Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/21399/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 8th January 2014	**On 16th January 2014**

Before

UPPER TRIBUNAL JUDGE D E TAYLOR

Between

SHOHIDA BURANOVA

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr I Graham of Counsel instructed by Malik & Malik Solicitors
For the Respondent: Ms J Isherwod, Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is the Appellant's appeal against the decision of Judge Glossop made following a hearing at Hatton Cross on 15th October 2013.

Background

2. The Appellant is a citizen of Uzbekistan born on 22nd September 1978. She came to the UK as a student on 28th November 2008 and was subsequently granted two periods of leave to remain until 28th April 2013. She made an in time application for leave to remain as the spouse of a British citizen which was refused on 20th May 2013 and the subject of the appeal before Judge Glossop.

3. The Sponsor and Appellant earn jointly £14,500 per year and they have around £10,000 in savings. They receive housing benefit. She cannot meet the requirements of the Immigration Rules which state that she needs to earn £18,600 per annum jointly with her husband.

4. The judge reviewed the case law, in particular MM [2013] EWHC 1900 (Admin). He then asked himself a series of rhetorical questions and stated:

> "The dicta in the above case do not appear to include a situation where persons agree to marry without giving any adequate thought to financial provision or where they have deliberately set their face against achieving the requirements of the new Rule. How much featherbedding is to be permitted under Article 8 where parties do not meet the requirements of the new Rule will clearly be a coming matter for debate when this particular case is appealed as I understand to be the case.... I am not inclined to allow Article 8 to be used to avoid the effect of the Immigration Rule where persons have done little to help themselves to meet it."

5. The Appellant appealed and permission was granted on 22nd November 2013 by Judge Grant-Hutchison on the grounds that the judge had erred in law in failing to consider the two stage approach as advocated in MF (Nigeria) v SSHD [2013] EWCA Civ 1192 in the application of a proportionality test as required by the Strasbourg jurisprudence. He did not consider whether it would be reasonable for the Appellant to return to Uzbekistan with or without her British husband, who is of Iraqi origin, or the fact that the Appellant is pregnant and is due to give birth to a British child.

6. On 15th December 2013 the Respondent served a reply accepting that it was arguable that the judge erred in law in failing to specifically address Article 8 but, considering the facts of the case, it was questionable whether this could truly be said to be material.

Submissions

7. Ms Isherwood sought to defend the determination and relied on the case of Gulshan (Article 8 – new rules – correct approach) [2013] UKUT 640 and in particular at paragraph 27 which reads as follows:

> "The judge then embarked on a free-wheeling Article 8 analysis, unencumbered by the rules. That is not the correct approach. The Secretary of State had addressed the Article 8 family aspects of the Respondent's position through the

rules, in particular EX.1, and the private life aspects through paragraph 276ADE. The judge should have done likewise, also paying attention to the Guidance. Thus the judge should have considered the Secretary of State's conclusion under EX.1 that there were no insurmountable obstacles preventing the continuation of family life outside the United Kingdom. Only if there were arguably good grounds for granting leave to remain outside the rules was it necessary for him for Article 8 purposes to go on to consider whether there were compelling circumstances not sufficiently recognised under the rules (see paragraph 24(b) above)....".

Consideration of whether there was a material Error of Law

8. The judge clearly erred. There were good grounds for considering whether the Appellant's circumstances were not sufficiently recognised under the Rules, namely the imminent birth of a British citizen child and the evidence given at the appeal hearing that the Appellant's British husband would not be safe in Uzbekistan, evidence upon which incidentally no findings were made. No consideration was given as to whether EX.1 applied. The judge confined himself to a series of observations highly critical of the couple's conduct and on the law inappropriate to a determination of an appeal.

9. In failing to address the issues, he erred in law.

The Resumed Hearing

10. It was possible to continue to re-make the decision without an adjournment. The Appellant gave oral evidence and said that since the last hearing she has given birth to a British child on 22nd November 2013. She gave evidence that it would be difficult for her husband, who originally comes from Iraq, to settle in Uzbekistan with her and their child because he does not speak the language and would find it difficult to get the proper documentation to allow him to work. As intermarriage between different nationals was uncommon in Uzbekistan, they would face hostility there.

11. At the end of the evidence Ms Isherwood submitted that there was no substantial evidence why the family could not go back to Uzbekistan. They simply wanted the choice of where to live and the ability to have a better life in the UK which they were not entitled to do. She accepted that the Appellant did not have any adverse immigration history and submitted that it would be better for the British child to return with her mother to Uzbekistan where she would have wider family support.

12. Mr Graham submitted that the appeal ought to be allowed within the Rules in that it was not reasonable for the child to "take his chances" in Uzbekistan. He would be going to an unpredictable situation where he could be at risk and would be deprived of the benefit of his British citizenship. There were no countervailing factors as to why his best interests should not be followed.

Findings and Conclusions

13. EX.1 applies if -

    (a)(i) the applicant has a genuine and subsisting parental relationship with a child who –

        (aa) is under the age of 18 years;

        (bb) is in the UK;

        (cc) is a British citizen or has lived in the UK continuously for at least the seven years immediately preceding the date of application; and

    (ii) it would not be reasonable to expect the child to leave the UK.

14. Paragraph (a) is satisfied and the only issue is the reasonableness of expecting the British child to go with his mother to Uzbekistan.

15. The Appellant has not been well-served by her solicitors who have failed to put in evidence about whether, as is claimed, a British citizen of Iraqi origin would have difficulties both in obtaining permission to work and hostility from the generalised population. The Appellant's evidence is therefore uncorroborated, but she gave consistent and straightforward evidence and there is no reason to doubt that she has many anxieties for the family's safety and well being in Uzbekistan. She does have family there however, with whom she is in regular contact and, whilst she said they were not in a position to provide accommodation, there is evidence that they have provided financial support in the past. None of the Appellant's nor the Sponsor's immediate family are in the UK.

16. On the other hand the child is a British citizen. Whilst he would go to Uzbekistan with his parents, assuming that his father could gain admittance, there would be clear disadvantages for him. The family are settled in the UK. Both parents are employed here and whilst it is possible that they could obtain employment in Uzbekistan the Sponsor's lack of language would be a severe impediment.

17. The consideration of the child's best interests is a primary albeit not a paramount consideration and plainly relevant to the question of reasonableness as set out in EZ.1 (ii). In ZH (Tanzania) v SSHD [2011] UKSC 4 the Supreme Court held that whilst the best interests of the child can be outweighed by the cumulative effect of other considerations, they must be considered first. Lord Kerr stated:

    (i) "It seems to me self-evident that to diminish a child's right to assert his or her nationality will not normally be in his or her best interests."

18. In that case the Appellant had an appalling immigration history.

19. Bearing in mind not only the fact that the child would be deprived of the benefits of British nationality, but also the difficulties which this family would have in relocating to Uzbekistan where the Sponsor has never been and does not speak the language, his best interests clearly point to the family remaining in the UK. There are no countervailing factors, and indeed in the longer term it seems likely that, far from being a drain, this family will be able to make a contribution to the UK economy, given the Appellant's qualifications and her husband's skills.

20. In these circumstances it would not be reasonable to expect the child to leave the UK. The Appellant falls within EX.1 of the Immigration Rules and accordingly the appeal is allowed.

Decision

21. The original judge erred in law. His decision has been set aside. The Appellant's appeal is allowed.

Signed Date

Upper Tribunal Judge Taylor