Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/39751/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 18th July 2014	**On 4th August 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

MR AMIR AFTAB
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms J Kyakwita, legal representative
For the Respondent: Mr N Bramble, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant is a citizen of Pakistan born on 24th January 1982. The Appellant's immigration history is set out in detail under a letter dated 20th September 2013. On 29th August 2012 the Appellant applied for indefinite leave to remain in the United Kingdom for reasons outside the Immigration Rules. That application was considered by an official acting on behalf of

the Secretary of State and by reasons for refusal letter dated 20th September 2013 the Appellant's application was refused.

2. The Appellant appealed and the appeal came before Judge of the First-tier Tribunal Drabu sitting at Taylor House on 6th March 2014. In a determination promulgated on 9th April 2014 the Appellant's appeal was allowed.

3. On 23rd April 2014 the Secretary of State lodged Grounds of Appeal to the Upper Tribunal. Those grounds contended that the judge had erred in law in failing to consider the first Appellant's Article 8 claim under Appendix FM and paragraph 276ADE of the Rules. On 21st May 2014 Upper Tribunal Judge Renton granted permission to appeal. Judge Renton noted that the First-tier Tribunal Judge had allowed the appeal because he found the Respondent's decision disproportionate as contrary to the best interests of the Appellant's minor son. However he noted the judge did not consider whether the Appellant met the requirements of Appendix FM of HC 395 and therefore the consequences for proportionality of her failure to do so and the *Gulshan* test and that this amounted arguably to an error of law.

4. It is on that basis that this appeal comes before me. I note that this is an appeal by the Secretary of State. For the purpose of continuity within all proceedings Mr Aftab is recited herein as the Appellant and the Secretary of State as the Respondent despite the fact that this is the Respondent's appeal. The Appellant appears by her legal representative Ms Joy Kyakwita. Ms Kyakwita is familiar with this matter having appeared before the First-tier Tribunal. The Secretary of State appears by her Home Office Presenting Officer Mr Bramble.

Submissions

5. Mr Bramble submits that the issue is simple in this matter namely that the judge failed to actually consider the appeals under the Immigration Rules and that the judge has merely concluded that the Appellant should be granted discretionary leave on the basis of ongoing family proceedings.

6. Miss Kyakwita submits that whilst she appreciates what is being said by Mr Bramble on behalf of the Secretary of State she submits that the judge ultimately got the decision correct and the question for the Tribunal to decide is whether or not there was an error of law and whether it is material.

The Law

7. Areas of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial consideration, reaching irrational conclusions on fact or evaluation or to give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.

8. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue of argument. Disagreement with an Immigration Judge's factual conclusion, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence which was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because an Immigration Judge concludes that the story is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

Findings on Error of Law

9. It is incumbent upon an Immigration Judge to follow appropriate process when considering an appeal of this nature. Firstly it is necessary to consider whether or not a claim should be allowed under the Immigration Rules. If it is found that a claim should not succeed under the Rules and if it does not succeed under the Rules then it is appropriate to consider whether or not it should be allowed outside the Rules pursuant to Article 8 of the European Convention of Human Rights. In this case the judge has not even made any reference to the Rules in his determination. He has merely noted that Ms Kyakwita asked for the appeal to be allowed on the basis of exceptional features that made its favourable consideration under Article 8 justified and concluded that the Appellant has a close relationship with his son and consequently that it is in the best interests of a child of his son's age to have the company, love and protection of both his parents and therefore he allowed the appeal. That is not the correct approach. In such circumstances there is a material error of law in the determination of the First-tier Tribunal and I set aside the decision and proceed to remake the decision.

Findings on the Remaking of the Decision

10. It is conceded by the Appellant's legal representatives that the Appellant does not meet the terms of the Immigration Rules. These have been set out in some detail in the Notice of Refusal. The Appellant fails to meet Appendix FM of the Immigration Rules and paragraph 276ADE where the basis of his claim is that of private life. However it is accepted and acknowledged that on 21st October 2010 the Appellant applied for leave to remain in the United Kingdom as a person exercising contact rights to a child and that on 16th May 2011 he was granted leave outside the Immigration Rules valid till November 2011 and that that leave was subsequently extended until June 2012.

11. The Appellant has a son with whom he has contact subject to proceedings in the County Court. I am provided with copies of the contact orders pursuant to Section 8 of the Children Act 1989. The last contact order is one dated 18th June 2012 stating that a contact order for up to three hours at a contact centre or venue agreed by the parties is to take place and that the matter would be listed for review on the first available date after 1st June 2012. I am referred to a letter of 7th February 2014 from the Appellant's former spouse's solicitors confirming contact and I am advised that the parties agreed that contact would take place on the basis of the previous order without the matter being restored in the County Court. A copy of the Appellant's attendance record at the contact centre where he exercises contact to his son is produced and is not challenged by Mr Bramble. Indeed Mr Bramble does not seek to challenge the finding of credibility of the Appellant's evidence made by the First-tier Tribunal Judge.

12. The impact of Family Court proceedings on immigration proceedings was considered in *RS (immigration and Family Court proceedings) India [2012] UKUT 00218* where it was held that:

    (i) Where a claimant appeals against a decision to deport or remove and there are outstanding family proceedings relating to a child of the claimant, the First-tier Tribunal Judge should first consider:-

        (a) Is the outcome of the contemplated family proceedings likely to be material to the immigration decision?

        (b) Are there compelling public interest reasons to exclude the claimant from the United Kingdom irrespective of the outcome of the family proceedings or the best interest of the child?

        (c) In the case of contact proceedings initiated by an Appellant in an immigration appeal, is there any reason to believe that the family proceedings have been instituted to delay or frustrate removal and not to promote the child's welfare?

    (ii) In assessing the above questions, the judge will normally want to consider the degree of the claimant's previous interest in and contact with the child, the timing of contact proceedings and the commitment with which they have been progressed, when a decision is likely to be reached, what materials (if any) are already available or can be made available to identify pointers to where the child's welfare lies?

13. I acknowledge that in this instant case the First-tier Tribunal Judge did conclude that the contact proceedings were not brought in an attempt to circumvent the Immigration Rules and that contact was regularly exercised both for the benefit of the child and the Appellant.

14. In this case there is clear evidence that contact is being maintained, that it is not disputed that the Appellant and his son have an established and

ongoing relationship and I am satisfied the finding of such a relationship and that it is in the best interests of the child was one that the First-tier Tribunal Judge was entitled to reach albeit that the manner in which he has addressed the issue in his determination is far from clear.

15. The issue therefore remains as to whether this appeal should be allowed outside the Rules. It is necessary to draw some conclusions.

16. In any consideration of an Article 8 claim the starting point is the law itself. Article 8 states:

    (i) everyone has the right to respect for his private and family life, his home and his correspondence;

    (ii) there should be no interference by a public body with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interest of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedom of others.

17. In *LD [2010] UKUT 278 (IAC)* the Tribunal stated:-

    "The interests of the minor children and their welfare are a primary consideration in the balance of competing considerations in this case and their educational welfare as part of the UK educational system point strongly to their continued residence here as necessary to promote those interests."

18. The law was recently considered in *Zoumbas v the Secretary of State for the Home Department [2013] UKSC 74*. Paragraph 10 of that determination sets out the basic principles the court needs to follows:

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

    (2) in making that assessment, the best interests of a 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 paramount consideration;

    (3) although the best interests of a 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 a 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 a 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 of 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 a 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.

19. The Tribunal in *Gulshan* made clear and has repeated subsequently in *Shahzad (Article 8: legitimate aim) [2014] UKUT 00085 (IAC)* at paragraph (31):

> *"Where an area of the rules does not have such an express mechanism, the approach in R (Nagre) v Secretary of State for the Home Department [2013] EWHC 720 (Admin) ([29]-[31] in particular) and Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 640 (IAC) 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."*

20. Drawing all the threads from the relevant case law and applying the basic principles set out in *Razgar* I am satisfied firstly that the best interests of the child are best served by his having contact with his father and general contact with both parents albeit that they do not live in a family environment. Secondly that it would not be possible for contact to be maintained if the Appellant were to be removed from the UK. In such a situation there are exceptional circumstances that enable this case to be considered outside the Immigration Rules applying the test originally set out in *Gulshan* and the general principles set out in *Razgar* it would be a disproportionate interference with the Appellant's family life and not in the interests of immigration control to refuse the Appellant's appeal and consequently the Appellant's appeal will be allowed under Article 8 for all the above reasons.

Decision

21. The appeal under the Immigration Rules is dismissed.

22. The Appellant's appeal is allowed under Article 8 of the European Convention of Human Rights.

23. The First-tier Tribunal did not make an order pursuant to Rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. No application is made to vary that order and none is made.

Signed Date

Deputy Upper Tribunal Judge D N Harris