Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: IA/42669/2013
IA/42670/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 28 July 2014	**On 18 August 2014**

Before

UPPER TRIBUNAL JUDGE PITT

Between

MR YAN KIT KO
MRS BRENDA SU PHIN SEK

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Ms R Moffatt, Counsel instructed by Duncan Lewis & Co Solicitors
For the Respondent: Ms A Everett, Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is an appeal brought by Mr Ko and Mrs Sek against the determination of First-tier Tribunal Judge Hawden-Beal promulgated on 12 May 2014 which refused their Article 8 ECHR appeals.

2. Ms Moffatt and Ms Everett put their cases to me clearly and succinctly and I was grateful to them both for their assistance.

3. It was common ground before me that Judge Hawden-Beal erred in applying the new Immigration Rules in her consideration of Article 8. The application made by the appellants predated 9 July 2012 and, therefore, following the case of **Edgehill v Secretary of State for the Home Department [2014] EWCA Civ 402**, the respondent conceded in the Rule 24 letter that an error arose.

4. However, the respondent did not concede that this meant that a material error arose. The respondent's position was that the appellants' situation was akin to that of appellant HB in **Edgehill** as a full **Razgar [2004] UKHL 27** and **Huang [2007] UKHL 11** assessment of their circumstances under Article 8 could still not have led to the appeal being allowed.

5. It was maintained for the appellants that an error of law must arise where a "new" Article 8 assessment is conducted in line with the current case law, reference being made in particular to **Gulshan [2013] UKUT 640**. A "**Gulshan**" assessment increased the importance to be placed on the public interest, on a failure to meet the Immigration Rules and created a higher "exceptionality" or "compelling circumstances" test. Where that was so, a material error inevitably arose if, as here, the appellants were entitled to "old" pre-9/7/12 Article 8 assessment.

6. Further, submitted Ms Moffatt, it must be the case that there was a likelihood of an Immigration Judge finding in favour of these appellants in a full **Razgar** assessment. There were significant features in their case. Although it was accepted that they had not had leave to remain since 2004 the couple had acted in good faith in reliance on what lawyers had told them about their right to British nationality where the husband was a British overseas citizen who had renounced his Malaysian nationality. They had clearly been entitled to hold such a belief where the first appellant's brother was granted British citizenship in similar circumstances.

7. There was a further material issue in that the first appellant's private life, established since 2001, had not been assessed by Judge Hawden-Beal. The failure to assess that period of 13 years' residence had to be a material matter.

8. It was maintained for the appellants that these matters, in addition to the accepted difficulties that they would face in re-establishing themselves in Malaysia where the husband was no longer a Malaysian citizen, were more than capable of showing that the Article appeal could be allowed.

9. I gave careful thought to the submissions for the appellants, conscious of the importance of this matter for them and accepting, as I do, that they were not seeking to circumvent the Immigration Rules at any time and were genuine in their belief that the first appellant had an opportunity to obtain British citizenship.

10. It remains the case that I did not find that it could be argued that a full "old" or **Razgar** Article 8 assessment would have made any difference to the outcome of this appeal.

11. The second appellant is still a Malaysian national. The first appellant can return with her as a spouse or use other provisions of Malaysian immigration law to return.

12. I accept the evidence of the second appellant before the First-tier Tribunal that she would have to work to support the family initially as her husband, whilst he remained a non-Malaysian national, would find difficulty in doing so.

13. The second appellant's evidence, set out at [18] of the decision of Judge Hawden-Beal, was also that her parents and siblings are in Malaysia and that she speaks to them on the telephone. Her parents manage financially. She also gave evidence that the first appellant's family remain in Malaysia. It is therefore not the case that the second appellant would be entirely responsible for all aspects of supporting the family. Both appellants have a network of immediate family members in Malaysia from whom they can expect some support. Further, both appellants have worked in the UK and have work experience and skills that could be put to use on their return in Malaysia, albeit the first appellant may have to wait some time to be able to do so.

14. I accept that it would take some time for the first appellant to regain his Malaysian nationality. I accept that both appellants have been in the UK for a significant amount of time, the first appellant since 2001 and the second appellant since 2002. They are entitled to have those periods of residence weighed in their favour as, although much of that time was spent here illegally, I have accepted above that this was not because they deliberately sought to evade or manipulate the immigration system but because they were pursuing what they thought was a good claim for the first appellant to be granted British citizenship.

15. It remains the case that both appellants lived far longer and by far the majority of their lives in Malaysia, the first appellant until he was 23 and the second appellant until she was 24. The second appellant also gave evidence that she had worked in administration in Malaysia prior to coming to the UK. As above, they have family networks there. They can be expected to establish private lives at least the equivalent of those they have in the UK relatively quickly on return, the only potential problem being the initial difficulty of the first appellant in finding work.

16. I can see why the appellants may well feel aggrieved that having been told that the first appellant would be able to obtain British citizenship by lawyers, in the end he was not able to do so and they are now expected to return to Malaysia. Their feeling of unfairness can only be increased by the fact that the appellants' brother did manage to obtain British citizenship at an earlier time. Be that as it may, and quite rightly not argued by Ms

Moffatt, the appellants did not have a legitimate expectation of British citizenship at any time. They were only ever here with limited leave, at best. Those matters, when combined with their much longer and more established histories in Malaysia and their families being there, made it clear to me that there was no likelihood that their Article 8 appeal, when assessed on any basis or against any legal matrix, could have succeeded. I therefore did not find that the decision of the First-tier Tribunal disclosed an error on a point of law.

Decision

17. The decision of the First-tier Tribunal does not disclose an error on a point of law and shall stand.

Signed:  Date: 18 August 2014
Upper Tribunal Judge Pitt