Upper Tribunal
(Immigration and Asylum Chamber)

SI (variation/curtailment – human rights ground) Pakistan [2011] UKUT 00118 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 23 February 2011	

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Before

THE HON. LADY DORRIAN

SENIOR IMMIGRATION JUDGE GILL

Between

SI

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the Appellant: Mr. B. Khan, of Burney Legal Firm of Solicitors.

For the Respondent: Mrs. D. Cantrell, Home Office Presenting Officer.

In an appeal against a refusal to vary leave or a decision to curtail leave or a decision to vary leave such that an individual's leave is effectively curtailed, there is a right of appeal on human rights grounds. There is nothing in SA (Pakistan) & Ors v SSHD [2010] EWCA Civ 210 which suggests to the contrary or which was intended by the Court to contradict its judgment in JM (Liberia) v SSHD [2006] EWCA Civ 1402 .

DETERMINATION AND REASONS

1. In this case the appellant, a citizen of Pakistan who had entered the UK as the spouse of a person present and settled in the UK, appealed against a decision of the respondent to curtail her leave to remain. At a hearing before the First-tier Tribunal it was recognised that the appellant could not meet the requirements of the immigration rules. The appellant had also, however, claimed that the decision was in breach of her Article 8 rights. The Immigration Judge, in rejecting her appeal, said that he had not considered the issue of her article 8 rights as no removal directions had been issued in this case and in his view the case of SA (Pakistan) & Ors [2010] EWCA Civ 210 precluded such a matter being addressed at this stage.

2. In our opinion the Immigration Judge proceeded on a misreading of that case and so erred in law in refusing to address the Article 8 point. In SA (Pakistan) the issue before the court was whether the law requires that where the Secretary of State has refused an application for variation of leave to enter or leave to remain in the UK, he should at the same time issue removal directions under s. 10 of the Immigration and Asylum Act 1999. For reasons which need not concern us, the court held that it did not have jurisdiction to decide that matter. In explaining the nature of the point the court stated: " The importance of the issue is that, if the immigrant is faced only with a refusal to vary leave, it may be that he cannot, on appeal to the Asylum and Immigration Tribunal, urge that he should nevertheless be allowed to remain on compassionate or human rights grounds because no question of his removal is at that stage live." We can only assume that the IJ has taken this as establishing that no human rights argument may be considered where removal directions have not been given. In our opinion it does no such thing. The court was merely explaining what was said to be the importance of the point at issue before it. In fact, if one reads on, it will be seen that the court quotes with approval from the case of JM (Liberia) v SSHD [2006] EWCA Civ 1402 in which this very point was decided. In that case the court was concerned with the question of whether an ECHR claim could lawfully be determined by the adjudicator in the absence of an imminent threat of removal from the UK. On this point the AIT had concluded that a human rights claim was not justiciable on a variation of leave appeal because in such a case the appellant's removal was not imminent and the case did not fall within s. 84(1)(g) of the Nationality, Immigration and Asylum Act 2002. The appellant sought to argue that such a claim was justiciable and indeed he was supported in that proposition by the respondent, who had obtained permission to cross-appeal on this very point. The argument was that a refusal to vary leave was for the purposes of s. 84(1)(g) an immigration decision in consequence of which the appellant's removal would be unlawful under s. 6 of the Human Rights Act 1998 as being incompatible with Convention rights, since removal may at least be an indirect consequence of the refusal to vary. The court agreed that the section in question should be given this wider interpretation, with the effect that the AIT should have considered the Article 8 point. The same argument applies to a decision to curtail leave as occurred in this case and the immigration judge should have continued to address the Article 8 point. His failure to do so was an error of law. We will now re-make the decision, limited to the Article 8 claim.

3. In that regard we are not satisfied that the appellant has established family life in the UK. She is 32 years of age. Reliance is placed on the fact that she is reunited with her family after 20 years. However, we note that she came to this country at the age of 30 as the spouse of a person settled in this country, not for reasons to do with her more extended family. She is residing in Stockton-on-Tees in hospital accommodation. The rest of the family live in Southall, West London. The documentation which has been submitted in support of her claim does not indicate any dependency between her and her extended family nor does it indicate anything beyond the normal emotional ties which may be expected to exist between adult members of the same family, even allowing for the breakdown of her marriage. We have had regard to the family life also of other members of her family – Beoku Betts [2008] UKSC 39 but the same points arise. It is submitted that she would have no family to live with in Pakistan because her sister lives in Rawalpindi with her husband's extended family. However it appears that the appellant was able to work and study in Islamabad without difficulty before she came to this country. Accordingly we conclude that article 8 is not engaged in respect of family life.

4. In addressing the issue of her private life we do of course take account of her relationships with members of her family living in the UK albeit that is not enough to establish family life for the purposes of the Convention. We are satisfied that she does have a private life in the UK which is expressed in terms of her employment, relationships with her colleagues at work and her family.

However she studied and practised as a doctor in Pakistan and will have developed similar work relationships there. There is no reason to think she will not in the future be able to do so. Although many of her family are here in the UK she would not be entirely without familial relationships in Pakistan. It is reasonable to expect that she could re-establish her professional private life in Pakistan in all its essential respects and yet maintain contact with colleagues here. Balancing all of her circumstances with the State’s interests in immigration control we consider that the decision would not prejudice her private life to the extent that it would constitute a breach of a protected right: it is therefore proportionate.

Decision

5. The decision of the immigration judge involved the making of an error on a point of law such that it falls to be set aside insofar as it relates to the Article 8 claim. We have re-made the decision on the Article 8 claim. Our decision is that the appellant’s appeal is dismissed on human rights grounds (Article 8). The Immigration Judge's decision to dismiss the appeal on immigration grounds stands.

Signed

The Hon. Lady Dorrian

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