



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

Appeal Number: IA/02503/2015

THE IMMIGRATION ACTS

**Heard at Glasgow
on 3 November 2015**

**Decision and Reasons
Promulgated
9 November 2015**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SUKHBIR SINGH

Respondent

Representation:

For the Appellant: Mrs S Saddiq, Senior Home Office Presenting Officer

For the Respondent: Mr S Winter, Advocate, instructed by Latta & Co.,
Solicitors

DETERMINATION AND REASONS

1. The parties are as described above, but the rest of this determination refers to them as they were in the First-tier Tribunal.
2. The appellant is a citizen of Pakistan, born on 19 September 1987. He came to the UK as a student. After his initial course, he obtained further leave until 28 July 2014 to take a degree in accountancy at the same college. The college had its licence revoked around the end of 2011. The

appellant says he could not enrol at an alternative college due to financial constraints. He ceased studying, but remained in the UK. He married Harinder Kaur Sandu on 4 June 2014. He submitted an application for leave to remain as her spouse on 12 July 2014.

3. The respondent refused that application by letter dated 18 December 2014, both in terms of the Immigration Rules, and for absence of circumstances to warrant a grant of leave outside the Rules.
4. By determination promulgated on 3 June 2015 Judge of the First-tier Tribunal McGrade allowed the appellant's appeal against that decision, outside the Rules, finding that removal would be disproportionate.
5. The SSHD's grounds of appeal to the Upper Tribunal are as follows:
 - 1 The Judge has allowed the appeal under Article 8.
 - 2 The Judge has made a finding that the appellant cannot meet the financial requirements of Appendix FM.
 - 3 The Judge has correctly given a self direction for the requirements for an Article 8 appeal to succeed on the basis of the test identified in *Razgar* at paragraph 22 of the determination.
 - 4 The law, currently on Article 8 is well summarised at paragraph 28 of *Agyarko and others* [2015] EWCA Civ 440 where at paragraph 28 Sales LJ states:

"So far as concerns Mrs Agyarko's claim under Article 8 for leave to remain outside the Rules since her family life was established with knowledge that she had no right to be in the United Kingdom and was therefore precarious in the relevant sense, it is only if her case is exceptional for some reason that she will be able to establish a violation of Article 8 : see *Nagre*, paragraphs [-] [41]; *SS (Congo)*, paragraph [29]; and *Jeunesse v Netherlands*, paragraphs. [108], [114] and [122].
 - 5 ... the Judge at paragraph 31 of the determination has failed to identify an exceptional factor in this case. He accepts that the appellant may have [*wording here incomplete in the grounds*] difficulties in obtaining entry clearance if the appellant and his partner return to India, he further accepts that if his partner remains in this country the period of separation may well exceed two years. However ... the correct test is whether it is exceptional and in failing to assess the factual matrix of this case against the test of exceptionality, the Judge has made a material error of law.

The determination is flawed and, in law, cannot stand.

6. Mrs Saddiq submitted thus. At paragraph 17 the judge identified the 2 matters on which the appellant relied as insurmountable obstacles to family life continuing outside the UK. At paragraph 19, the judge rightly rejected his case on both. The judge's final conclusion at paragraph 31 did not reflect his earlier assessment, which was in effect that there were no

exceptional circumstances. There were no such circumstances to justify the conclusion reached.

7. Mr Winter submitted along the following lines. The Secretary of State had accepted that the appellant's spouse could not be expected to relocate. (The refusal letter says that while it may not be reasonable to expect her to relocate to India permanently, it would not be unreasonable for her to accompany the appellant for a short time while he made his entry clearance application, or for him to do so alone while she remained in the UK.) That was also the line the respondent took in the First-tier Tribunal (paragraph 27 of the determination). The grounds of appeal to the Upper Tribunal failed to acknowledge that approach. The question for the judge had been whether it was proportionate to expect the appellant to apply again from India. The appellant's spouse had at one time been earning enough to meet the income threshold from two employments, but she lost one of those. She was in process of setting up her own grocery business. The indications were that the separation was likely to be fairly lengthy, and the judge found that it might well be in excess of 2 years. Although the judge did not accept what the appellant said about insurmountable obstacles, he had to consider these circumstances: the spouse is a UK citizen; her family is here; she has a young sister, whom she assists in her care needs; if she were to return to India with her husband, there would be "an adverse effect in particular upon her sister" (paragraph 25); return would result in her loss of employment, accommodation, and the chance to pursue her business, and would make it difficult for the appellant to satisfy the financial requirements of the Rules (paragraph 29). The respondent's grounds complained that the judge had not applied the test of exceptionality but that expression has itself been rejected recently by the Inner House. It has different meanings in different contexts, and can be confusing. The correct formulation may be put in various ways, but in effect they all come back to an assessment of proportionality. The grounds in substance were only disagreement with the proportionality assessment made by the judge. As Carnwath LJ (as he then was) said in *Mukarkar v SSHD* [2007] Imm AR 57 at paragraph 9, there was a danger of over complicating such cases; and at paragraph 40:

"Factual judgments of this kind are often not easy, but ... not made easier or better by excessive legal or linguistic analysis. It is the nature of such judgments that different tribunals, without illegality or irrationality, may reach different conclusions on the same case ... The mere fact that one Tribunal has reached what may seem an unusually generous view of the facts of a particular case does not mean that it is made in error of law ..."

The determination should stand.

8. Mrs Saddiq in response acknowledged that the respondent in the refusal letter and in the First-tier Tribunal accepted that it would not be reasonable to expect the appellant's wife to relocate permanently to India. However, she submitted that the respondent's grounds showed more than a semantic quibble over the test to be applied. The judge failed to set out any compelling or exceptional circumstances, and referred only to a period

of separation, which was simply the consequence of the Rules. The judge was not entitled to give that matter the weight which he did. In all the circumstances, the decision should have been to the contrary.

9. I indicated that the SSHD's appeal would not succeed.
10. Of all the cases dealing with the formulation of the correct approach to cases based on Article 8 outside the Rules, the grounds perhaps do not find the one most suited to the respondent's argument. This is not a case where family life was established while the appellant had no right to be in the UK. He had a formal grant of leave. Even if reliance upon it became somewhat questionable once the licence of his college was revoked, the respondent did not take it away from him.
11. The grounds of appeal to the Upper Tribunal accept that the judge gave himself the correct self-direction in terms of *Razgar*. There is nothing in the citation in the grounds which required him to decide otherwise than as he did.
12. If the judge had specified a test of exceptionality, without further explaining the different meanings that term has in different contexts, that again might have opened the way to legal debate.
13. The judge found this a finely balanced appeal. It might not be difficult to find quite similar cases which have gone against appellants, and another judge might have decided another way, but each case does turn eventually on its own particular facts.
14. Although the Rules, case law and statute have all moved on since *Mukarkar* the respondent did not suggest that it is not a good guide (even if not often cited with such enthusiasm by appellants' representatives). I further note from it that the eventual issue for the judge was one of factual judgment, not law (paragraph 12) and not open to challenge unless on grounds of perversity (paragraph 38).
15. The grounds amount to disagreement with the final judgment on the facts, rather than to identification of legal error.
16. The determination of the First-tier Tribunal shall stand.
17. No anonymity order has been requested or made.



Upper Tribunal Judge Macleman

7 November 2015