



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/53106/2013

THE IMMIGRATION ACTS

Heard at Field House

**On 10 July 2014
Delivered Orally**

**Determination
Promulgated
On 18 July 2014**

Before

UPPER TRIBUNAL JUDGE GOLDSTEIN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

HANIFUNNISA BEGUM

Respondent

Representation:

For the Appellant: Mr P Deller, Senior Home Office Presenting Officer
For the Respondent: Mr S Khan, Counsel, instructed by KTS Legal Limited

DETERMINATION AND REASONS

1. This is an appeal by the Appellant hereinafter, called the Secretary of State, against the decision of the First-tier Tribunal who in a determination promulgated on 29 April 2014 allowed the appeal of the Respondent (hereafter called the claimant) a citizen of India born on 30 June 1981

against the decision of the Secretary of State dated 16 November 2013 refusing her application for indefinite leave to remain in the UK as the spouse of a person present and settled in the United Kingdom.

2. The claimant's immigration history as succinctly set out by the First-tier Judge at paragraph 8 of his determination, is that the claimant entered the UK as the spouse of Mr Ibrahim Jamal Mohammed on 15 April 2008 and as at the date of the application (1 February 2013) the claimant had been residing with him continuously for four years and ten months. On 25 November 2009 the claimant was granted leave as a work permit dependant of her husband and this was valid until 15 April 2010. It is clear from the judge's determination that the claimant's representative at the hearing before him, Mr Khan (who indeed also appeared before me) accepted that she could not meet the requirements of the new Immigration Rules under paragraph 276ADE.
3. The judge found the claimant "to be entirely credible in her evidence and I have no concerns about the accuracy of her account". Nonetheless the judge concluded that the Appellant did not meet the requirements of the new Rules "in relation to rights to private and family life". Further, he considered the claimant's private life outside the Rules finding that it was only of a short duration and that "as against her life in the UK she was born in India, educated in India and has spent a large part of her life in India". The claimant was thus able to resettle in India. The judge also found the claimant's family life was very limited in the UK, recognising that the claimant was separated from her husband.
4. Applying the guidance in Gulshan (Article 8 - new Rules - correct approach) [2013] UKUT 00640 (IAC), he was satisfied that the facts of the claimant's case did not meet the exceptional circumstances enunciated in the Home Office Guidance at paragraph 3.2.8 on the new Rules so as to enable the Secretary of State to exercise her discretion outside of the Immigration Rules. The judge found that on the facts of the case "there will be no unjustifiably harsh consequences for the (claimant) in refusing her Article 8 claim (private and family life) which would make the refusal disproportionate."
5. However the nub of the matter before me is that over paragraphs 22 to 25 of the determination the judge had this to say:
 - "22. The refusal letter did not deal with the Appellant's application under the Tribunal old Rules (Part 8 paragraph 391E) (as it should have done) but went onto consider her application under paragraph 276ADE of the new Immigration Rules.
 23. Applying the Rules in Part 8, paragraph 399E of the old Immigration Rules and the Home Office Guidance on family members of points-based system migrants (A1, pp 31 and 34) it is clear that the Appellant should have been granted indefinite

leave to remain because she has previously been granted leave as the partner of a PBS migrant under the Rules in place before 9 July 2012, paragraph 319E. I therefore find that the refusal decision was therefore not in accordance with the law.

24. Notwithstanding that I allow the appeal under the Old Immigration Rules, as this appeal has been brought also under the right to private life (and family life) Article 8 of the ECHR, I deal with this ground of appeal in the alternative.

25. The Appellant did not meet the new Rules in relation to her right to private and family life. This was accepted by the Appellant and the SSHD's reasons for refusal stand under the Rules."

6. It is apparent to me that the judge did indeed materially err in law by allowing the claimants appeal under paragraph 319E of the old Rules. I have to say that, most fairly and realistically, Mr Khan at the outset of the hearing conceded this to be the case and I am grateful to him for his helpful intervention in that regard.
7. As the grounds rightly point out, even under the old Rules for the reasons stated in the Secretary of State's grounds, the claimant could not have met the requirements, but the point is that the claimant's application was dated 28 January 2013, thus after the new Rules came into effect on 9 July 2012. To reinforce the point, the Administrative Court has recently in Shahbaz [2014] EWHC 2038 (Admin) held that the relevant time for judging whether the requirements in the Rules have been complied with, is the time of the decision and not the time of the original making of the application.

Conclusion

8. The making of the decision of the First-tier Tribunal in allowing the claimant's appeal under paragraph 319E of the Immigration Rules did involve the making of an error on a point of law.
9. I set aside that decision.
10. I remake that decision in the appeal by dismissing it.

Signed

Date 16 July 2014

Upper Tribunal Judge Goldstein