Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: IA/43004/2014
IA/43008/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 23 November 2015	**On 8 December 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE SHAERF

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

PREYAL PATEL
VATSALKUMAR PATEL
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Applicants: Mr S Canter of Counsel under the Public Access Scheme.
For the Respondent: Ms S Sreeraman of the Specialist Appeals Team

DECISION AND REASONS

The First-tier Tribunal Appellants

1. Preyal Patel and Vatsalkumar Patel are sister and brother born respectively on 9 September 1991 and 30 May 1995. They are Indian citizens.

2. On 1 May 2005 they entered with leave as visitors and overstayed. They have a maternal aunt and a paternal grandmother living in the United Kingdom who are stated to be British citizens. The First-tier Tribunal found that both their parents had come to the United Kingdom as visitors and overstayed. It would appear from the sister's statement of 24 April 2015 that her father but not her mother has been removed to India and that her parents are separated. On 14 October 2005 the brother and sister each applied for indefinite leave to remain. On 12 June 2006 the applications were refused. On 24 August 2010 further applications were made by each of them relying on Article 8 of the European Convention. On 6 October 2010 both applications were refused with no right of in-country appeal.

3. On 15 July 2014 further representations for the sister and brother were made which the Respondent treated as fresh applications which were refused on 8 October 2014 by way of reference to paragraph 276ADE(1) of the Immigration Rules and to Article 8 of the European Convention outside the Immigration Rules. They were each given an in-country right of appeal under Section 82 of the Nationality, Immigration and Asylum Act 2002 as amended (the 2002 Act) which on 27 October 2014 each of them exercised. The grounds of appeal note the sister and brother arrived when they were children and met the requirements of paragraph 276ADE(1)(vi) of the Immigration Rules because there were very significant obstacles to their integration on return to India and for similar reasons their removal would place the United Kingdom in breach of its obligations to respect their private and family life protected by Article 8 of the European Convention outside the Immigration Rules.

The First-tier Tribunal Decision

4. By a decision promulgated on 21 May 2015 Judge of the First-tier Tribunal Zahed found at paragraph 11 that the sister had spent less than half her life in the United Kingdom and so could not succeed under paragraph 276ADE(1). He found that as at the date of the hearing before him the brother had spent over half his life continuously in the United Kingdom. He found that each of the sister and brother had no family life in the United Kingdom and that their private lives had been established over a time when they were unlawfully in the United Kingdom. He noted the sister had a boyfriend of some years' standing in the United Kingdom and was supported in the United Kingdom by her aunt and that she was pursuing studies here. He concluded the sister's removal would not be in breach of her rights protected by Article 8 and dismissed her appeal under both the Immigration Rules and Article 8. Having found for the brother under the Immigration Rules he did not consider the brother's position under Article 8 outside the Immigration Rules.

5. The sister sought permission to appeal on the grounds that:-

   - The Judge had erred in failing to consider her claim specifically under sub-paragraph (vi) of paragraph 276ADE(1) (very significant obstacles to re-integration).

- The Judge had erred in not carrying out an adequate assessment of the nature and extent of the family life of the sister and brother in the United Kingdom and had erred in concluding they had no family life.

- The Judge had erred in not considering all the relevant factors identified in Section 117B of the 2002 Act and in particular whether each of them was not a burden on taxpayers and able to integrate as provided for in Sections 117B(2) and (3) of the 2002 Act.

- The Judge had erred in considering that there was a minimum threshold of the existence of "exceptional circumstances" before a breach of Article 8 could be found and had failed to conduct an assessment of the claims under Article 8 complying with the procedure recommended in *R (Razgar) v SSHD [2004] UKHL 27*.

6. The SSHD sought permission to appeal the decision in favour of the brother on the grounds that the Judge had erred in assessing whether the brother had spent half his life in the United Kingdom by reference to the date of the hearing rather than the date of his application. If assessed at the date of his application, he would not have spent half his life in the United Kingdom.

7. By decisions of 4 and 5 August 2015 Judge of the First-tier Tribunal Fisher granted each party permission to appeal. The grant to the sister was on the basis that the Judge had arguably erred in law by in not considering her claim under paragraph 276ADE(1)(vi) of the Immigration Rules and granted permission solely on that ground. He granted the SSHD permission to appeal the Judge's decision in respect of the brother on the basis that it was arguable he had used the wrong termination date for assessing the length of time the brother had lived continuously in the United Kingdom.

The Upper Tribunal Hearing

8. Both sister and brother were present although they took no part in the proceedings.

9. Mr Canter submitted that although the sister may not have qualified under the "half life" Rule in paragraph 276ADE(1)(v) the Judge had made no findings whether there were "very significant obstacles" to her re-integration into India under paragraph 276ADE(1)(vi). Her evidence in this regard was limited to what she had said in paragraph 19 of her statement which refers to her ambition to study law at university and the shortage of women police officers.

10. In response, Ms Sreeraman relied on the letter of 12 August 2015 from the SSHD, being a response under Procedure Rule 24. The Judge had considered all the evidence before him and read as a whole his decision dealt with the issue of the sister's return to India where her father lived. She is an Indian national and had been living in the "ethnically Indian Diaspora in the UK". There was no evidence that her re-integration into India would be unduly harsh or that there would be substantial obstacles

to it. Her aunt could continue her support if the sister pursued her studies in India. Despite the lengthy relationship with her boyfriend, there was no evidence that they planned to marry and the Judge was entitled to conclude that family life had not been established in that context.

11. The relevant factors for consideration under Section 117B of the 2002 Act were not positive points in favour of the sister but simply factors the Judge was required to take into account.

12. Ms Sreeraman continued that on looking at paragraphs 12-15 of the Judge's decision it would be seen that he had effectively had regard to paragraph 276ADE(1)(vi) and had not identified any very significant obstacles to her re-integration in India and so was entitled to reach his conclusion at paragraph 16 of his decision rejecting the sister's claim under Article 8 outside the Immigration Rules. The assessment of the proportionality of the decision of the SSHD's decision in paragraph 18 of the Judge's decision was adequate and on the facts as found no other Tribunal would have reached a different decision. There was no material error of law in the decision of the sister's appeal.

13. Mr Canter replied that paragraphs 12-15 of the Judge's decision merely summarised the evidence before him but contained no findings that the evidence showed there were no very significant obstacles to the sister's re-integration in India.

14. Turning to the SSHD's appeal against the Judge's finding in favour of the brother, Ms Sreeraman relied on the SSHD's grounds for permission. The Judge had erred in finding that the end date for assessment whether an applicant had lived more than half his life in the United Kingdom was the date of the hearing. The relevant end date was the date of the application to the SSHD for leave to remain. The provisions of paragraph 276AO of the Immigration Rules were not applicable and the decision should be set aside.

15. Mr Canter relied on paragraph 276AO(iii) which came into effect on 6 November 2014 and provides that:-

> For the purposes of paragraph 276ADE(1) the requirement to make a valid application will not apply when the Article 8 is raised:
>
> (i) Not applicable.
>
> (ii) Not applicable.
>
> (iii) in an appeal (subject to the consent of the SSHD where applicable).

16. He stated he had relied on this when he had presented the case for the brother at the First-tier Tribunal hearing. The effect of sub-paragraph (iii) was to waive the requirement of there being a valid application in an appeal. The issue of the SSHD's consent was not applicable to the brother's appeal.

17. He submitted that because there was no valid application, the end date for assessment of the length of time an applicant had lived in the United Kingdom could not be the date of the application and so must be the date of the hearing of the appeal. He was not aware of any guidance from the SSHD or case law which addressed this particular point.

18. Additionally or in the alternative, he submitted that the Judge at paragraphs 16-18 of his decision had erred in that his consideration of the claim under Article 8 outside the Immigration Rules was inadequate because he had not addressed the brother's claim at all.

Findings and Consideration

19. It was incumbent upon the Judge to address the sister's claim by way of reference to paragraph 276ADE(1)(vi). At paragraph 8 of his decision he set out the whole of paragraph 276ADE(1) but did not consider the sister's claim in that and the context of sub-paragraph (vi): as identified by Judge Fisher in his grant of permission. This amounted to a material error of law.

20. I do not accept the SSHD's submission that paragraph 276AO(iii) has no application to the brother's appeal. Paragraph 276AO refers to the "requirement to make a *valid* application" (emphasis added). Even if the applicant makes an application which is not valid and which is not made in time during the currency of a previous leave, the applicant has nevertheless made an application just that it does not meet the requirement of being a valid one. In such circumstances absent any guidance or authority, I find the relevant end date for assessment whether an applicant has lived half his life in the United Kingdom would be the date of the application, whether valid or not. Alternatively and if I am incorrect about the application date, I would find the next most appropriate end date would be the date of the SSHD's decision and if the point was not addressed by the SSHD in the reasons for refusal, I would suggest that the last appropriate date would be the date the Appellant lodged his appeal but certainly not the date of the hearing.

21. In the brother's case he meets the "half life" requirement only if the end date for assessment of the half life is the date of the hearing. He cannot meet the requirement if any earlier date is used.

22. It was also incumbent on the Judge to consider the brother's claim under Article 8 of the European Convention outside the Immigration Rules in the light of the paragraph 276AO(iii) argument which Mr Canter says was canvassed at the First-tier Tribunal hearing.

23. I would add that the Judge appears to have had no regard to the possible impact of his decisions which effectively separate sister and brother who have been living in the same household since their arrival in the United Kingdom. Further, the Judge erred in finding that "family life is not engaged" in his assessment of the claim under Article 8 outside the Immigration Rules at paragraph 16 of his decision. There was ample evidence before him that the sister and brother had a family life with each other and with the relatives with whom they have lived since arriving in

the United Kingdom. There was also ample evidence they each had established a substantial private life in the United Kingdom if only by reason of the length of time that they have been here during which they have been educated.

24. The issue which the Judge had to decide was whether the SSHD's decisions amounted to an interference with the private and family lives of each of the sister and brother which would be sufficiently serious to engage the State's obligations under Article 8 of the European Convention to respect their private and family lives. He failed so to do.

25. For these reasons the appeals of the sister and the SSHD are upheld because there are material errors of law in the Judge's decision in relation to each of the brother and sister. The errors are such that the decision must be set aside in its entirety and in the circumstances no findings of fact can be preserved.

26. Having regard to Section 12(2) of the Tribunals Courts and Enforcement Act 2007 and Practice Statement 7.2(b) and the nature and extent of fact-finding required, I conclude both appeals should be remitted to the First-tier Tribunal to decide afresh.

Anonymity

27. Neither sister nor brother applied for an anonymity direction and having heard the appeals I do not consider such directions are warranted.

NOTICE OF DECISIONS

The decision of the First-tier Tribunal contains errors of law such that it is set aside in its entirety and both appeals are remitted to the First-tier Tribunal for hearing afresh.

Signed/Official Crest Date 30. xi. 2015

Designated Judge Shaerf
A Deputy Judge of the Upper Tribunal