Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/05402/2014
IA/05403/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 17th September 2014	**On 16th October 2014**
Prepared 24th September 2014	

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

MS BALWINDER KAUR (FIRST APPELLANT)
MR PARMINDER SINGH (SECOND APPELLANT)
(NO ANONYMITY ORDER MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Ms E. Greenwood of Counsel
For the Respondent: Ms S. Vidyadharan, Home Office Presenting Officer

DETERMINATION AND REASONS

The Appellants

1. The Appellants are both citizens of India. The first Appellant who I shall refer to as the Appellant was born on 16th April 1971. The second Appellant who is the son of the first Appellant and who I shall refer to as P. was born on 11th November 1998 and is therefore now 15 years of age.

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The Appellants' appealed against decisions of the Respondent dated 12th January 2014 to refuse their application for settlement outside the Immigration Rules and to remove them from the United Kingdom by way of directions under Section 10 of the Immigration and Asylum Act 1999. Their appeals against those decisions were dismissed by Judge of the First-tier Tribunal Lawrence sitting at Hatton Cross on 12th May 2014. The Appellants appeal with leave against his determination and the matter comes before me to decide whether there is an error of law in the Judge's decision such that it falls to be set aside and remade failing which the decision of first instance will stand.

2. The Appellants entered the United Kingdom on 3rd November 2010 as visitors with leave to remain until 3rd May 2011. They did not leave the United Kingdom within the time stipulated but overstayed. P. was enrolled in the English school system and remains a pupil whilst the Appellant has been working

3. On 20th June 2012 the Appellants were encountered at their address by the Respondent and served with notice informing them they were liable to removal. On 10th July 2013 the Appellant submitted an application for leave to remain in the United Kingdom outside the Immigration Rules. Her application was made on two grounds. The first was that removal would expose the Appellants to ill treatment contrary to Article 3 (prohibition of torture) of the Human Rights Convention. The second was that the Appellants' removal to India would breach this country's obligations under Article 8 (right to respect for private and family life) of the Human Rights Convention. The burden of establishing either breach rested on the Appellant. The standard of proof for Article 3 was that there was a reasonable likelihood of risk (the "lower standard"), for Article 8 it was the normal civil standard of the balance of probability

The Proceedings at First Instance

4. The Appellant told the Judge that she had had an arranged marriage at the age of 18 years to a man called Jasvinder Singh. The couple had three children P. and two daughters (who remain in India). Mr Singh was an alcoholic and there was domestic violence during the relationship. He died on 29th August 2003 and the Appellant and her three children continued to live at Mr Singh's family home. After his death the Appellant's in-laws' behaviour towards her changed as they blamed her for Mr Singh's death. She was considered to be "bad luck", women stopped talking to her, she was considered as dirt. She was sexually harassed by a brother of her late husband. She was then told to leave home. The daughters did not wish to join the Appellant as they had been brainwashed by the Appellant's mother-in-law. P. did leave with the Appellant moving first to the Appellant's parents but as they did not wish to accommodate the Appellant and P. both had to move out. The Appellant was advised to leave India and after the service of an agent was secured she left for the United Kingdom with P. The Appellant never intended to leave the United Kingdom once she had arrived here. Within three months of arrival P. was

admitted to a school and continues with his education. As a widow the Appellant was likely to face ill-treatment in India as Indian society did not look kindly on widows.

5. In his determination the Judge considered the issue of societal attitudes towards women in India see paragraphs 23 to 30. He found that the Appellant had given contradictory evidence to him about a number of issues. He did not find it plausible that the Appellant's mother-in-law would eject the Appellant and P. from the family home only to accommodate them in another house for two years until 2002. At paragraph 32 he said "I do not find the [Appellant] has told me the truth in this regard." When the particular facts of the Appellant's case were scrutinised the Judge found they did not stand up. Applying the lower standard of proof to the Article 3 claim he found that the Appellant had not discharged the burden upon her.

6. At paragraph 37 the Judge went on to consider P.'s claim to remain in this country on the basis of his educational requirements. He found that P. could readapt to life in India and reintegrate into the educational system there. The issue the Judge decided was whether P. could access education in India "and the answer to that question is in the affirmative" (paragraph 38). The Judge directed himself that he had to consider the best interests of P. and considered the Upper Tribunal authority of **Azimi-Moayed**. In a somewhat ambiguous paragraph 41 the Judge wrote:

> "Insofar as P. is concerned I find his best interests have not been considered to the fullest. I find that his removal from the UK does not undermine the need to safeguard and promote his welfare."

7. The Judge directed himself at some length on the case law of **Green [2013] UKUT 00254**, **Gulshan [2013] UKUT 640** and **MF (Nigeria) [2013] EWCA Civ 1192** and a number of other authorities. At paragraph 49 the Judge stated:

> "The Appellants will be removed as a single family unit. There is therefore no evidence that there is to be any disruption in them enjoying family life with each other in India. There is nothing to indicate that the Appellants cannot replicate any private life they have established in the UK in India. The first Appellant was working in the same sort of area she now works in the UK. The second Appellant attended school in India as he has done in the UK. The Appellants may not wish to return to India. However personal preference is not the issue".

He dismissed the appeals.

The Onward Appeal

8. The Appellant appealed against that decision arguing that the Judge had made unreasonable findings. It was unreasonable to base his decision on

an expectation that the Appellant's mother-in-law to act reasonably. The Appellant had been consistent about the conduct she faced from her mother-in-law including the addresses she had stayed at. The Judge was making unsupported findings in describing the educational system in the United Kingdom and India as the same (and thereby playing down the risk of disruption to P's education).

9. The Judge had failed to make relevant findings that were crucial to the Appellants' Article 8 case. There were no findings about P.'s special educational requirements, his ties to the UK or the state of education in India. Without such findings the **Gulshan** assessment was highly flawed. The Judge had been asked to consider objective evidence from the Country of Origin Information Report that went directly to the Appellants' case.

10. The application for permission to appeal came on the papers before Judge of the First-tier Tribunal White on 30th July 2014. In granting permission to appeal he wrote that he was satisfied that the Judge had arguably made an error of law for the following reasons:

"(a) In concluding that P. could adapt to the education system in India it is arguable that the Judge failed properly to engage with the fact that P. has a statement of special educational needs.

(b) In paragraph 41 of the determination the Judge states that the best interests of P. 'have not been considered to the fullest' yet (arguably inconsistently) the Judge proceeds to dismiss P.'s appeal.

(c) It is arguable that the Judge is in error in stating that 'the new Article 8 Rules is a complete code for applications for private life and family life' (paragraph 46).

(d) The **Gulshan/Nagre/Shahzad** approach to Article 8 adopted by the Judge_at paragraph 46 is arguably wrong in the light of **MM [2014] EWCA Civ 985** at paragraph 128."

11. The Respondent replied to the grant of permission by letter dated 8th August 2014 stating that the Judge of the First-tier Tribunal had directed himself appropriately. He had properly applied the relevant case law of **Azimi-Moayed** as it applied to P. His findings were fully reasoned and sustainable on the facts.

The Hearing before Me

12. In submissions Counsel argued that the Judge had erred in his assessment of Article 8. The Judge should have gone on to consider if there were good arguable grounds for considering the application outside the Rules. The Judge had failed to make clear findings on what evidence he accepted and what he rejected. Counsel's skeleton argument dated 17th September 2014 cited paragraph 128 of **MM.** The objective of the new Rules was to

address more explicitly than previous Immigration Rules had done the factors under which case law weigh in favour or against a claim by a foreign national to remain in the United Kingdom based on Article 8. The new Rules would guide the decision makers in most cases but in those that were not covered by the new Immigration Rules only if there was an arguable case that there may be good grounds for granting leave to remain outside the Rules by reference to Article 8 would it be necessary for Article 8 purposes to go on to consider whether there were compelling circumstances to grant such leave. The Judge had adopted the wrong approach to Article 8 at paragraph 46 of his determination. He was wrong to say that the new Rules were a complete code. There were arguably good grounds for granting leave to remain outside the Rules and the Judge should have gone on to consider whether there were compelling circumstances not sufficiently recognised under them.

13. In **EV (Philippines) [2014] EWCA Civ 874** the Court of Appeal had held that a decision as to what was in the best interests of the children would depend on a number of factors such as their age, length of time they had been in the United Kingdom, how long they had been in education, what stage their education has reached, to what extent they have become distant from the country to which it is proposed that they return, how renewable their connection with it may be, to what extent they will have linguistic, medical or other difficulties in adapting to life in that country and the extent to which the course proposed would interfere with their family life or their rights if they have any as British citizens.

14. The finding that there was no difference between the education systems in India and the United Kingdom was without foundation. The Judge had failed to take account of the fact that P. was approaching critical exams in the UK or that he had been referred for an assessment of his special educational needs. The Judge had failed to make specific findings as to the Appellant's account of her ill-treatment in India. P.'s best interests could not be properly assessed without regard to the level of hardship likely to face the Appellant and therefore him on return. The determination had failed to take into account key considerations regarding the best interests of P. as indicated in **EV (Philippines)**. P. had reached a critical stage in his education and would not be able to simply pick up in India where he left off in the United Kingdom. He had spent all of his teenage years in the United Kingdom. The connections with India had been severed because the Appellant would be forced to live as an outcast in Indian society even before she left India.

15. Although the Judge had considered the objective evidence about the position of women in India he had not applied it. Whilst there was an education system in India the extent to which P. could engage in it was a matter of judgment. The idea that P. could slip into the Indian educational system was simply wrong. There was no basis on which to make that finding. P.'s special educational needs was an additional hurdle for him to re-engage with. The Respondent had a discretion to act outside the Rules

otherwise the Rules would not be a lawful approach to Article 8. The Judge had misinterpreted the authorities.

16. Briefly in response the Presenting Officer stated that there was no right to have an education as such, it was not a right protected under Article 8, see **Pankina** and **Patel**. The Judge had considered the evidence of the Appellant's Article 3 claim and found that she was not as helpless as painted. She sought employment and supported herself and her son through lawful means. Paragraph 41 of the determination (see paragraph 6 above) clearly contained a typographical mistake. It should have read that P.'s best interests had been considered to the fullest not that they had not been so considered. The educational needs of P. were that he had a reading and maths age lower than the average but there was nothing to say he would not be offered any assistance in India. P. came here four years ago, he had adapted to the British system and therefore could readapt to the system in India. There was no error in the Judge's determination.

17. In conclusion it was acknowledged by Counsel that the Judge had made some findings about past behaviour but there were no findings about the conditions the Appellant would face on return.

Findings

18. The Appellant's Article 3 claim was rejected by the Judge on the basis that even if the Appellant had given credible evidence of her circumstances in India she was far more resilient than was being credited by her lawyers. She had taken up employment and supported herself and her son. Even on her own case (of abuse and being forced to leave her accommodation) the Judge found that the Appellant would be able to support herself and her son upon return. In fact the Judge did not find the Appellant to be a credible witness in relation to what the Appellant claimed had happened to her in India and he did not accept the Appellant's account of abuse particularly that said to be caused by her mother-in-law. These were findings of fact which were open to the Judge on the evidence and the Appellant's grounds of appeal and submissions made to me amount in reality to no more than a mere disagreement with those findings.

19. The Judge rejected the Appellant's account of ill-treatment from the mother-in-law (see paragraph 36) pointing out a number of inconsistencies for example that the mother-in-law had not been concerned when the Appellant left with P. but was now threatening to kill the Appellant for running away with the "heir" of the family that is to say P. In the light of those findings the Article 3 case could not succeed and the case before the Judge remained on the basis of the Article 8 claim including an assessment of what was in the best interests of P.

20. Much of the argument in this case turned on whether the Judge was correct in describing the post-July 2012 Immigration Rules as a complete code for determining Article 8 matters. I interpret what the Judge said at

paragraph 46 to mean that there was nothing in the evidence before him to indicate that these appeals should be allowed outside the Immigration Rules. The Judge had specifically directed himself (contrary to the submission made in Counsel's skeleton argument) at paragraph 45 that the Appellant had not demonstrated that there were compelling circumstances not sufficiently recognised under the new Article 8 Rules. Although in considering P.'s best interests under the proportionality exercise the Judge had not specifically referred to **EV (Philippines)**, he had set out at some length the Upper Tribunal's decision in **Azimi-Moayed** and in doing so had encompassed the factors set out by the Court of Appeal in **EV (Philippines)**.

21. I agree with the submission of the Respondent that paragraph 41 did contain a typographical error and that it should have read that P.'s best interests had been considered to the fullest. When looked at in the context of the rest of the determination this error becomes clearer. The alternative, that the Judge meant what he said, would imply that he could have gone on to find that P.'s best interests would be served by remaining in this country. The Judge's findings were the exact opposite. Thus whilst the Judge perhaps did not express himself as felicitously as he might concerning the issue of whether the July 2012 Rules were or were not a complete code, the Judge was well aware of the issues that he had to consider when assessing the proportionality of interference with family and private life caused by the pursuit of the legitimate aim of immigration control.

22. The Appellant attacks the Judge's findings on certain conclusions for example as to the relative merits of the British and Indian educational systems. P. had not been in education a particularly long time, only four years and as the Judge pointed out P. had already been able to adapt to the educational system in the United Kingdom without any apparent difficulty. If the two educational systems were in fact different then P.'s ability to adapt to a different educational system when coming to the United Kingdom showed his remarkable resilience. It would also indicate an ability to adapt back to the Indian educational system that he had previous experience of. It was open to the Judge on the evidence before him to find as he stated at paragraph 37 that it was "not simply credible that [P.] cannot readapt" to the Indian system. The Judge did not place much weight on the additional assistance that P. was receiving in the United Kingdom finding that P. could access education in India. The criticism made of the Judge's consideration of P.'s best interests is that the Judge did not give sufficient weight to the fact that P. had special educational needs. I do not accept that that criticism has any basis to it either. For the Appellants to succeed with this argument they would have to show that it would not be possible for P. to receive an adequate education in India. The evidence is far from showing that and it is difficult to see how far this argument takes the Appellants.

23. The fourth ground given by Judge White in granting permission was the rather sweeping ground that the **Gulshan/Nagre/Shahzad** approach to

Article 8 was arguably wrong in the light of **MM**. Counsel for the Appellant, rightly, did not go as far as Judge White appeared to go in his grant of permission. Indeed it is rather difficult to see precisely what Judge White was intending to say. The Court of Appeal's decision in **MM** has not swept away the jurisprudence that built up regarding the application of the July 2012 Rules to Article 8 claims. The Immigration Act 2014 has replaced the July 2012 Rules with the force of statute and now expresses the public interest in Article 8 cases differently. However in considering whether Judge Lawrence made an error of law I have to consider the state of the law at the date of the hearing before him not as it is now.

24. The Judge very carefully considered the Article 8 arguments in this case and found that neither of the Appellants had lost any of the social, cultural or language ties to India in the four years that they had been in the United Kingdom. At paragraph 45 the Judge wrote that he had considered whether he should go outside the post-July 2012 Rules when assessing Article 8 but was satisfied that he need not because the Appellants had not demonstrated that there were compelling circumstances not sufficiently recognised under the Rules. There were no insurmountable obstacles facing them in India.

25. The Judge was dealing with a mother and son who had been in the United Kingdom for a relatively short period of time, some four years. For most of that time neither Appellant had had any leave to remain. The Appellant had put P. into the British educational system within a short period of time of arriving, she had no intention to return to India. She did not however bring herself to the attention of the authorities of the Home Office by making an application to regularise her stay but instead sought to evade the attention of the authorities. In those circumstances the private life of the Appellants such as it was in this country for that relatively short period was built up at a time when neither had leave to remain.

26. The Judge considered P.'s best interests in some detail but found that there were no compelling circumstances such that the Appellants should be allowed to remain in this country outside the Immigration Rules. Whether the Judge did or did not express himself well regarding whether the July 2012 Rules were or were not a complete code is beside the point. The Judge was aware of the correct test he had to apply in assessing Article 8 and applied it. The Judge had disbelieved the Appellant's Article 3 claim; that was not a factor which would influence him regarding what P. and the Appellant could expect to face upon return. The Judge evidently felt that the Appellant and P. would manage in India as they had managed before. P's best interests would be to be removed with the Appellant as a family unit to their country of origin with which they were both familiar. In my view the Judge did not make any material error of law in his determination. The conclusions he arrived at both in relation to Article 3 and Article 8 were open to him on the evidence before him. In those circumstances I do not find that there was an error of law and I uphold the decision of the Judge to dismiss the Appellants' appeals.

Decision

The decision of the First-tier Tribunal did not involve the making of an error of law and I uphold the decision to dismiss the Appellants' appeals.

Appeals dismissed.

I make no anonymity orders as there is no public policy reason for so doing. As I have dismissed the appeals and they were dismissed at first instance there can be no fee award.

Signed this 16th day of October 2014

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Deputy Upper Tribunal Judge Woodcraft