



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/27242/2012

THE IMMIGRATION ACTS

Heard at Field House
On 7 August 2013
Prepared 7 August 2013

Determination Promulgated
On 21 August 2013

Before

UPPER TRIBUNAL JUDGE MCGEACHY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

UMESHKUMAR RAMANBHAI PATEL

Respondent

Representation:

For the Appellant: Mr P Deller, a Senior Home Office Presenting Officer
For the Respondent: Mr S Jeshani, of Counsel instructed by Messrs Markand & Company

Decision And Directions

1. The Secretary of State appeals, with permission, against a decision of Judge of the First-tier Tribunal Abebrese who in a determination promulgated on 3 April 2013 allowed the appellant's appeal against a decision of the Secretary of State made on 7

November 2012 to refuse the appellant's leave to remain under the provisions of Article 8 of the ECHR.

2. Although the Secretary of State is the appellant before me I will for ease of reference refer to her as the respondent as she was the respondent of the First-tier Tribunal. Similarly for ease of reference I will refer to Mr Umeshkumar Ramanbhai Patel as the appellant as he was the appellant for the First-tier Tribunal.
3. The appellant is a citizen of India born on 22 August 1981 who entered Britain as a visitor on 30 October 1997.
4. He overstayed and then applied for leave to remain as a dependant of his father in 2004. That application was refused. The appellant appealed and became appeals right exhausted on 22 June 2006.
5. He was served a notice as a person liable to removal on 18 April 2006.
6. On 23 March 2012 the appellant made an application for leave to remain under paragraph 276B of the Immigration Rules.
7. That application was refused on 7 November 2012 on the basis that the appellant had been issued with the form IS151A as a person liable to removal on 18 April 2006 which had the effect of "stopping the clock". The Secretary of State also refused applications on the issues of the appellant's rights under Article 8 of the ECHR referring to the terms of Appendix FM and paragraph 276ADE of the Immigration Rules.
8. The appellant appealed. His appeal was heard by Judge of the First-tier Tribunal Abebrese on 12 March 2013.
9. The judge noted the evidence of the appellant which included an assertion that he had not been aware of the application for leave to remain as a dependant had been made by his father and stated that he had never seen the notice of removal before the hearing.
10. The appellant's evidence included the fact that his father resides in India and he has siblings there and that his mother travels to India on a regular basis to see his father.
11. The judge noted that the appellant's representative made a submission that "the test in **Kugathas** is satisfied in that the appellant was completely dependent on his mother and brother beyond normal ties."
12. Having found that the appellant could not benefit from the Immigration Rules relating to private and family life the judge referred to the decision of the House of Lords in **Razgar [2004] UKHL 27** and then in paragraph 15 stated that he found that removal would interfere with the appellant's family and private life and that Article

8 was engaged. He also found that the decision was in accordance with the law and was a decision which the Secretary of State was entitled to make. He then went on to say:-

“The decision I find however the decision (sic) is not proportionate for the following reasons. The appellant has been in the United Kingdom since the age of 15 he resides with his mother and depends on her and his elder brother. He has provided evidence of his social ties in this country in respect of charity events and I found his evidence to be credible. The appellant’s evidence in respect of charity events was not challenged by the respondent. The appellant does have ties in India as stated above but he also has ties in the United Kingdom and his mother, cousins, maternal uncles and aunts. I also found the appellant and his witnesses to be credible in respect of the family of the appellant in this country and the closeness of the family. On balance the removal would not be proportionate bearing in mind his ties in the United Kingdom and the length of time in this country.”

13. In paragraph 12 of the determination the judge considered whether or not the appellant satisfied the provisions of paragraph 276B of the Rules. He stated that he accepted from the evidence the appellant had been in the United Kingdom for a period of sixteen years since 1997 but went on to say that he was of the view that the appellant had not been in the United Kingdom for a continuous period of ten years. He then stated:-

“I do not find it credible that the appellant and his brother were not aware of the application made by his father. The appellant at the time that his father made the application was an adult and on balance his father because of the importance of the application would have made him and his brother aware of the application. I also do not find it credible the appellant and his brother would not have been served with the liable to removal notice on 18 April 2008. The service of the documents did therefore stop the clock from continuing to run.”

The judge therefore went on to allow the appeal on Article 8 grounds.

14. The Secretary of State appealed stating that the judge had failed to make any findings as to whether the appellant had ties with his mother in Britain that went beyond mere emotional ties. The grounds pointed out the appellant was 27 years of age and referred to the judgment of the Court of Appeal in **Kugathas [2003] EWCA Civ 31** which had stated that there was no presumption that a person has family life even with members of a person’s immediate family. It was stated that the judge had erred in law by finding that the appellant had established family life in the United Kingdom.
15. It was also argued that it was wrong for the judge to find that it would be a disproportionate breach of the appellant’s Article 8 private life rights if he were removed. It was noted the appellant carried out charity events but it was stated it was no reason why he could not carry out those in India and it was pointed out that his father had returned to settle there and the family maintained close contact. Any

private or family life ties which he had established here could be maintained through visits and modern means of communication.

16. Permission to appeal was granted by Designated Judge of the First-tier Tribunal Garratt on 25 June 2013.
17. On 12 July 2013 the appellant's representatives served a response under Rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008.
18. The response submitted that the judge had referred to **Kugathas** in the determination and that that case had been cited both by the appellant's representatives in oral submissions but also in the skeleton argument submitted. The response went on to state that it was implied that the judge had been satisfied that there was family life between the respondent and his mother "as per the **Kugathas** test" and that the judge was perfectly entitled to reach the decision which he had on the totality of the evidence.
19. It was also argued that the judge had been wrong to decide that form IS151A had been served on the respondent and the clock had stopped on 18 April 2006 and as a result paragraph 276B of the Immigration Rules had not been satisfied.
21. At the hearing of the appeal before me Mr Deller first argued that the judge should not have considered that the appellant had family life which could properly be considered to have sufficient strength as to mean that the breach thereof would infringe the rights of the appellant under Article 8(1) of the ECHR. Indeed he referred to the adverse finding made by the Secretary of State in 2004 - it having been found then, and on appeal, that the appellant could not qualify as dependent relative.
22. He further argued that the judge had not properly considered the guidance in **Kugathas**.
23. He indicated however that if it were the case that it was found that the appellant had not been properly served with the decision with the IS151 notice that, given the transitional provisions when Appendix FM of the Rules was brought in the issue would be whether or not the appellant met the long residence requirements of the Rules when he made the application rather than at the date of the decision.
24. Mr Jeshani relied on the response and emphasised that the judge had referred to the **Kugathas** test and the fact that he had not set out the principles thereof in the determination did not mean that he had made an error of law. He argued that the judge had made findings after applying the principles in **Kugathas** and having in mind the vast amount of evidence which had been submitted - he referred to a bundle which comprised 313 pages - and that he had reached findings of fact which

were fully open to him on the evidence. He asked me to find therefore that there was no material error of law in the determination of the Immigration Judge.

25. I have found that there are material errors of law in the determination. The appellant is aged 32. As an adult the principles set out in the judgment in **Kugathas** apply. These make it clear that when considering the issue of family life between adults the principles set out in the decision in **S v United Kingdom [1984] 40 DR 196** apply. That decision stated:-

“Generally, the protection of family life under Article 8 involves cohabiting dependents such as parents and their dependent, minor children. Whether it extends to other relationships depends on the circumstances of the particular case. Relationships between adults, a mother and her 33 year old son in the present case, would not necessarily acquire the protection of Article 8 of the Convention without evidence of further elements of dependency involving more than the normal emotional ties”.

In **Kugathas** Sedley LJ endorsed that approach. The reality in this case is that when, in the penultimate paragraph of the determination the judge turns to the issue of the proportionality of removal not only does he not refer to the leading judgment in **Kugathas** but he does not set out the accepted principles therein let alone give any indication as to how he applied that guidance in this particular case. It is not correct that it should be implied that he was applying the guidance in **Kugathas** because the appellant’s representative referred to that case in his oral submissions and in the skeleton argument. It cannot be taken for granted that the judge had those principles in mind when he wrote the determination and clearly there is nothing to indicate that he did.

26. I consider therefore that the lack of application of accepted principles as well as a lack of reasons for his decision amount to an arguable error of law.
27. Mr Deller argued that the judge should not have found that Article 8 was engaged. I consider that argument has less merit. The reality is that the rights under Article 8 are composite and given the length of time which the appellant had lived here it would have been difficult, when considering his rights under the Convention not to have concluded that the appellant was exercising private life here which would be infringed by his removal.
28. The judge recorded that it was not argued before him that the appellant met the requirements of the Immigration Rules as regards his rights under Article 8 of the ECHR. That was clearly correct.
29. With regard to the issue of whether or not the appellant was served with the notice under IS151A in April 2006 the judge, I consider, that when the judge found that the appellant had been served he reached conclusions which were open to him in paragraph 12 of the determination. Nevertheless I consider that on the rehearing of this appeal that is an issue which can still be argued – Mr Deller indicated that there

was considerable case law in which he would have relied should it have been reargued in the Upper Tribunal.

30. Mr Deller made it clear that he did not have the authorities on which he would wish to rely and I did not have the bundle of evidence which has been submitted before the First-tier. In these circumstances and given that findings of fact on the evidence would have to be made these having been absent from the determination of the First-tier Judge it was agreed that it would be appropriate that the appeal should be remitted to the First-tier for a hearing afresh. I consider that it is an appropriate case to follow this course of action and that in so doing the requirements of the Senior President in the Practice Statement paragraph 7.2(a) are met.

Decision

31. The appeal is therefore remitted to the First-tier Tribunal for a hearing afresh on all issues. The relevant issues relate not only to the rights of the appellant under Article 8 of the ECHR but also the issue of whether or not time stopped running when the form IS151 was served in 2006.

Directions

- 32 As the bundle of documents before me is no longer with the file I direct that a fresh bundle of documents be served fourteen days before the hearing and furthermore that the respondent shall serve all relevant authorities on which the respondent wishes to rely with regard to the issue of service of form IS151. This appeal is remitted to the First-tier Tribunal to be heard at Taylor House on 9 December 2013. A Gujarati interpreter is required and there is a time estimate of two hours.

Signed

Date

Upper Tribunal Judge McGeachy