



Upper Tier Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/03186/2014

THE IMMIGRATION ACTS

Heard at Field House
On 7 January 2015

Determination Promulgated
On 22 January 2015

Before

Deputy Upper Tribunal Judge Pickup

Between

Naranjan Kaur
[No anonymity direction made]

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:

For the appellant: Ms K Ojutiku, instructed by YY
For the respondent: Mr I Jarvis, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, Naranjan Kaur, date of birth 1.7.39, is a citizen of India.
2. This is her appeal against the determination of First-tier Tribunal Judge Paul promulgated 1.10.14, dismissing her appeal against the decision of the respondent, dated 11.12.13, to refuse leave to remain in the United Kingdom outside the Immigration Rules on the basis of human rights. The Judge heard the appeal on 18.9.14.

3. First-tier Tribunal Judge Colyer granted permission to appeal on 20.11.14.
4. Thus the matter came before me on 7.1.15 as an appeal in the Upper Tribunal.

Error of Law

5. In the first instance I have to determine whether or not there was an error of law in the making of the decision of the First-tier Tribunal such that the determination of Judge Paul should be set aside.
6. In summary, the grounds of appeal suggest that the tribunal judge erred in law:
 - (a) By misdirecting himself on article 8, assessing it under the constraints of Appendix FM when it was not essential to do so;
 - (b) By failing to reference any of the compelling circumstances justifying an article 8 assessment;
 - (c) By making a factual error at §17, by concluding that the grandchildren were in India, when they are now in the UK, and thus the adverse credibility findings are flawed;
 - (d) By failing to consider that the appellant would not be able to return to the UK as an adult dependant relative unless and until she requires long-term personal care, which is a greater threshold to qualify under the Rules as opposed to the former requirement in paragraph 370 of the Immigration Rules.
7. In granting permission to appeal, Judge Colyer considered it arguable that the decision was influenced by the comment in the grandson's letter which relates to a possible erroneous finding that the appellant still had family in India. "This appears to have been an influential fact in the decision-making by the judge. The representatives' submissions at the appeal indicate that there was no family left in India and the judge has not explained why he rejects that submission."
8. "In the appeal the appellant's representative had raised the Chickwamba argument regarding proportionality when requiring someone to leave the UK to make an application to return. It may be argued that this issue was not fully addressed by the Tribunal judge (for example at paragraph 22). When considering the determination it is arguable that the judge has made a material error of law in the determination for the reasons outlined in the appellant's application. Permission to appeal is granted."
9. The Rule 24 response, dated 1.12.14, submits that the First-tier Tribunal Judge directed himself appropriately and the grounds of appeal are a disagreement with the cogent findings. "The judge at paragraph 18 questions the truthfulness of the circumstances claimed by the appellant and questions whether she does have other children in India and observes a lack of evidence at paragraph 20 on her claimed medical needs."

10. It is further submitted that the judge did not err in considering the Immigration Rules first as the starting point for the assessment of article 8 private and family life. The Secretary of State asserts that following Gulshan [2013] UKUT 00640 (IAC), once the Rules have been considered, an appeal should only be allowed where there are exceptional circumstances as defined in Nagre [2013] EWHC 720 Admin, meaning where refusal would lead to an unjustifiably harsh outcome. "In this case the Judge has found that the appellant's circumstances do not reveal any exceptional circumstances. The judge considered all the evidence that was available to him and came to a conclusion open to him based on that evidence and the relevant rules on the balance of probability and the determination does not disclose any error."
11. There may have been a mistake of fact as to whether the appellant has any family remaining in India. However, on the information put before the judge it was reasonable to assume that there were grandchildren and thus family members in India. I find no material error in this regard.
12. There is no merit in the Chikwamba point. Chikwamba appears to have turned on its own facts. The Court of Appeal in Hayat [2012] EWCA Civ 1054, summarised the Chikwamba principles at §30, including that in an article 8 a dismissal of the claim on the procedural ground that the policy requires the applicant to make the application from outside the UK may, but not necessarily will, constitute an interference with family or private life sufficient to engage article 8 and where article 8 is engaged, it will be disproportionate to enforce such a policy unless there is a sensible reason for doing so. This is a fact sensitive issue which includes certain potentially relevant factors such as the prospective length and degree of disruption of family life. Where article 8 is engaged and there is no sensible reason for enforcing the policy, the decision maker should determine the article 8 claim on its substantive merits, having regard to all material factors, notwithstanding that the applicant has no lawful entry clearance. Nothing in Chikwamba was intended to alter the way the courts should approach substantive article 8 issues as laid down in such well known cases as Razgar and Huang. In the view of the Court of Appeal, if the Secretary of State has no sensible reason for requiring the application to be made from the home state, the fact that he has failed to do so should not thereafter carry any weight in the substantive article 8 balancing exercise.
13. In the present case, and as observed by the judge at §22, it is far from clear that the appellant would be successful in making an application for entry clearance from outside the UK. This is not a case where it is only the application of the policy that requires the removal of the appellant.
14. However, for the reasons set out below, I find that the judge should have gone on to conduct a careful article 8 ECHR assessment outside the Immigration Rules.
15. The judge may have had in mind Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 00640 (IAC) where the Tribunal set out, inter alia, that on the current state of the authorities:
 - (b) after applying the requirements of the Rules, only if there may be arguably good grounds for granting leave to remain outside them is it necessary for Article 8 purposes

to go on to consider whether there are compelling circumstances not sufficiently recognised under them: R (on the application of Nagre) v Secretary of State for the Home Department [2013] EWHC 720 (Admin);

16. Although case law continues to develop, the current position is perhaps best expressed in paragraph 135 of R (MM (Lebanon)) v SSHD [2014] EWCA Civ 985:

135. Where the relevant group of IRs [immigration rules], upon their proper construction provide a “complete code” for dealing with a person’s Convention rights in the context of a particular IR or statutory provision, such as in the case of “foreign criminals”, then the balancing exercise and the way the various factors are to be taken into account in an individual case must be done in accordance with that code, although reference to “exceptional circumstances” in the code will nonetheless entail a proportionality exercise. But if the relevant group of IRs is not such a “complete code” then the proportionality test will be more at large, albeit guided by the Huang tests and UK and Strasbourg case law.”

17. Recent decisions, including Ganesabalan [2014] EWHC 2712 (Admin) have suggested that Appendix FM and paragraph 276ADE are not a complete code. It is probably also the case that regardless of the application of those provisions, the Tribunal is required to consider and address the grounds raised on appeal, pursuant to section 86 of the 2002 Act. Further, there was a one-stop warning in the refusal decision, requiring the appellant under section 120 of the Nationality Immigration and Asylum Act 2002 to state all reasons why she should be allowed to remain in the UK.
18. The judge found that there were no compelling features in the case to justify consideration of article 8 outside the Rules, but in the alternative considered that even if wrong on that, that the “any decision would be proportionate on these facts.” That is not a satisfactory treatment of the careful proportionality balancing exercise required by Razgar, between on the one hand the legitimate and necessary public interest in protecting the economic well-being of the UK through immigration control and on the other, the private and family life rights of the appellant. There is a legal duty to give at least a brief explanation of reasons for reaching the conclusion that the decision was proportionate. The parties would be unable to see from the determination what factors have been taken into account and weighed in the balance. Neither has the judge made any consideration, as is required by the statute, of the public interest factors in section 117B of the 2002 Act.
19. It may well be that on the facts of this case and in the light of section 117B, the outcome of the decision will be the same. However, in fairness the appellant and the respondent are entitled to clarity as to the factors taken into account in the proportionality balancing exercise.
20. When a decision of the First-tier Tribunal has been set aside, section 12(2) of the Tribunals, Courts and Enforcement Act 2007 requires either that the case is remitted to the First-tier Tribunal with directions, or it must be remade by the Upper Tribunal. The scheme of the Tribunals Court and Enforcement Act 2007 does not assign the

function of primary fact finding to the Upper Tribunal. Where the facts or reasons for findings are unclear on a crucial issue at the heart of an appeal, as they are in this case, effectively there has not been a valid determination of those issues. The errors of the First-tier Tribunal vitiates all other findings of fact and the conclusions from those facts so that there has not been a valid determination of the issues in the appeal.

21. In all the circumstances, at the invitation and request of both parties to relist this appeal for a fresh hearing in the First-tier Tribunal, I do so on the basis that this is a case which falls squarely within the Senior President's Practice Statement at paragraph 7.2. The effect of the error has been to deprive the appellant of a fair hearing and that the nature or extent of any judicial fact finding which is necessary for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2 to deal with cases fairly and justly, including with the avoidance of delay, I find that it is appropriate to remit this appeal to the First-tier Tribunal to determine the appeal afresh.

Conclusion & Decision:

22. For the reasons set out herein, I find that the making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside.

I set aside set aside the decision.

I remit the decision in the appeal to the First-tier Tribunal to be remade afresh.



Signed:

Date: 7 January 2015

Deputy Upper Tribunal Judge Pickup

Consequential Directions

23. The appeal is remitted to the First-tier Tribunal at Taylor House;
24. The appeal should be listed for a full hearing, with a time estimate of 2 hours;
25. No findings of fact are preserved and the appeal is to be heard afresh.

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Given the circumstances, I make no anonymity order.

Fee Award **Note: this is not part of the determination.**

In the light of my decision, I have considered whether to make a fee award (rule 23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007).

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: The outcome of the appeal remains to be decided.



Signed:

Date: 7 January 2015

Deputy Upper Tribunal Judge Pickup