Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/15052/2014
IA/15045/2014

THE IMMIGRATION ACTS

Heard at: Field House	**Determination Promulgated**
On 20th March 2015	**On 15th July 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE BRUCE

Between

Secretary of State for the Home Department

Appellant

and

Sakeenah Beebee Faldeenah Dauhoo
Abdool Kader Khudarun
(no anonymity direction made)

Respondent

Representation:
For the Appellant: Ms Isherwood, Senior Home Office Presenting Officer
For the Respondent: Mr Hawkin, Counsel instructed by Lambeth Solicitors

DETERMINATION AND REASONS

1. The Respondents are nationals of Mauritius. They are respectively a wife and husband born 9th February 1978 and 20th August 1975. On the 7th November 2014 the First-tier Tribunal (Judge M. Davies) allowed their linked appeals against decisions to refuse to vary their leave and to remove them from the United Kingdom pursuant to s47 of the Immigration Asylum and Nationality Act 2006. The Secretary of State now has permission[1] to appeal against that decision.

[1] Permission granted by First-tier Tribunal JM Holmes on the 21st January 2015.

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Background and Matters in Issue

2. The Respondents had originally come to the United Kingdom as students and latterly as Points Based System Migrants. On the 6th September 2013 they made applications to be granted indefinite leave to remain on the grounds that they had each accrued 10 years continuous lawful residence in the UK.

3. The applications were rejected by way of letters dated 27th February 2014. The Secretary of State accepted that the couple had come to the UK in 2003 but found there to have been a break in the continuous lawful residence claimed. The period identified was from 31st January 2010 to 17th September 2010. The applications did not therefore meet the requirements of the Rules. Consideration was given to Article 8 under and outwith the Rules, and the decision to refuse further leave found to be proportionate and lawful.

4. Appeals were brought to the First-tier Tribunal. In a decision promulgated on the 20th November 2014 Judge Davies carefully sets out the chronology of the Respondents' periods of leave. She accepts that on the 13th January 2010 in-time applications to vary leave were lodged. On the 24th February 2010 the Secretary of State informed the Respondents that those forms had not been completed properly and were invalid. The Secretary of State invited the Respondents to make valid applications within a 28 day period, which they did, on the 10th March 2010. The difficulty arose that when those applications were substantively rejected on the 28th April 2010, the Respondents were given no right of appeal. That was because their last leave had expired on the 31st January 2010, so the valid applications lodged on the 10th March 2010 were made out of time. Judge Davies accepted that the in-time applications made in January had not been valid, and that the Secretary of State had been right to reject them. It was this chain of events which had led to the break in lawful residence, ending in September of that year when further leave was granted. This chronology led to the first finding made by the First-tier Tribunal: given that factual background the Secretary of State should have exercised her discretion as to whether to disregard the break in lawful residence between the 31st January and 17th September 2010. The refusal letters gave no indication that discretion had been exercised and to that extent the decision was 'not in accordance with the law'. The appeal was allowed on that basis and the decision 'remitted' to the Secretary of State in order that she exercise her discretion. There is no challenge to that decision: paragraph 3 of the Grounds expressly accept that it is correct.

5. This appeal arises from what the First-tier Tribunal did next. That was to take account of the evidence before it, including the live testimony of nine witnesses, and allow the appeal substantively on Article 8 grounds. The Secretary of State submits that having allowed the appeal as 'not in accordance with the law' there was "no need to travel into Article 8" since unlawfulness had already been established: Mirza & Ors (oao) v SSHD [2011] EWCA Civ 159. The challenge to this Tribunal is there was, in

effect, no appeal left before the First-tier Tribunal to be allowed under Article 8.

6. For the Respondents Mr Hawkin submits that the Judge was entitled to consider the appeal under Article 8 by virtue of s84(1)(g) of the 2002 Act. He pointed out that Article 8 can be considered in variation appeals as well as removals (see for instance Patel [2013] UKSC 72) and that it made a good deal of sense for the Judge to deal with the matter, not least because nine witnesses had all come to court. He notes that there is no challenge to the substantive findings made by the Judge. In those circumstances the Respondents should be granted discretionary leave. Alternatively the Secretary of State can exercise her discretion in their favour and grant them indefinite leave to remain.

My Findings

7. The point made in these grounds is a simple one. That is that if the decision appealed is found to be unlawful and is set aside, there is no decision left to appeal on human rights grounds. That is precisely the point made by Sedley LJ in Mirza. Ms Isherwood further points out that even if that were not the case the Razgar Article 8 assessment should have simply have halted at question 3: "is the decision in accordance with the law?". Having found it not to be, there was no basis upon which the tribunal could have gone on to determine proportionality. The fudge at paragraph 53 of the decision does not adequately deal with that fundamental problem: "to the extent that the decision under paragraph 276B was in accordance with the Rules (save for the failure to exercise discretion)…the decision would be in accordance with the law". Mr Hawkins relies on Pun and Ors (Gurkhas –policy-Article 8) Nepal [2011] UKUT 00377 (IAC) but I found nothing therein to address these central grounds for the Secretary of State. I find that the grounds are made out. The decision of the Secretary of State had been set aside as unlawful and there was therefore no more to be done in the appeal.

8. Although the decision in respect of Article 8 cannot stand for the reasons identified in the grounds, it is correct to say that there was no substantive challenge to the Tribunal's carefully reasoned findings. In granting permission to appeal to this Tribunal Judge Holmes nonetheless found it to be arguable that the reasoning *was* flawed, notably for failure to properly engage with s117B of the Nationality, Immigration and Asylum Act 2002. To the extent that it is relevant, I consider the reasoning in the determination to be a lawful proportionality balancing exercise. The Judge had the benefit of hearing from a number of witnesses, none of whom were challenged by the HOPO on the day. It is apparent from paragraphs 54 and 55 of the determination that the Judge did have regard to s117. No doubt the Secretary of State will wish to take all of this into account when considering whether to disregard the seven months in 2010 when this couple had no valid leave.

Decisions

9. The determination contains an error of law and the decision is set aside to the extent identified above. I re-make the decision in the appeal as follows:

> "The appeal is allowed as not in accordance with the law".

10. I was not asked to make an order for anonymity and on the facts I see no reason to do so.

Deputy Upper Tribunal Judge Bruce
12th June 2015