Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/02715/2020
HU/02716/2020

THE IMMIGRATION ACTS

Heard at Birmingham Civil Justice Centre	**Decision & Reasons Promulgated**
On 26th October 2021	**On 18th November 2021**

Before

UPPER TRIBUNAL JUDGE MANDALIA

Between

MRS MANGAL KAUR (1)
MR BALRAJ SINGH (2)
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr I Hussain, Syeds Law Office Solicitors
For the Respondent: Mr C Bates, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellants are nationals of India. The first appellant is the mother of the second appellant. They appealed to the First-tier Tribunal against the decision of the respondent on 5th February 2020 refusing to grant them leave to remain in the United Kingdom on the grounds of their family life. First-tier Tribunal Judge

Parkes dismissed their appeals for reasons set out in a decision promulgated on 23rd March 2021.

Background

2. The appellants arrived in the United Kingdom in November 2009 with the benefit of a visitor visa valid until 25th June 2010. The second appellant was 11 years old at the time. They arrived in the United Kingdom with the husband of the first appellant and father of the second appellant, Mr Gursewak Singh. The family remained in the United Kingdom unlawfully after the visit visa expired. They have since made various unsuccessful applications for leave to remain in the United Kingdom. Notably, on 8th January 2015 the respondent refused applications for leave to remain on Article 8 grounds. The appellants' appeal against that decision was dismissed by First-tier Tribunal Judge Ross for reasons set out in a decision promulgated on 21st March 2016.

3. The appellants' made a further human rights claim for leave to remain in the UK on family life grounds on 18th April 2018. The respondent refused the claims for reasons set out in her decisions dated 5th February 2020. It is appropriate to note at this point that at the hearing of the appeal before me on 26th October 2021, Mr Hussain confirmed that a decision was also made by the respondent refusing the human rights claim made by Mr Gursewak Singh. Neither party was able to provide me with a copy of that decision. Nevertheless, Mr Hussain confirmed that an appeal had been submitted on his behalf to the First-tier Tribunal at the same time as the appeals lodged by the appellants'. Mr Hussain said that the documents filed on behalf of Mr Gursewak Singh were lost by the Tribunal and when further enquiries were made, the appellants' representatives were informed by the Tribunal that the appeal should be re-sent, with supporting documents to show that the relevant Notice of Appeal (Form IAFT-5) had been sent to the Tribunal previously. I was informed that the Notice of Appeal that had previously been sent on behalf of Mr Gursewak Singh was not resubmitted to the Tribunal. A decision had been taken by the appellants, Mr Gursewak Singh, and their representatives that re-sending any Notice of Appeal on behalf of Mr Gursewak Singh would only serve to delay matters. Mr Hussain accepts that the respondent made a decision refusing the human rights claim made by Mr Gursewak Singh

and that there is no extant appeal before the First-tier Tribunal against that decision. He submits the Article 8 rights of Mr Gursewak Singh are closely aligned to the Article 8 rights of the first appellant.

4. The appellant's appeal against the respondent decisions of 5th December 2020 were dismissed by First-tier Tribunal Judge Parkes for reasons set out in his decision promulgated on 23rd March 2021. Permission to appeal to the Upper Tribunal was granted by First-tier Tribunal Judge Grant on 27th April 2020.

5. At the hearing before me, Mr Bates candidly accepted the decision of Judge Parkes is infected by a material error of law and must be set aside. At the hearing before Judge Parkes, the claim advanced by the second appellant was that he had arrived in the United Kingdom, aged 11, with his parents on 25th November 2009. On 18th April 2018, he made a human rights claim for leave to remain in the UK based on his private life. In her decision of 5th February 2020, the respondent concluded the second appellant could not meet the requirements set out in paragraph 276ADE(1) of the immigration rules. The second appellant could not benefit from paragraph 276ADE(1)(v) because at the date of application, he had not spent at least half of his life living continuously in the UK. Judge Parkes found, at [19], that the fact that the second appellant had now acquired the required length of residence is a "new matter", and as the respondent had not given consent, it was not a matter that fell for consideration. Mr Bates accepts that whether it was a 'new matter', it was a factor that was relevant to an assessment of the Article 8 claim outside the immigration rules and relevant to the question whether the decision to refuse the second appellant leave to remain is disproportionate. Mr Bates accepts Judge Parkes did not complete the required assessment of the Article 8 claim outside the immigration rules and the decision should therefore be set aside. Mr Bates submits the discrete findings made by Judge Parkes as to whether there would be very significant obstacles to the appellants' integration into India, are not challenged by the appellants and are not infected by the error of law conceded and can be preserved. Insofar as the fact that the second appellant can now meet the requirement set out in paragraph 276ADE(1)(v) of the Immigration Rules is a "new matter", Mr Bates gives consent on behalf of the respondent for that matter to be considered by me in re-making the decision.

6. Mr Hussain accepts the appellants are unable to meet the requirements set out in Appendix FM and paragraph 276ADE(1) of the immigration rules but agrees with Mr Bates that it was incumbent upon Judge Parkes to carry out an assessment of the Article 8 claim outside the immigration rules. As the second appellant was able to establish that as at the date of the hearing of his appeal, he met the requirements for leave to remain on private life grounds set out in paragraph 276ADE(1)(v), that is a factor that weighs heavily in his favor and should have been considered in the assessment of proportionality. Mr Hussain accepts that the discrete findings made by Judge Parkes as to whether there would be very significant obstacles to the appellants' integration into India, are not challenged by the appellants. He also accepts that a successful appeal by the second appellant is not to say that a decision to refuse the first appellant leave to remain, would be in breach of Article 8.

7. Mr Hussain submits that I should remake the decision insofar as the second appellant is concerned and allow his appeal on Article 8 grounds. He submits the second appellant satisfies the requirements to be met by an applicant for leave to remain on the grounds of private life set out in paragraph 276ADE(1)(v) of the immigration rules. He submits that in considering the public interest in the maintenance of effective immigration control, there is nothing that weighs in the respondent's favor and the decision to refuse the second appellant leave to remain would be disproportionate. He invited me to remit the first appellant's appeal to the First-tier Tribunal for hearing afresh.

Error of Law

8. At the hearing of the appeal before me, Mr Bates, rightly in my judgment, concedes the decision of Judge Parkes contains a material error of law and should be set aside. As the Upper Tribunal held in OA and Others (human rights; 'new matter'; s.120) Nigeria [2019] UKUT 00065 (IAC), the fact that an appellant meets the requirements of a rule during the course of that person's human rights appeal will generally constitute a "new matter" within the meaning of section 85 of the 2002 Act. Here Judge Parkes found, at [19], that the fact that the second appellant now has the required length of residence is a new matter, and as consent had not

been given by the respondent, it did not fall for consideration. It was of course open to the second appellant to withdraw his appeal and make a fresh application to the respondent for leave to remain on private life grounds, relying upon paragraph 276ADE(1)(v) of the immigration rules but he opted not to do so. Although he could not therefore establish that he met the requirements of the immigration rules, the fact that he is aged 18 years or above and under 25, and had spent at least half of his life living continuously in the UK, as at the date of the hearing of his appeal, was capable of having a material bearing on the sole ground of appeal that can be advanced in a human rights appeal; namely, whether the decision of the Secretary of State to refuse his human rights claim is unlawful under section 6 of the Human Rights Act 1998. The respondent had already accepted in her decision of 5th February 2020 that the second appellant's claim did not fall for refusal on grounds of suitability set out in section S-LTR of Appendix FM.

9. The judgment of the Supreme Court in Agyarko -v- SSHD [2017] UKSC 11 confirms that the fact that the immigration rules cannot be met, does not absolve decision makers from carrying out a full merits-based assessment outside the rules under Article 8, where the ultimate issue is whether a fair balance has been struck between the individual and public interest, giving due weight to the provisions of the Rules. Although the appellants' ability to satisfy the Immigration Rules was not the question to be determined by Judge Parkes it was capable of being a weighty, though not determinative factor, when deciding whether such refusal is proportionate to the legitimate aim of enforcing immigration control. Judge Parkes simply considered the appeal by reference to whether the requirements set out in the immigration rules are met and erred in failing to address the Article 8 claim outside the immigration rules. Having heard the parties submissions as to the error of law, I informed the parties that I am satisfied the decision of Judge Parkes is vitiated by a material error of law and must be set aside.

10. The submission made by Mr Bates that the discrete finding made by Judge Parkes that there are no very significant obstacles to the appellants' integration into India

can be preserved, was not challenged by Mr Hussain. The finding is preserved. At paragraphs [10] and [11] of his decision, Judge Parkes referred to the evidence of the appellant:

> "10. The second appellant gave evidence first. His evidence was that he has been here since the age of 11 and has now spent more than half his life in the UK and there is evidence in the papers to show he was educated in the UK and has qualifications. Although the evidence was that the first appellant and her husband work the second appellant maintained that he has never worked in the UK, not even on a casual basis.
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> 11. The first appellant's evidence was that they lived in difficult circumstances in India with no income and little food, she described at *(sic)* as absolute poverty with a leaking roof. They had come across an agent who said that he could send them to the UK taking their house and lending them money, but they have not paid him back. They would be homeless if they returned and their relatives, being poor, could not help. In the UK they live in a flat provided by friend and their outgoings, including rent, come to about £900 a month. The first appellant said that she and her husband work and they just about make ends meet."

11. At paragraphs [14] to [16] of his decision, Judge Parkes said:

> "14. The evidence that their circumstances are *(sic)* little better in the UK in terms of making ends meet does not take the case much further. The second appellant will have received an education to which he had no entitlement and to which his parents appear to have made no contribution. He has qualifications that he could use on return and has the advantage of also being able to speak English. His evidence that he has not worked in the UK seems unlikely, he is very young, able and qualified and given the circumstances described by his mother the suggestion that he does nothing while his parents support and is not credible.
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> 15. India is a huge country with a large population and a diverse and growing economy, there would be no obvious need for the appellants to return to their home area and no evidence that they would be identified by an agent last seen many years ago if they were to live in a different state. They managed to establish themselves in the UK when they had no contacts or support and did not even have the advantage of speaking the language and while handicapped with having no lawful status. They have managed to maintain themselves many years, they appear to be resourceful and could use those skills on return and in reintegrating.
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> 16. Given that they would have the advantage of being there lawfully, have shown that they are adaptable and that they speak one of the official languages of the country it is difficult to see how it could be said that the obstacles they might face could be said to be very significant…."

12. Although Mr Hussain invited me to allow the second appellant's appeal on Article 8 grounds and to remit the first appellant's appeal to the First-tier Tribunal I declined to do so. There is a presumption that if the decision of the First-tier

Tribunal is set aside, the Upper Tribunal will proceed to remake the decision at the hearing of the appeal. It is common ground that the appellants cannot meet the requirements of the immigration rules. The sole issue is whether their appeals can succeed outside the immigration rules. No application has been made by the appellants in accordance with Rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 to adduce any further evidence.

Remaking the decision

13. The evidence relied upon by the appellants is set out in the appellant's bundle comprising of 119 pages that was before the First-tier Tribunal previously. The evidence before the Tribunal is limited to witness statements made by the appellants, and letters in support, provided by friends of the second appellant. There is no statement at all from Mr Gursewak Singh. No further witness statements have been made by the appellants.

14. I heard submissions from the parties representatives. I record from the outset that it is common ground between the parties that the second appellant cannot meet the requirements of paragraph 276ADE(1)(v) because the rule requires that at the date of application, the second appellant had spent at least half of his life living continuously in the UK. The requirement could not be met at the date of application. Insofar as the claim made by the second appellant that he now meets the requirement set out in paragraph 276ADE(1) is concerned, and that is a "new matter" for the purposes of section 85 of the 2002 Act, Mr Bates on behalf of the respondent gave consent for the new matter to be considered by the Upper Tribunal.

15. On behalf of the respondent, Mr Bates submits the fact that the second appellant can now demonstrates that he has spent at least half of his life living continuously in the UK is relevant to my assessment of the second appellant's Article 8 claim outside the immigration rules. Mr Bates submits that even if the second appellant establishes he has a right to remain in the UK, it remains open to him to live in

India with his parents if they have no lawful basis to remain in the UK and the Tribunal dismisses the first appellant's appeal. He submits there is a preserved finding that there are no very significant obstacles to the appellants' integration into India, and in any event, there is nothing in the evidence that suggests the second appellant cannot remain in the UK himself, if he chooses not to return to India with his parents. Mr Bates submits that here, the first appellant is unable to satisfy the requirements for leave to remain on family and private life grounds and the maintenance of effective immigration control is in the public interest. He submits that there is nothing in the evidence before me capable of establishing that the Article 8 rights of the first appellant outweigh the public interest in the maintenance of effective immigration control. He submits the decision to refuse the first appellant leave to remain is, in all the circumstances, proportionate.

16. In reply, Mr Hussain adopted his skeleton argument and refers in particular, to what is said in paragraphs [13] to [16]. He submits that the second appellant now meets the requirement set out in paragraph 276ADE(1)(v) of the immigration rules, and the respondent is unable to point to any particular factor that establishes that the second appellant's removal is nevertheless proportionate. Mr Hussain submits the appellants have lived together in the UK as a family unit and here, if it is disproportionate for the second appellant to be refused leave to remain, it must follow that it is equally disproportionate for the first appellant to be refused leave to remain. They have a close bond and in reality, as the second appellant states in paragraph [13] of his witness statement dated 22nd February 2021, if his parents' appeal is refused and they are removed from the UK, he will have no choice but to leave with them and the successful outcome of his appeal will be purely academic. He claims he will suffer from homelessness and destitution if he were to remain in the UK himself. Mr Hussain submits a decision to allow the second appellant's appeal but to dismiss the first appellant's appeal, would either result in the family being split up, or in the second appellant being unable to take any advantage of the leave to remain he will be entitled to.

17. The burden of proof is upon the appellants to show, on the balance of probabilities, that they have established a family life and that their exclusion from the UK as a result of the respondent's decision, would interfere with that right. It is then for the respondent to justify any interference caused. The respondent's decision must be in accordance with the law and must be a proportionate response in all the circumstances.

18. I find that the appellants enjoy family life with each other. I also find that the decision to refuse the appellants leave to remain, may have consequences of such gravity as to engage the operation of Article 8, and I accept that the interference is in accordance with the law, and that the interference is necessary to protect the economic well-being of the country. The issue in this appeal, as is often the case, is whether the interference is proportionate to the legitimate public end sought to be achieved. It is appropriate for me to consider the question of proportionality separately for each of the appellants.

The second appellant

19. The second appellant could not satisfy the requirements of paragraph 276ADE(1)(v) of the immigration rules at the date of his application. He has however now spent at least half of his life living continuously in the UK. The appellants' ability to satisfy the immigration rules is not the question to be determined, but it is capable of being a weighty factor when deciding whether the refusal is proportionate to the legitimate aim of enforcing immigration control.

20. Whether or not a finding that the second appellant now meets the requirements of paragraph 276ADE(1)(v) of the immigration rules is determinative of his human rights appeal depends upon whether the respondent has any additional reason, effectively overriding that particular rule, for saying that the effective operation of the respondent's immigration policy nevertheless outweighs the second appellant's interest in remaining in this country. As set out by the Court of Appeal in TZ (Pakistan) [2018] EWCA Civ 1109, compliance with the immigration rules

usually mean that there is nothing on the respondent's side of the scales to show that the refusal of the claim could be justified.

21. Here, Mr Bates did not claim that there is anything to indicate that an application under paragraph 276ADE(1)(v) made by the second appellant, would be likely to be rejected by the respondent. There is therefore no discrete public interest factor that the respondent can rely upon, that would still make removal of the second appellant proportionate. Having regard to the policy of the respondent as expressed in the immigration rules, and in the absence of any countervailing factors in the public interest that weigh against the second appellant, I am satisfied that on the facts here, the decision to refuse the second appellant leave to remain is disproportionate to the legitimate aim of immigration control. In the circumstances I allow the second appellant's appeal on Article 8 grounds.

22. The leave granted to the second appellant is a matter for the respondent. Where the Tribunal finds that an appellant's compliance with an immigration rule is such as to require the human rights appeal to be allowed, this does not mean that the appellant is entitled, without more, to be given leave of the precise nature and duration envisaged by that rule. In OA and Others (human rights; 'new matter'; s.120) Nigeria [2019] UKUT 00065 (IAC), the Upper Tribunal considered what flows from such a decision. At paragraphs [35] to [38], it said:

> 35. "…..First, even where (as here) the human rights appeal falls to be allowed because the first and second appellants have been found, as matters stand at the date of hearing, to meet the requirements of paragraph 276B, it remains the position that the only action the Tribunal can take is to allow the appeal on the ground specified in section 84(2). Neither the First-tier Tribunal nor the Upper Tribunal (exercising its appellate jurisdiction) has power to direct the respondent to grant any particular form or duration of leave.
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> 36. The second point follows from the first. In all cases, therefore, including where (as here) there is not merely no reason to suppose that indefinite leave would not be granted but an acceptance by the respondent that all the requirements of the rule are currently met, after the appeal is allowed, an application will need to be made to the respondent by the successful appellant for indefinite leave to remain. If the Rules so require, that application will require payment of a fee (or proof of entitlement to fee remission).
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> 37. Unless waived by the respondent, the requirement to make such an application is, thus, unaffected by the allowing of a human rights appeal. Leaving aside whether the appellant has any other Article 8 argument to deploy besides paragraph 276B (as to

> which, see paragraphs 39 to 44 below), and in the absence of any policy to give successful human rights appellants a particular period of limited leave, all that the respondent is required to do is grant the appellant a period of leave that is sufficient to enable the appellant to make the application for indefinite leave to remain. (Section 3C of the Immigration Act 1971 will extend that leave if it would otherwise expire before the respondent has reached a decision on the application).
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> 38. If an appellant, whose appeal has been allowed by reference to paragraph 276B, subsequently fails to make an application for indefinite leave to remain, then he or she will continue to be subject to such limited leave as the respondent has granted, in consequence of the allowing of the human rights appeal."

The First Appellant

23. The first appellant is unable to satisfy the requirements of Appendix FM and paragraph 276ADE of the Immigration Rules. That is particularly relevant since the respondent's policy on immigration control is expressed through the rules and it is entitled to be afforded *'considerable weight'*; TZ (Pakistan) [2018] EWCA Civ 1109 *at [34].*

24. In his witness statement dated 22nd February 2021, the second appellant claims that both his parents cannot have any formal jobs because of their immigration status. Nevertheless, they have both found, and do odd jobs with cash in hand, and that income is used for the family to survive. He claims the family has an income of around £1000 a month and they are assisted by his uncle when the need arises. In her witness statement, the first appellant claims the family left India to escape a situation of poverty. She sets out in paragraph [8] of her statement that she has two brothers. One lives in the UK and the other lives in India. She claims her brother in India struggles to feed his family and her parents survive on the little money that is sent to them by her brother in the UK. She claims her husband has a brother, but they do not speak. She claims her husband's brother lives in the same village in India and because of his own circumstances. She claims that upon return to India. She claims that if her son is permitted to live in the UK, but she is unable to do so, that would be in breach of the Article 8 rights of the family as such a decision will compel the second appellant to leave the UK as he is young and dependent on his parents for financial and emotional support.

25. In light of the preserved finding that there would not be very significant obstacles to the families integration into India, I invited Mr Hussein to draw my attention to

anything in the evidence before the Tribunal that may be capable of establishing that GEN.3.2 of Appendix FM, applies. That is, there are exceptional circumstances which could render refusal of leave to remain a breach of Article 8, because such refusal could result in unjustifiably harsh consequences for the appellants, and Mr Gursewak Singh. Mr Hussain submits the unjustifiably harsh consequences of allowing the second appellant's appeal, but dismissing the first appellant's appeal, are that the family would be separated, or the second appellant would be unable to benefit from any leave to remain granted to him. Mr Hussain simply relied upon the evidence set out in the witness statements before me.

26. There is in my judgement nothing in the evidence before me or the submissions made by Mr Hussain that undermine the previous finding that there are no very significant obstacles to the first appellant's integration into India. The phrase "very significant" connotes an "elevated" threshold, and it is now well established that the test will not be met by "mere inconvenience or upheaval".

27. I reject the claim the second appellant would be compelled to leave the UK in the event that the first appellant and her partner are not permitted to remain in the UK. I do not accept that in the event of the first appellant's removal to India, the second appellant would be unable to support himself and that he would face destitution or homelessness. The appellants' claim it is the first appellant and her partner who work to support the family. Judge Parkes found the second appellants claim that he has not worked in the UK, is not credible. There is nothing in the evidence before me that even begins to suggest that the second appellant is unable to work, and once his immigration status is established, there is no reason why an abled bodied individual of the second appellant's age, who has benefited from an education in the UK, should not be able to find employment, support himself and be able to meet his basic needs. The evidence of both appellants is that the second appellant has an uncle that has assisted the family when the need has arisen. There is nothing in the evidence before me to suggest that the uncle would not do so in the future, and particularly in the short term. I find the uncle would be prepared to step in and to provide some support to the second appellant in the UK and to the first appellant and her partner in India, should the need arise, and particularly whilst the first appellant and her partner re-establish their lives in India.

28. In reaching my decision I have regard to all the evidence before me and carried out an evaluative assessment of the circumstances this family find themselves in, in light of my finding that the decision to refuse the second appellant leave to remain is disproportionate and in breach of Article 8. I acknowledge that in refusing to grant the first appellant leave to remain, there is the possibility of the family being separated. I accept the appellants live together in the UK as a family unit and that they would all wish to remain together in the UK. There is however nothing in the evidence before me that establishes that the second appellant has any particular needs that require the presence of his parents in the UK or that the first appellant and her partner have any particular needs that can only be met by the second appellant.

29. The family no doubt wishes to continue living together in the UK, but that does not equate to a right to do so. The appellants might well initially feel a sense of loss because of their separation, but the sense of loss caused by the separation of the appellants who are adults, is not to say that they cannot continue to receive the love, care and emotional support that they provide each other. The appellants will be able to continue contact, albeit remotely, and the first appellant and her partner have demonstrated their resilience in the way that they have been able to support themselves since their arrival in the UK in 2009. There will be nothing preventing the second appellant from living with his family in India if that is the choice he makes, or alternatively nothing preventing him from travelling to India to visit his parents.

30. I acknowledge the public interest in the maintenance of effective immigration control. I have had regard, inter alia, to the first appellant's length of residence in the UK, and the close ties she retains with her son. I have also had regard to the first appellant's immigration history, and the family circumstances as a whole. However, there are in my judgment no very compelling circumstances which make her claim based on Article 8 especially strong.

31. In my final analysis, I find the first appellant's protected rights, whether considered collectively or individually, are not in my judgement such as to outweigh the public interest in the first appellant's removal. It follows that in my

judgement, the decision to refuse the first appellant leave to remain is in the public interest and not disproportionate to the legitimate aim.

Notice of Decision

32. The appellants' appeal against the decision of First-tier Tribunal Judge Parkes is allowed and the decision of First-tier Tribunal Judge Parkes is set aside.

33. I remake the decision and:

a. I dismiss the first appellant's (Mrs Mangal Kaur) appeal;

b. I allow the second appellant's (Mr Balraj Singh) appeal on Article 8 grounds.

Signed *V. L. Mandalia* Date 27th October 2021

Upper Tribunal Judge Mandalia

FEE AWARD

The second appellant was unable to satisfy the requirements of paragraph 276ADE of the immigration rules as at the date of his application. I have allowed his appeal on the basis of the facts as they are as at the date of my decision and in the circumstances, I decline to make a fee award in favour of the second appellant.

Signed *V. L Mandalia* Date 27th October 2021

Upper Tribunal Judge Mandalia