Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/04016/2014
IA/04010/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 27 May 2015	**On 9 June 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

MRS HALEEMA AFANDI (FIRST APPELLANT)
MR ISHAN ELLAHI (SECOND APPELLANT)
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr A Otchie, Counsel, instructed by M-R Solicitors
For the Respondent: Ms A Fijiwala, Specialist Appeals Team

DECISION AND REASONS

1. The appellants appeal to the Upper Tribunal from the decision of the First-tier Tribunal dismissing their appeal against the decision by the Secretary of State to refuse to issue them with EEA residence cards as extended family members of an EEA national exercising treaty rights here. The First-tier Tribunal did not make an anonymity direction, and I do not consider that the appellants should be accorded anonymity for these proceedings in the Upper Tribunal.

2. The first appellant, Mrs Haleema Afandi, was born on 16 December 1990. The second appellant, Mr Ishan Ellahi, is her husband, born on 4 November 1975. Both of them are Pakistani nationals, as is their son who was born in the UK on 23 January 2013. As the first appellant is the main appellant in this appeal, I shall hereafter refer to her simply as the appellant save where the context otherwise requires.

3. Mr Ellahi first entered the United Kingdom in 2008, apparently with valid entry clearance as a work permit holder. He returned to Pakistan in 2009 for a visit, during which he married the appellant on 8 October 2009. Towards the end of her husband's work permit employment as a tailor, the appellant joined him in the UK on 29 January 2012. After her husband's job as a tailor finished, he started working in what the appellant described as a chicken shop. He was encountered by the authorities working there, and the Home Office cancelled his work permit. On 26 February 2013 both husband and wife were served with a form IS15A notice notifying them of their liability to administrative removal for the husband's breach of employment restrictions. On 6 March 2013 the appellants applied for leave to remain, but their applications were refused with no right of appeal. A human rights application was also lodged, but this was also refused with no right of appeal.

4. On 2 September 2013 the appellant applied for a residence card as the family member of an EEA national exercising treaty rights here. She included her husband and son as dependants on her application. Her EEA national sponsor was Noman Ali Liaqat, a French national, whose date of birth was 27 June 1989. He was related to her as a cousin, and he had been in full-time employment with a firm of accountants in London since 1 May 2013.

5. On 30 December 2013 the Secretary of State gave her reasons for refusing to issue the appellant with a residence card. She had not provided sufficient evidence of her dependency on her EEA national sponsor whilst in Pakistan. She also had not provided any evidence that she was dependent on her EEA national sponsor immediately prior to her entering the United Kingdom, as required under Regulation 8(2)(a). She stated that she also wished to rely on family or private life established in the UK under Article 8 of the ECHR. If she wished the UK Border Agency to consider her application on this basis she had to make a separate charged application using the appropriate specified application form for the five year partner route, or the five year parent or ten year partner or parent route, or the ten year private life route. Since she had not made a valid application for Article 8 consideration, it had not been decided whether her removal from the UK would breach Article 8 of the ECHR. Additionally, it was pointed out the decision not to issue her with a residence card did not require her to leave the United Kingdom if she could otherwise demonstrate that she had a right to reside under the Regulations.

6. The accompanying notice of immigration decision stated she was entitled to appeal against the decision under Section 82 of the Nationality, Immigration and Asylum Act 2002 and Regulation 26 of the Immigration (EEA) Regulations 2006. An appeal had to be made on one or more of the following grounds, which the Secretary of State went on to list. The grounds listed did not include a human rights ground.

The Hearing before, and the Decision of, the First-tier Tribunal

7. The appellants' appeals came before Judge Clough sitting at Hatton Cross on the First-tier Tribunal on 12 September 2014. Both parties were legally represented. The judge received oral evidence from the appellant and her cousin. In her subsequent decision, she found that the appellant was maintained in Pakistan after her marriage in 2009 until she came to the UK in January 2012 by her husband, who was working in the UK as a tailor with a valid work permit to allow him to do so. Her evidence was that he sent her the equivalent of £100 per month. This continued until she came to the UK and she lived with him in his flat at an address in Forest Road, London, E17. Following his arrival in the UK as a dependant on his work permit, her husband was in work until his work permit was cancelled after he was encountered working in February 2013 a chicken shop. This was in employment not covered by his work permit conditions.

8. She accepted the sponsor may have sent money to the appellant in Pakistan, but even if it were for the appellant, rather than the joint family in Pakistan, "by no stretch of the imagination could she be considered dependent on Noman Ali Liaqat considering the money remitted to her by her husband."

9. It was not clear from the sponsor's evidence if he was in the UK exercising his treaty rights until he started trading in his shop in Camden Town. There was no evidence as to his working before that date. If he had he been working with Hamad & Co (a firm of accountants) as claimed, she would have expected him to be able to produce payslips, a P60, or at least some written evidence from Hamad & Co as to his earnings.

10. In addition, she found the sponsor was evasive in giving his evidence. In particular, it was not until he gave oral evidence that he stated he was sending money to Pakistan when he was still at school. She had no doubt that he was aware that what he said in his witness statement about maintaining the appellant and her family in Pakistan was not truthful; and that she was a married woman who was financially dependent on her husband and maintained by him from earnings in the UK.

11. It was for the appellant to show she was financially dependent on her sponsor before and after she came to the UK. The judge was wholly satisfied that she came nowhere near to doing so from the information before her. The judge continued in paragraph [22}:

> The appellant has claimed Article 8 is in issue. This is not so as no removal directions have been sent.

The Application for Permission to Appeal to the Upper Tribunal

12. The appellants applied for permission to appeal to the Upper Tribunal, arguing that the judge did not take into account the exceptional circumstances of their case. The documentary evidence needed to be considered again, and Article 8 had not been considered properly.

The Eventual Grant of Permission to Appeal

13. On 21 November 2014 First-tier Tribunal Judge Chambers refused permission to appeal, on the ground that there was no arguable error of law arising. But upon a renewed application to the Upper Tribunal, Deputy Upper Tribunal Judge Archer granted permission on 30 March 2015 in respect of the Article 8 claim. He found there was no arguable material error of law in the decision under the Regulations. But there was an arguable material error of law on the basis that the judge should have considered Article 8 and permission to appeal was granted on that ground alone. His reasoning was that Schedule 1, paragraph 1 of the Immigration (EEA) Regulations 2006 as read with Section 84(1)(g) of the 2002 Act granted the appellants a right of appeal against an EEA decision on the ground that a hypothetical removal would breach protected rights under ECHR.

The Rule 24 Response

14. On 21 April 2014 Karen Pal, a member of the Specialist Appeals Team, settled a Rule 24 response opposing the appeal. She submitted the judge was correct in not dealing with Article 8. The appellant was required to make a separate charged application for a consideration of paragraph 276ADE or Appendix FM. The application was only refused with respect to the EEA Regulations and a removal decision was not made.

The Hearing in the Upper Tribunal

15. At the hearing before me, Ms Fijiwala took a different line from that taken by her colleague. She accepted that the statutory jurisdiction of the Tribunal to consider a human rights claim pursuant to Section 84(1)(g) was engaged, and to that extent the judge was in error. But the error was not material, as the Tribunal needed only to conduct a light touch review. I asked her what that would involve in this case. She answered it would simply involve the judge directing herself that questions 1 and 2 of the **Razgar** test should be answered in favour of the respondent, as the appellant's enjoyment of private and family life in the United Kingdom was not under any immediate threat. But if, as Mr Otchie contended, the appellant was entitled to a comprehensive review of her Article 8 rights, on the facts the proposed interference was plainly proportionate, and therefore the error of law was still not material to the outcome.

Discussion

16. The line taken by Ms Pal of the Specialist Appeals Team in the Rule 24 response has the virtue of clarity and simplicity, and it is consistent with the Court of Appeal decision in **Lamichhane [2012] EWCA Civ 260**.

17. On the reasoning of the Court of Appeal in **Lamichhane**, Judge Clough was right not to entertain an Article 8 claim by the appellant as (a) the appellant was not facing removal; and (b) the appellant had not been served with a Section 120 notice enabling her to appeal on Section 84(1)(g) grounds.

18. Giving the leading judgment of the court, Stanley Burnton LJ expressly disapproved the earlier Court of Appeal decision in **Mirza & Others v Secretary of State for the Home Department [2011] EWCA Civ 159**.

19. In **Mirza**, the court found that the Secretary of State had a duty to serve a one-stop notice because it had "duties of fairness towards individuals whose lives are on hold, and who may well be committing a criminal offence by their mere presence, while they await an appealable decision".

20. Stanley Burnton LJ described this approach as judicial legislation, not interpretation. He rejected the submission that the Secretary of State was under a duty to serve a Section 120 notice, or indeed that she was under such a duty unless there was a good reason not to do so. The Section conferred a discretionary power, as held in **AS (Afghanistan)**.

21. He went on to conclude at paragraph [41] that an appellant on whom no Section 120 notice has been served may not raise before the Tribunal "any ground for the grant of leave to remain different from that which was the subject of the decision of the Secretary of State appealed against".

22. However, in the light of the stance taken before me today by Ms Fijiwala (which is also apparently the same stance that has been taken by the Secretary of State in a pending decision by a Presidential panel on this difficult area of law) I will not dispose of the appeal on **Lamichanne** grounds. Following the route map outlined by Ms Fijiwala in her extensive skeleton argument, the question which I have to decide is whether the judge's failure to conduct a light touch review translates into a material error of law.

23. Mr Otchie does not accept the underlying premise of Ms Fijiwala's skeleton argument which is that only a light touch review is required. But on the facts of this case, the distinction between the two types of review (light touch versus comprehensive) is irrelevant. On the evidence relied upon before the First-tier Tribunal, no reasonable Tribunal properly directed could have reached any other conclusion than that the alternative claim under Article 8 should be dismissed.

24. For the appellant did not seek to argue before the First-tier Tribunal that either she or any other member of her family came within the scope of Appendix FM or Rule 276ADE. So for a putative Article 8 claim outside the Rules to have any traction, there had to be compelling circumstances: see **SS (Congo) [2015] EWCA Civ 387** at [33]:

> In our judgment, even though a test of exceptionality does not apply in every case falling within the scope of Appendix FM, it is accurate to say that the general position outside the sorts of special contexts referred to above is that compelling circumstances would need to be identified to support a claim for grant of LTR outside the new Rules in Appendix FM. In our view, that is a formulation which is not as strict as a test of exceptionality or a requirement of "very compelling reasons" (as referred to in *MF (Nigeria)* in the context of the Rules applicable to foreign criminals), but which gives

> appropriate weight to the focused consideration of public interest factors as finds expression in the Secretary of State's formulation of the new Rules in Appendix FM. It also reflects the formulation in *Nagre* at para. [29], which has been tested and has survived scrutiny in this court: see, e.g., *Haleemudeen* at [44], per Beatson LJ.

25. The appellant did not identify any arguably compelling circumstances.

26. Mr Otchie submitted that it could be inferred from the evidence that the appellant has established family life with her cousin for the purposes of Article 8 because it could be inferred that the relationship between them went beyond the normal ties to be expected between adult relatives. But the witness statement evidence before the First-tier Tribunal only asserted financial dependency. There was no suggestion of emotional dependency. It was not part of the appellant's case that she had established family life with her cousin for the purposes of Article 8 ECHR.

27. In the absence of compelling circumstances militating against the appellant returning with her husband and child to Pakistan, the public interest was decisively weighted in favour of the family leaving the country voluntarily or accepting the Secretary of State's invitation to make a separate charged application for leave to remain on Article 8 grounds.

Conclusion

The decision of the First-tier Tribunal did not contain an error of law, and accordingly the decision stands. This appeal to the Upper Tribunal is dismissed.

No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge Monson