Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: IA/19804/2012
IA/19805/2012

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 22 March 2013	**On 27 June 2013**

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ABDUL WAHEED
JAMILA KOUSAR

Respondents

Representation:

For the Appellant: Ms L. Kenny, Home Office Presenting Officer
For the Respondents: Mr Z. Malik, Counsel instructed by Solicitors

DETERMINATION AND REASONS

Introduction

1. The appellant is the Secretary of State. However, for convenience I refer to the parties as they were before the First-tier Tribunal.

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2. Thus, the appellants are citizens of Pakistan, born on 4 April 1955 and 6 March 1961, respectively. They are husband and wife. They arrived in the UK on 26 June 2011 with leave to enter as visitors, that leave valid until 26 December 2011. On 11 July 2011 they applied under the Immigration Rules for indefinite leave to remain as dependent relatives. That application was refused and the appellants then submitted an in-time application, on 19 December 2011, for further leave to remain on human rights grounds. Those applications were also refused in decisions to refuse to vary leave to remain made on 7 September 2012.

3. They appealed against those decisions and their appeals were allowed by First-tier Tribunal Judge Martins after a hearing on 29 November 2012. Permission to appeal having been granted, the appeals came before me.

Submissions

4. The following is a summary of the submissions made on behalf of the parties. Further reference to the submissions is made during the course of my assessment of the competing arguments.

5. Ms Kenny submitted that the 'new' Immigration Rules in relation to Article 8 should have been taken into account by the First-tier judge in terms of the public interest, namely paragraph 276ADE and Appendix FM. I was referred to paragraph 91 of HC 194 which introduced the relevant Rules. The grounds of appeal to the Upper Tribunal were relied on, Ms Kenny reiterating that no account was taken of the public interest in terms of immigration control as reflected in the Immigration Rules. It was also submitted that there was a lack of adequate reasons for finding that the appellants are dependent on family here. Various factual matters were referred to in submissions on behalf of the respondent.

6. Mr Malik relied on his skeleton argument. Referring to HC 194 he submitted that it was clear from the preamble that those Rules did not apply to applications made prior to 9 July 2012. It was only Rule A279 and the suitability requirements that applied to all immigration decisions on or after 9 July 2012 and those provisions do not apply to the circumstances of these appeals.

7. Even if the 'new' Article 8 Rules did apply, there was no error of law in the decision of the First-tier Tribunal. Reference was made to the decision of the Upper Tribunal in Izuazu (Article 8 – new rules) [2013] UKUT 00045 (IAC) at [41]-[41] and [43]. As was noted in that decision, those Rules do not in every respect reflect the law in relation to Article 8. In relation to family life, the Secretary of State's arguments amount only to a disagreement with the findings of the First-tier judge.

8. Ms Kenny in reply referred to the determination to suggest that it had been accepted before the First-tier judge that the appellants were not

able to meet the requirements of the Rules. The applicability of the Rules extends beyond the suitability requirements.

My assessment

9. I am not satisfied that there is any error of law in the judge's decision in terms of the failure to consider the public interest in the proportionality assessment in terms of the application of the 'new' rules. Those rules came into force on 9 July 2012. The applications for leave to remain were made on 19 December 2011. HC 194 states in the preamble that applications made before 9 July 2012 are not covered by the Rules introduced by HC 194. The preamble materially states as follows: "…if an application for entry clearance, leave to remain or indefinite leave to remain has been made before 9 July 2012 and the application has not been decided, it will be decided in accordance with the rules in force on 8 July 2012."

10. The argument on behalf of the respondent with reference to paragraph 91 of HC 194 does not assist in establishing the applicability of the Rules in HC 194. Paragraph 91 of HC 194 materially states as follows:

> **"Transitional provisions and interaction between Part 8 and Appendix FM**
>
> A277 From 9 July 2012 Appendix FM will apply to all applications to which Part 8 of these rules applied on or before 8 July 2012 except where the provisions of Part 8 are preserved and continue to apply, as set out in paragraph A280.
>
> A278 The requirements to be met under Part 8 after 9 July 2012 may be modified or supplemented by the requirements in Appendix FM.
>
> A279 The requirements of sections "S-EC: Suitability – entry clearance" and "S-LTR: Suitability – leave to remain" of Appendix FM shall apply to all applications made under Part 8 and paragraphs 276A-276D and paragraphs 398-399A shall apply to all immigration decisions made further to applications under Part 8 and paragraphs 276A-276D where a decision is made on or after 9 July 2012, irrespective of the date the application was made."

11. As suggested on behalf of the appellants, the suitability requirements do not apply in any event. Furthermore, as I indicated to the parties, I am not satisfied that paragraph 276ADE comes within paragraph 91 because it is not part of 276A-D; it comes after it in the Rules. Paragraph 91 of HC 194 is ambiguously worded but I am satisfied that the preamble is clear in stating that the relevant part of the Rules, here paragraph 276ADE, did not apply to these appellants. Even if 276ADE did apply, the effect of paragraph 91 is to limit its application in this case to the suitability requirements. In addition, paragraph 276ADE is outside of the range of applicable Rules described in paragraph 91. Lastly, in so far as there could be said to be any remaining ambiguity because of inconsistency between paragraph 91 and the preamble, that

ambiguity should be resolved in favour of the appellants. If it was intended that paragraph 91 should apply to applications such as these, that intention would have to have been clear and unambiguous.

12. It was submitted on behalf of the Secretary of State that it had been conceded before the First-tier Tribunal that the appellants were not able to meet the requirements of the new Rules. In this respect I note [55]-[56], and in particular [61] of the determination. However, I am satisfied that the appellants' representative was wrong to make that concession. It is not a concession that can have any effect in the circumstances of this appeal, because it is wrong in law. The situation would arguably be different if it were a concession of fact as opposed to one of law.

13. It follows, that I am not satisfied that there is any merit in the Secretary of State's first ground of challenge to the determination of the First-tier Tribunal in terms of the applicability of the Immigration Rules relating to Article 8 of the ECHR.

14. The Secretary of State's second ground of appeal refers to the finding made by Judge Martins at [65] that the appellants are dependent on their children in the UK. The respondent contends in the grounds that the appellants' children can continue to offer emotional support from the UK and can visit the appellants and the appellants can visit the UK as they have previously done. They have family in Pakistan who can support them. The grounds continue that the Tribunal has given inadequate reasons for its findings "which are scant" and do not give sufficient detail as to the claimed dependency and how the appellants are said to have developed close ties, beyond ordinary emotional ties, with their grandchildren.

15. Ms Kenny relied on evidence that there were other siblings in Pakistan in the near vicinity. Medical treatment would be available for the appellants. The appellants have a home, a car and employ a driver and a housekeeper. Their relationship with the grandchildren has endured for only 18 months.

16. However, Judge Martins' determination set out in detail the written and oral evidence, and the respective submissions of the parties. She referred to the Secretary of State's contentions in terms of the availability of treatment in Pakistan for the appellants' medical conditions. She also addressed the competing arguments and evidence in terms of the appellants' financial situation and their family relationships both here and in Pakistan, the appellants having explained why the Secretary of State's analysis of their situation was wrong.

17. At [62] she stated that having seen and heard the appellants and their sons give evidence, which she found to be "straightforward and helpful", she found them to be credible.

18. At [63] she noted that the appellants had visited the UK on numerous occasions and that they had always abided by the immigration rules. She referred to the second appellant's depression (and there was detailed evidence, set out in the determination, of the effect on the appellants of that condition). She noted the efforts the appellants' children had made to try to manage the second appellant's depression but that the situation had become unmanageable because of age and possibly the first appellant's physical health. There was evidence that he had retired from work on health grounds, had a heart bypass and has severe diabetes.

19. She concluded at [63] that the evidence established that between the three sons in the UK they are able to maintain and accommodate the appellants without recourse to public funds.

20. At [64] she found that prior to coming to the UK and since 2008 the appellants have been wholly dependant on their children in the UK. She accepted the evidence in relation to the extended family in Pakistan, that they have their own families and are not in a position to assist the appellants and that the first appellant's two brothers are estranged from him.

21. Next, at [65] she concluded that taking into account the appellants' medical conditions, and the "difficult nature of the emotional and psychological state of the second appellant", there is dependency between the appellants and their children that extends beyond ordinary emotional ties. Thus, she found that there was family life between them.

22. Judge Martins also found that the appellants had developed a bond with their grandchildren, in particular the eldest daughter of their eldest son, such that there was family life with the grandchildren also.

23. She concluded that if the appellants returned to Pakistan there would be an impact not only on the appellants but also on their sons and families since the families could not relocate (the grandchildren being British citizens).

24. The legitimate aim of immigration control was referred to at [65] and at [66] the conclusion was reached that the decision was a disproportionate interference with the appellants' Article 8 rights. Judge Martins again referred to the appellants' ill health, their "complete financial dependence" on their children and their psychological and emotional dependence, as well as the bond between them and their grandchildren.

25. Neither the grounds of appeal to the Upper Tribunal nor the oral submissions persuade me that there is any error of law in the judge's assessment under Article 8. Submissions in relation to the support that could be provided on their return, to relatives they have in Pakistan, or

to the appellants' circumstances there, reveal nothing more than a disagreement with the judge's evaluation of the evidence and her assessment of proportionality.

26. As I indicated at the hearing, there is some conflation of factors in the Article 8 assessment but this is a matter of form not substance. The judge analysed the relationships in terms of assessing the extent of family and private life, evaluated the extent of any interference with the appellants' Article 8 rights, recognised the legitimate aim that was pursued and made an assessment of proportionality based on the findings of fact that she made. The weight to be attached to any aspect of the evidence was a matter for the judge. When a holistic view of the Article 8 consideration is taken, it is clear that the conclusion that Judge Martins came to in terms of the disproportionate interference with the appellants' Article 8 rights was a conclusion that was open to her on the evidence.

27. In these circumstances, there is no need to go on to consider the separate argument made on behalf of the appellants to the effect that the decision to refuse to vary leave to remain is not in accordance with the law and thus unlawful because it was a decision that applied the Article 8 Immigration Rules which have no application.

Decision

28. The decision of the First-tier Tribunal did not involve the making of an error on a point of law. The decision of the First-tier Tribunal to allow the appeal of each appellant under Article 8 ECHR stands.

Upper Tribunal Judge Kopieczek

25/06/13