Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/24199/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 2 June 2014	**On 17 June 2014**

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

MRS ZAITOON BIBI

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Mr Naqvi, Solicitor
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant appeals with permission against the determination of First-tier Tribunal Judge I Howard promulgated on 3 February 2013 dismissing her appeal against a decision of the respondent to refuse her leave to remain in the United Kingdom.

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2. The appellant's case is that she is married to Saeed Shah, a citizen of Pakistan, who has indefinite leave to remain in the United Kingdom and has done since 5 November 2011. She entered the United Kingdom with entry clearance as a visitor valid from 10 July 2011 until 10 January 2012. On 5 January 2012 she applied for an extension of stay pursuant to Articles 2, 3 and 8 of the Human Rights Convention on the basis that her husband required a kidney transplant, was at that point undergoing dialysis four times a week and his wife had offered herself as a donor. That application was refused on 29 May 2013, the respondent concluding that the appellant did not fall within the requirements of paragraph 276ADE of the Immigration Rules. An appeal was lodged to the First-tier Tribunal on the grounds that the appellant and her husband could not enjoy life apart and that requiring the appellant to return to Pakistan would be a breach of her and her husband's right to respect for their family life and due to the sponsor's medical problems. It is also averred that the decision was wrong in that an incorrect Rule – 276ADE – had been applied.

3. On appeal Judge Howard noted [6] that there was no dispute as to the evidence and, having directed himself to follow the five steps set out in **Razgar** [12], found that her removal was proportionate given the need to maintain effective immigration control. He found:-

   (i) that the family life he would change would be one where the appellant cares for her husband who has kidney failure and is awaiting a transplant to one where contact is by telephone and the like;

   (ii) that the appellant had not named her husband as the person she was visiting in the UK or as a member of her family in the UK when she applied for a visit visa;

   (iii) albeit her husband's indefinite leave to remain had been granted as a result of his professed relationship with Susan Wilkinson, a British citizen, the relationship had since ended;

   (iv) that the appellant had flagrantly ignored the Immigration Rules and he was satisfied that when she had applied for a visit visa she had every intention of staying with her husband;

   (v) that at the time of the application the appellant had offered herself as a donor for her husband but that two years had elapsed and nothing had come of this and was therefore disregarded;

   (vi) that he was only concerned with the care the applicant offers him, rejecting any claim that he was unable to care for himself as he was employed and care administered by the appellant could not be accurately described as essential;

   (vii) he did not accept the appellant's statement that she had no home to return to in the USA.

4. The appellant sought permission on the grounds that:-

   (i) the judge had erred in failing to take into account that the application for further leave to remain had been submitted on 5 January 2012 prior to the changes in the Rules implemented on 9 July 2012 and thus the "new Rules" should not have been applied [2] and thus paragraph 276ADE should not have been considered [3];

   (ii) that the judge had erred in failing to know that the Secretary of State had erroneously relied upon Section 47 of the Immigration, Asylum and Nationality Act 2006;

   (iii) that the judge made mistakes of fact in finding (wrongly):

      (a) that the sponsor had been granted indefinite leave to remain as a result of his relationship with a British citizen;

      (b) failed to take into account that Susan Wilkinson had left the sponsor rather than the other way round, that the appellant had in her visa application referred to going to see her niece and her family in the UK, the appellant also being related to the sponsor out with their marriage as their families are intermarried;

      (c) that the kidney donation had in fact gone ahead, the donor being somebody other than the appellant, a fact referred to in the witness statements and in all the submissions;

   (iv) that the judge had erred in failing to consider whether the couple could live together in Pakistan, in doing so failing to have regard to the decision of the Court of Appeal in **<u>SSHD v Hayat</u> [2012] EWCA Civ 1054**.

5. On 16 April 2014 First-tier Tribunal Judge McDade granted permission on all grounds.

6. I heard submissions from both representatives.

7. It is not properly arguable that the Secretary of State erred in applying Section 47 of the 2006 Act given that with effect from 8 May 2014 the provision had been amended by the Crimes and Courts Act 2013 to permit removal directions being given in these circumstances.

8. Similarly, it is not arguable that the Secretary of State erred in having had regard to paragraph 276ADE given that the initial application was made not under the Immigration Rules but on the basis that discretionary leave should be granted. The application does not suggest that any particular provisions of the Immigration Rules could be applied nor was it put to the judge in the First-tier that it fell to be allowed under the Immigration Rules which are preserved for these purposes by the transitional arrangements set out in HC 194 which brought Appendix FM into force.

Further, the judge assessed this case in line with **Razgar** and there is no indication from his decision that he took into account paragraph 276ADE or any other provision of the Immigration Rules as having weight in so doing.

9. It appears from the Record of Proceedings and the determination that neither the appellant nor the sponsor gave evidence before Judge Howard. The refusal letter contains no submission that the appellant's immigration history is poor nor, so far as can be determined from the brief Record of Proceedings, was any such submission made by the respondent. It is unclear where Judge Howard found the evidence that the appellant had entered the United Kingdom without mentioning her husband in the Visa Application Form. There is no copy of that form on file nor was Mr Tufan able to provide such. Further, whilst Judge Howard does refer to the appellant's witness statement which he quotes as "I Mrs Zaitoon Bibi DOB 1/1/1970 came to visit my husband with a valid visit visa to the United Kingdom starting from 10/7/2011 to 10/1/2012", it is not immediately apparent from that that the valid visit visa had been obtained to visit the husband – that appears to be a gloss added by the judge.

10. The documents presented to the judge and attached in the bundle indicate that the sponsor was granted indefinite leave to remain outside the Rules, not as a result of any marriage application, and thus he made an error of fact which appears to have led to adverse conclusions.

11. It is evident also from the documents before me that, contrary to what Judge Howard had thought, the sponsor had undergone a kidney transplant; it is just that his wife was not the donor. Again, this was an error of fact.

12. I am therefore satisfied that there were a number of factual errors which were taken into account by the judge in reaching his conclusions adverse to the appellant. Further, he appears, without having given the appellant the opportunity to reply, to have drawn inferences adverse to her without putting her on notice of the same. That is procedurally unfair, and thus the findings of fact are undermined.

13. In addition, the judge appears to have accepted a family life between the appellant and the sponsor yet fails to have engaged with the fact that this is a family life between a husband and wife; it is not simply a carer and patient relationship. There is no proper analysis of whether there would be insurmountable obstacles in family life continuing in Pakistan, a point raised in the skeleton put before him.

14. In the circumstances, I am satisfied that the judge's approach to the proportionality exercise was flawed to such an extent that it is a material error of law.

15. I am satisfied also that the approach to the fact-finding exercise in this case is flawed to such an extent that none of the findings of fact reached by Judge Howard can stand and that accordingly, it would be appropriate to remit the case to the First-tier Tribunal for a fresh finding of facts on all issues.

Summary of Conclusions

1. The determination of First-tier Tribunal Judge Howard involved the making of an error of law and I set it aside.

2. I direct the matter be remitted to the First-tier for a fresh determination on all issues. For the avoidance of doubt, none of the findings of fact made by Judge Howard are to stand.

Signed Date: 12 June 2014

Upper Tribunal Judge Rintoul