



IAC-HX-MH/11-V1

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

Appeal Number: IA/51032/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 7th January 2016**

**Decision & Reasons Promulgated
On 1st February 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

**MISS KULJIT KAUR
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr T. Samuel of Counsel

For the Respondent: Mr P. Duffy, Home Office Presenting Officer

DECISION AND REASONS

The Appellant

1. The Appellant is a citizen of India born on 8th July 1993. She appealed against a decision of the Respondent dated 2nd December 2014 which was to refuse to vary her leave to remain in the United Kingdom and to give directions for her removal to India under Section 47 of the Immigration, Asylum and Nationality Act 2006. Her appeal was allowed at first instance by Judge of the First-tier Tribunal Roopnarine-

Davies sitting at Taylor House on 8th July 2015. The Respondent appeals with leave against that decision and for the reasons which I set out below at paragraphs 12 to 21 I have set aside the decision at first instance on the grounds of a material error of law and have re-heard the appeal. I therefore continue to refer to the parties as they were known at first instance for the sake of convenience notwithstanding that this matter comes initially before me as an appeal by the Respondent.

2. The Appellant entered the United Kingdom on 3rd October 2010 with leave as a Tier 4 (General) Student valid until 30th September 2014. On 30th June 2011 whilst studying in the United Kingdom the Appellant applied for indefinite leave to remain as the dependent child of her father (at the time she was 17 years old). On 24th August 2011 this application was refused by the Respondent with no right of appeal. On 25th October 2013 the Appellant made a further application that was refused under paragraphs 322 of the Immigration Rules on the grounds that she was applying for a purpose not covered by the Rules. This refusal dated 25th February 2014 also did not carry a right of appeal. The Appellant obtained a BSc (Hons) in Pharmacology in July 2014. On 29th September 2014 she applied for indefinite leave to remain in the United Kingdom on the grounds of her private and family life in this country.
3. The Appellant's father entered the United Kingdom illegally in 2002 leaving behind his wife and two children. He obtained leave to remain in the United Kingdom in October 2010 under the legacy scheme and is now a British citizen. His wife and children visited him in the United Kingdom in 2007 and 2009 and he has visited India since he was granted indefinite leave to remain. Following the grant of to him the Appellant's mother and brother applied for and were granted leave to enter and remain in the United Kingdom as his dependants from December 2013 until December 2015 when they would be eligible to apply for indefinite leave to remain. The Appellant's brother is presently studying in the United Kingdom.

The Explanation for Refusal

4. The Respondent refused the Appellant's application for leave to remain based on her private life finding that the Appellant could not meet the requirements of paragraph 276ADE of the Immigration Rules. At the time of her application the Appellant was aged 21 but had not spent at least half of her life living in the United Kingdom. It was not accepted that there would be very significant obstacles to the Appellant's reintegration to India if she were required to leave the United Kingdom because she had previously lived in India for seventeen years. She would be familiar with the language and culture there. There were no particular circumstances set out in the application which constituted exceptional circumstances which might warrant grant of leave outside the requirements of the Immigration Rules.
5. The Appellant had claimed that her family were all in the United Kingdom and she was financially dependent upon her father. However the family life which she had with her relatives did not in the Respondent's view constitute family life as set out in Appendix FM of the Immigration Rules. Her relationship with her family could continue from overseas via modern methods of communication. She could apply for

entry clearance should she wish to return to the United Kingdom to visit her family and friends. It would be open to her father to financially support her from the United Kingdom if they wished. Upon return to India she could seek employment there, something which she was currently unable to do in the United Kingdom lawfully.

The Decision at First Instance

6. At paragraph 7 and following the Judge gave her reasons for finding that the appeal should be allowed outside the Immigration Rules. It was not doubted that the Appellant did not meet Appendix FM or paragraph 276ADE but as the Rules were not a complete code a second stage and separate assessment under Article 8 (right to respect for private and family life) was required. The Appellant had family in India but her close family were in the United Kingdom. It had not been shown on balance that the family home in India had been sold as claimed. However the Appellant was not living an independent life and was financially and emotionally dependent on her family unit. There was family life between the Appellant and her family members which would be interfered with by the Respondent's decision. There was no blanket rule that adult children cease to have family life with parents simply by reaching 18.
7. The Judge held at paragraph 9 of her determination that the Respondent had not considered Article 8 as a discrete issue including the impact of the Respondent's decision on the Appellant's family members and the Appellant's circumstances if the Appellant had to return to India on her own. The Respondent's decision was terse and did not substantively engage with the particular circumstances of the Appellant or the impact of the Appellant's separation from her family and their rights to respect for family life under Article 8. The Judge found that the Respondent's decision was not in accordance with the law but the Judge did not consider it appropriate to go on and decide the Article 8 claim herself "in circumstances where the Appellant's mother and brother have only limited leave".
8. The Judge added at paragraph 10:

"Though I was not addressed on the point it occurs to me that the Respondent may well have a policy on the treatment of legacy dependants for immigration purposes. This appeared not to have been explored at the time of the Appellant's application in 2011 when she was only 17 years old. The Respondent should consider all matters comprehensively."
9. She held that the Respondent had failed to demonstrate a consideration of discretion outside the Rules. More was required than simply to assert that the Respondent had considered the Appellant's claim on an exceptional basis. The appeal was allowed to the limited extent that the Respondent's decision was unlawful and remained outstanding for a lawful decision to be taken.

The Onward Appeal

10. The Respondent appealed against the Judge's decision arguing that the decision to allow the appeal on the grounds the Respondent's decision was not in accordance

with the law was *ultra vires*. The refusal letter had considered the exercise of the Respondent's decision outside the Rules. The Appellant had claimed to be financially dependent on her father and that claim was acknowledged in the refusal letter which indicated that the Respondent understood the claim. In the case of **Ganesabalan [2014] EWHC 2712** it was held that the Respondent was not required to undertake any particular review or assessment or parallel assessment of a claim. In order to be a lawful decision the Respondent was required to address her mind to the question of discretion and was required in her reasons to demonstrate that she had done so in whatever conclusion she had reached. The Respondent had done this. Even if the decision was terse that was not enough to establish that it was unlawful. The grounds cited two paragraphs from page 2 of the refusal letter which I have summarised above (see paragraphs 4 and 5) as evidence that the Respondent had considered the issue of discretion.

11. The application for permission to appeal came on the papers before First-tier Tribunal Judge Lambert on 28th October 2015. In granting permission to appeal she wrote that the grounds disclosed an arguable error of law. The grounds had argued that the Judge erred in concluding failure by the Respondent to demonstrate consideration of exercise of her discretion outside the Rules. "Excerpts from the refusal letter set out in the grounds render the ground arguable". Although there was no Rule 24 response to the grant of permission, the Appellant's solicitors filed and served a bundle for the Upper Tribunal proceedings comprising statements of the Appellant's parents and the Appellant herself and further financial documents together with a skeleton argument prepared by Counsel who appeared before me.

The Error of Law Stage

12. The matter thus came to me in the first place to decide whether there was an error of law in the Judge's determination such that the decision fell to be set aside and the matter re-heard. If there was not then the decision at first instance would stand. I queried at the outset with both representatives whether there was in fact any policy of the type referred to by the Judge in her determination, that is to say for the dependants of successful legacy applicants. Neither party indicated that they had been able to discover any such.
13. For the Respondent reliance was placed on the grounds. In reply Counsel relied on his skeleton argument which argued that the refusal letter had not covered all the issues that were raised that would be relevant at the proportionality stage of an assessment under Article 8. There were representations about the absence of any home in India and the cultural difficulties faced by a young woman in the absence of her immediate family on whom she was dependent. The Respondent's treatment of Article 8 was muddled referring to both exceptional circumstances and also whether family life came within the Rules. It was not the case that if the Respondent's assessment under Article 8 was defective the matter could be cured by an appeal to the Tribunal. It was not reasonable for the Respondent to imply that there were different standards of adequacy of reasoning in refusal letters depending on whether the application carried a right of appeal or not. The Respondent was the primary

decision maker and it was not fair to Appellants to have less than a full timeous consideration of all the relevant matters without having to appeal to obtain such a proper consideration. In any event it was not good for the administration of justice for there to be two standards of refusal letters depending on whether the decision was appealable or otherwise.

14. In oral submissions Counsel supported the Judge's characterisation of the refusal letter as terse. There had been no engagement with the effect on the family in line with the authority of **Beoku-Betts**. If the Respondent's decision was judicially reviewed (as opposed to being the subject to an appeal to the Tribunal) it would be found to be unlawful as not covering material matters. It could not be that such a decision would be acceptable where there was an appeal to a Tribunal. The key to this case was the effect on the wider family. It was an unsatisfactory position if a refusal letter would not be acceptable in judicial review proceedings but would be in an appeal to the Tribunal. The Judge could in fact have heard the Article 8 appeal herself.
15. In response the Presenting Officer argued that judicial review proceedings and statutory appeals to the Tribunal were two quite different matters. Judicial review was a challenge of last resort whereas in a statutory appeal the Tribunal was remaking the decision itself not simply setting aside the previous decision.
16. At the close of the submissions I indicated that I found there was a material error of law in the Judge's decision such that it fell to be set aside and the appeal re-heard. It appeared to be common ground that the Appellant could not bring herself within either Appendix FM or paragraph 276ADE. The Judge had decided that the Respondent's decision was unlawful because the Respondent had not considered whether the Appellant's appeal could be allowed outside the Rules. That gave rise to the question whether there was a private and/or family life which would be disproportionately interfered with by the Respondent's decision.
17. The Appellant's argument is that the refusal letter was inadequate and had this been a judicial review hearing would have been successfully attacked as disclosing an inadequacy of reasoning. This however is not a judicial review hearing, it is a statutory appeal and the question before me is whether there is a sufficient indication in the refusal letter that the Respondent has shown an awareness that she has a discretion outside the Rules and has shown that she has made a decision one way or the other under that discretion.
18. The refusal letter states that the Respondent has considered whether the particular circumstances of the Appellant constitute exceptional circumstances outside the Rules under Article 8. Whilst the refusal letter is concise, that of itself does not make it unlawful. The question is whether the Respondent is aware of the salient features of the case and has directed her mind to them. The Respondent was aware of the Appellant's claim to be financially dependent on her father and aware that the Appellant could not obtain work lawfully at the present time because of her immigration status. Those were not exceptional circumstances in the Respondent's

view which meant that the Appellant's application should be granted outside the Rules. When the Respondent stated that the family life the Appellant claimed did not constitute family life "as set out in Appendix FM" the Respondent was stating that the Appellant's claim to a family life did not fall within the Immigration Rules.

19. I see nothing muddled in that approach. The Respondent was obliged to consider first whether the Appellant's claim could succeed under the Immigration Rules and she decided for the reasons she gave that it did not. What the Respondent did acknowledge in the refusal letter was what was referred to as "the relationship with your family". It was that relationship, outside the Rules which the Respondent did not consider constituted exceptional circumstances such that the application fell to be refused. It is correct that the Respondent did not set out as one might expect a Tribunal Judge to do an analysis following a step-by-step **Razgar** approach. That of itself would not make this decision not in accordance with the law such that it remained outstanding before the Respondent to take. The Appellant was well aware that her claim had been refused and why it had been refused.
20. In any event there would not appear to be any significant difference between a judicial review finding that a refusal letter was **Wednesbury** unreasonable for inadequacy of reasons and a finding by a Tribunal in a statutory appeal that the decision is unlawful (for inadequacy of reasons) and remains outstanding. It is a distinction without a difference. I do not consider that there is any danger as Counsel sought to suggest that the Upper Tribunal hearing a case in a statutory appeal or the Upper Tribunal hearing a judicial review application might come to different views. I venture to suggest that if this decision was adequate for the purposes of statutory appeal it would be adequate for the purposes of a judicial review.
21. It was an error for the Judge to find that the Respondent's decision was not in accordance with the law because the Judge was mistaken in finding that the Respondent had not considered the exercise of her discretion. In those circumstances it was a further error of law for the Judge not to go on and consider the Article 8 claim herself rather than leave the matter still to be determined by the Respondent.

The Substantive Re-hearing

22. Having indicated to the parties that I found an error of law the matter proceeded by way of a re-hearing. At the outset Counsel indicated that the Appellant's mother and brother had been issued with biometric documents and therefore had lodged their applications for indefinite leave to remain. The Judge's finding that there was no evidence that the family home in India had been sold was disputed by the Appellant. Her father had said in his statement that there was no property left in India. The most recent bundle submitted by the Appellant for the re-hearing contained financial documents to show continuing financial and emotional dependence by the Appellant. There were documents in the original bundle submitted at first instance including letters from friends and the village elder which were still relied upon.

23. The Appellant gave evidence adopting her statement that she had made for the first instance proceedings dated 7th July 2015 (which was in the supplementary bundle). This had confirmed that she was financially and emotionally dependent on her father who was in full-time employment and fully responsible for her entire educational, living and accommodation expenditure in the United Kingdom. His gross salary was more than £2,250 per month and was paying her £150 by direct debit on a regular basis. It was not possible in India to rent a house on her own and live there without her brother or parents. Her cultural, religious and emotional values required the sole responsibility of her biological parents until she married. The village elder had written a letter to say it was not safe for the Appellant to live without her parents. She had a strong private life in the United Kingdom having completed her degree. She considered the United Kingdom as her home.
24. She was asked in examination-in-chief to identify a document in the bundle which she said was the English translation of a Punjabi document relating to a plot of land in her mother's name which had since been sold. Her two paternal uncles had moved to Dubai in or about 2005/2006. There was no documentary evidence regarding the sale of the family home because it was in a village and it was sold to a rich person. There was no accommodation available in India now. She had two maternal uncles living in Canada, living with their families but she had no contact with them. Separation from her family would be unimaginable because she could not live alone.
25. In cross-examination she said that when her mother was left behind in India, she had her brother, the Appellant's maternal uncle living with her. She thought she might be able to get a job in India but life was unsafe in the large cities. She did not know how frequently attacks on women were but she thought there were many. She had no contact with her friends from school in India any longer. Her female friends had since got married. She had been back to India with her father to meet her mother and brother in 2012 on a four week visit. They had gone to the same house where her mother and brother were living. It was her maternal uncle who had sold the house. Her uncle had wanted to sell the property but her father had asked him to allow the family to live in the property which he gave permission for. She had not used Skype to keep in contact with her friends in India.

Closing Submissions

26. For the Respondent reliance was placed on the refusal letter. There was still no real evidence that the house in India had been sold. The Appellant's evidence amounted to requiring the Tribunal to accept that that had happened "on a nod and a wink". It was difficult to believe that there would not be deeds of transfer, otherwise how could a buyer prove that they had bought the land? The Appellant was now in her early 20s, she had obtained a degree in Pharmacology and there were no serious obstacles to her reintegration to life in India. She had left there five years ago but she would be able to form a private life and obtain employment there. There was nothing to support the assertion that she would be at risk as a single woman. There was nothing disproportionate about the removal of the Appellant. The Appellant

could not meet the Rules. Outside the Rules, on the Appellant's side she could speak English and her father was maintaining her and paying for her education and therefore the Appellant was not a burden on the state. However the maintenance of immigration control was in the public interest and the appeal should fall for refusal.

27. In closing for the Appellant reliance was placed on the remainder of the skeleton argument. The Appellant spoke English and had passed the Life in the United Kingdom test such that the public interest consideration was not heightened. The family and private life of the Appellant was formed prior to coming to the United Kingdom and there were no other factors that would raise the bar of the public interest in the maintenance of effective immigration control. The skeleton argument set out seven factors derived from the witness statements of the Appellant and her parents. These were: the emotional and financial dependence of the Appellant on her family; direct emotional support could not be given to the Appellant if she were to be in India; she had been living with her mother and brother in India but the family were all present now in the United Kingdom; the family had serious concerns about the appropriateness of the Appellant living in India on her own; the Appellant's father maintained there was no home in India for the Appellant to live in and no other relatives to care for her; she came here when 17 years old and there was no explanation why her application for indefinite leave to remain was refused; even if there were no significant obstacles preventing her reintegration into India there were many practical, psychological and cultural obstacles to her return.
28. In oral submissions Counsel argued there was no question about the credibility of the evidence given. There was no documentary evidence of the sale of the property but the Appellant had given her evidence again and she should be found credible. Family life in this case and dependency did not just end at 18. She would be on her own in India. Cultural concerns had to be given weight.

Findings

29. This is an appeal outside the Immigration Rules. The Appellant cannot satisfy either Appendix FM (family life) or paragraph 276ADE in relation to private life. That was acknowledged by the Judge at first instance and no argument has been made to me to indicate that that is incorrect. I must therefore consider whether this appeal succeeds or fails outside the Immigration Rules but looking through the prism of the Rules. The Appellant must show that there are compelling circumstances in this case should the matter reach the proportionality stage.
30. The Appellant has a family life with her father, mother and brother who are all in the United Kingdom. Her father has indefinite leave to remain but neither her mother nor her brother have such leave. They have made an application but it has not yet been decided upon by the Respondent. The position might have been different had the Respondent granted indefinite leave to remain to the other two members of the family, but in the absence of such a grant that is not a factor on which I place any great weight. Thus if the Appellant's mother and brother's applications were to be refused by the Respondent then all three would return to India together. Much of

the argument put forward by the Appellant in this case as to her personal circumstances would then fall away.

31. The Appellant's father is a British citizen who lived the majority of his life in India before travelling to this country illegally. Given that the Appellant's mother and brother could return to India now since they have not been granted indefinite leave to remain, family life in this case could be continued elsewhere and the interference with the Appellant's family life she has in this country would be slight. The interference with such family life would be proportionate as a far greater weight would be attached to the public interest in maintaining immigration control as the three members of the family referred to have no expectation of leave.
32. In the event that the Respondent granted the Appellant's mother and brother's application for indefinite leave to remain, the position would then be that the Appellant's removal to India would interfere with her family life as she would go but they could stay. It would still be pursuant to the legitimate aim of immigration control, given that the Appellant is an adult whose studies are now complete and her student leave has expired. Would the Appellant's removal to India then be proportionate to the legitimate aim being pursued? The Appellant has a financial dependence on her family since she is not able to work. That was a consequence of her limited immigration status as a student. If she were to return to India her family were they to remain in this country could continue to financially support her by remitting monies to her. In any event the Appellant now has a qualification from an English university which would stand her in very good stead in obtaining employment and therefore being self-sufficient upon return. The issue of financial dependency I find is not a factor to be afforded any significant weight.
33. As to her claim to have an emotional dependence on her family, the Appellant is an adult in her early 20s and I do not find that her relationship with her parents and brother amounts to more than the normal emotional ties one would expect to see in a family. The Appellant argues that there is no accommodation available for her to live in India citing the fact that the family home was sold. The Judge at first instance did not accept that and there is no better evidence before me than was before Judge Roopnarine-Davies. The point made by the Respondent on this issue is a telling one. If the property has been bought as the Appellant says by a rich person, how would that person be able to prove ownership without some form of documentation to support it? This Tribunal is familiar with evidence regarding the sale of properties in the Indian subcontinent and if it is to be argued that a house has been sold legally with no supporting documentation one would expect to see some background information to support such an otherwise unusual assertion.
34. In this case there is no better evidence now than there was before. The Appellant's evidence is that her uncles have sold the property but she herself was not involved in the sale and her evidence on the point is of limited value. The Appellant relies on a statement made by her father for the First-tier proceedings (which has not been updated), which states at paragraph 5 "I have sold all my property while my family left India". That statement is to use a phrase employed by the Judge about the

refusal letter “terse”. This is a core component of the Appellant’s claim and it is reasonable to have expected rather more detail about it than has in fact emerged. I do not find that there is evidence to show that the family property in India has been sold. I agree with the finding of the First-tier Tribunal on that point. In my view there is accommodation for the Appellant to return to, it is of course a matter for her whether she chooses to live in such property or to relocate within India, a large and populous country.

35. There is no background evidence to support the Appellant’s contention that as a single female she would be at particular or indeed any risk. I place little weight on the letters said to be from the village elders, or indeed the assertion that all family members have now left India. The letter written by the head of the village was dated 25th August 2014, some two years after the Appellant’s mother’s property was said to have been sold and some years after other family members had left India. This indicated that there is still contact between the Appellant’s family on the one hand and her home village on the other in order at the very least to obtain the correspondence. I do not consider that I have been given a full account of the Appellant’s family’s circumstances in India or indeed who remains there. I do not accept the contention that the Appellant would face insurmountable obstacles in returning to her country of origin. Indeed it is my view that it would be reasonable to expect that she could return.
36. As to the effect on the other members of the family in this country, as I have indicated two at least could in any event return to India should they so wish but failing that could maintain contact with the Appellant through visits and modern means of communication. It is clear from the evidence given by the Appellant she and her family have maintained connections in the past through visits after the Appellant’s father left India to travel to the United Kingdom. The Appellant is not in a relationship in this country and there are no qualifying children of relevance. I do not accept the argument that weight should be given to the establishment of a family life in India before the Appellant came to this country. It is the quality or otherwise of the family life in this country which is being measured. In my view it would not be a disproportionate interference with the family life the Appellant has with her family in this country to refuse her application for further leave and to require her to return to India.
37. Turning to the issue of private life, the Appellant has only been in the United Kingdom a relatively short time whilst her status here was precarious as she had leave as a student but with no legitimate expectation that that leave would be extended. The Appellant’s argument is that she did not form her private life whilst her status here was precarious. However that is a reference to her private life in India. What I am concerned with is the Appellant’s claim to have established a private life in this country. Her private life in this country was established whilst her status here was precarious as such little weight can be ascribed to it in the proportionality exercise. For the reasons which I have given above, the Appellant would not face significant obstacles to her reintegration back into India. She has cultural and other ties to India. Although she produces letters from friends who

know her in this country, it is clear that she would have friends in India that she knew from before. I do not accept her evidence on the point that she has lost all contact with her friends in India. The Appellant has visited India since she first arrived in this country. For the reasons I have given above in relation to both the family life and private life claims there are no compelling circumstances in this case such that the Appellant's appeal should be allowed outside the Immigration Rules. I dismiss the appeal in relation to Article 8.

Notice of 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 in this case by dismissing the Appellant's appeal.

Appellant's appeal dismissed.

I make no anonymity order as there is no public policy reason for so doing.

Signed this 29th day of January 2016

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Deputy Upper Tribunal Judge Woodcraft

TO THE RESPONDENT
FEE AWARD

As I have dismissed the appeal there can be no fee award.

Signed this 29th day of January 2016

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Deputy Upper Tribunal Judge Woodcraft