Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/30097/2014
IA/30106/2014

THE IMMIGRATION ACTS

Heard at Bennett House, Stoke-on-Trent	**Determination Promulgated**
On 23rd March 2015	**On 25th March 2015**

Before

UPPER TRIBUNAL JUDGE MARTIN

Between

MRS KULDIP KAUR
MISS KHUSHVEEN KAUR
(Anonymity Direction Not Made)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr A Mahmoud (instructed by Dent Abrams Solicitors)
For the Respondent: Mr G Harrison (Senior Home Office Presenting Officer)

DETERMINATION AND REASONS

1. This is an appeal to the Upper Tribunal by the Appellants, with permission, against the determination of First-tier Tribunal Judge Stephen Pacey promulgated on 21st October 2014 by which he dismissed the Appellants' appeals against the Secretary of State's decisions to refuse them leave to

remain in the UK on the basis of their private and family lives. Permission was granted by a First-tier Tribunal Judge on the basis that the Judge may have made an error of law by having regard to the "new rules" despite the application being made prior to their coming into force. Reliance was placed on the guidance in Edgehill and Anor [2014] EWCA Civ 402.

2. Before setting out Mr Mahmoud's submissions I will set out the background to this case. The Appellants are a mother and daughter who are nationals of India. The mother was born on 10th August 1964 and her daughter on 9th July 1990. Both came to the United Kingdom on 6th June 2006 with leave to enter. Mother had been granted leave to enter for the purpose of settlement with her spouse who was a British citizen with her daughter as her dependent. However, the British citizen husband had in fact died on 21st April 2006, some two months prior to their entry. That leave was due to expire on 5th May 2008. The Appellants put in an application on 2nd June 2008 for indefinite leave to remain as a bereaved spouse and her daughter. That application was refused of 17th February 2010. The refusal was appealed to the First-tier Tribunal and Upper Tribunal, all of which were unsuccessful such that they became appeal rights exhausted on 4th July 2011.

3. However, on 4th July 2011 a fresh application was submitted based in no small part on the fact that the first Appellant was by then cohabiting with another British citizen. In relation to that application, on 15th May 2013 a judicial review application was submitted with regard to the delay in the defendant reaching a decision. That judicial review was compromised by a consent order in which the Secretary of State agreed to make a decision. That consent order was sealed on 11th September 2013. The Appellants' representative submitted further evidence to the Secretary of State, which the Secretary of State erroneously referred to in the Letter of Refusal as the application, in June 2014. A decision was ultimately made refusing the application on 16th June 2014 and it is that decision that gave rise to the appeal before Judge Pacey.

4. In his determination, Judge Pacey indicated that he had heard evidence from both the Appellants and a number of witnesses and he set out the immigration history. He noted that in the refusal the Secretary of State had applied Appendix FM and paragraph 276ADE of the Immigration Rules. The refusal was on the basis that the first Appellant did not satisfy the Rules in relation to either a partner or a parent. The length of time the first Appellant and her new partner had been living together did not meet the required two years according to the Secretary of State and the Secretary of State also concluded that the exceptions in paragraph Ex.1 did not apply.

5. The skeleton argument before Judge Pacey argued, in summary, that the mother and her partner had been living together since July 2012 and that in any event there were insurmountable obstacles to her return and that of her daughter to India. It was argued that there were significant obstacles

to the re-integration of the Appellants in India and furthermore there were exceptional circumstances in this case warranting consideration of Article 8 outside the Immigration Rules.

6. Judge Pacey analysed the evidence carefully and at paragraph 13 of his decision found that he was satisfied on a balance of probabilities that the first Appellant and her partner have been living together in a relevant relationship since July 2012. However, he then concluded that made no material difference to the outcome since the Rules required the period to have been two years prior to the date of the application and in this case that was not the case.

7. He then went on to consider paragraph Ex.1 of the Rules and found that it did not avail the Appellants as it was made clear in Sabia [2014] UKUT 63 (IAC) that paragraph Ex.1 is not a freestanding element of the Rules but is parasitic on the relevant Rule.

8. Judge Pacey then went on to consider paragraph 276 ADE and in relation to the mother found that she had spent the vast majority of her life in India and must therefore be familiar with its history, culture and traditions and it was not reasonably likely that she would have lost all cultural ties with India. He found it significant that she had formed a relationship with a man from the same culture. He also referred to the determination in the previous appeal in 2010 where it was recorded that she had a brother in India. However, he found irrespective of family ties, that she had not lost all cultural ties.

9. In relation to the daughter he found, which is clearly the case, that she is no longer dependent of her mother. He noted her claim not to speak the national language of India and only a little Punjabi but he also noted that she had also spent the majority of her life in India and for similar reasons found she had not lost cultural ties with the country.

10. Having found that neither Appellant succeeded under the Immigration Rules Judge Pacey then referred himself to the then applicable case of Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 00640 (IAC). He considered the claimed health issues of the mother, hypertension Type II diabetes and high cholesterol but found there was no evidence that medical care for those conditions is not available in India nor was it the case that she would be without her daughter for support. He noted that the daughter had obtained a university degree from the UK which would be highly relevant to her being able to make way in India and found overall no compelling reasons justifying the appeal under Article 8 of the ECHR.

11. When permission to appeal was sought on the Appellants' behalf in relation to that determination it was based mainly on the assertion that the judge had made mistakes which fundamentally undermined the determination. Permission to appeal was granted on the basis that he

Judge had not followed the approach of Edgehill. The grounds suggest he was led to the error by mistaking the date of application as 2014 when in fact it was 2011 (before the new Rules).

12. Dealing with that argument first, it was acknowledged by Mr Mahmoud that it had been swept away by the subsequent decisions of the Court of Appeal in Singh and Khalid [2015] EWCA Civ 74 . Given that the Rules were changed again in September 2012 it is now clear that the rationale of Edgehill is applicable only to a window of time between 9th July 2012 and 6th September 2012. That does not apply in this case. The application was made in 2011 and the decision not until 2014. Therefore the Secretary of State and the Judge were correct to refer to the new rules and in particular to Appendix FM and paragraph 276 ADE.

13. Mr Mahmoud sought to rely on a different ground in particular paragraph 24 of the determination were Judge Pacey said:-"additionally, however, I am entitled to attach little weight to a private life or a relationship formed with a qualifying partner, if established by a person at a time when the person is in the United Kingdom unlawfully and little weight should be given to a private life established by a person at a time when the person's immigration status is precarious." Referring to the chronology I have outlined above, that indicates the Judge was wrong to find that the first Appellant had at any time been unlawfully in the United Kingdom and thus wrong to take that as a factor against the Appellants. Conversely he pointed out that the Appellants spoke English and were not a burden on the taxpayer and that the Judge's error meant that the whole assessment of Article 8 was fundamentally flawed.

14. He also referred to the case of Singh and Khalid and in particular Lady Arden's contribution submitting that the rationale of that case was limited in its application to the long residence rules. In my view that misreads the findings of the Court of Appeal. In particular at paragraph 43 the Court of Appeal made clear that the opening words of Appendix FM, with the amendment, contains an explicit statement that the suitability provisions of Appendix FM apply where a decision is made on or after 9th July 2012, irrespective of the date the application was made. The Court of Appeal said that inescapably provides that the provisions in question should apply to pending applications.

15. So far as the mistake of fact made by the Judge infecting his decision such as to render fatally flawed his assessment of Article 8, I find no merit in that argument.

16. It has not been argued either Appellant meets the requirements of either Appendix FM or paragraph 276 ADE. Rather it is argued that looking at the case in the round it ought to have been successful under Article 8. What Singh and Khalid also tells us is that any previous arguments about separate assessments and an intervening step as to whether it is necessary to find compelling reasons to consider Article 8 outside the

Immigration Rules is no longer helpful. Rather what is required is a decision on whether in the factual matrix of a given case, there is anything falling outwith the Rules to merit consideration. So far as Gulshan suggested an intervening stage it is wrong. However the changes are of form rather than substance as Singh and Khalid made clear. Clearly in this case, the facts disclosed nothing of substance not covered by the Rules as I now explain.

17. So far as the mistake as to lawfulness is concerned, that is relevant when a Judge considers, as he is required to do, paragraph 117B of the Nationality, Immigration and Asylum Act 2002 as inserted by section 19 of the Immigration Act 2014. Those are considerations which a court or tribunal must take into account when considering proportionality. The Secretary of State's consideration of proportionality is encompassed within the Rules. It is true to say however that the contents of s.117B reflect the provisions of the Rules and the exceptions contained therein.

18. What is of particular relevance in this case is that paragraph 117B does not present the Tribunal with an inclusive list of factors to be considered. The use of the word "in particular" in s.117A (2) makes clear that there may also be other factors, not listed, which may be relevant. However those factors which are listed must be taken into account. It is also true to say that if an Appellant can bring himself within the exception contained in section 117B (6) then the assessment of proportionality would result in a decision in the Appellant's favour because the public interest side of the scale has been removed. However, in this case the Judge gave reasoned findings as to why that exception did not apply.

19. So far as the unlawfulness aspect is concerned, it is true that technically the first Appellant has never been in the UK unlawfully. However, that is not to say that her immigration history is one of which she should be proud. She came to the UK for settlement as a spouse knowing full well that her spouse had died two months previously. Even if she had not known, which I find to be highly unlikely, she would have known as soon as she arrived. Nevertheless, she remained in the UK enjoying the benefit of a visa to which she was no longer entitled right up until its expiry when she sought to extend her leave. An honest Appellant would have notified the Entry Clearance Officer that her husband had died or, if in the unlikely event that it was news to her, should have notified the Secretary of State after she had arrived. Had she done so the likelihood is that her visa would have been cancelled, which may provide the explanation for why she did not. She then made an application which failed and her leave thereafter was statutory leave whilst she pursued her appeals until all rights were exhausted and then made a fresh application, on the same day it appears that her appeal rights became exhausted. Therefore, whilst it is true that she has not been in the UK unlawfully, she was certainly here for the first two years on a false premise and deceiving the UK authorities. That has to be highly relevant to an assessment of Article 8 and in particular to the fact that she embarked on a relationship with her partner knowing that

was the basis of her stay. Both she and her partner would/should have known that her ability to remain in the United Kingdom was precarious indeed and that it may be that in order to continue to live together they may have to face the prospect of doing so in India. Those are considerations that Judge Pacey clearly had in mind as they form part of his reasoning.

20. The remaining grounds, not pursued before me, amount to no more than a disagreement with Judge Pacey's conclusions. This was a thorough and detailed assessment of the Appellants' case and any minor mistake of fact as to the date of application or whether the Appellant's lawful status was technical or real had no bearing on the outcome. I cannot envisage any Judge coming to a different conclusion on the facts of this case and therefore any error by Judge Pacey was not material and I uphold his decision.

21. The appeal to the Upper Tribunal is dismissed.

Signed Dated 25th March 2015

Upper Tribunal Judge Martin