



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number IA/06564/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 17 December 2014**

**Decision and Reasons
Promulgated
On 31 July 2015**

Before

Deputy Judge of the Upper Tribunal I. A. Lewis

Between

Secretary of State for the Home Department

and

Maimoona Asif

(No anonymity order made)

Appellant

Respondent

Representation

For the Appellant: Mr. S. Whitwell, Home Office Presenting Officer.

For the Respondent: Mr. B. Lams of Counsel (Direct Access).

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge A W Khan promulgated on 3 September 2014 allowing Ms Asif's appeal against the Secretary of State's decision dated 15 January 2014 to refuse to vary leave to remain and to remove her pursuant to section 47 of the Immigration, Asylum and Nationality Act 2006.

2. Although before me the Secretary of State is the appellant and Ms Asif is the respondent, for the sake of consistency with the proceedings before the First-tier Tribunal I shall hereafter refer to Ms Asif as the Appellant and the Secretary of State as the Respondent.

Background

3. The Appellant is a national of Pakistan born on 2 January 1980.
4. The Appellant last arrived in the UK on 5 June 2011 accompanied by her 2 children (dates of birth 18 October 2008 and 31 July 2010). The Appellant held entry clearance as the partner of a Tier 1 (General) migrant valid until 9 September 2012. The Appellant's husband, and father of her children, is Mr Malik Asif Mahmood (date of birth 28 March 1977). Mr Mahmood has been present in the UK with leave since September 2004; the Appellant had held earlier entry clearance as a partner prior to June 2011.
5. On 5 September 2012 both the Appellant and her husband made applications for leave to remain. The Appellant's husband applied for indefinite leave to remain pursuant to paragraph 245CD of the Immigration Rules; the Appellant's application (in which her children were included as dependants) was made on the basis of her husband's application for settlement - and it was indicated on her application form at paragraphs 2.1 and 3.15 that such an application had been made.
6. The Appellant's husband's application was refused on 11 April 2013; no decision was made in respect of the Appellant by the Respondent at this time. The Appellant's husband appealed (ref. IA/13423/2013). In a determination promulgated on 23 October 2013 his appeal was allowed on human rights grounds. In consequence the Respondent granted him 30 months exceptional leave to remain from 24 December 2013 until 23 June 2016. (I am told that he has since made a further application for indefinite leave to remain.)
7. On 15 January 2014 the Respondent refused the Appellant's application for reasons set out in a 'reasons for refusal' letter ('RFRL') of that date, and a Notice of Immigration Decision was issued. The RFRL referred to the grant of limited leave to remain to the Appellant's spouse, and on that basis it was determined that because he had not become a settled person the Appellant could not succeed under paragraph 286 of the Rules with reference to paragraph 284(ii). The application was also refused with reference to Appendix FM of the Rules.
8. The Appellant appealed to the IAC.
9. Both the Appellant and her husband attended before the First-tier Tribunal to give evidence: they each adopted their respective witness statements, but there were no further questions in-chief and the Respondent's representative did not ask any questions in cross-examination. The First-tier Tribunal Judge allowed the appeal on human rights grounds pursuant to Article 8 of the ECHR for reasons set out in his decision.
10. The Respondent applied for permission to appeal which was granted by First-tier Tribunal Judge Cheales on 21 October 2014.

Consideration

11. The Respondent's grounds in support of the application for permission to appeal plead, with particular reference to the cases of **Gulshan [2013] UKUT 00640 (IAC)** and **Nagre [2013] EWHC 720 Admin**, that the First-tier Tribunal Judge had failed to identify compelling circumstances or exceptional circumstances that warranted a grant of leave outside the Immigration Rules. Mr Whitwell, in his submissions, emphasised that this was essentially a challenge to the proportionality exercise undertaken by Judge.

12. In amplification of the grounds of challenge Mr Whitwell argued that the Judge erred in relying upon his own evaluation that the Appellant's husband would likely be granted indefinite leave to remain in circumstances where he had not yet even made such an application (paragraph 12). It was also identified and emphasised that there had in the past been a period where the Appellant and her husband had involuntarily lived apart: the Appellant had been residing in the UK with her husband in 2008, but had returned to Pakistan following the birth of their first child before returning to the UK in June 2011 (e.g. see at paragraph 11). Finally Mr Whitwell also argued that the Appellant and her husband could have had no reasonable basis of expectation that they would be allowed to make a future home in the UK – pleading by analogy the observations at paragraph 35 of **E-A (Article 8 - best interests of child) Nigeria [2011] UKUT 315 (IAC)**.

13. I do not accept this latter point. The parents in **E-A** had been students and as such had not been granted leave in a capacity that might lead to settlement, whereas the Appellant's husband herein was, as a Tier 1 (General) migrant, in a category that could potentially lead to settlement. Be that as it may, I am in any event not satisfied that such a submission as advanced by Mr Whitwell actually identified any error of law on the part of the First-tier Tribunal Judge rather than seeking to reargue the case on its merits.

14. Indeed, it seems to me that such a criticism is apt in respect of the Respondent's challenge to the decision of the First-tier Tribunal more generally. The history, including the Appellant's absence from the UK between 2008 and 2011 was a matter expressly referred to by the First-tier Tribunal Judge, and so cannot be said to be a point disregarded; moreover such an absence is not in any way determinative of where the proportionality balance should be struck in the context of the instant appeal. Reference to it at this stage (i.e. before the Upper Tribunal at an 'error of law' hearing), therefore, is no more than to raise an argument on the facts. Whilst it is the case that the Judge expressed a view as to the likely outcome of any future application for indefinite leave to remain, he prefaced such an observation with the following – "*I accept that it is not possible to predict the outcome of the husband's application for indefinite leave to remain which he is entitled to make in September 2014*". The Judge thereby appropriately identified that he was taking into account a likely, rather than a certain, outcome. In my judgement he is not to be faulted in this regard.

15. Be that as it may and in any event it seems to me that the key paragraphs in the Article 8 decision are 13 and 14. Paragraph 13 accedes to the substance of, in particular, paragraphs 4.2 – 4.4 of the Appellant's Skeleton Argument (a copy of which is on file): the Appellant and her husband had submitted their

applications at the same time in the same envelope and yet they had been separated and dealt with differently and at different times without any explanation or justification ever being advanced by the Respondent; it was argued that had they been dealt with together the Appellant would have had her case considered alongside that of her husband (he being the principal applicant within the family) and accordingly would likely have succeeded pursuant to Article 8 as the dependent of her husband in his successful appeal. On the face of it this is an unusual circumstance that sets this case apart from the vast majority of cases involving a family unit. Moreover at paragraph 14 the Judge identified factors that, in my judgement, adequately justified departure from the usual requirements of the Immigration Rules: essentially it is indeed illogical that the Appellant and her children be expected to quit the UK in circumstances where her husband has obtained exceptional leave to remain on Article 8 grounds and where if they were to be removed this would involve either a disruption of the mutual family life or the husband's own abandonment of the private life established in the UK.

16. Accordingly, in all the circumstances I reject the Respondent's challenge to the decision of the First-tier Tribunal.

Notice of Decision

17. The decision of the First-tier Tribunal contained no errors of law and stands.

18. Ms Asif's appeal remains allowed.

Deputy Judge of the Upper Tribunal I. A. Lewis 28 July 2015