Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/16903/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 19 December 2017	**On 02 February 2018**

Before

THE HON. MR JUSTICE LANE, PRESIDENT
UPPER TRIBUNAL JUDGE McWILLIAM

Between

MRS HIRABEN HASMUKH VADHER
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellant: Mr I Singh, instructed by Ishwar Solicitors
For the respondent: Mr T Wilding, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of India. Her date of birth is 12 September 1955. She came the UK in 2008 having been granted leave to enter as the spouse of a British citizen, Hasmukh Laxmikant Vadher, under paragraph 284 of the Immigration Rules.

2. The appellant made an in-time application for leave to remain on 21 January 2014 (her leave expired on 24 January 2014). The application was returned to her as invalid because according to the respondent the

payment page had not been properly completed. She resubmitted the application with a cheque on 11 February 2014. The application was refused by the Secretary of State on 29 March 2014. The appellant appealed against that decision. Her appeal was dismissed by First-tier Tribunal Judge Crawford in a decision of 18 July 2014 following a hearing on 11 July 2014. It was accepted by the appellant's representative that she did not have an English language certificate and therefore she could not meet the requirement of the Rules. The judge dismissed the appeal under Article 8. He found that the appellant has family and private life here with her husband, a British citizen, and adult son. However, he concluded that there are no insurmountable obstacles to family life with her husband continuing in India. He found that the appellant would not be removed from the UK for approximately seven weeks and would have time to study for the English language test and if necessary she could study for the test in India. The judge found that there were no exceptional circumstances why the appellant should not be removed from the UK and therefore removal would not breach her Article 8 rights.

3. The appellant was granted permission to appeal against the decision of First-tier Tribunal Judge Crawford on 12 September 2014. The matter came before a panel comprising Upper Tribunal Judge Perkins, Upper Tribunal Judge Hanson and Deputy Upper Tribunal Judge McGinty on 30 June 2015. In a decision promulgated on 24 July 2015 the panel concluded that the first application on 21 January 2014 was not accompanied by a fee and was not an application for the purposes of the Immigration Rules with reference to the case of Kaur [2013] UKUT 00381. It followed that she did not have valid leave at the date of her application on 11 February 2014. Her leave was not extended by section 3C of the 1971 Act. There was no right of appeal according to the panel. Judge Crawford had no jurisdiction to determine the appeal. The Tribunal set aside the decision of Judge Crawford.

4. The Court of Appeal on 28 September 2016 by order of Vos LJ granted permission to appeal to the appellant. The decision states:

> "It appears arguable that the SSHD wrongly persuaded the UT that the FtT had no jurisdiction to hear the appeal because the application had been completed and paid only after the Appellant's LTR had expired. It is arguable (indeed that much may be accepted by the SSHD) that, in fact, the proper payment page was completed with the application made three days before the Appellant's leave LTR expired..."

5. It was agreed by the parties that the issue for us to determine was whether there is an error of law in the decision of First-tier Tribunal Judge Crawford. Mr Wilding conceded that the appellant had properly completed the payment form rendering her application of 21 January 2014 valid and therefore there was an in-time application. There was no jurisdiction issue for us to decide.

6. Mr Wilding stated that in his view the proportionality assessment was "somewhat light" and that it was "odd" that the judge considered the case of *Razgar v SSHD [2004] UKHL 27* in the final paragraph (see paragraph 19 of Judge Crawford's decision).

7. We conclude that the judge made a material error of law when assessing the appellant's rights under article 8 and proportionality. The judge's decision lacks essential detail. There is no proper assessment of proportionality whereby the judge considered matters in favour of removal and all those against. There is no identification of the public interest and what weight the judge attached to it. The judge accepted that the appellant's husband had lived in the UK for 32 years. He was employed and owned the family home. It is not clear from the decision what if any weight he placed on these factors. As a matter of fact the appellant had entered the UK lawfully as a spouse and made an in-time application. The judge attached weight to immaterial matters, namely that the appellant would not be removed for seven weeks and therefore would have time to complete the relevant English language test. The judge directed himself on *Razgar*, but is not apparent from the decision that he properly applied the guidance.

8. We set aside the decision to dismiss the appellant's appeal under Article 8. The parties conceded that we could go on to re-make the decision on the basis of the evidence now before the Tribunal. The appellant has, since the hearing before Judge Crawford, passed the relevant English language test and would therefore, as accepted by Mr Wilding, be able to meet the relevant Immigration Rule (paragraph 284 of the Rules).

9. Mr Wilding conceded that it would be difficult for him to advance a case that the decision was proportionate considering that the appellant now meets the Rules. We agree. The appellant has significant family and private life here. She has been here lawfully at all times. There is no suggestion from the respondent that her circumstances have changed since the decision of Judge Crawford. The family remains self-sufficient and there is no language problem. She now meets the requirements of the Rules. Whilst removal is in the public interest, the balance of the scales weighs very heavily against removal. The appeal is allowed under Article 8.

Notice of Decision

The appeal is allowed under Article 8.

No anonymity direction is made.

Signed Joanna McWilliam Date: 1 February 2018

Upper Tribunal Judge McWilliam