Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/34461/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 20 August 2014	**On 3 September 2014**

Before
UPPER TRIBUNAL JUDGE PITT
DEPUTY UPPER TRIBUNAL JUDGE G A BLACK

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRS TRUPTI HARIKRUSHANA PADARIA

Claimant

Representation:

For the Appellant: Ms J Isherwood, Home Office Presenting Officer
For the Respondent: Mr R Sharma (Counsel instructed by Malik Law Chambers Solicitors)

DETERMINATION AND REASONS

1. This matter comes before us for consideration as to whether or not there is a material error of law in the determination by First-tier Tribunal (Judge Lawrence) promulgated on 10 June 2014, in which he allowed the claimant's appeal under Article 8 for leave to remain outside of the Rules.

Background

2. The claimant, whose date of birth is 12 November 1985, is a citizen of India.

3. In a letter dated 15 August 2013 the Secretary of State refused the claimant's application for leave to remain in the UK under pararagraph 276ADE of the Immigration Rules as she had not lived continuously in the UK for at least twenty years. She entered as the spouse of a highly skilled migrant on 31 October 2008 but her marriage ended in July 2012. She formed a relationship with her sponsor with whom she cohabited since 30 January 2013. They celebrated a Hindu wedding ceremony in March 2013 but had not cohabited for two years.

4. The First tier Tribunal hearing took place on 27 May 2014 at which time the appellant was heavily pregnant with a "due" date in July 2014.

5. The Tribunal confirmed at [8] that the appellant did not meet the requirements of paragraph 276ADE because the sponsor was not settled in the UK, the appellant did not meet the requirements of paragraph E-LTRP.2.1, and paragraph EX1(b) did not apply. The Tribunal found at [9] that there were no insurmountable obstacles to family life being continued in India. There was no evidence that the Indian sponsor could not accompany the claimant and their child to India.

6. The Tribunal considered the appeal under Article 8 ECHR following principles set out in **SSHD v Treebhowan and Hayat [2012] EWCA Civ 1054** [19]. The Tribunal found the claimant's advanced stage of pregnancy to be a significant factor and exceptional circumstance such that consideration of the appeal could be made outside of the Rules. Following **Razgar [2004] UKHL 27** the Tribunal found family life was established [20] and that the interference was disproportionate having regard to the legitimate public end [25].

7. Grounds of appeal were submitted by the Secretary of State. Ground one was that the Tribunal erred by failing to follow the "arguably good grounds" approach as per **Gulshan** and **R (on the application of Nagre) v SSHD [2013] EWHC 720 (Admin)** and that the claimant's pregnancy and temporary inability to travel was not an arguably good ground for consideration outside of the Rules. Ground two was that the Tribunal erred in the assessment of proportionality.

8. Permission to appeal was granted by First-tier Tribunal Judge Levin on 27 June 2014 who concluded that the judge's reasoning that the claimant's advanced stage of pregnancy warranted consideration outside of the Immigration Rules was properly open to him. However, it was arguable that the proportionality assessment was flawed by a failure to have proper consideration of the material facts, and the Secretary of State's duty to apply the Immigration Rules and the public interest factors.

Discussion and Decision

9. The first ground relates to the "**Gulshan**" test. While we acknowledge that an advanced state of pregnancy was arguably a good ground for consideration outside of the Rules, in light of the recent judgment in **MM (Lebanon) and others, R (on the application of) v Secretary of State for the Home Department and another [2014] EWCA Civ 985** that approach no longer forms a necessary stage prior to consideration of Article 8 ECHR and it appeared to us that this ground therefore fell away.

10. The second ground focuses on the Article 8 proportionality assessment. It was our view that the First-tier Tribunal's assessment was indeed flawed in failing to take into account at all the appellant's failure to meet the Immigration Rules.

11. Further, there is no dispute that the sponsor here is an Indian national with limited leave to remain. The decision was also in error where the Tribunal found, correctly, at [9], that there were no insurmountable obstacles to the couple living together in India but that finding not being weighed at all in the Article 8 proportionality assessment.

12. We also found that the Tribunal was misconceived in stating at [25] that because the claimant may be able to meet the Rules in an out of country application "the notion of immigration control loses its potency". The fact of her being unable to meet the Immigration Rules now remained a relevant factor in the Article 8 assessment; see Haleemudeen v SSHD [2014] EWCA Civ 558.

13. Accordingly we find the decision of the First-tier Tribunal disclosed an error on a point of law such that it should be set aside and be remade.

14. As regards the re-making, Mr Sharma indicated that he wished to take instructions a letter dated 24 July 2014 from the Secretary of State informing the claimant's sponsor of his liability for detention and removal. It appeared to us that the appeal should be re-made on the evidence as it was before the First-tier Tribunal and we indicated that we therefore placed no weight on that letter. Mr Sharma confirmed that otherwise he was content for the Tribunal to proceed to remake the decision without further submissions, as did Ms Isherwood.

15. As may be clear from our reasons for finding an error of law above, it was not our view that the decision to refuse leave under Article 8 could be found to be disproportionate. The appellant cannot meet the Immigration Rules and that must be taken as the starting point in any proportionality assessment; see Haleemudeen v SSHD [2014] EWCA Civ 558. We accept that she has a family life here with her partner and will have established a limited private life in the time that she has been in the UK. Her partner is Indian, however, and he is in the UK on a temporary basis. It appeared to

us that the couple, having decided to begin a relationship when the claimant's immigration status was uncertain, could reasonably be expected to exercise their family and private life in India, their country of origin and the place they have spent most of their lives and were always expecting to return to at the end of their limited leave. The appellant's pregnancy might be a factor to consider when setting precise removal directions but was not something that could show the refusal of leave to be disproportionate.

16. In short, it was not our judgement that anything in the circumstances of the claimant or her partner showed that the decision to refuse leave was disproportionate and we therefore refused the appeal.

Decision

17. We find a material error of law in the determination of the First-tier Tribunal and set it aside.

18. We remake the decision as refused under Article 8 ECHR.

Signed Date 2.9.2014

Deputy Upper Tribunal Judge G A Black

No anonymity order made.

There is no fee award as the appeal is dismissed.

Signed Date 2.9.2014

Deputy Upper Tribunal Judge G A Black