Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: IA/29666/2013
IA/29672/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 10 June 2014	**On 30 June 2014**

Before

UPPER TRIBUNAL JUDGE ESHUN

Between

MR SISIR CHAUDHURI
MRS MONJUSHREE CHOUDHURY

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr Z Malik, Counsel
For the Respondent: Miss J Isherwood, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellants have been granted permission to appeal the decision of First-tier Tribunal Judge A J M Baldwin dismissing their appeals against the respondent's decision dated 27 June 2013 to refuse their applications for leave to remain under Article 8 family and private life grounds.

2. The appellants are citizens of India born on 22 January 1943 and 12 December 1952 respectively. They arrived in the UK separately on 6 September 2012 and 10 October 2012 respectively on visit visas issued on 6 March 2012 and 11 April 2012 respectively. They made their present applications on 6 March 2013.

3. The respondent's notice of immigration decision included a decision to remove the appellants by way or directions under Section 47 (removal: person with statutorily extended leave) of the Immigration, Asylum and Nationality Act 2006. The first ground of the appellants' appeal argued that the First-tier Tribunal's failure to allow the appeal under Section 47 removal decision amounted to an error of law. Counsel conceded that the Upper Tribunal's decision in **Castro (Removals: s.47 (as amended)) [2014] UKUT 234 (IAC)** conclusively decides the points raised in the first ground. However, Counsel reserved his position because there is an application pending before the Upper Tribunal to appeal **Castro** to the Court of Appeal.

4. The appellants' second ground of appeal was in respect of the Secretary of State's policy in relation to paragraph 276ADE and Article 8 of the ECHR. Counsel relied on the argument that the Secretary of State's decision to refuse the appellants' application was plainly inconsistent with their published policy, "Long residence and private life - v11.0". In particular the grounds relied on instruction to caseworkers when assessing whether an applicant has "no ties" (including social, cultural or family) with the country to which they would have to go if required to leave the UK, the factors they must consider, which are:

   - the length of time the person has spent in the UK;
   - the length of time the person has spent in the country to which they would have to go if required to leave the UK;
   - the exposure the person has had to the cultural norms of that country;
   - whether the person speaks the language of that country;
   - the extent of the family and friends the person has in that country; and
   - the quality of the relationships the person has with those family members and friends.

5. Counsel submitted that the phrase "the factors he must consider" clearly means that it is mandatory to give express and clear consideration to the listed factors. Counsel compared the language used in the policy to Head

Note 8 of the case of **EO (deportation appeals: scope and process) Turkey [2007] UKAIT 00068**. Head note 8 states:

> "***In determining an appeal against a decision (whether before or after 20 July 2006) to give directions under s.10*** *(as distinct from directions for removal of an illegal entrant) the Tribunal should first consider whether the decision shows, by its terms that the decision maker took into account the factors set out in paragraph 395C and exercised a discretion on the basis of them. If it does not, the appeal should be allowed on the basis that it was not in accordance with the law and that the appellant awaits a lawful decision by the Secretary of State ...*"

6. Counsel relied on paragraph 44 of **EO** which states:

> "*So far as the appellant process is concerned, two conclusions follow from it. The first is that, where the decision to give removal directions under s.10 does not clearly demonstrate a proper consideration of the matters set out in paragraph 395C and the exercise of a discretion to make the decision, the decision will be one which is challengeable on the ground that it is not in accordance with the law ...*"

7. Counsel also relied on paragraph 34 of **Lumba v SSHD [2011] UKSC 12** where Lord Dyson made clear that:

> "*The rule of law calls for a transparent statement by the executive of the circumstances in which the broad statutory criteria will be exercised ... [35] The individual has a basic public law right to have his or her case considered under whatever policy the executive sees fit to adopt provided that the adopted policy is a lawful exercise of the discretion conferred by the statute: see In re* ***Findlay [1985] AC 318, 338E****."*

8. Counsel submitted that the respondent's immigration decision failed to engage with the factors in the respondent's published policy on long residence and private life and therefore her decision was not in accordance with the law.

9. Counsel submitted that the Secretary of State's policy was published at the same time as the new Immigration Rules which came into force in July 2012. I went through the factors as listed in paragraph 21 of the grounds and asked Counsel which, if any, of those factors were not taken into account by the Secretary of State. Whilst not able to identify a particular factor, Counsel argued that the Secretary of State should have listed the factors to show that she was considering them and then to have made clear decisions in relation thereto. The fact that she had not listed the factors did not demonstrate that she had considered them and therefore her decision was not in accordance with the law.

10. I have no hesitation in rejecting Counsel's argument. I find that the Secretary of State was not obliged to list each of the factors to show that she had considered each one, so long as the decision showed that those factors had been taken into account in her assessment as to whether an applicant has not ties (including social, cultural or family ties) with the country to which they would have to go if required to leave the UK. I find that the respondent did just that. She considered those factors in the Reasons for Refusal Letter. Indeed Counsel could not point to any factor which was not considered by the Secretary of State. I therefore fail to see any consistency between the respondent's decision and her published policy

11. I find that to compare the language used in the policy with the language used in **EO Turkey** is not comparing like with like. **EO Turkey** concerned the consideration of 395C factors before the Secretary of State made a decision under Section 10 to remove an applicant. The published policy concerns an assessment of a phrase "no ties" within an immigration rule. The decision in respect of 276ADE is not dependent solely on the ties an applicant has to their country of origin. It is part of the consideration of matters linked to Article 8.

12. Miss Isherwood submitted that Counsel's argument in respect of the published policy was not raised in the grounds against the Secretary of State's decision or at the hearing before the First-tier Tribunal. She relied on **Sarkar [2014] EWCA Civ 195** where the Court of Appeal found **[11]** that the appellants had failed to adduce any evidence or argument in support of their Article 8 case before the First-tier Tribunal, and when invited to respond to the Upper Tribunal's proposals for the disposal of the appeal, took no steps to ensure that the case was considered by the Tribunal either. It was difficult to see how in those circumstances the Upper Tribunal could be said to have made a material error of law in failing to deal with it. Relying on **Sarkar**, Miss Isherwood submitted that Counsel was precluded from raising this issue before me.

13. In reply Counsel argued that Miss Isherwood had misunderstood the decision in **Sarkar**. It was said at **[6]** of **Sarkar** that no evidence was adduced in support of the appellants' Article 8 claim and no argument was addressed in support of it before the First-tier Tribunal. In its formal notice decision dated 18 October 2012, the Upper Tribunal had said that the First-tier Tribunal Judge who refused permission to appeal in the First-tier Tribunal said that no evidence was adduced in support of the appellants' human rights grounds of appeal under Article 8 of the ECHR. The appeal proceeded on the basis of oral submissions. The Upper Tribunal Judge therefore refused leave on the grounds advanced, which would have been the grounds advanced under Article 8 of the ECHR. The Court of Appeal said at **[17]** that the unqualified grant of permission to appeal must be read in the context of the reasons which the Upper Tribunal Judge gave for

his decision, which made it clear that he intended to limit it to the ground that he had identified based on Section 47 of the Immigration, Asylum and Nationality Act 2006. The Court of Appeal accepted that the Upper Tribunal could have granted permission to appeal in respect of the question whether the First-tier Tribunal ought to have considered the Article 8 claim (that being the only relevant point of law arising from the decision of the First-tier Tribunal), and if it had done so, would have had jurisdiction to decide that question.

14. In light of Mr Counsel's submissions with reference to **Sarkar**, I find that as the appellants were granted permission by an Upper Tribunal Judge on 24 April 2014 to argue all the grounds, I had jurisdiction to consider the new point raised by Counsel.

15. I have already dealt with his new point and decided against it. To conclude I find that the respondent's decision was in compliance with paragraph 276ADE(vi) of the Immigration Rules. It was not unlawful at "basic public law" as claimed in the grounds and was therefore in accordance with the law.

16. In respect of Article 8, I accept Counsel's argument that the judge did not refer to the first four questions in **Razgar** but proceeded to consider the fifth question, which is whether the interference of the family and private lives of the appellants as a result of the respondent's decision was proportionate to the legitimate public end sought to be achieved. Counsel did not dispute the proportionality findings. His principle argument was that the judge would not have had to consider proportionality if he had found that as a result of the respondent's failure to consider the factors in her published policy, the respondent's decision was unlawful and amounted to an interference which was not in accordance with the law for the purpose of article 8(2). Mr Malik relied on **SC (Article 8 – in accordance with the law) Zimbabwe [2012] UKUT 00056 (IAC)** in support of his argument. In light of my conclusions at paragraph 15 above, I find that Counsel's argument is not sustainable.

17. I find that the judge's decision discloses no error of law. The judge's decision dismissing the appeals of the appellants shall stand.

Signed Date

Upper Tribunal Judge Eshun