Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/32104/2013

Heard at Field House
on 28th April 2014

Determination Promulgated
On 29th April 2014

THE IMMIGRATION ACTS

Before

UPPER TRIBUNAL JUDGE HANSON

Between

ALI AZMAT
(Anonymity direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Talacchi instructed by Westkin Associates
For the Respondent: Mr Whitwell Home Office Presenting Officer.

DETERMINATION AND REASONS

1. This is an appeal against a determination of First-tier Tribunal Judge Hodgkinson promulgated on the 5th February 2014, following a hearing at Hatton Cross on 29th January 2014, in which the Judge dismissed the appeal under both the Immigration Rules and on human rights grounds.

Background

2. The Appellant was born on the 2nd November 1972 and is a citizen of Pakistan. He entered the UK on 26th November 2012 with the benefit of a multi-entry visit visa granted on 2nd December 2011 and valid until 2nd December 2013. He has remained in the UK since. On 16th May 2013 the Appellant's legal representatives applied on his behalf for a variation of his leave to remain on the basis of his private and family life with reference to Article 8. The Appellant had in the meantime married a British citizen who he met during a previous visit to the UK. They entered into a customary marriage in the UK on 18th September 2011 and were officially married in Malaysia on 11th July 2012. The Appellant's wife gave birth to twins on 5th March 2013.

3. The Judge noted that it was accepted before him that the Appellant was unable to satisfy the provisions of Appendix FM of the Immigration Rules in relation to either the "partner" or "parent" routes and that it was conceded by the Appellant's representative that the issue was one of Article 8 ECHR on the basis of an exercise of a discretionary power outside the Rules.

4. The Judge conducted an assessment of the evidence following the guidance provided in the case of Razgar before concluding:

> 33. In considering the issue of proportionality, I have taken into account all of the factors to which I have referred above, which includes what is in the best interests of the children, and I have given those interests very significant weight in undertaking the relevant balancing exercise. Against this, I reiterate that the appellant has his parents in Pakistan, and he also has his brother and one sister remaining there, according to his evidence. It may be that the appellant has not lived in Pakistan since 2005, but there is no reason known to me as to why he cannot do so. Whilst I accept that the sponsor does not speak Urdu, there is no reason known to me as to why she cannot seek to learn the language, in the event that she elects to return to Pakistan with the appellant and their two children.
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> 34. If the appellant and the sponsor do not wish to conduct their family life in Pakistan, then it is a matter for them as to whether the appellant wishes to make an entry clearance application to enter the United Kingdom as a spouse in due course, subject to him being able to satisfy the requirements of the relevant Rules at that stage.
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> 35. As part of my consideration of proportionality in this appeal, I would add that I have also taken into account the reasoning contained in the Upper Tribunals decision in Gulshan (Article 8 – new Rules- correct approach) [2013] UKUT 00640 (IAC), as relied upon by Ms Parkes, which, in turn, makes reference to relevant case

law, including the Administrative Court's judgment in R (on the application of Nagre) v SSHD [2013] EWHC 720 (Admin). In this instance, I am satisfied that, to require the entire family unit to live together in Pakistan, would not result in unjustifiably harsh consequences for the appellant, the sponsor and their two children, and that it would not be disproportionate to expect them to do so. I would add that the two children were conceived at a time when both the appellant and the sponsor were aware that the appellant's position in the United Kingdom was precarious and, whilst clearly no blame lies at the two children's feet in relation to thereto, it is nevertheless a factor of some relevance to the issue of proportionality.

36. I confirm that, in reaching my conclusions in relation to the proportionality of the respondent's decision, I have not only taken into account the appellant's rights but, additionally, the impact of the respondent's decision upon the sponsor, and upon the two children, applying the reasoning of the House of Lords in its judgment in Beoku-Betts [2008] UKHL 39.

37. I have also borne in mind the reasoning of the House of Lords in its judgment in Huang [2007] UKHL 11 and note that the Court, in the judgment, indicated that, in circumstances where an individual was unable to satisfy the requirements of a relevant Rule, Regulation or similar, it was envisaged that it would be in a very few cases where the respondent's decision relating to that individual would be deemed to involve a disproportionate interference with that individual's rights under Article 8 (2). I entirely appreciate that this is not a strict legal test but would add that the evidence before me causes me to be entirely satisfied, based upon my analysis of the particular facts and evidence relating to this appellant, that the relevant balancing exercise should weigh in the respondent's favour.

5. The Judge concluded that the Respondent's decision did not involve a disproportionate interference with the Appellant's, or any other relevant person's rights and so dismissed the appeal under Article 8.

6. Permission to appeal was sought on the grounds (a) the Judge failed to explain adequately or at all why he did not accept that the sponsor would have difficulty living in Pakistan, (b) that there had been no or no adequate assessment of the best interests of the two children, (c) the judge took no adequate account of the children's British nationality, and (d) that the Judge misdirected himself as to the proper approach to the assessment of proportionality in relation to Article 8 rights. Permission to appeal was not admitted by First-tier Tribunal Judge Grimmett on 28th February 2014 as it was out of time although Judge Grimmett noted that the grounds were no more than

a disagreement with findings made. The application was renewed directly to the Upper Tribunal where it was admitted and permission granted by Upper Tribunal Judge Grubb on the basis it was arguable that Judge Hodgkinson failed properly to consider the best interests of the children, in particular in finding that they could reasonably be expected to live in Pakistan and hence leave the EU which is arguably contrary to the established case law on the rights of EU citizens. It is said to be arguable that the Judge should have approached the appeal on the basis that the family would be split between the UK and Pakistan and that the children and their mother could not be expected to accompany the appellant to Pakistan. The Judge should have considered whether that was proportionate.

7. In his submissions to the Upper Tribunal Mr Talacchi relied upon the decision of the Supreme Court in Zoumbas v Secretary of state for the Home Department [2013] UKSC 74, at paragraph 10, in which the Court paraphrase the principles arising from the cases of ZH (Tanzania) [2011] 2 AC 166, H v Lord Advocate [2012] SC (UKSC) 308 and H(H) v Deputy Prosecutor of the Italian Republic [2013] 1 AC 338, as follows

(1) The best interests of the child are an integral part of the proportionality assessment under article 8 ECHR;

(2) In making that assessment, the best interests of the child must be a primary consideration, although not always the only primary consideration; and the child's best interests do not of themselves have the status of the paramount consideration;

(3) Although the best interests of the child can be outweighed by the cumulative effect of other considerations, no other consideration can be treated as inherently more significant;

(4) While different judges might approach the question of the best interests of the child in different ways, it is important to ask oneself the right questions in an orderly manner in order to avoid the risk that the best interests of the child might be undervalued when other important considerations were in play;

(5) It is important to have a clear idea of a child's circumstances and what is in a child's best interests before one asks oneself whether those interests are outweighed by the force of other considerations;

(6) To that end there is no substitute for a careful examination of all relevant factors when the interests of the child are involved in an article 8 assessment; and

(7) A child must not be blamed for matters for which he or she is not responsible, such as the conduct of a parent.

8. Mr Talacchi referred specifically to (3) above alleging that the Judge had given undue weight to other factors and treated other factors as being inherently more significant than the needs of the children.

9. A useful summary of the approach to assessing the best interests of children is to be found in ZS (Jamaica) and Another v SSHD [2012] EWCA Civ 1639 in which the Court of Appeal reiterated that ZH (Tanzania) v SSHD [2011] UKSC 4 made it clear that the correct approach is to treat best interests of the child as a starting point and then go on to assess whether those interests were outweighed by the strength of other considerations.

Discussion

10. In relation to the ground on which Upper Tribunal Judge Grubb granted permission to appeal, namely that as the children are British and therefore European citizen's the matter should be considered as a 'family splitting case', no decision has been made by the Secretary of State which will have the consequence of requiring the children to leave the United Kingdom. In Damion Harrison and Others v SSHD [2012] EWCA Civ 1736 the Court of Appeal rejected an argument that an issue of European law arose in a case in which there was no basis for asserting that it is arguable, in the light of the authorities, that the *Zambrano* principle extends to cover anything short of a situation where the EU citizen is forced to leave the territory of the EU. If the EU citizen, be it child or wife, would not in practice be compelled to leave the country if the non-EU family member were to be refused the right of residence, there is nothing in the authorities to suggest that EU law is engaged. "Article 8 Convention rights may then come into the picture to protect family life as the Court recognised in *Dereci*, but that is an entirely distinct area of protection".

11. As the Secretary of State's decision relates to the Appellant only and it has not been shown that it will create a situation where the children will have no choice but to leave the territory of the European Union, I find European law is not engaged in relation to this appeal.

12. It is also submitted that the Judges determination is somewhat muddled. The Judge records that it was accepted that the Appellant is unable to succeed under any of the Immigration Rules and so went on to undertake an 'old style' Article 8 ECHR assessment. Having done so, and having set out the conclusions in paragraphs 33 and 34 of the determination, the Judge then makes reference to the decisions in Gulshan and Nagre which are decisions of the Tribunal and High Court which provide guidance on the correct approach be taken when considering Article 8 issues in relation to the Rules in force post 9th July 2012.

13. In accordance with the approach set out by the Court of Appeal in MF (Nigeria) [2013] EWCA Civ 1192, the High Court in Nagre [2013] EWHC 720 (Admin) and by the Upper Tribunal in Gulshan [2013] UKUT 640, as confirmed by Shahzad (Art 8: legitimate aim) [2014] UKUT 00085 (IAC), the Judge was required to consider the question of proportionality in the context of the Immigration Rules first with no need to go on to a specific assessment under Article 8 if it is clear from the facts that there are no particular compelling or exceptional circumstances requiring that course to be taken. That approach is consistent with what the Court of Appeal said in MF (Nigeria) and with the approach of the House of Lords, particularly in cases such as Huang [2007] UKHL 11 and Razgar [2004] UKHL 27. In Shahzad it was found that where an area of the Rules does not have an express mechanism such as that found in the provisions relating to deportation appeals, the approach in Nagre ([29]-[31] in particular) and Gulshan should be followed: i.e. after applying the requirements of the rules, only if there may be arguably good grounds for granting leave to remain outside them is it necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under them.

14. The starting position for the Judge was to look at the Rules and see whether the Appellant was able to meet their requirements. He was not and so the next question to be considered should have been whether the decision would lead to a breach of Article 8 but in the context of whether there are factors not covered by the Rules which give rise to the need to consider Article 8 further.

15. It is clear from reading paragraphs 33 and 34 of the determination that the Judge accepted that this is, in reality, a family splitting case. In paragraphs 28 and 29 of the determination there is reference to the best interests of the children who were only 11 months old at the date of the hearing and whose private lives were found to be wholly based upon their relationship with each other and with their mother and father. It is accepted that the best interests of a child are to be brought up by both their parents, if possible, and absent countervailing factors. There was no evidence before the First-tier Tribunal to suggest that the children have any special needs such as to indicate an adverse impact upon the removal of their father. The Judge noted in paragraph 12 of the determination that it was part of the Appellant's case that the sponsor needed his support in order to look after and raise the children and that she would have difficulty in coping if the Appellant was not with her. There was, however, no evidence available of any existing condition or situation that would prevent the sponsor from adequately meeting the needs of her children. On the basis of the material the Judge was asked to consider it has not been arguably made out that the decision to refuse the appeal, even though this may result in the family being separated, will result in compelling circumstances giving rise to unjustifiably harsh consequences for the Applicant or any family member, such as to establish an arguable case at this time.

16. The Judge also considered the question of whether the family could relocate as a

unit and found that in all the circumstances they could on the basis that it was not disproportionate to expect them to do so. In Gulshan it was held that the term "insurmountable obstacles" in provisions such as Section EX.1 are not obstacles which are impossible to surmount. They concern the practical possibilities of relocation. In the absence of such insurmountable obstacles, it is necessary to show other non-standard and particular features demonstrating that removal will be unjustifiably harsh. This is the test that I find was considered, in the alternative, by the Judge in paragraph 35 and on the basis of the material provided to the Judge it has not arguably been established that such circumstances existed. The grounds question whether the Applicant and her husband will be able to relocate but this statement is not supported by adequate evidence establishing an arguable case that they cannot, despite the accepted practical difficulties they will/may face. The Judge refers to the existence of family in Pakistan.

17. The finding in paragraph 34 that, if necessary, the Appellant could make an application for entry clearance was challenged on the basis that this may take a long time although there is no indication that this claim was advanced before the Judge or evidence provided to show that any period out of the United Kingdom whilst an application was made would make the requirement for the Appellant to return to Pakistan disproportionate. This is not a decision made as a result of policy being imposed by the Secretary of State but as a natural consequence of the lawful decision to remove the Appellant and the necessary steps that he will have to undertake to seek re-entry to the United Kingdom lawfully in the capacity in which he seeks to remain.

18. I do not find this is an appeal in which it can be found that the Judge failed to consider material issues. The Judge considered the facts with the degree of care required in appeal of this nature, including the best interests of the children. I do not find any arguable merit in the submission the Judge treated other considerations as inherently more significant than the best interests of the children. The assertion he did so is no more than an attack upon the weight the Judge chose to give to the competing interests. The Appellant cannot claim to have any legitimate expectation that he would be permitted to remain in the United Kingdom. He entered as a visitor which is a temporary status yet chose to marry and have children against a background of a lack of relevant immigration status, a fact which it was found both he and his wife were fully aware of by the Judge. He is in some respects responsible for the difficulties that he now faces. There was insufficient evidence to show that expecting family life to continue in Pakistan is unlawful or irrational or that expecting this family to be separated with the Appellant's wife and children remaining as an independent family unit in the United Kingdom is unlawful or irrational either. There is no evidence of any adverse impact upon the children whose needs will be fully met by their mother, or mother and father whichever option is chosen by the family unit, such as to make the decision disproportionate. In AF v SSHD

[2013] CSIH 88 it was re-iterated that nationality is not a trump card and the Tribunal is required to take into account the full circumstances

19. I find the conclusions reached by the Judge are within the range of permissible findings open to the Judge on the evidence. Those findings are the 'steppingstones' leading to the decision under challenge to dismiss the appeal and I find no arguable legal error material to that decision has been proved.

Decision

20. **There is no material error of law in the Immigration Judge's decision. The determination shall stand.**

Anonymity.

21. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 as no application for anonymity was made and has not been shown to be warranted in the facts.

Signed…….
Judge of the Upper Tribunal
Dated the 29th April 2014