Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: HU/16591/2017
HU/16584/2017
HU/16595/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 13 December 2018	**On 23 January 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE MCGEACHY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

DILSHOD [S]
GULCHEKHRA [N]
[D S]
(ANONYMITY DIRECTIONS NOT MADE)

Respondents

Representation:
For the Appellant: Ms A Everett, Senior Home Office Presenting Officer
For the Respondents: Mr B Hawkin, of Counsel, instructed by Arlington Crown Solicitors

DETERMINATION AND REASONS

1. The Secretary of State appeals, with permission, against a decision of Judge of the First-tier Tribunal Wright, who in a determination promulgated on 29 August 2018 allowed the appeals of the appellants against a

decision of the Secretary of State made on 21 November 2018 to refuse to grant leave to remain on human rights grounds.

2. Although the Secretary of State is the appellant before me I will for ease of reference refer to him as the respondent as he was the respondent in the First-tier. Similarly, I will refer to Dilshod [S], Gulchekhra [N], his wife, and [DS], their son, as the appellants.

3. The first appellant, who is a citizen of Uzbekistan and who was born on 21 May 1980, arrived in Britain in 2002 as a student. He had leave to remain in that capacity until November 2009. His wife, the second appellant, who is also a citizen of Uzbekistan, arrived in Britain in January 2005 as a student and also had leave to remain until 2009. In November that year her application was refused and since 2009 the first and second appellant have overstayed. They had a child who was stillborn who was buried in Britain in 2011. The third appellant, their son [D], was born in April 2015. A daughter of the second appellant entered Britain in 2015 as a visitor and was later refused an extension of stay on human rights grounds. Her appeal was heard by Judge Wright with those of the appellants before me and dismissed but she has not appealed.

4. The appellants made their human rights claims in August 2016. These were refused in November 2017. In the letter of refusal the Secretary of State referred to the fact that the appellants had no basis of stay here and considered that they could return to Uzbekistan. It was pointed out that they would be returning to Uzbekistan as a family and that the first appellant had spent most of his life in Uzbekistan, as indeed had the second appellant, who is five years older than the first appellant. It was considered that although they might have some initial difficulty upon return to Uzbekistan there was no reason to believe that they would not be able to establish contact with their family and resume family life with them in Uzbekistan and in any event, they were healthy adults who would be able to work in Uzbekistan.

5. In making the decision the Secretary of State took into account their immigration history and also the exceptional circumstances put forward, which included the fact that they had a child who was buried in London and that the third appellant had been diagnosed with brainstem encephalitis and required ongoing medical care. It was considered in that regard that Uzbekistan had a health service that would be able to provide treatment for the third appellant and that as he would be with his parents they would be able to support him, especially with his “moderate learning, behavioural, and mobility difficulties”.

6. The judge heard evidence from the appellants and in paragraphs 34 onwards, having set out the submissions made and, having correctly referred to the judgment of the Court of Appeal in **SSHD v Kamara [2016] EWCA Civ 813**, he commented that integration was:

> "not confined to the mere ability to find a job or to sustain life whilst living in the other country. … The idea of 'integration' calls for a broad evaluative judgment to be made as to whether the individual will be enough of an insider in terms of understanding how life in the society in that other country is carried on and a capacity to participate in it, so as to have a reasonable opportunity to be accepted there, to be able to operate on a day-to-day basis in that society and to build up within a reasonable time a variety of human relationships to give substance to the individual's private or family life."

7. In paragraphs 42 onwards the judge set out what appear to be his reasons for concluding that the appeal should be allowed. He pointed to the length of time that the appellants had been in Britain – the first appellant for over fourteen years and the second for just under twelve years – and said that it did not appear to be the case that the respondent had ever tried to remove the first and second appellants after their leave expired in November 2009. The judge noted that the appellants had had a stillborn child who had been buried in Essex. The judge then referred to the diagnosis of brainstem encephalitis and other medical conditions from which the third appellant suffered and stated that it was not disputed that he had special educational needs. He took into account various reports relating to the third appellant's medical history and prognosis. He noted that the third appellant had a package of care in place in Britain.

8. In paragraph 51 the judge wrote:-

> "Whilst the RFRL states that 'it is considered that Uzbekistan does have a health service that *will* be able to provide treatment of your child [D]', it is not stated (nor at all clear) what this 'consideration' is based upon and there is no supporting evidence referred to (even as at the DOH Mr Allen, HOPO, could do no more than produce a simple list of the names [without more] of ten children's hospitals in Uzbekistan from 'Yellow Pages')."

The judge, in the following paragraph, wrote:-

> "Whilst the Reasons for Refusal Letter also states that 'it is noted that there are [sic] provisions for education and employment in your home country [Uzbekistan]', it is not stated (or at all clear) where this is 'noted' from or what the provisions actually are, and there is no supporting evidence referred to."

9. He then stated that, applying the test of very significant obstacles, he was satisfied that, as understood in light of the words of Sales LJ in **Kamara**, the appellants would have such very significant obstacles because of the length of time they had been in Britain or absent from Uzbekistan, not only because their stillborn child is buried here but also because of the seriousness of the third appellant's condition. He therefore considered that the refusal of the human rights claim was unlawful. Following on from that, he concluded that the third appellant should be granted a period of leave in line with that of his father and mother as was in his best interests to remain in Britain with his parents.

10. The judge therefore allowed the appeals of the appellants although with regard to the second appellant's daughter he dismissed her appeal.

11. The Secretary of State argued in the grounds of appeal that the judge had found that the appellants would face insurmountable obstacles on return to Uzbekistan because of their length of residence and medical needs of their son. He argued that the judge had misinterpreted the judgment in **Kamara** and, in effect, that the judge had reversed the burden of proof which rested on the appellants to establish their case that relevant facilities for the third appellant did not exist in Uzbekistan. Furthermore that it had not been shown that the family could not re-establish links there. Permission was granted by Judge of the First-tier Tribunal Osborne on 25 October 2018. Ms Everett relied on the grounds, arguing that there had been no adequate consideration of the issue of integration.

12. In reply, Mr Hawkin argued that the determination was careful and thorough. He had prepared a detailed reply to the grounds which he went through the various points raised by the judge and argued that cumulatively those showed that the judge had properly assessed all relevant factors and had correctly taken into account these when reaching a conclusion that was fully open to him. He pointed to the fact that there was no evidence of any enforcement attempt made to move the appellants and referred to the length of time they had been in Britain and that the appellants had claimed that they were estranged from their family. The judge, he argued, made a broad evaluative judgment and was entitled to place weight on the medical requirements of the third appellant. He referred to the medical evidence and to a letter written on 10 August 2018 by a Dr Nodira Nasritdinova, who had been working here as an associate specialist in psychiatry in NHS hospitals but who had been born and brought up in Bukhara. She had come to Britain because her child was disabled as he was being profoundly deaf, and although that child had gone to a specialist school in Uzbekistan she had felt it appropriate to home-school that child. She had emphasised that she had felt that coming to Britain would be best for her child.

13. He asked me not to set aside the decision on the basis that I would have reached a different conclusion.

Discussion

14. I consider that there are material errors of law in the determination of the judge. Indeed, I consider that he misunderstood the judgment of Sales LJ in **Kamara**. When looking at the factors set out by Sales LJ the reality is that there is nothing to show that the appellants would not be considered as insiders in terms of understanding how life in in Uzbekistan society is carried on or that they would not have the capacity to participate in it, including working or not have a reasonable opportunity to be accepted there and to be able to operate on a day-to-day basis in that society and to build up a variety of human relationships.

15. As was pointed out by the respondent in the letter of refusal, that the first two appellants lived in Uzbekistan for their entire lives before coming to Britain – they had spent all their childhood and early adulthood there. They speak the language and there is simply nothing to indicate that they would be unable to integrate in that country. They would be entitled not only to work but also would surely be able to form relationships with their fellow countrymen. The fact that the Secretary of State had not made attempts to remove the appellants after 2009 is not a positive factor to be taking into account and does not affect their ability to integrate nor indeed assist them in any application outside the Rules. It is clear from Section 117B(4) that little weight should be given to their private life formed when their immigration status was precarious. Not only was it always precarious, as they were here as students and did not have any form of leave that would have led to the expectation of leave to remain. The reality, moreover, is that since 2009 they have remained without authority. While it might well be relevant that private life is strengthened the longer a person remains in Britain because of intervening events such as the birth of a child, mere remaining without authority is not a relevant factor.

16. Secondly, the reality is that the judge has reversed the burden of proof. It is for the appellants to show that they would not be able to integrate into life in Uzbekistan. For the reasons which I have set out above, there is absolutely nothing to show that they could not do so and the appellants themselves have said nothing to indicate that they would be excluded from society or from the workplace there. Similarly, with regard to the consideration of the third appellant's health, it is for the appellants to show that his health would stop them from integrating into life in Uzbekistan and, moreover, that he would have such a lack of effective proper treatment that it would be life-threatening – there has been no indication that the third appellant's illness would mean that he would meet the threshold for treatment under Article 3 of the ECHR. I note, moreover, from the letter of Dr Nasritdinova that she states that basic healthcare is free in Uzbekistan, although she argues that for further treatment payment would have to be made.

17. Those facts do not assist the appellants. I have also considered the fact that the appellants have a stillborn child who was born here but that is not a factor that indicates that they could not be able to integrate into life in Uzbekistan. I therefore find that there are material errors of law in the determination of the First-tier Judge and I set aside that decision.

18. Mr Hawkin has asked that should I consider that the decision should be set aside that the appeal would be remitted before the First-tier Tribunal, and this I now do.

Decision

The decision of the Judge of the First-tier Tribunal is set aside for error of law.

Direction

The appeal will proceed to hearing in the First-tier Tribunal at IAC Hatton Cross, time estimate two hours, no interpreter required.

No anonymity directions made.

Signed:  Date: 5 January 2019

Deputy Upper Tribunal Judge McGeachy