in her general proposition. The position, in my view, is more nuanced. Whilst the Rules relating to family and private life “take into account the need to safeguard and promote the welfare of children in the UK, in line with the Secretary of State’s duty under section 55 of the Borders, Citizenship and Immigration Act 2009” [GEN 1.1 of Appendix FM], the question of whether such duties have been discharged by the Respondent in any given case is necessarily intensely fact sensitive. If authority is needed for this, it can be found in Lord Hodge’s judgment in Zoumbas in which his Lordship emphasis, in the sixth of his seven principles relating to a consideration of the best interests of a child:

“…there is no substitute for a careful examination of all relevant factors when the interests of a child are involved in an Article 8 assessment…”

48. In JO and Others (section 55 duty) Nigeria [2014] UKUT 00517 (IAC), the President of the Upper Tribunal (IAC) said of the Respondent’s duties under section 55, at [12]:

“I consider that these provisions, considered in tandem with the principles enunciated by the Supreme Court and the public law duties rehearsed above, envisage a process of deliberation, assessment and final decision of some depth. The antithesis, namely something cursory, casual and superficial, will plainly not be in accordance with the specific duty imposed by section 55(3) or the overarching duty to have regard to the need to safeguard and promote the welfare of any children involved in or affected by the relevant factual matrix…”

49.
Although there may be cases in which a consideration of the Immigration Rules will fully discharge the Respondent’s section 55 duties, I do not envisage such cases being the norm and, in my conclusion, this is not such a case. Numerous features of the evidence given by A1 are relevant to a consideration of the best interests of A3; however, the 2013 Decisions do not disclose that the Respondent gave any consideration to, or engaged with, such evidence. For this reason I conclude that the 2013 Decisions are also unlawful as a consequence of the Respondent’s failure to lawfully consider the duties imposed upon her by section 55.

50.
Once again, however, Ms Stout relied on the 2015 Decision in support of a contention that any failing of the Respondent in the 2013 Decisions should not lead to such decisions being quashed. She sought to draw support for this submission from the judgments in R v Secretary of State for the Home

Department ex parte Turgut [2001] 1 All ER 719 and R (Khan) v Secretary of State for the Home Department [2012] EWHC 707.

51.
In response, Mr Malik asserted that the 2015 Decision was no more an ex post facto justification of the unlawful decisions made in 2013; drawing support for his position from the judgment of Holman J in R (SM) v Secretary of State for the Home Department .

52.
I have found the judgments that the parties have respectively sought to rely upon to be of little assistance, each decision providing nothing more than an example of a court coming to a conclusion on the facts of a particular case.

53.
Having carefully considered the terms of the 2015 Decision for myself, I conclude that it is not simply an after the event attempt to demonstrate a reasoning process which was not described, and is unlikely to have taken place, at the time the 2013 Decisions were taken. The reasoning in the 2015 Decision relating to the welfare and interests of A3 displays a rigour of deliberation and analysis that leads me to find that its author independently turned her mind to the Respondent's section 55 duties, and to the relevant material put forward by the Applicants in relation to the discharge of such duties.

54.
Had I found the Respondent's consideration of the Immigration Rules in the 2015 Decision to have been lawful, I would unhesitating have concluded that she had lawfully discharged her section 55 duties in the 2015 Decision, and that such lawful discharge would have rendered academic the failings in the same regard in the 2013 Decisions. However, this is not the position. A lawful consideration of the Applicants' applications under the Immigration Rules is an essential requirement, in this case, of the lawful discharge by the Respondent of her section 55 duties. For the reasons detailed above, the Respondent has not lawfully considered the Applicants applications under the Immigration Rules and in my conclusion cannot, therefore, have lawfully considered her section 55 duties.

Decision

55.
For the reasons given above, the Applicants' claims for judicial review succeed and I quash the Respondent's decisions of the 23 October 2013.