



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/40363/2014

THE IMMIGRATION ACTS

Heard at Field House

On 26th October 2015

Decision & Reasons

Promulgated

On 4th January 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE MANDALIA

Between

MR. KASHIF AJMAL
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondents

Representation:

For the Appellant: Mr M Iqbal of Counsel instructed by SHN Solicitors

For the Respondent: Miss K Pal: Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against a decision and reasons by First-tier Tribunal Judge Lamb promulgated on 19th May 2015 in which he dismissed the appellant's appeal against the decision made by the Secretary of State on 25th September 2014 to refuse to vary the appellant's leave to remain in the UK and to give directions under s47 of the Immigration, Asylum and Nationality Act 2006 for removal of the appellant from the UK.

Background

2. The appellant is a Pakistani national. He entered the UK on 10th of March 2009 and was given leave to enter as the spouse of a Tier 1 general migrant until 30th January 2012. He was subsequently granted leave to remain in the UK as the spouse of a Tier 1 general migrant until 13th June 2014.
3. The appellant and his wife have three children born on 20th August 2000, 3rd February 2005 and 3rd June 2006 respectively. The children entered the UK at the same time as the appellant and his wife and they were aged 8, 4, and 2 when they arrived in the UK.
4. On 3rd April 2014, the appellant's wife applied for indefinite leave to remain in the UK. The appellant and their three children were named as dependants to that application. It seems that the appellant's wife and their three children were granted indefinite leave to remain, but the appellant's application was refused for the reasons set out in a 'Reasons for Refusal Letter' dated 25th September 2014. It was respondent's decision of 25th September 2014 that gave rise to the appeal before the First-tier Tribunal.
5. The appellant was refused indefinite leave to remain in the UK because, as at the date of the decision, the evidence before the respondent suggested that he was unable to satisfy the requirements of paragraph 319E(g) of the Immigration Rules.
6. In her decision of 25th September 2014, the respondent noted that the appellant had stated in his application that he wished to rely on his family or private life established in the UK pursuant to Article 8 of the ECHR. To that end, the respondent stated:

"If you wish the UK Border Agency to consider an application on this basis you must make a separate charged application using the appropriate specified application form and pay the appropriate fee..."

The respondent then stated:

"It has also been considered whether the particular circumstances set out in your application constitute exceptional circumstances which, consistent with the right to respect for private and family life contained in Article 8 of the European Convention on Human Rights, might warrant a grant of leave to remain in the United Kingdom outside the requirements of the Immigration Rules."

7. Having considered her duty under s55 of the Borders, Citizenship and Immigration Act 2009, and the family's immigration history, the respondent concluded that there are no exceptional circumstances in the appellant's case, and that his application does not fall for a grant of leave outside the rules.

The decision of First-tier Tribunal Judge Lamb

8. First-tier Tribunal Judge Lamb dismissed the appeal under the Immigration Rules. His reasons for doing so are far from clear. Insofar as the appellant relied upon post decision evidence, he stated:

"I therefore agree that I can consider the new matters constituted by the certificates now obtained; the evidence of the misleading conduct of the solicitors who previously acted; and the grant of indefinite leave to the appellant's family; but only in the context of the alternative argument based on Article 8." [22]

9. The Judge then referred to the Article 8 claim and dealt with it in a very confused fashion. Insofar as is relevant to the appeal before me, he stated:

"25. Mr Parkin pressed an argument based on Article 8, set out in his skeleton argument, and I am required to determine it: s. 86(2) of the Nationality Immigration and Asylum Act 2002.

....

27. *I then consider whether the appellant is entitled to consideration of his Article 8 claim in the absence of an application having been made on that basis, and therefore of a decision on that point. I have decided that he is not, for two reasons.*

28. *Firstly, it seems fundamentally unfair to decide the appeal on a basis which has not been the subject of a decision, because none was sought.*

29. *Secondly, the caselaw concerning the relationship between Article 8 and the Rules requires a case to be considered under the Rules firstly, and under Article 8 only if there is an arguable case to do so: R (Nagre) v SSHD (2013) EWHC 720; Gulshan (2013) UKUT 00640. That principle would be breached if an appellant could pursue the course advocated in this case.*

....

31. *If I am wrong in the statements of principle set out above, then it may be helpful if I consider the Article 8 contention on its merits...*

10. At paragraphs [32] to [42] of his decision, the Judge has regard to the five stage test referred to by Lord Bingham in **R -v- SSHD ex parte Razgar [2004] UKHL 27**. He found that removal of the appellant would amount to an interference with the family life of the appellant and his family. [32] He found that the interference with the right to family life would have consequences of such gravity as potentially to engage the operation of Article 8. [33] The Judge then turned his mind to the fifth and crucial question, of whether the interference is necessary and proportionate at paragraphs [34] to [41] of the decision. At paragraph [41] he concluded:

".... I am satisfied that removal would be disproportionate and that the article 8 argument would succeed if I were free to make the assessment as I have."

However, having previously determined that the appellant is not entitled to a consideration of his Article 8 claim in the absence of an Article 8 application and decision by the respondent, the Judge dismissed the appeal.

The Grounds of Appeal

11. The appellant appeals on the grounds that the decision of the Judge is ambiguous insofar as the consideration of the appeal under the Immigration Rules is concerned, and that the Judge erred in failing to allow the appeal on Article 8 grounds, in light of the matters set out at paragraphs [31] to [41] of the decision.
12. Permission to appeal was granted by First-tier Tribunal Judge Fisher on 30th July 2015. In doing so, she noted that arguably the Judge's somewhat confused treatment of the Article 8 aspects of this appeal, amounts to an error of law.

The hearing before me

13. At the hearing before me on 26th October 2015, Mr Iqbal adopted the grounds of appeal and submitted that the Judge noted at paragraphs [11] and [12] that since the decision of the respondent of 25th September 2014, the appellant has in fact passed the Life in the UK test. He has been awarded Grade 5 in spoken English; entry level certificate in ESOL International (Speaking and Listening) (Entry 3), B1.1 of the CEFR, with distinction. He submits that the failure of the appellant to complete the tests and provide evidence in support of the application, was found by the Judge to have been caused by a failure on the part of the appellant's previous representatives, to advise the appellant of the need to provide the evidence that is now available.

14. Mr Iqbal submits that the Judge has dealt with the Article 8 claim in a confused manner. Having accepted that the removal of the appellant would be disproportionate, the Judge appears to have dismissed the appeal on the basis that the appellant was not entitled to a consideration of his Article 8 claim in the absence of an Article 8 application having been made by the appellant, and a decision by the respondent.
15. The respondent has filed a rule 24 response. In that response, the respondent concedes that “the judge has clearly failed to deal with a matter that he was obliged to, under s86(2) of the 2002 Act. In that respect the Judge has erred in law”. Having made that concession, the respondent goes on to make other criticisms about the consideration of the evidence by the Judge and in particular the Judge’s acceptance of the evidence of the appellant with regard to his previous representation, and the lack of evidence before the Tribunal that any allegations of misconduct have been put to the previous representatives.
16. Miss Pal adopted the matters set out in the respondent’s rule 24 response and provided me with a copy of the decision of the Upper Tribunal in **Philipson (ILR - not PBS: evidence) India [2012] UKUT 00039 (IAC)**.

Decision as to ‘Error of Law’

17. It is common ground between the parties that the decision of the Judge discloses a material error of law. For my part, I have carefully read the decision of the First-tier Tribunal and I am entirely satisfied that the appellant’s grounds of appeal are made out.
18. I find a material error of law in the decision of the First-tier Tribunal which shall be set aside.
19. I note that the Upper Tribunal in accordance with Part 3 of the Practice Statement for the Immigration and Asylum Chamber of the Upper

Tribunal is in terms of disposal of appeals, likely on each occasion to proceed to remake the decision, instead of remitting the case to the First Tier Tribunal unless the Upper Tribunal is satisfied that the effect of the error of the First Tier Tribunal Judge has been to deprive a party before the First Tribunal of a fair hearing or other opportunity for that parties case to be put to, and considered by the First Tier Tribunal.

20. In my view the most fair and proportionate way in which to deal with this case and given the nature of the factual findings to be made, is to remit the matter for a de novo hearing in the First-tier Tribunal.

Notice of Decision

21. The appeal is allowed. The decision of the First-tier Tribunal promulgated on 19th May 2015 is set aside and I remit the matter for a de novo hearing in the First-tier Tribunal.

22. No anonymity direction is applied for and none is made.

Signed

Date

Deputy Upper Tribunal Judge Mandalia

FEE AWARD

The First-tier Tribunal made no fee award, and whether or not a fee award is appropriate, is again a matter for the First-tier Tribunal in due course.

Signed

Date

Deputy Upper Tribunal Judge Mandalia