



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

Appeal Number: IA/48923/2014

THE IMMIGRATION ACTS

**Heard at Birmingham Employment
Centre
On 22 December 2015**

**Decision and Reasons
Promulgated
On 13 January 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE McCARTHY

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ARADHANA ARADHANA

Respondent

Representation:

For the Appellant: Mr D Mills, Senior Home Office Presenting Officer
For the Respondent: Mr M Iqbal, instructed by Rainbow Solicitors

DECISION AND REASONS

1. After discussing the Secretary of State's appeal with the parties, I decided that the decision and reasons statement of First-tier Tribunal Judge Tindal promulgated on 30 March 2015 contains an error on a point of law requiring it to be set aside and the appeal remitted to the First-tier Tribunal for a fresh hearing. I announced my decision at the end of the hearing but reserved my reasons which I now give.

Reasons

2. The reasons for my decision relate to what Judge Tindal found at paragraphs 3 and 8 of his decision. It is clear that Judge Tindal assessed a material issue at the lower standard of proof on the assumption that any protection issue should be considered at that standard. In law he had no power to do so.
3. The appellant never made an asylum or protection claim and therefore there was no jurisdiction for the judge to make findings on the evidence on the lower standard. He should have approached the evidence as it was presented, which was as part of the appellant's case that there were very significant difficulties to her continuing family life in India because of her conversion from Hinduism to Islam and her family's objection to her husband.
4. It was open to the judge to make findings on that part of her case but he could only do so by assessing the evidence at the normal civil standard.
5. The confusion is compounded because in the absence of any self-direction regarding the proper standard of proof (which was the normal civil standard) it leaves the parties unclear as to what standard of proof was applied in relation to the other material issues.
6. In addition, it would appear that Judge Tindal took into account his findings made at the lower standard of proof when deciding whether there were insurmountable obstacles to the appellant's family life continuing if she were removed. Because he took this approach, I can only conclude that his overall findings are unsound. The fact that we cannot rely on his findings regarding insurmountable obstacles undermines the whole decision.
7. I am aware that the Secretary of State also argues that Judge Tindal erred in law at paragraph 10 (iii) where he found that the financial requirements were met. In so doing it is argued that he disregarded the provisions and requirements of appendix FM-SE which he was not entitled to do as per the guidance in SSHD v SS (Congo) & Ors [2015] EWCA Civ 387.
8. Mr Mills maintained this argument. Mr Iqbal did not argue directly against it but suggested that Judge Tindal had made his findings by application of Article 8 direct, as was evident by the judge's reference to the public interest considerations in s.117B of the Nationality, Immigration and Asylum Act 2002 (as amended).
9. I find that the Secretary of State's argument to be undermined by the fact that it is clear that Judge Tindal applied the classic Razgar approach in paragraphs 11 to 14 of his decision and in so doing clearly had regard to the possibility of the appellant failing to meet the requirements of the immigration rules. However, because it is clear from those same

paragraphs that the judge's conclusions relating to Article 8 draw on the same finding that there were insurmountable obstacles to family life continuing were the appellant expelled from the UK, those conclusions cannot be regarded as sound. They too are based on the wrong standard of proof being applied.

10. For this reason the Article 8 assessment is also to be regarded as legally flawed and cannot be sustained.
11. Mr Iqbal accepted that if I found that Judge Tindal had erred in law then I should remit the appeal to the First-tier Tribunal for a fresh decision but suggested that the finding that the appellant met the "relationship requirements" of appendix FM could be maintained because they were undisputed. Because the issues arising in the original appeal were whether the appellant should benefit from paragraph EX.1 of appendix FM to the immigration rules, this is a relevant finding which can be preserved as long as no evidence to the contrary is presented at the remitted appeal.
12. Because I have found there to be an error on a point of law, it follows that the parties agree to remittal and I do so with the following directions.

Directions for remitted hearing

13. The appeal is remitted to the First-tier Tribunal for a fresh hearing.
14. The hearing can be before any judge other than Judge Tindal.
15. The issues to be determined are whether the appellant can benefit from paragraph EX.1 or in the alternative Article 8 directly if the immigration rules are not a complete code.
16. As the First-tier Tribunal will have to consider the situation as at the date of hearing, the parties are at liberty to rely on additional evidence as long as it is filed and served at least 14 calendar days before the next hearing.
17. The finding that the relationship requirements of appendix FM are met is preserved subject to there being no fresh evidence to the contrary.

Decision

The Secretary of State's appeal to the Upper Tribunal is allowed because the decision of Judge Tindal contains legal error and is set aside.

I remit the appeal to be decided afresh in the First-tier Tribunal subject to the directions I have set out.

Signed

Date

Judge McCarthy

Deputy Judge of the Upper Tribunal