Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/10966/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 17 January 2014	**On 14 February 2014**

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

RAKAN MOHAMMED ALRUWAILI

Respondent

Representation:

For the Appellant: Mr S Whitwell, Home Office Presenting Officer
For the Respondent: Mr P Chaudhary, Solicitor, of Asher & Tomar Solicitors

DETERMINATION AND REASONS

1. This is the Secretary of State's appeal against a decision of First-tier Tribunal Judge Callender Smith. For ease of reference, I shall refer throughout this determination to

the Secretary of State, who was the original respondent, as "the Secretary of State" and to Mr Alruwali, who was the original appellant, as "the claimant".

2. The claimant, who is a citizen of Saudi Arabia, was born on 14 September 1983. He entered this country on a student visa on 28 October 2010, in order to study at the London Metropolitan University. This visa did not expire until October 2013.

3. While here, he had difficulties with this university, and his ID card did not work. His case is that a security guard told him that this card had expired, and he had to apply again. He says that a tutor gave him similar assurances.

4. The claimant went back to Saudi Arabia for a holiday, but returned to the university in February 2012 when he was informed that his registration had been terminated. Following an unsuccessful appeal to that university, he enrolled at Birkbeck College, and paid £12,000 towards a first-year course running from 2012 to 2013.

5. While in the UK, the claimant had met Keely Williams, a UK national, and they had commenced a relationship in or about October 2011. They married, in the UK, on 11 May 2012.

6. On 24 September 2012, while lawfully present in this country (on the basis of the leave originally granted) the appellant applied for further leave to remain as a spouse of a British citizen, following his marriage. That application is dated 20 September 2012. The application was refused by the Secretary of State on 27 March 2013 and the refusal letter is dated the same date. The Secretary of State was not satisfied that the claimant had produced an English language test certificate as required under the Rules, and also considered that the claimant had not provided satisfactory evidence of income as required under the Rules, because he had failed to provide bank statements for the requisite six month period. Further, it was the Secretary of State's case that the claimant's leave to enter had been curtailed such that permission expired on 26 June 2012. Accordingly, as he did not have valid leave to remain at the time of making his application, he had no right of appeal.

7. The claimant appealed against this decision and his appeal was heard before First-tier Tribunal Judge Callender Smith, sitting at Taylor House on 1 November 2013, who, in a determination promulgated on 11 November 2013, allowed the claimant's appeal, under Article 8.

8. Judge Callender Smith found, as a preliminary issue, that the claimant had never received the curtailment notice which had been sent by the Secretary of State, and that accordingly he remained entitled to be in this country at the time he made his application. Accordingly, he had an in-country right of appeal.

9. Although Judge Callender Smith agreed that the claimant could not succeed under the Rules, nonetheless, he allowed the appeal under Article 8.

10. The Secretary of State has appealed against this decision, and was granted permission to appeal by First-tier Tribunal Judge Hemingway on 29 November 2013.

11. When giving his reasons for allowing the claimant's appeal, having heard the evidence of the claimant and his wife, the judge accepted it. He accepted that they had been in a committed and enduring relationship since October 2011, when they had started living together, and that they had subsequently married on 11 May 2012. They had been together for over two years, for most of that period as a married couple (at para 33).

12. The judge accepted also that as a consequence of the marriage the claimant's wife had become completely estranged from her UK family because she had married a Muslim, and that the claimant's wife was at the time of the hearing about six months pregnant, and was expecting a child towards the end of January 2014. He considered that the couple had a "quite reasonable plan" (at para 34) that the claimant would look after the chid after birth, so that his wife could go back to work as soon as possible; she had a good job , from which she earned about £30,000 a year.

13. The judge found further that to expect the claimant to return to Saudi Arabia in order to complete a settlement visa application in order that he could return in a reasonable time, was a process that could take months, and that it would not be proportionate to require him to do this.

14. It is asserted in the grounds that the appeal should not have been allowed, because such an appeal could only be allowed on the basis that it is "exceptional in some way" and that this means that the refusal to allow the claimant to stay must "result in an unjustifiably harsh outcome". It is also asserted that "the sole basis of the proportionality assessment appears to be the advanced pregnancy of the [claimant's wife]" and it is asserted that "this cannot be sufficient grounds on which to make a proportionality finding."

15. Although, when granting permission to appeal, Judge Hemingway considered that Judge Callender Smith had "conducted a full and fair assessment of the circumstances having heard evidence from the [claimant] and his partner", and also considered that it was "not right to say the judge resolved the proportionality issue solely on the basis of the pregnancy but took into account findings that the relationship is genuine and the partner has become estranged from her family" he nonetheless considered that

> "It is arguable the judge should have considered the extent to which the appeal failed under the Rules as part of the Article 8 assessment and should have asked whether, in light of such failure, it was the case that there were compelling circumstances not sufficiently recognised under the Rules which would justify the allowing of the appeal".

The Hearing

16. I heard submissions on behalf of both parties. As these are contained in the Record of Proceedings, in which I attempted to record contemporaneously everything which was said during the course of the hearing, I shall not set out everything which was said, but shall refer only to such of the submissions as are necessary for the purposes

of this determination. However, I have had regard to everything which was said during the course of the hearing, as well as to all the documents contained within the file, whether or not the same is referred specifically below.

17. On behalf of the Secretary of State, whose appeal this was, Mr Whitwell formally adopted the grounds of appeal, which he had not personally settled. Essentially, it was the Secretary of State's case that the appeal having been dismissed under the relevant Rules, that factor should have been given greater weight when consideration was given to the appeal under Article 8. In particular, the Secretary of State would wish the Tribunal to have in mind the guidance given by the Administrative Court in *Nagre* [2013] EWHC 720 (Admin), and in particular at paragraphs 42 and 43. This guidance was particularly relevant where a family life had been established while an applicant's immigration position was precarious.

18. However, when pressed by the Tribunal, Mr Whitwell accepted that in light of the judge's finding that the applicant had not received notice of curtailment of his original leave, and thus was still entitled to remain in this country at the time he made his application (and it would follow during the period when his family life was being established) he could not rely on this guidance give by Sales J in *Nagre*, because it could not properly be argued that family life had been established during a period where the couple should have known that the claimant's immigration position was precarious.

19. While Mr Whitwell formally asked the Tribunal to revisit some of the findings of fact which had been made, in particular that the process of applying for permission to return to this country from outside was a "process that could take months", he acknowledged that in the circumstances that now existed, which was that there was now a young child who had been born, in the event that the original decision was set aside, the Secretary of State would then have to establish that there were weighty circumstances making it reasonable for the claimant to return now to Saudi Arabia. However, he formally asked the Tribunal to set aside the decision which had been made.

20. On behalf of the claimant, Mr Chaudhary maintained that the judge had properly analysed the claimant's personal circumstances, which could properly be said to be exceptional. In the circumstances of this case, the judge had been entirely justified in finding that the consequences of the claimant's removal would be unduly harsh for the family life of this couple.

Discussion

21. When considering whether or not there is an error of law in the determination of the First-tier Tribunal, I must consider the position as it was at the date of that decision. However, were I to find that that determination did contain an error of law such that the decision must be remade, when remaking the decision I would have to have regard to the situation as it is now. As Mr Whitwell accepted, the claimant's position is stronger now, because the interests of his child, who has now been born, would also have to be considered.

22. It is apparent from the determination of the First-tier Tribunal that the judge considered the claimant's circumstances, and that of his family, very carefully. Although it is right that the claimant's application could not have succeeded under the Rules, because he had not satisfied the technical requirements under the Rules, the judge was entitled to take account of the facts, as he found them to be, that the couple did in fact have adequate funds to provide for their reasonable maintenance and that without the claimant's presence, the family unit would potentially not be viable economically once the expected child had been born. The judge was also entitled to take into account that the time it would take for the claimant to complete his visa application from abroad and then be allowed to return was unpredictable.

23. Although the judge did not give specific consideration in his determination to the House of Lords' decision in *Chikwamba* [2008] UKHL 40 or the subsequent Court of Appeal decision in *Hayat* [2012] EWCA Civ 1054, in my judgement had he done so he would have appreciated, in light of his other findings, that the claimant's position was even stronger. While Article 8 should not and cannot be used merely as a long-stop to allow an appeal to succeed where the Rules have not been satisfied, even if only by a small margin, this is not such a case. This claimant clearly had a substantial family life in this country, which was established when he had a right to be here, and the rights of his English wife have to be considered, in light (at the time of the First-tier Tribunal decision) of her pregnancy. Now, of course, were I to be remaking the decision, I would have to take account also of the rights of the child who has been born.

24. In my judgement, the First-tier Tribunal was entirely justified in finding that it would be wholly disproportionate to require this claimant to leave this country in order to make an application from abroad, given his good standing here, the fact that the unit, so long as he was here, was economically viable, and the substantial and harsh disruption to the family life which would be occasioned by his removal at a time when his presence was particularly important.

25. It was apparent to the judge (as it was apparent to this Tribunal during the hearing) that the claimant and his wife "have had a committed and enduring relationship" (at paragraph 33) and he also found that the claimant's wife had become "completely estranged from her UK family because she [had] married a Muslim". Were this claimant to have been removed, there would have been no one in the claimant's wife's family to whom she could have turned for support once the child had been born in order that she could go back to work.

26. In all the circumstances of this case, and in light of the judge's clear findings of fact, as set out above, he was entirely justified in finding that the removal of this claimant, in order to ensure compliance with the Rules, would not be proportionate. In my judgement, given the judge's findings, it is difficult to see how he could have come to any other conclusion, and the Secretary of State's appeal must accordingly be dismissed, and I will so find.

Decision

27. The Secretary of State's appeal is dismissed; the decision of the First-tier Tribunal, allowing the claimant's appeal under Article 8, is affirmed.

Signed: Date: 13 February 2014

Upper Tribunal Judge Craig