



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/28372/2013
IA/45150/2013

THE IMMIGRATION ACTS

Heard at Field House
On 12 March 2014
Prepared 12 March 2014

Determination Promulgated
On 28 March 2014

Before

UPPER TRIBUNAL JUDGE MCGEACHY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRS SAVITRI PAREY
DAVID PAREY

Respondents

Representation:

For the Appellant: Ms J Isherwood, Senior Home Office Presenting Officer
For the Respondents: Ms E King, of Counsel instructed by The Sethi Partnership

DECISION AND DIRECTIONS

1. The Secretary of State appeals, with permission, against decisions of Judge of the First-tier Tribunal Dickson and Designated Judge of the First-tier Tribunal Manuell who in determinations promulgated on 13 December 2013 and 8 January 2014 allowed the appeals of Mrs Savitri Parey and her husband Mr David Parey against decisions of the Secretary of State to refuse them leave to remain in Britain.

2. The appeal of Mrs Savitri Parey was heard first, by Judge Dickson. He allowed the appeal on human rights grounds. Because Mrs Parey's appeal had been allowed on human rights grounds Judge Manuell allowed the appeal of Mr Parey.
3. Mrs Parey came to Britain as a visitor in June 2002 and thereafter made various applications for leave to remain as a student. She was eventually granted leave to remain until 31 January 2009. On 30 January 2009 she made an application for further leave to remain as a student. That application was not dealt with promptly by the Secretary of State and because Mrs Parey had arranged some considerable time before to marry Mr Parey in Trinidad and Tobago on 26 July 2009 - a date which had been arranged a long time in advance to suit both families and also because it was an auspicious day in the Hindu religion - Mrs Parey withdrew her application for leave to remain as a student on 14 July 2009 so she could travel to Trinidad and Tobago for the wedding.
4. Mrs Parey had met Mr Parey in 2005 and they had decided to marry in October 2008. Mr Parey had entered Britain as a working holidaymaker in 2005, had then received a student visa followed by a work permit in 2009 which expired in 2012. After the wedding they had returned to Britain together, Mrs Parey having received leave to enter as the spouse of a work permit holder. Mr Parey had applied for further leave to remain in Britain before the expiry of his leave - his application was based on his being a dependant of Mrs Parey. Consequently after her application had been refused on 17 June 2013 his application was refused on 14 October 2013.
5. As stated above their appeals were not heard together; Mrs Parey's appeal was heard first.
6. Judge Dickson had before him a detailed Reasons for Refusal Letter relating to Mrs Parey's application for indefinite leave to remain on the basis of her legal residence in Britain for ten years. The refusal was focussed on the fact that she had left Britain on 19 July 2009 without existing leave to remain and had then returned on 17 August 2009 as a visitor with leave until 17 February 2010 but that on 15 February 2010 she had left Britain with existing leave returning on 2 April 2010 with entry clearance as a spouse until 8 May 2013. Her application for indefinite leave to remain had been made on 24 July 2012. Under the provisions of paragraph 276B she had to show that she had had ten years' continuous lawful residence in Britain and under paragraph 276A(a) continuous residence and residence in the United Kingdom for a unbroken period although a period should not be considered to have broken where an applicant would have been absent from the United Kingdom for a period of six months or less at any one time provided that the applicant had had existing leave to enter or remain upon their departure and return. It was stated that when Mrs Parey had left Britain on 19 July 2009 she had returned within a period of less than six months but she had not had existing limited leave to enter or remain upon departure and therefore she had broken her continuous lawful residence and therefore any point prior to her departure would not count towards long residence. She was

therefore, it was considered, unable to demonstrate ten years' continuous lawful residence and her application was refused. It was also considered that she could not meet the requirements of Article 8 of the ECHR as set out in the Immigration Rules.

7. Judge Dickson referred to the terms of the Rules and concluded the appellant could not meet the requirements therein.
8. Without reference to the Rules he also considered the issue of Mrs Parey's rights under Article 8 of the ECHR under the structured approach set out in the judgment of the House of Lords in **Razgar [2004] UKHL 27**.
9. In paragraphs 24 onwards of his determination he set out his findings of fact and conclusions. In paragraph 28 he stated:-

“The appellant told Miss Harris (*Mrs Parey's Counsel*) that she is the manager of a restaurant a part owner of the business. She referred to the bundle of documents concerning her student studies. She has also worked as a part-time administrator”.

10. He noted that there were good reasons why Mr and Mrs Parey had wanted to get married in Trinidad and Tobago, that they had expected that Mrs Parey would have leave to remain by the time the wedding took place but that having made the arrangements she felt compelled to withdraw the application and then return. In paragraphs 33, 34 and 35 he set out his conclusions as follows:-

“33. Miss Harris submitted that the Home Office should have dealt with the application before the Appellant departed for Trinidad and Tobago in July 2009. She referred to the withdrawal of the application by the Appellant as ‘a small disproportionate glitch’. I would agree with these submissions. However ‘continuous residence’ is defined under paragraph 276A. It states that continuous residence means residence in the United Kingdom for an unbroken period and if the applicant is absent from the United Kingdom for a period of six months or less, it shall not be considered broken provided that the applicant had existing leave to enter or remain upon his or her departure and return. In this case as the Appellant had withdrawn her application, she had no leave to remain in the United Kingdom after 31st January 2009.

34. With regard to the human rights claim it is quite clear that while the Appellant cannot succeed under the Immigration Rules, she and her husband have a strong family and private life. It is relevant that they would have qualified for indefinite leave to remain had it not been for the dilatory and unacceptable behaviour of UKBA. It is quite apparent that both the Appellant and her husband have at all times complied with the immigration requirements of the United Kingdom. They are hardworking members of the community. The Appellant's husband hopes to qualify as an accountant within the next twelve months and they both wish to remain in the United Kingdom where they have many family members and friends.

35. It is an extremely strong Article 8 claim. I have quite satisfied that the Appellant has a private and family life and the interference has consequences of such

gravity as to engage the operation of Article 8. On any balancing exercise, I find that the interference is wholly unnecessary and disproportionate having regard to the particular circumstances of this case.”

11. Designated Judge Manuell, when dealing with Mr Parey’s case on the papers allowed his appeal for the sole reason that Mrs Parey’s appeal had been allowed.
12. The respondent appealed, emphasising that the Immigration Rules were a detailed expression of government policy on controlling immigration and protecting the public and that the Rules now showed how “broadly” public policy considerations are weighed against individual family and private life rights in assessing Article 8 in any individual case.
13. The grounds asserted, incorrectly, that after the marriage Mrs Parey had delayed for six months, until April 2010, before returning to Britain. That assertion, Ms Isherwood, accepted, was completely wrong.
14. It was stated that the judge had been wrong to refer to the delay in dealing with Mrs Parey’s application for an extension of stay as “dilatory and unacceptable” - a number of cases relating to delay were listed - before it was asserted that there was a material misdirection in law and that the judge had failed to point to any exceptional factors which meant that it was appropriate to allow the appeal under Article 8 when the appeal had not succeeded under the Immigration Rules.
15. Before the hearing a Rule 24 response was submitted. That referred to the finding of Blake J in **MM [2013] EWHC 1900 (Admin)** and the judgment of the Court of Appeal in **MF (Nigeria) [2013] EWCA Civ 1192**, the first of which had stated that the “exceptional circumstances” route was not sufficient to render the decision making process lawful in an Article 8 case and the second of which stated that exceptional circumstances might render deportation disproportionate notwithstanding the failure to meet the criteria set out in paragraphs 339 and 339A of the Rules. It was argued that EX.1 did not adequately reflect the jurisprudence of Article 8 with relation to delay and that there was case law to indicate that an Article 8 assessment should be carried out independently from how closely an appellant came to meeting the Rules. It was argued that the judgment in **Nagre [2013] EWHC 720** considered that EX.1 did not contain a complete code for the consideration of proportionality of removal. It was submitted the judge had taken into account all relevant factors making findings that were properly open to him and given adequate reasons for his findings particularly with regard to when Mrs Parey had left Britain and returned. He had reached proper conclusions on the issue of delay. It was argued that the grounds of appeal were wrong in that Mrs Parey had had 3C leave after she had made her application in January 2009. It was argued therefore that there was no material error of law.
16. At the hearing before me Ms Isherwood relied on the grounds of appeal with the exception that the assertion that Mrs Parey had left Britain in July 2009 and not returned until April 2010 was wrong. However she stated the fact was that that Mrs

Parey had not had leave to remain when she had left the country and indeed that she had come back in a totally different capacity. She pointed out that there was nothing in the evidence to support the belief by the judge that Mrs Parey had formed a business here and she said that he had clearly erred in considering the issue of Article 8 under the Rules. He had not explained how the Article 8 rights of Mrs Parey outweighed the fact that she did not qualify for leave to remain outside the Rules. She referred to the determination of the Tribunal in **Gulshan (Article 8 - new Rules - correct approach) Pakistan [2013] UKUT 640** where at paragraph 24 the Tribunal had stated that

“(b) after applying the requirements of the Rules, only if there may arguably be good grounds for granting leave to remain outside them is it necessary for Article 8 purposes to go on to consider whether compelling circumstances are not sufficiently recognised under them.”

She stated moreover that there was no indication of insurmountable obstacles to family life taking place elsewhere. There were no compelling circumstances which should mean that the appellant should be allowed to remain given that Mrs Parey had been in Britain as a student with no legitimate expectation of leave to remain and that thereafter she had been treated as the dependant of her husband when he was a work permit holder.

17. In reply Ms King stated that the judge had properly directed himself on the law setting out the relevant requirements of the Rules and dealing carefully with the relevant test. He was clearly aware that it was only in the small minority of cases that the Article 8 rights of an appellant would outweigh the fact that an appellant did not meet the requirements of the Rules. She stated that the judge was entitled to place weight on the delay and it has not been argued that the judge's findings of facts were wrong. Indeed the conclusions of the judge were open to him. She refers to the Immigration Directorate's Instructions on long residence suggesting that a gap of less than 180 days should not be taken into account. The appellants had built up private life here and the judge was correct to find that that should be respected.

Discussion

18. I consider that there are material errors of law in the determination of Judge Dickson when he dealt with the consideration of the proportionality of the removal of Mrs Parey. He did not take into account the factor that Mrs Parey had been in Britain as a student with no expectation of indefinite leave to remain and indeed that Mr Parey had been in Britain as a work permit holder again with no expectation of leave to remain. He did not assess the circumstances in which Mr and Mrs Parey are now living. He appears to have accepted an assertion that Mrs Parey was working but there seemed to be no evidence to back up the fact that that was the case - the only evidence relating to her work which is on the file relates to periods of employment while she had been studying here. The judge did not enquire as to whether or not Mr Parey had worked or indeed how the couple supported themselves. I consider without a full evaluation of the facts of the case he was not entitled merely to

consider that the fact that an application for an extension of stay had not been dealt with promptly by the Secretary of State – although there is evidence on the file that the Secretary of State was asking for further information regarding Mrs Parey’s studies – was a reason to find that because Mrs Parey did not meet the requirements of the Rules it would be appropriate for her to be granted leave to remain on Article 8 grounds. Without a full assessment of the circumstances of both Mr and Mrs Parey I cannot see how he could have concluded that Mrs Parey’s removal would be disproportionate.

19. Similarly the determination of Judge Manuell does not appear to take into account any information before him other than the fact that Mrs Parey’s appeal had been allowed. The fact that Mrs Parey had been allowed to remain would not automatically entitle Mr Parey to permission to remain – there appeared to be no evidence considered by Judge Manuell as to how Mr Parey could have met the requirements of the Rules.
20. I therefore consider that the decisions in both determinations should be set aside.
21. I do have some sympathy with Mrs Parey given that she withdrew her application for an extension of stay as a student because she had to travel and I can fully understand why she did not want or indeed could not have changed her wedding arrangements. I therefore do not substitute my own decision dismissing this appeal as I consider it appropriate that there should be a full consideration of all relevant factors in this case including the work being undertaken by Mrs Parey, her qualifications, whether or not Mr Parey has any opportunity to continue working here and indeed the life which they have built up here over the last few years. I therefore consider that it is appropriate that in this case the appeal is remitted to the First-tier for a hearing afresh in that I consider that the provisions of Practice Directions 7.2 of the Senior President of Tribunal’s Practice Directions are met.

Decision

This appeal is allowed to the limited extent that it is remitted to the First-tier for hearing afresh on all issues.

Signed

Date

Upper Tribunal Judge McGeachy