



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Numbers: IA/18636/2013  
IA/18633/2013

**THE IMMIGRATION ACTS**

Heard at Field House  
On 17<sup>th</sup> September 2014  
Prepared 25<sup>th</sup> September 2014

Determination Promulgated  
On 9<sup>th</sup> October 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

BIPASHA BARDHAN  
RAINA BARDHAN  
(ANONYMITY ORDERS NOT MADE)

First Appellant  
Second Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellants: Ms M. Vidal, Solicitor  
For the Respondent: Ms S. Vidhyadharan, Home Office Presenting Officer

**DETERMINATION AND REASONS**

**The Appellants**

1. The Appellants are both citizens of India and are mother and daughter respectively. The First Appellant, who I shall refer to as the Appellant, was born on 1<sup>st</sup> October 1963 and the Second Appellant, who I shall refer to as R, was born on 9<sup>th</sup> January 1998 and is therefore 16 years of age. They appealed against decisions of the Respondent dated 3<sup>rd</sup> May 2013 to refuse their application to vary leave to remain both under the Immigration Rules and pursuant to Article 8 (right to respect for private and family life) of the Human Rights Convention. Their appeals were allowed at first instance by First-tier Tribunal Judge Metzger sitting at Taylor House

on 30<sup>th</sup> June 2014. The Respondent appeals against those decisions with permission and the matter therefore comes before me as an appeal by the Respondent against the decision of the First-tier. However, for the sake of convenience I will continue to refer to the parties as they were referred to at first instance.

2. The Appellant was granted entry clearance as a student on 16<sup>th</sup> August 2007 valid until 31<sup>st</sup> January 2009 and R was granted leave in line with that as the Appellant's dependant. They entered the United Kingdom on 10<sup>th</sup> September 2007. The Appellant was later granted further leave to remain as a student, then as a Tier 4 Student and then as a Tier 1 Highly Skilled post-graduate worker until 9<sup>th</sup> February 2013. On 8<sup>th</sup> February 2013, one day before that leave was due to expire, the Appellants made their applications for variation, refusal of which has given rise to these proceedings.
3. The Appellant's case was that she had arrived in the United Kingdom after her marriage broke up, stating that she had been the victim of domestic violence. She was divorced in February 2006. She was accepted to study for a Master's in Business Administration at Canterbury and R went to school in Canterbury. The Appellant graduated with a distinction in her MBA in October 2010 and went on to form a private limited company of which she is the managing director, coaching business start-ups of small and medium enterprises. R was said to have done very well at her school. The Appellants produced a number of references in support of the Appellants.
4. The Respondent refused the applications because neither Appellant could meet the Immigration Rules. R was not a British citizen and had only lived in the United Kingdom (at the date of decision) for 5 years and 5 months. They could not satisfy Section E-LTRPT 2.2 which required seven years residence nor could they succeed under section EX1 of Appendix FM. They could not meet the private life requirements in paragraph 276ADE of the Rules (twenty years residence) and they had not lost all ties to India. The stated fear of returning to India should more properly be made in person at the Asylum Screening Unit.

### **The Proceedings at First Instance**

5. It does not appear to have been argued before the Judge that either Appellant could meet the Rules. In closing submissions the Respondent acknowledged that Article 8(1) of the Human Rights Convention was engaged in that both Appellants had established a private life in this country which would be interfered with by their return to India. The issue was the proportionality or otherwise of that interference.
6. In somewhat brief findings at paragraph 10 of his determination the Judge noted that the parties had lived in the United Kingdom lawfully for "nearly seven years". He continued:

"Taking into account the Respondent's legitimate interest in immigration control and noting the Appellants' lack of ties to India (the First Appellant has

only an aged mother there), the length of time the Appellants have been in the United Kingdom and what they have done with their time and taking into account further the Second Appellant's age upon arrival and her interests as a child, I have no difficulty in finding that carrying out the balancing exercise in accordance with **Razgar** there would be a disproportionate interference with the Appellants' rights to private life were the Appellants to be returned to India."

### **The Onward Appeal**

7. The Respondent appealed the decision to allow the appeal arguing that the Judge had failed to identify compelling circumstances not sufficiently recognised under the Rules in order to found an arguable case for the grant of leave outside the Rules. The Respondent relied on the decisions of the High Court in **Nagre [2013] EWHC 720** and the decision of the Upper Tribunal in **Gulshan [2013] UKUT 640**. Only if there may be arguably good grounds for granting leave to remain outside the Rules was it necessary for Article 8 purposes to go on to consider whether there were compelling circumstances not sufficiently recognised under them. The Judge had embarked upon a cursory analysis resulting in the finding that the decisions were disproportionate. He failed to identify compelling circumstances which had not been sufficiently recognised under the Rules.
8. The Judge had also erred by not having regard to the requirements of the Rules as a relevant consideration in the proportionality exercise. Paragraph 276ADE(iv) would have been particularly relevant in this regard. It was only if a child had been in the United Kingdom for seven years prior to the application that she could qualify for leave to remain on the basis that it would not be reasonable to expect her to leave. In this case the child had not been in the country for seven years at the date of hearing. The Judge had embarked on a freewheeling analysis unencumbered by the Rules which was not the correct approach. The Judge had failed to have regard to the Appellant's immigration status when assessing the weight to be accorded to R's best interests. This argument relied on **EV Philippines [2014] EWCA Civ 874**. Further, the Judge had failed to have regard to the public interest in effective immigration control.
9. The application for permission to appeal came on the papers before First-tier Tribunal Judge Cox on 31<sup>st</sup> July 2014. In granting permission to appeal he wrote:

"I can understand why the Judge decided as he did because he had before him two entirely admirable Appellants in terms of their behaviour and achievements in this country. However sympathy and admiration do not suffice as a basis for allowing an Article 8 appeal. I fear that it is arguable that the Judge embarked upon the sort of freewheeling analysis disapproved in **Gulshan**. There is a lack of hard-edged analysis and adequate reasoning taking proper account of the Rules, the public interest and the need to show compelling circumstances which would result in removal being unjustifiably harsh."

## The Hearing before Me

10. At the hearing before me the Presenting Officer submitted that it did not appear that the Judge had directed himself towards the relevant case law. His determination was rather brief. Although **Razgar** was mentioned it was not clear that the Judge had carried out a balancing exercise. There was no mention of **Gulshan** or what the compelling circumstances were outside the Rules which were not recognised under the Rules. At the date of hearing the Appellants had not been in the United Kingdom for seven years. The Judge had compassion and respect for the achievement of both Appellants but he was not entitled to embark on a freestanding application under Article 8.
11. In reply the Appellants' solicitor acknowledged that the determination was brief but that did not detract from the matters put before the court. The Judge had the Appellants' skeleton argument before him which referred to case law including **Gulshan**. As at the date of the application in February 2013 the Appellants had been in the United Kingdom for five and a half years. It was not a near miss. The only issue had been proportionality and the Judge had carried out the assessment of proportionality correctly. However, the Appellants had now been in the United Kingdom for seven years and if an application was made now they would come within the provisions of the Nationality, Immigration and Asylum Act 2002 as amended by the Immigration Act 2014.
12. At the close of the submissions I indicated to the parties that I found that there was a material error of law in the Judge's determination such that his conclusions fell to be set aside although not his findings of fact. It was not at all clear from the Judge's very brief analysis of the Article 8 claim at paragraph 10 of the determination that the Judge had given any consideration at all to the public interest in immigration control and the weight to be given in a proportionality exercise to the fact that the Appellants were applying outside the Rules. The Judge referred to the Respondent's legitimate interest in immigration control but appeared to overlook the fact that in carrying out the proportionality exercise he needed to say what factors weighed on which side of the balance. His analysis was fundamentally flawed and needed to be remade although in doing so I would preserve the findings of fact that he made in relation to the Appellants.
13. I invited the parties to make further submissions and invited the Appellant to put forward any further evidence she might wish in support of her appeal under Article 8. Oral evidence was given by the Appellant at first instance and I was informed by her solicitor that it was not intended to give any further oral evidence now. Bringing matters up to date, R had continued to do well at school, her results for her GCSEs were now available and there was a confirmation letter from the prestigious King's School, Canterbury that R would be able to begin her two year 'A' level course in September 2014. During that course R would be a boarder at the school. The Appellant's company BR Education and Training Ltd was now an approved training qualifications UK centre for Training Qualifications UK, a company which described itself as representing over 100 training providers.

14. In closing submissions the Presenting Officer indicated that, notwithstanding R's tremendous achievements, there were no insurmountable obstacles or unduly harsh circumstances that either Appellant would face upon return to India. Article 8 was not an opportunity for an Appellant to choose their place of residence and the case law supported that.
15. In closing for the Appellant it was argued that it would be unduly harsh to require the Appellants to return to India. There was information to suggest that domestic violence was prevalent in that country and the authorities had failed to curb violence against women and girls. The Appellants had now been here for seven years and had both done well. Both regarded the United Kingdom as their home. It was not a question of just looking at the length of time but what had been achieved during that time.

### **Findings**

16. The effect of setting aside Judge Metzger's decision in order that this appeal should be reheard is that in assessing the appeal I must take into account Sections 117A, B and C of the 2002 Act. It is correct that at the date of the appeal before Judge Metzger the Appellants had not been here for seven years. As the Court of Appeal had made clear there is no such thing as a near miss, the argument based on seven years or more residence would therefore have failed before Judge Metzger but by reason of the effluxion of time since then it can now be prayed in aid by the Appellants.
17. Section 117B(6) provides that in the case of a person who is not liable to deportation the public interest does not require the person's removal where the person has a qualifying and subsisting parental relationship with a qualifying child and it would not be reasonable to expect the child to leave the United Kingdom. Paragraph 117D defines a qualifying child as being (inter alia) a child who has lived in the United Kingdom for a continuous period of seven years or more.
18. The result of the length of time taken to deal with this matter, first by the Respondent to make a decision and then the Tribunal to deal with this appeal, is that by the time the matter came before me R had become a qualifying child as she has lived in the United Kingdom for a continuous period of seven years or more. She had arrived in the United Kingdom on 10<sup>th</sup> September 2007. The Appellant clearly has a genuine and subsisting parental relationship with R and the only issue in the case therefore is whether it would be reasonable to expect R to leave the United Kingdom. If it would not then there would no longer be a public interest in the removal of either Appellant and when carrying out the proportionality exercise under Article 8 the appeals would necessarily succeed.
19. If it would be reasonable to expect R to leave the United Kingdom the appeals would fail. Section 117 supersedes the provisions of paragraph 276ADE of the Immigration Rules and Appendix FM when deciding whether this country's obligations under Article 8 would be breached. Although a proportionality exercise must still be carried

out, the weight to be ascribed to certain elements of an Article 8 claim has been significantly affected by the new provisions.

20. The Judge had erred by not carrying out the proportionality exercise correctly based on the law at the date of his decision. He had made no reference to the relevant case law and had not assessed proportionality in the light of that case law. As the Respondent pointed out, he had not directed himself that he needed to go on to consider whether there were sufficiently compelling and compassionate circumstances such that the appeal should be allowed outside the Immigration Rules. It may be argued that the tenor of the determination is such that the Judge evidently did think that there were compelling compassionate circumstances but to satisfy the test as to adequacy of reasons a losing party must reasonably be able to ascertain why they have lost. The brief determination did not do that.
21. Having said that, the position has changed again as a result of the change in the law and the requirements that I must now apply. I must consider the issue of the reasonableness or otherwise of expecting R to leave the United Kingdom. In doing so I bear in mind the following factors:
  - (a) On what might be referred to as the debit side of the equation, that neither the Appellant nor R have any leave to remain in this country save for Section 3C leave. They cannot bring themselves within the Immigration Rules and are applying for leave to remain outside the Rules. The private life which they have built up in this country has been established when they have been in the United Kingdom lawfully but arguably whilst their immigration status was precarious for some of the time given that initially the Appellant was granted entry clearance as a student with no expectation that her leave would be made permanent. Little weight is not the same as no weight but it is a factor that I must take into account.
  - (b) On the other side of the equation are the matters referred to by the Judge at first instance, in particular the tremendous achievements of both Appellants since they have been here and the very severe disruption which would be caused to R's education were she to be required to return to India. R is now able to be a boarder at a distinguished public school and the Appellant's training company appears to be going from strength to strength. All of that would be put at risk by the Appellant's return.
  - (c) One other factor is argued by the Appellant on the side of the equation that the Appellants should be allowed to remain. That is the Appellants' fear of domestic violence if returned to India. There appears to be no dispute that the Appellant was the victim of domestic violence in India but I see little reason why upon return either the Appellant or R would be exposed to any particular risk. Whilst it is true that there have been a number of highly publicised cases of criminal activity against women and girls in India, it is in my view hard to argue that there is an inadequate system of protection available to Indian citizens to the Horvath standard. I would not rate the fear expressed by the

Appellants as to what might happen to them if they were to return to India as a significant factor.

22. Having set out the matters on either side of the equation, what tips the scale? That the Appellant's company has done well is not in my view such a factor. Upon return to her country of origin she would be able to use the skills she has acquired in this country. Section 117B (5) of the 2002 Act would undermine the Appellant's claim to have an established private life that should not be interfered with. The only significant matter is the reasonableness or otherwise of expecting R to return to India. To take R away from her education at this stage would in my view be unreasonable but that is not to say that R should necessarily be granted indefinite leave to remain at this stage. She is a qualifying child, she has lived in the United Kingdom for a period of seven years, it would not be reasonable to expect her to leave the United Kingdom at this present stage where she has just embarked on her 'A' level course at a prestigious school. Whether the Respondent wishes to grant the Appellants discretionary leave for a period of two years or more to enable R to complete her school education is a matter for the Respondent but it is in my view unreasonable at this stage to expect R to leave the United Kingdom. For that reason I would allow the Appellants' appeals against the Respondent's decision to refuse them leave to remain.

### **Fee Award**

23. The Judge of the First-tier allowed the appeals and ordered that the appeal fee be repaid to the Appellants. I have set the Judge's decision aside in relation to the appeal being allowed and therefore I set aside his decision that the Respondent should repay the appeal fee to the Appellants. I have allowed these appeals because of a change in the law which has occurred due to the length of time that this case has taken to come to a hearing. In those circumstances I do not consider it reasonable that the Respondent should be expected to repay the appeal fee to the Appellants. I therefore make no fee award in this case, notwithstanding that I have ultimately allowed the Appellants' appeals for the reasons I have stated.

### **Decision**

The decision of the First-tier Tribunal involved the making of an error of law and I have set it aside. I have remade the decision by allowing the Appellants' appeals against the Respondent's decisions.

Appeals allowed.

The Judge at first instance did not make an anonymity order and I also make no anonymity order as there is no public policy reason for so doing.

Dated this 8th day of October 2014

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Deputy Upper Tribunal Judge Woodcraft