Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: IA/29435/2014
IA/29442/2014
IA/29451/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 17th April 2015	**On 30th April 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE LEVER

Between

MRS VASUKI PAKEERATHAKUMAR (FIRST APPELLANT)
MR KABILASH PAKEERATHAKUMAR (SECOND APPELLANT)
MASTER AVIHINASH PAKEERATHAKUMAR (THIRD APPELLANT)
(ANONYMITY NOT RETAINED)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr Harris of Counsel
For the Respondent: Mr Savage

DECISION AND REASONS

Introduction

1. The Appellants born on 17th September 1971, 3rd October 1996 and 5th April 2001 respectively are all citizens of Sri Lanka. The first Appellant is the mother of the second and third Appellants.

2. The first Appellant had entered the United Kingdom on 19th October 2011 with entry clearance as the spouse of a settled person i.e. her Sponsor husband valid from 4th October 2011 until 4th January 2014. She made application in respect of herself and her two dependent children for indefinite leave to remain on 9th December 2013. That application was refused by the Respondent on 27th June 2014.

3. The Appellants had appealed that decision and their appeal was heard by First-tier Tribunal Judge Horvath sitting at Taylor House on 14th November 2014. The judge had dismissed the Appellants' appeals under both the Immigration Rules and Article 8 of the ECHR outside of the Immigration Rules. Application for permission to appeal was made and was granted on 9th February 2015 by First-tier Tribunal Judge Simpson. It was said that it was arguable that this case came within A280(c) and the Judge ought to have adopted the five stage **Razgar** approach in determining this case. Directions were issued that the First-tier Tribunal should firstly consider whether or not an error of law had been made in this case and the matter came before me in accordance with those directions.

Submissions on Behalf of the Appellants

4. Mr Harris referred me to A280(c)(ii) and it was submitted that the judge should have considered the matter outside of the Immigration Rules.

5. In particular it was said that in looking at EX.1 under Appendix FM and the test of "insurmountable obstacles" the judge had not looked at the question of reasonableness or proportionality in terms of the position of the Sponsor husband when looking at the case as a whole.

Submissions on Behalf of the Respondent

6. Miss Savage noted that the transitional provisions at A280(c) allowed the Appellants' application for ILR to be considered under paragraph 287A of the Immigration Rules but that if that application failed under the Immigration Rules as it did in this case it was submitted, it was then incumbent upon a judge to look at Article 8 within the context of Appendix FM. It was also submitted that the judge had properly looked at the Sponsor's position when reading the decision as a whole and the judge had applied the law in accordance with the most recent authority of **Singh [2015]**. In resubmissions Mr Harris submitted by way of a question as to whether it could be found within the decision that the judge had looked at the Sponsor's position as to why it was reasonable for him to return to Sri Lanka to accompany his family.

7. At the conclusion of the hearing I reserved my decision to consider the submissions and the evidence. I now provide that decision with my reasons.

Decision and Reasons

8. In this case the Appellants applied for further leave to remain in the United Kingdom on 9th December 2013. That application had been refused by the Respondent on 27th June 2014. It was said that the Respondent was wrong in considering the application with reference to Appendix FM of the Immigration Rules because of the transitional provisions as outlined at A280(c)(ii). The case of **Singh [2015] EWCA Civ 74** noted at paragraph 56 that when HC 194 first came into force on 9th July 2012 the Secretary of

State was not entitled to take into account the provisions of the new Rules when making decisions on private or family life applications made prior to that date but not yet decided. That was in accordance with the implementation provisions as outlined in **Edgehill**. However in **Singh** the Supreme Court noted that the position was altered by HC 565 specifically by the introduction of new paragraph A277C with effect from 6th September 2012 and as from that date the Secretary of State was entitled to take into account the provisions of Appendix FM and paragraphs 276ADE in deciding private or family life applications even if they were made prior to 9th July 2012. This application for further leave to remain was made after 9th July 2012 but even if one looked at the original application for entry clearance made in 2011 the position in **Singh** would appear to cover the point and there was no error in the decision to examine family and private life under Appendix FM and paragraph 276ADE.

9. It was agreed evidence that the Appellant no longer sought to rely upon paragraph 287 of the Immigration Rules and the judge correctly dismissed the appeal under that head. He had then considered in detail the current jurisprudence on the interaction between the new Immigration Rules (Appendix FM and paragraph 276ADE) and Article 8 of the ECHR. He made specific reference and quoted extensively from a number of cases in that respect. The judge had concluded at paragraph 28 that **Gulshan** and **Shahzad** were binding upon him in terms of an examination of Article 8 outside of the Immigration Rules.

10. However having made that point at paragraph 28 the judge then at paragraph 29 had made an assessment as to whether there were insurmountable obstacles to family life continuing outside the UK at the present time. He had set out a detailed analysis of the facts of this case and all the factors that were relevant in considering the question of continuance of family life outside the UK. That analysis included at paragraph 37 onwards, as the judge noted:

> "I propose to deal now with proportionality and Article 8(2) and my statutory obligations pursuant to Section 55 in relation to the children's best interests. I bear in mind Mr O'Callaghan's submissions in regard to the children's best interests in relation to Article 8 Section 55 and proportionality".

Thereafter and again in not inconsiderable detail the judge had looked with care at the family and private life particularly in respect of the children and had further looked at Section 117 of the 2002 Act and had noted at paragraph 46 that he needed to carry out a balancing exercise as required by Section 117A. At paragraph 48 he had concluded that he found the Respondent's decision to refuse leave to remain was a limited interference justified and proportionate. He found at paragraph 51 that the Respondent's decision to refuse and her exercising effective immigration control within the proviso of Article 8(2) was justified, lawful and proportionate within the terms of this case. That detailed and careful

analysis of all the facts was done by the judge within, as he saw it, the provisions of the Immigration Rules. At paragraph 53 he found there were no sufficiently compelling circumstances to justify a grant of leave outside of the Immigration Rules. He then continued in that paragraph by stating:

> "There is no need for me to repeat my findings all over again in regard to Article 8 outside of the Rules. Suffice it for me to say that even if I were to do so and even if I were to take insurmountable circumstances out of the equation which I do I would still have come to the same decision in regard to the proportionality issue".

11. It is clear that the judge had with care and not insignificant detail looked at all the relevant factors relating to this family in assessing the question of whether removal would place the United Kingdom in breach of its obligations under Article 8 of the ECHR. He had conducted that exercise within, as he put it, the framework of the Immigration Rules and had concluded that the case law of **Gulshan** did not compel him to repeat that exercise outside of the Immigration Rules but also made it clear that had he so done he would have arrived at the conclusion that a removal was not disproportionate. The judge's approach is not inconsistent with the authority of **Singh** which looked at earlier cases on this vexed issue including **Gulshan**. It is clear, that what is important in this case, is that the judge had carefully looked at all the relevant facts in relation to these Appellants and had conducted a proportionality exercise based upon all the relevant evidence and also taken account, as he was obliged to do so, of the requirements of Section 117 of the 2002 Act. Having conducted that detailed analysis and having been alive to the prospect that even if he was conducting that exercise with no reference to the Immigration Rules he would have reached the same conclusions based upon the same evidence, there was no material error of law made by the judge and his approach was compatible with that which is said in **Singh.**

Notice of Decision

There was no error of law made by the judge in this case and I uphold the decision of the First-tier Tribunal.

No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge Lever

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed Date

Deputy Upper Tribunal Judge Lever