IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/16192/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 18th December 2014	**On 20th January 2015**

Before

UPPER TRIBUNAL JUDGE KING TD

Between

MR SYED SAULAT BUKHARI

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M Iqbal, Counsel instructed by Pride Solicitors
For the Respondent: Mr S Kandola, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Pakistan born on 16th March 1982.

2. He applied for leave to remain as a dependant of a Tier 1 (Entrepreneur) Migrant. The application was refused on 7th May 2013 because his wife had been refused leave to remain as a Tier 1 (Entrepreneur) Migrant and so the respondent was not satisfied that he fulfilled the requirements laid down in paragraph 319C(h) and 319C(b) of the Immigration Rules HC 395 (as amended). It was also refused on the basis that he himself did not have the required leave originally as is required under the Rules.

3. Subsequently the appellant's wife challenged her decision through judicial review. It was held that the decision, so far as she was concerned, was unlawful and fell to be remade. Leave was subsequently granted to her to remain as a Tier 1 (Post-Study Work) Migrant.

4. The appellant sought to appeal against the decision against him, which appeal came before First-tier Tribunal Judge Napthine on 18th February 2014. It was found that he did not satisfy the Immigration Rules. Nevertheless it was considered that his removal under the Section 47 removal notice would be contrary to law. Thus the appeal was allowed in respect of Article 8 of the ECHR.

5. The Secretary of State sought to appeal against that decision on the basis that an incorrect application of **Gulshan [2013] UKUT 00640** and **Nagre [2013] EWHC 720** had been made by the Judge.

6. The matter came for hearing in pursuance of that permission before myself and Lord Matthews, sitting as a Judge of the Upper Tribunal on 10th June 2014. We upheld the challenge made to the decision by the respondent. The decision was set aside to be remade in the light of our written decision arising from the hearing. The decision fell therefore to be remade upon a rehearing.

7. Very much at the heart of the original appeal lies the case of **Zhang [2013] EWHC 891 (Admin)**.

8. The nature of the case reflected the application of paragraph 391C(h) of the Immigration Rules. The appellant in that case, as indeed the applicant in this case, fell foul of the requirement set out under the original version of the Rules, namely that he could not make an in country application because he had not been granted the requisite category of leave to enter initially. The appellant in the case of **Zhang** was required to return to her home country on the same basis in order to make an out of country application simply because of that narrow requirement of the Rules.

9. Mr Justice Turner, in the case of **Zhang**, made it entirely clear that the application of a blanket requirement to leave the country imposed by paragraph 319C(h)(i) of the Immigration Rules was unsustainable. It was not consistent with the ratio of the decision in **Chikwamba**.

10. Following the comments in **Zhang**, the respondent indeed changed paragraph 319C(h) of the Immigration Rules with effect from 1st October 2013. It no longer imposed the same requirement and an application could be made in country.

11. As the appellant in the present case had made the application prior to the change in the Immigration Rules, it is contended on behalf of the

respondent that the refusal on that basis was lawful as he was subject to the old Rule and not to the new one.

12. We commented in our decision at paragraph 10 as follows:-

> "Although we recognise the important point of principle in this case, it is a matter of some concern that the Secretary of State seeks to maintain a decision on a version of the Immigration Rules which it was agreed should not continue and should be amended. We find that to be disconcerting and it may have the result of some unfairness. It seems to us, looking at the matter in a practical way, that the appeal should be dealt with in a pragmatic way, namely, that the claimant should submit a fresh application for leave to remain, relying on the new Regulation, and that the respondent should make a decision upon that without delay. We are told, however, by Mr Melvin that no such fresh application will be considered until the conclusion of this present appeal. We ask that commonsense prevails."

13. The matter thus came before me in pursuance of the joint decision to rehear the appeal. Mr Iqbal, who represents the appellant, invited my attention to his skeleton argument that he had produced on the previous occasion. Mr Kandola, who represents the respondent, indicated that there had been no reconsideration of the decision since the last attendance because no fresh application had been made. Mr Iqbal indicated that he had made no fresh application because of the specific indication that had been reflected in a comment by Mr Melvin that it would not be considered even if it had been.

14. It seems to me that this is a most unfortunate situation to have arisen. The appellant's wife has the leave that she sought, there is family life and there is no suggestion that has been made that a fresh application if made would not be successful. There seem, however, to be barriers being erected around this matter.

15. Mr Iqbal indicated that if the appellant made a fresh application outside the protection given to him by his 3C leave he would suffer considerable prejudice not of his making. The first prejudice would be that if he made his application within 28 days of the cessation of the 3C leave that would be considered but he would have no in country right of appeal were it to be made against him. Secondly he would not be entitled to continue working and contributing to the home and supporting his family as he does at present.

16. The stress of this particular matter has taken its toll upon the appellant, as I have been informed by Mr Iqbal and indeed by the appellant himself. The stress of the uncertainty of his status has badly affected his wife, who has for the last six months been receiving counselling for her stress and depression. The family are renting at a high rate every month and cannot take out a mortgage because the appellant's passport has remained with the Home Office for the past two years. I am invited to find that it is an intolerable situation essentially over a very narrow point of principle.

17. Mr Kandola invited me to dismiss the appeal against the Immigration Rules on the grounds that the correct Rules were applied. The remedy he submits was for the appellant to make a fresh application. Mr Iqbal invites me to find that the decision, taken in relation to the Immigration Rules, was unlawful and unfair such that it should not be upheld in any event. As to Article 8 he invites me to find that it was grossly disproportionate for the Secretary of State to rely upon a Rule which it has been accepted was defective and oppressive such that it had to be changed. There was little distinction between the case of the appellant and that of **Zhang** in his submissions.

18. He invites me to find in the alternative that the decision of 7th May 2013 is fundamentally flawed. There were two reasons for the decision. One is the issue of the appropriate leave to enter. More particularly it is predicated on the refusal of the appellant's wife, a refusal which was judged upon judicial review to have been unlawful such as to call for a review of that matter and the grant of leave, albeit on a slightly different basis to the original application, made in all the circumstances.

19. Mr Iqbal invites me to declare the decision of 9th May 2013 to be unlawful and to remit the matter back to the Secretary of State for a lawful decision to be made. He undertakes to supply to the Secretary of State a fresh application to meet the new Rules.

20. Looking at the matter as a whole, I find that that submission has considerable merit. The Secretary of State has granted the appellant's wife status in leave to remain in the United Kingdom. It is entirely clear from the reasoning of the decision of 7th May 2013 that the fact that the appellant's partner's application for leave to remain had been refused was a significant factor in the refusal. Clearly that taints all matters on that decision. It would not be realistic, as I so find to separate the technicality of leave from the practicality of the partner's refusal. It having been found upon judicial review that that refusal of the partner was unlawful and unjustified it follows therefore that such matters taint the decision of 7th May 2013 as to lawfulness. Although the Secretary of State is entitled to rely on the matter of principle, when that principle results in visible unfairness to an individual, unfairness which was accepted as a proper criticism of the old Rule by its change into the new format it seems that that also calls into question the very fairness of the decision.

21. In the circumstances therefore I find that the decision of 7th May 2013 is not in accordance with the law. To that extent the appeal is allowed. The decision in the matter is remitted to the Secretary of State for a fresh decision to be made in the light of such application under the new Rule as may be made to the Secretary of State.

22. In those circumstances it is perhaps unnecessary to make positive findings in relation to Article 8 of the ECHR. Family life exists as between the

appellant and his wife and a small child. She has leave to remain and is setting up an accountancy business freelance. She relies essentially upon the earnings of the appellant which are not inconsiderable. The stress of the pending separation for lack of clarity as to the appellant's status has had a marked and deleterious effect upon her health and I note evidence to that effect. She and the appellant are living under unacceptable strain. Given the finding in **Zhang** that the expectation of making an out of country application was unreasonable and unjustified, it was difficult to imagine what public interest there is in terms of proportionality to enforce any removal. In the circumstances I find that it is disproportionate to remove the appellant from the jurisdiction pending a proper and reasoned outcome to his immigration application.

23. Mr Kandola, on behalf of the respondent, has agreed that a fresh application by the appellant would be considered as part of the reconsideration process. In the circumstances it seems to be in the interest of both parties for the matter to be reconsidered under the Immigration Rules rather than my allowing the appeal outright under Article 8 of the ECHR.

24. In all the circumstances therefore the appeal both in respect of the Immigration Rules and the removal notice shall be allowed to the extent that the matters be remitted to the Secretary of State for her decisions to be made.

Notice of Decision

The appeal is allowed both under the Immigration Rules and Article 8 ECHR to the extent that the matter be remitted to the Respondent for a fresh and lawful decision to be made.

No anonymity direction is made.

Signed Date **16th January 2015**

Upper Tribunal Judge King