Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: IA/37297/2014
IA/37299/2014

THE IMMIGRATION ACTS

Heard at Glasgow	**Decision issued**
on 8th April 2015	**on 16th April 2015**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

SHAHIDA PARVEEN &
AQDAS AZIM
(No anonymity direction requested or made)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr S Winter, Advocate, instructed by Livingstone Brown, Solicitors
For the Respondent: Mrs M O'Brien, Senior Home Office Presenting Officer

DECISION ON APPLICATION FOR PERMISSION TO APPEAL

1. The appellants seek to appeal against a determination by First-tier Tribunal Judge Blair, dismissing their appeals against refusal of variation of leave to remain and against removal to Pakistan. They argued their cases only under Article 8 of the ECHR, outwith the Immigration Rules.

2. The first question is whether (exercising the powers of the First-tier Tribunal) time should be extended for seeking permission to appeal to the Upper Tribunal. The application concedes that it is late. On 2nd February 2015 First-tier Tribunal Judge Tiffen purported to grant permission, but did not deal with extension of time.

3. Mr Winter relied on the explanation at part B of the application, which says that the previous agents for the appellants failed to contact their clients:

> … until after twelve days from the date of receiving the decision which left them with two days to locate a new solicitor. The previous agents only advised the clients of this over the telephone and did not provide the clients with an opportunity to instruct new agents or seek a second opinion within the appeal deadline.

The explanation goes on to narrate the actions of present agents and of counsel once instructions had been received. Mr Winter argued that the explanation was a reasonable one, that the delay caused no prejudice to either party, and that the application should therefore be admitted for consideration.

4. Mrs O'Brien pointed out that although the bulk of the delay was blamed on previous solicitors, there was no evidence that the matter was put to them for confirmation or comment. Nor did the appellants lay any basis in evidence for the proposition that they had not been contacted until two days before the end of the period. That should have been backed up by witness statements. Judge Blair found the evidence for the appellants unreliable, so caution should be exercised in approaching this allegation. Mrs O'Brien submitted that no proper foundation had been laid for extending time.

5. Parties agreed that if time were to be extended, the question whether permission should be granted remained to be decided. The purported decision of 2 February 2015, issued in error, did not resolve that issue.

6. At this point I provisionally preferred the submissions for the respondent, for the reasons given. I raised the question whether the strength of the grounds of appeal was relevant to a final resolution. Mrs O'Brien submitted that it was not.

7. The potential strength of the grounds cannot resolve whether time should be extended. Any other rule would have the effect that good grounds are not time limited. However, on the view that the strength of the grounds might have some bearing, I decided to hear submissions thereon before finally resolving admission.

8. I advised parties of three points which might have led me, if considering the matter on the papers, not to admit the grounds:

(i) The primary criticism of Judge Blair is that he asked "whether there was a good arguable case outside the Rules", but that was the approach the appellant asked for.

(ii) The grounds of appeal rely heavily upon *Ganesabalan* [2014] EWHC 2712 (Admin) for the proposition that the judge erred by asking that question, and should have recognised that there is no prior threshold. *Ganesabalan* is a decision of a Deputy High Court Judge. The six authorities to which that judge was referred do not include *MS v SSHD* [2013] CSIH 52, in which Lord Drummond Young expressed the conclusion of the Inner House:

> [30] In summary, therefore, we are of opinion that in all cases where the right to private and family life under Article 8 is invoked the first stage must be to consider the application of the Immigration Rules. The new rules are designed to cover the considerations that are relevant to an Article 8 claim in a normal case. The fundamental issue raised by Article 8 is an assessment of on one hand the requirements of an effective immigration policy, including the enforcement of that policy by removal from the United Kingdom, and on the other hand the right of the individual concerned to private or family life. That exercise involves an assessment of proportionality. In most cases, the new rules will ensure that assessment is properly carried out. In some cases, however, the rules will not produce a fair result that accords with Article 8. In those cases the Home Secretary, acting through immigration officials, will need to consider whether leave should be granted outside the rules. That will require an assessment of the precise circumstances of the individual case, taking account of all factors that are relevant. These will include factors mentioned in paragraph 3.2.7d of the Home Secretary's instructions and also any other factors that may be relevant to the particular assessment of proportionality that is being undertaken. The relevant factors will also include those mentioned in the rules themselves, notably in rules 276ADE-276DH, and in appendix FM, including section EX of that appendix. The purpose of those provisions is to set out the factors that normally apply to the assessment of Article 8 rights in an immigration context; consequently both the terms of those provisions and the underlying policy that can be discerned from those terms are of importance. They must, of course, be weighed against the other special considerations that apply in the particular case. Before it is necessary to embark on that second-stage exercise, however, the application for leave to enter or remain must demonstrate a good arguable case that leave should be granted outside the rules: that a distinct assessment of proportionality should be made to determine whether removal would infringe the applicant's Article 8 rights. If that is not demonstrated, it can be assumed that the applicant's Article 8 rights will be adequately dealt with by applying the new rules. Finally, the test of exceptionality should not be used any longer; instead, decision-makers should focus on the question of whether the applicant has shown a good arguable case that his or her application should be dealt with outside the rules.

Judge Blair's test reflects not only what was put to him by representatives but the authority of the Court.

(iii) The outcome of this case might not realistically have been any different whether Judge Blair approached it through one or two stages.

9. On (i) and (ii), Mr Winter submitted that the cases on the correct approach to Article 8 are now reconciled by *Singh* [2015] EWCA Civ 74, which approved *Ganesabalan*. Although *MS* was not expressly considered, it was based on *Nagre*, which was cited in *Singh*. A judge who relied on the submissions of parties might nevertheless fall into error of law. As to (iii), Mr Winter went through the relevant factors in this case and argued that these had to be considered outwith the Rules as well as inside the Rules. Cases had succeeded on quite similar facts. It was not inevitable if the judge had taken into account all the relevant circumstances outside the Rules that he would have reached the same result. The error was therefore material.

10. I was not persuaded that the application should be admitted.

11. *Singh* leaves it open to a decision-maker to find that all Article 8 issues are addressed while determining a claim under the Rules. The Court does seek to reconcile the cases, but that includes a finding that *Nagre* remains good law. Significantly, at paragraph 66 of *Singh* Underhill LJ adds certain comments in the light of being "conscious of how practitioners in this field can sometimes seek to exploit even the faintest ambiguity". I do not think there is any more than that in the principal argument for the present appellants.

12. While preparing this judgment I note that in *AAA* [2015] CSOH 37, published today, Lord Armstrong simply applied *MS*.

13. On the proposed grounds for the appellants apart from the alleged error of legal approach, I note in relation to (ii) that Judge Blair approached the case throughout on the basis of the evidence from Mr Azim that he would not be returning to Pakistan – see paragraphs 25, 26 and 39. That choice was Mr Azim's. It did not require the First-tier Tribunal to assess the appeal on the basis that the respondent's decision enforced separation of husband and wife. Ground (iii) is based on the second appellant, no longer a child, possibly nevertheless having family life with his father for Article 8 purposes. This is faintly raised by the submission (recorded at paragraph 18 of the determination) that he was "dependent on his parents". However, there was no reference to case law and no development of the question whether dependence amounted to family life going beyond adulthood for Article 8 purposes. There is nothing in those grounds which carries a realistic chance of another outcome.

14. I do not think that the grounds raise any arguably material error of law. Their main complaint is essentially one of form and not of substance. It is

clear from paragraph 39 in the determination that the judge would have found the case to fall well short, based on any formulation of the relationship between Article 8 and the Immigration Rules. The grounds are not of such strength as to add to the case for extending time.

15. Time is not extended. The application for permission to appeal is **not admitted**. The effect of this decision is that there is no appeal pending before the Upper Tribunal.

Upper Tribunal Judge Macleman
8th April 2015