



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

Appeal Number: IA/52592/2013

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 3<sup>rd</sup> November 2014**

**Decision & Reasons  
Promulgated  
On 11<sup>th</sup> December 2014**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE RIMINGTON**

**Between**

**MRS HAVABIBI YUSUFBHAI PATEL  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Ms S A Walker, Counsel instructed by Time Solicitors  
For the Respondent: Mr S Kandola, Home Office Presenting Officer

**DECISION AND REASONS**

- 1.** The appellant is a citizen of India born on 29<sup>th</sup> August 1977 and she appeals against the decision of the respondent dated 22<sup>nd</sup> November 2013 refusing her application for leave to remain on human rights grounds. The appellant lodged an FLR(O) on 5<sup>th</sup> October 2011 on the basis of her private life in the UK.
- 2.** The appellant first entered the UK on 12<sup>th</sup> May 2005 from India on a two year spouse visa valid until 29<sup>th</sup> April 2007. It was recorded by the Home

Office that her previous relationship broken down on 7<sup>th</sup> February 2006 and an application for leave to remain had been refused on 5<sup>th</sup> December 2007.

3. On 11<sup>th</sup> August 2008 First-tier Tribunal Judge Pacey dismissed the appellant's appeal to remain in the UK as a victim of domestic violence on the papers. The appellant finally became appeal rights exhausted on 30<sup>th</sup> September 2008.
4. Her human rights Article 8 application was submitted on 21<sup>st</sup> October 2011 and this was refused on 30<sup>th</sup> January 2012 with no right of appeal. Further consideration was requested by letter dated 22<sup>nd</sup> March 2012 from Time Solicitors. The Secretary of State responded on 22<sup>nd</sup> November 2013 and the appellant's application was refused with a right of appeal. Judge of the First-tier Tribunal A W Khan heard the appeal at Birmingham on 7<sup>th</sup> July 2014 and dismissed the appeal on 15<sup>th</sup> July 2014.
5. The appellant applied for permission to appeal. It was contended that the judge acted unlawfully by finding and attaching adverse weight to the fact that the appellant did not seek to rely on her marriage to a British national in her *original* claim, that is her application of 21<sup>st</sup> October 2014.
6. Further the judge's reasons for finding that the relationship was not genuine and subsisting had not been adequately substantiated and the judge had given no, or inadequate reasons, for rejecting the substantial evidence that was before him. In particular the judge had not given any reasons for not accepting the oral evidence of the appellant, her husband or her father-in-law.
7. It was asserted in the application that the judge had become confused by the law and had erred by unreasonably deciding to attach no or little weight to the divorce certificate. The judge erred in his findings on Article 8 by departing from **Chikwamba v SSHD** [2008] UKHL 40 and had misapplied **Edgehill v SSHD** Civ 402 and undertook an article 8 assessment with reference to the law post 9<sup>th</sup> July 2014. Permission to appeal was granted.
8. At the hearing Ms Walker submitted that there were numerous letters of support and there had been insufficient reasons for the rejection by the judge. The fact that they were self-serving was a fact shown to be an inadequate explanation by the cases of **Moyo v Secretary of State for the Home Department** [2002] UKIAT 01104 and **MJ (Singh v Belgium: Tanveer Ahmed unaffected) Afghanistan** [2013] UKUT 00253.
9. In response to the grounds Mr Kandola made various submissions and I will weave these into my decision in relation to the grounds of appeal.
10. Although the grounds place the argument in slightly different order I have revised them for clarity.

- 11.** The judge made a comprehensive assessment of the evidence. There was criticism made of him that he was not clear as to whether he was applying the pre-July 2012 Rules or the post-2012 Rules but as I pointed out to Counsel at the hearing, the judge recorded at paragraph 19 that it was accepted that the appellant could not meet the requirements of the Immigration Rules as she was an overstayer. Indeed Ms Walker accepted that the appellant could meet neither the old Rules nor the new Rules but she submitted that the judge had become confused and erred in his consideration of Article 8.
- 12.** However, the judge reasoned at [23] that ‘this leaves me to consider the appellant’s appeal purely under Article 8 in respect of her family and private life claim. It is not that he failed to consider her family life or her Islamic marriage. This evidence is fully considered. It is quite clear that the judge at [20] directed himself appropriately in relation to the five step approach in **Razgar v SSHD [2004] UKHL 27** and that the first question to be assessed is whether the removal would be an interference of the appellant’s right to respect for her private or family life.
- 13.** The judge also makes reference to the last question under the **Razgar** principles and that is whether the interference is proportionate. He weighed the evidence in this regard.
- 14.** He considered whether she had against this background a genuine and subsisting relationship with Mr Abdul Salam Amujee.
- 15.** The judge set out at [22] the context of the appeal; that the appellant was not recognised as having a marriage in English law and he also recorded that she was still not legally divorced from her first husband. The evidence set out was that not only had she separated from her husband in 2006 (the previous determination was adopted) but further she claimed that she was a victim of domestic violence and submitted an application in support of that claim was refused. It was also dismissed on appeal. The judge also clearly found that the appellant’s appeal rights came to an end on 30<sup>th</sup> September 2008 and any extant leave she might have during the appeal process by virtue of Section 3C of the Immigration Act 1971 also came to an end then [22]. The judge therefore recorded that the appellant had no further leave to remain in the UK from 30<sup>th</sup> September 2008 and became an overstayer.
- 16.** It is against this background that the judge assessed the appellant’s claim under Article 8 which is what he did [23].
- 17.** The judge was criticised for his treatment of the letter from Time Solicitors dated 22<sup>nd</sup> March 2012 but he recorded at [23] that the appellant produced a marriage certificate showing that she entered an Islamic marriage on 1<sup>st</sup> January 2012, but there was no reference to this *marriage* in the letter of 22<sup>nd</sup> March 2012 written by the appellant’s solicitors to the respondent. This was despite the fact that the letter of 22<sup>nd</sup> March 2012

was *after* the claimed marriage. Indeed the application was made on the basis of the appellant's private life.

- 18.** The judge recorded the evidence, not least the respondent's submissions which placed his findings in context. This recorded that there had also been no mention in the original application form about any form of relationship and this was only relayed in further representations *after* the wedding to Mr Amujee. A relationship with a British national was referred to in the letter dated 22<sup>nd</sup> March 2012 (misdated as 2010) the Home Office but the identity of the said spouse was not disclosed and nor was there any reference to a marriage in that letter. It is for the appellant to put forward evidence and to prove her case on the balance of probabilities. The fact of an Islamic marriage may still be a relevant consideration to have placed in the letter from Time Solicitors but it was not. It was open to the judge to question this and attach the weight he did.
- 19.** The judge looked at and acknowledged the letter and further representations from the solicitors in relation to the relationship but considered them in the context of all of the evidence. Thus the judge had made an assessment against the background of the appellant being appeal rights exhausted and having made a further application to remain in the UK on the basis of her private life without mention, at the stage of the application or of the letter in March 2012 of any marriage. I do not find that the judge can be criticised in this respect. The judge did not overlook the nature of the appellant's claim. It is clear from the papers that the original application was not made on the basis of family life and a matter for the appellant to address. At [18] the judge recorded the submissions in which criticism was made by the respondent of the appellant for failing to make her original claim on the basis of her relationship. It was open to the appellant's representatives to counter this point at the time and the judge cannot be criticised for addressing a point which was raised in court at the time.
- 20.** The judge gives further consideration to the witness statement of the appellant with regards to her marriage at [23] and further with respect to the husband's evidence states: "Mr Amujee does not say in his witness statement when he first met the appellant or give any details about arrangements in relation to the marriage" [23]. The judge took into account the relevant evidence.
- 21.** In the next sentence at (24) the judge states: "There is a lack of satisfactory evidence to show that the parties are in a genuine and subsisting relationship."
- 22.** At [24] the judge did acknowledge the wedding photographs but stated that there "were no other photographs to show family life". He added: "There are also greeting cards in the bundle but there is no evidence as to who the cards were sent to and who were they from." He clearly considered that there was a paucity of evidence.

- 23.** The judge albeit briefly did acknowledge and consider the numerous letters of support from various friends and family but did not find that these satisfied him that the appellant was in a genuine and subsisting marriage because they were “entirely self-serving”. There was criticism of the judge for the use of the term self-serving but he also stated [24] at:

*“The authors of the letters never gave evidence and the only other witnesses who actually did give evidence apart from the appellant and Mr Amujee were her sister and his father.”*

- 24.** Even though the point was made in the grounds for permission that the witnesses were at court, it was for the appellant’s representative to bring forward those witnesses if they wished, rather than expect the judge to surmise evidence from the statements as if those witnesses had actually given evidence.
- 25.** As stated above the judge did refer to Mr Amujee’s, (the appellant’s said partner) evidence but he also found that the evidence of Mrs Nazir, the appellant’s sister, was “grossly exaggerated” [25] and he did, contrary to the grounds for application for permission, give reasons why he rejected her evidence. He also added that she did not make a formal witness statement but wrote a letter to be found at page 144 of the bundle. This undermined the evidence. As the judge points out the sister stated that “she was very happy in the care of her husband and parents in law” but in fact “The main part of the letter relates to Mrs Nazir needing help with her children when she is away and that the appellant has fulfilled this need.” The judge clearly placed less weight on this evidence because the emphasis from the sister was on the help that the appellant gave her and the importance of her in the use of childcare and the support they received from her rather than the emphasis on her relationship.
- 26.** I can accept that there was no specific reference to Mr Amujee Senior’s evidence but in the context of the whole the judge rejected the evidence that this was a genuine and subsisting relationship. Not least the judge at [27] cited the details of the previous claim that the appellant had made to be a victim of domestic abuse which claim was rejected. Although there may have been an error in not specifically identifying the oral evidence, in the face of the remaining assessment I do not accept that this would have materially affected the outcome. The judge was well aware of the role of Mr Amujee Senior and the relationship asserted between his son and the appellant.
- 27.** The judge noted that there was the previous determination but it was not accepted that there was a valid reason for the appellant’s non-attendance with her solicitors in London. The judge further considered the appellant’s claim that she could not remember signing the notice of appeal requesting a paper appeal. Overall the judge did not accept the appellant’s credibility in this respect and found that there was a complete lack of independent evidence to support the appellant’s claim that she had been a victim of domestic violence. Indeed the judge found that even to the date of the

second appeal before him there was no satisfactory medical evidence. In addition the judge found rather than in a relationship with the sponsor the appellant was in a caring role for the parents of Mr Amjee. He found the evidence of Mr Amjee that they were in a relationship to be undermined by stating:

*“The letter also stated that the appellant was providing care for her disabled parents-in-law which included helping them with activities of daily living and if this appeal was not successful she would no longer be able to provide this care and thus her wider family would be directly affected. This lends further support to the fact that the appellant is in essence looking after Mr Amjee’s parents.”*

28. The judge then draws to a conclusion, on a recitation of all the evidence, in [29] that the appellant decided that she would not wish to return to India and decided to enter into a contrived marriage with someone else in order to remain in the UK.
29. I find that the reference at paragraph 26 in relation to the divorce document merely refers to a further disbelief of the appellant’s credibility whereby she stated that she was not asked to produce her divorce certificate. Nonetheless I find that this criticism of the judge’s reference to the Sharia divorce does not assist the appellant’s case. On the one hand it was not produced at the hearing until requested by the judge who was then criticised for placing no weight on it.
30. What is clear is that the judge found that she had not produced evidence that she was divorced under *English* law by the date of the hearing. The fact is that the appellant must prove the genuineness of her present relationship which the judge did not accept in the light of all the circumstances. This was not the only fact which the judge found which weighed against the appellant.
31. In sum the judge assessed and examined the credibility of the appellant as a whole in relation to her first marriage and rejected the claimed facts.
32. Nevertheless, the judge at paragraph 30 of the determination went on to state that:

*“Even if I am wrong that the appellant is not in a genuine and subsisting relationship there is nothing to prevent her from returning to India and making an application in the proper way for an entry clearance certificate to join Mr Amjee in the UK.”*

33. The judge noted **VW (Uganda)** and **AB (Somalia) v SSHD** [2009] EWCA Civ 5 and noted the ratio of **Chikwamba [2008] UKHL 40** which “called a halt to the false logic of there being relatively little hardship in breaking up a family by removal” but the judge then stated “it would not be unreasonable to expect her to return and regularise her position rather than jump the queue”.

34. However the question is whether the decision is proportionate to the legitimate aim and the judge clearly did not lean to the view that there was something unreasonable in expecting the appellant to undertake an application from abroad. The judge had looked at all of the facts and looked at the facts in relation to the appellant's husband and the family and decided that interference was justified. He found that the family and parents could care for themselves. The judge had recorded that the appellant had been in the UK unlawfully and had made previous unmeritorious claims. The judgment of **Kotecha (on the application of) v Secretary of State for the Home Department [2011] EWHC 2070 (Admin)** confirmed that the test was not one of insuperable difficulties but the need for a balanced judgment of what could reasonably be expected in the light of the material facts. The judge found that the appellant had contacts in India and indeed at paragraph 32 found that:

*"The fact of the matter is that the appellant is in regular contact with her mother, brother and sister in India and there is no reason why she could not return and go and live with them. She was previously working as a religious teacher in India as evidenced by documents in the bundle."*

35. He found that she would have no difficulty whatsoever in readjusting to life in India in relation to her private life and that she displayed a degree of independence; indeed at [25] the judge found that she had

*"been very busy in conducting herself in various different ways in relation to her social, family and religious life including looking after her parents-in-law on account of their ill health as well as having taken the time to improve her education and learn English and looking after other people's children."*

36. The judge in his decision did not expect a British national would be expected to leave the UK but concluded that the appellant could return to make an application from abroad if she so wished in other words that the interference with the family life, in the circumstances was justified. There was no indication from this that either the appellant or her husband would have difficulty in her returning to India and making an application to return and he could by choice, if he wished, accompany the appellant when making the application from abroad.

37. This is not a case such as in **Chikwamba** where the appellant would be returning to unpalatable conditions. The judge recorded that the appellant still had family in India. There is no indication that the judge departed from the reasoning in **Huang v SSHD [2007] UKHL 11 which confirms**

*'In an article 8 case where this question is reached, the ultimate question for the appellate immigration authority is whether the refusal of leave to enter or remain, in circumstances where the life of the family cannot reasonably be expected to be enjoyed elsewhere, taking full account of all considerations weighing in favour of the*

*refusal, prejudices the family life of the applicant in a manner sufficiently serious to amount to a breach of the fundamental right protected by article 8. If the answer to this question is affirmative, the refusal is unlawful and the authority must so decide. It is not necessary that the appellate immigration authority, directing itself along the lines indicated in this opinion, need ask in addition whether the case meets a test of exceptionality.*

- 38.** The judge identified [30] that there were other members of the family who could give support to Mr and Mrs Amujee senior in the UK and took into account the affect on their lives **Beoku Betts v SSHD** [2008] UKHL 39. Although children are not a requirement for the application of the principle in **Chikwamba** the judge found that the elderly parents for whom she was caring could continue their lives with the assistance of their own family and as **Kotecha** states:

*“The question in these cases, as in all Article 8 cases, is whether the interference which will flow to the family life of the claimant and his or her family members from removal is in all the circumstances proportionate.”*

- 39.** On a reading of the determination as a whole the judge clearly found that it was. In **Chikwamba** factors such as the immigration history of the appellant and the fact that the wait would be temporary were considerations. Here the appellant had made a previous application to remain in the UK regarding a previous relationship which was rejected (albeit on grounds of domestic abuse). The appellant was also an overstayer.
- 40.** I therefore find that there is no error of law in this determination and the decision shall stand.

Signed

Date 6<sup>th</sup> December 2014

Deputy Upper Tribunal Judge Rimington