Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU020832016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 19 June 2017	**On 23 June 2017**

Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MEHTAB MAHEBUBBHAI UMARJI BHAI PATEL

Respondent

Representation:

For the appellant: Ms K. Pal, Senior Home Office Presenting Officer
For the respondent: Ms A. Nizami, Counsel instructed by Nasim & Co. Solicitors

DECISION AND REASONS

1. For the sake of continuity I will refer to the parties as they were before the First-tier Tribunal although technically the Secretary of State is the appellant in the appeal to the Upper Tribunal.

2. The appellant appealed the decision made by the Secretary of State on 12 January 2016 to refuse leave to remain as the spouse of a person with limited leave to remain in the UK. The respondent was not satisfied that

she met the 'Eligibility' requirements of the immigration rules because her partner was not a British citizen or a person who was settled in the UK at the date of the application. She concluded that there was insufficient evidence to show 'insurmountable obstacles' to the couple continuing their family life in India for the purpose of paragraph EX.1 of Appendix FM of the immigration rules. The appellant did not meet the private life requirements of paragraph 276ADE(1)(vi) of the immigration rules because there was no evidence to show 'very significant obstacles' to her integration in India. The respondent concluded that there were no 'exceptional circumstances' to justify granting leave to remain on human rights grounds outside the immigration rules.

3. First-tier Tribunal Judge Carlin ("the judge") allowed the appellant's appeal in a decision promulgated on 16 November 2016. The judge noted that the respondent was unrepresented and that there was no dispute as to the facts of the case [8]. The appellant's representative accepted that she could not meet the requirements of the immigration rules [9]. As such, the judge went on to assess whether the decision amounted to a disproportionate breach of the appellant's rights under Article 8 outside the rules. He referred to the wording of Article 8 and the five-stage approach outlined by the House of Lords in *R v SSHD ex parte Razgar* [2004] UKHL 27 [13]. The judge acknowledged that the decision pursued the legitimate aim of maintaining an effective system of immigration control. The judge then went on to make the following findings relating to proportionality (questions (iv) and (v) of the *Razgar* test).

> "15. The burden is on the respondent to show, on a balance of probabilities, to show that the interference in any family life is proportionate. However, the appellant has the responsibility of adducing evidence that lies within his remit and of which the respondent is unaware as to any relevant matters which may have a bearing on the issue.
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> 16. There are a number of authorities that hold that if it is reasonable, in any particular case, for family life to be enjoyed elsewhere, then there will have been no violation of Article 8. In AS (Pakistan) v. SSHD [2008] EWCA Civ 1118, the Court of Appeal made it clear that the question of whether the life of a family can reasonably be expected to be enjoyed elsewhere is part of the considerations of proportionality (point (v) in the Razgar test).
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> 17. In Beoku-Betts v SSHD [2008] UKHL 39, it was accepted by the House of Lords that it is permissible to take into account the impact of the removal of the appellant on other members of her family such as her husband and her daughter.
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> 18. The impact of the removal of the appellant from the UK would be serious in that inevitably the appellant's husband would lose contact with his daughter for a period of time. Whilst it is arguable that the appellant's husband would be able to maintain contact with the appellant by means of modern technology, this clearly does not apply in relation to their daughter. Given the age of the daughter, only face to face contact would enable the appellant's husband to maintain a father/daughter relationship with his daughter.

> 19. By virtue of EB (Kosovo) [2008] UKHL 41, the test, in considering whether family life can be enjoyed elsewhere, is whether it is reasonable to expect the appellant's husband to leave the UK with her.
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> 20. I was of the view that the appellant's husband could not reasonably be expected to leave the UK with the appellant. This was for two reasons. Firstly, the appellant's husband has built up a private life in the UK, in that he has full-time employment earning a sufficient income to be able to obtain a mortgage to purchase his own property. Secondly, as submitted by Ms Nizami, it is reasonable to expect the appellant's husband to be given leave to remain in the UK in the foreseeable future. This would have the effect of regularising the appellant's position.
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> 21. For all of these reasons, it is disproportionate for the appellant to be removed from the UK.
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> 22. In coming to this conclusion, I took into account the provisions contained in s.117 of the Nationality, Immigration and Asylum Act 2002 and in particular the factors set out in s.117B. It was clear and not in dispute that both the appellant and her husband speak English. It is also clear and not in dispute that the appellant and her husband are financially independent. On considering s.117 in its totality, I was of the view that there was nothing in the wording of the provision that led me to the conclusion that it was in the public interest for the appellant to be removed from the UK."

4. The Secretary of State appeals against the First-tier Tribunal decision on the following grounds:

   (i) In assessing the case outside the immigration rules the First-tier Tribunal failed to apply the proper legal test. The judge failed to consider whether there were sufficiently 'compelling circumstances' to demonstrate a breach of Article 8: *SSHD v SS (Congo)* [2015] EWCA Civ 387 referred.

   (ii) The First-tier Tribunal failed to give proper weight to private life accrued while the appellant's immigration status was precarious with reference to section 117B of the The Nationality, Immigration and Asylum Act 2002 ("NIAA 2002") and/or erred in speculating about the future immigration status of the appellant's husband.

   (iii) The First-tier Tribunal failed to conduct an adequate balancing exercise and failed to take into account public interest considerations. No consideration was given to the fact that the appellant did not meet the requirements of the immigration rules, the fact that her husband was not settled in the UK, her immigration history or the family's social and cultural ties to India.

Decision and reasons

5. After having heard submissions from both parties I gave summary reasons for concluding that the First-tier Tribunal decision involved the making of an error of law. Both parties agreed that the appropriate course of action

was for the appeal to be remitted to the First-tier Tribunal for a fresh hearing.

6. Although the judge made proper reference to the five-stage test in *Razgar*, there is nothing in his findings to indicate that he recognised the stringent nature of the test required to show a breach of Article 8 of the European Convention in circumstances where an appellant does not meet the requirements of the immigration rules. At the date of the hearing the relevant principles were outlined by the Court of Appeal in *SS (Congo)*. There is nothing to indicate that the judge applied, or had in mind, the need for the appellant to show that there were sufficiently 'compelling circumstances' outside the rules to engage Article 8.

7. Nor is there any indication that the judge applied, or had in mind, the relevant legal test as to whether there were 'insurmountable obstacles' to the couple continuing their family life in India. At the date of the hearing the relevant test was outlined in the Court of Appeal decision in *Agyarko v SSHD* [2015] EWCA Civ 440.

8. The recent Supreme Court decision in the same case did not alter the stringent nature of the test: see *R (on the application of Agyarko & Ikuga) v SSHD* [2017] UKSC 11. The Supreme Court noted that the position has changed since the House of Lords decided *Huang v SSHD* [2007] UKHL 11. At that time the immigration rules did not incorporate specific human rights provisions and were deemed to be a starting point for an assessment under Article 8. Since 2012 the immigration rules state where the Secretary of State considers a fair balance will be struck in cases involving private and family life issues under Article 8.

9. In cases involving human rights issues under Article 8, the heart of the assessment is whether the decision strikes a fair balance between the due weight to be given to the public interest in maintaining an effective system of immigration control and the impact of the decision on the individual's private or family life. In assessing whether the decision strikes a fair balance a court or tribunal should give appropriate weight to Parliament's and the Secretary of State's assessment of the strength of the general public interest as expressed in the relevant rules and statutes: see *Hesham Ali v SSHD* [2016] UKSC 60.

10. The First-tier Tribunal's reference to the decisions in *AS (Pakistan)* and *EB (Kosovo)*, and the judge's apparent emphasis on a test of 'reasonableness' [16 &19], did not reflect the current legal position. Whilst it was open to the judge to consider the ties that the appellant's partner had to the UK, and the effect that potential separation might have on the appellant's daughter if he chose to remain here, there were a number of relevant matters that were simply not considered.

11. While the judge referred to some of the public interest considerations in section 117 NIAA 2002 [22] there appears to be no recognition of the

weight to be placed on the public interest in maintaining an effective system of immigration control and no assessment of what weight should be placed on that issue in circumstances where it was accepted that the appellant did not meet the requirements of the immigration rules. There is little evidence to suggest that relevant matters were weighed against one another with reference to the correct legal tests to ascertain where a fair balance should be struck on the facts of this particular case. For these reasons I conclude that the First-tier Tribunal decision involved the making of an error of law and should be set aside.

12. Ms Nizami informed me that there have been further developments in the case. The appellant's partner has now been granted Indefinite Leave to Remain and an application has been made for their child to be naturalised as a British citizen. In view of these further developments both parties agreed that the appropriate course of action was to remit the appeal for a fresh hearing before the First-tier Tribunal. In the meantime, the appellant can consider her position and put forward further evidence. It will also provide time for the respondent to consider her position in light of these further developments.

DECISION

The First-tier Tribunal decision involved the making of an error on a point of law

The decision is set aside and the appeal remitted for a fresh hearing

Signed  Date 22 June 2017
Upper Tribunal Judge Canavan