IAC-AH-SAR-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/25045/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 30 July 2015	**On 26 August 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE HANBURY

Between

MR SHERAZ HUSSAIN SHAH
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr D Shaw, a Solicitor
For the Respondent: Mr E Tufan, a Home Office Presenting Officer

REASONS FOR FINDING A MATERIAL ERROR OF LAW

Introduction

1. This is an appeal by the Secretary of State for the Home Department ("the Secretary of State") against the decision of the First-tier Tribunal ("FtT") to allow the appellant's appeal against the Secretary of State's decision that the UK would not be in breach of the of the Immigration Rules or the European Convention on Human Rights ("ECHR") and specifically Article 8 thereof ("Article 8") by returning the appellant to Pakistan.

2. First-tier Tribunal Judge Mailer gave the Secretary of State permission to appeal on 26 February 2015 because he considered it to be arguable that Judge of the First-tier Tribunal O'Rourke ("the Immigration Judge") had applied the incorrect threshold to the appellant's spouse joining him in Pakistan. It was at least arguable that the Immigration Judge had incorrectly decided that the respondent's decision breached Article 8.

Background

3. The appellant, a citizen of Pakistan, was born on 28 February 1985. He first entered the UK as a student on 13 June 2008 with valid leave until 30 September 2011. On 28 September 2010 he applied for a certificate of approval to marry Ms Payabba Ali, which was granted on 11 November 2010. The appellant applied for leave as the spouse of a British citizen on 20 May 2011 having gone through a ceremony of marriage with Ms Ali on 26 January 2011. On 28 July 2011 the application was refused. A request for reconsideration of that application had not been considered when on 15 November 2013 the appellant was arrested working illegally and served with an IS.151A as an overstayer. He was placed in detention. On 18 November 2013 the appellant asked to stay in the UK on the grounds that Article 8 rendered his continued detention and a removal unlawful. On 11 December 2013 he was released from detention and given temporary leave to remain in the United Kingdom. On 8 May 2014 the Secretary of State wrote to the appellant's representatives asking for any additional grounds on which that application was based and for him to provide supporting evidence. On 14 May 2014 the appellant's representatives responded to that request.

4. On 4 June 2014 the Secretary of State rejected the appellant's application under Article 8 because she considered the appellant's return to Pakistan would not breach the UK's obligations under the ECHR. The appellant did not have a good immigration history and there were insufficient factors justifying allowing him to remain in the UK having regard to the limited time he had spent here and the fact that Ms Ali could return to Pakistan to continue her family life with the appellant there.

5. The appellant appealed to the First-tier Tribunal ("FtT") on 11 June 2014 and his appeal came before the Immigration Judge on 19 January 2015. The decision was promulgated on 20 January 2015.

6. The Immigration Judge decided that, based on the evidence, it would be unreasonable to expect the sponsor to live in Pakistan. The Immigration Judge purported to consider Section 117B of the Nationality, Immigration and Asylum Act 2002 but decided that it was unreasonable to "expect (the sponsor) to adjust to a long-term or permanent existence in Pakistan". It was "pointless" to "send the appellant back to Pakistan simply for the purpose of him applying to enter the UK to rejoin his wife". The appellant's "somewhat 'chequered' immigration history" and the arguments in relation to the appellant's "precarious" immigration status did not "outweigh the couple's Article 8 rights".

The Grounds of Appeal

7. The grounds of appeal state that the Immigration Judge had made a material error of law because the appellant did not have any leave to be in the UK as a spouse and was therefore here precariously. It was not unreasonable for the appellant's wife to go to Pakistan with him of them to continue their family life there on a temporary or permanent basis. It was submitted that the Immigration Judge misunderstood or misinterpreted Section 117B of the 2002 Act and failed to understand that the appellant was in the UK unlawfully, as contended by the Secretary of State. Accordingly his immigration status was "precarious" for the purposes of section 117 B (5) and little weight should have been given to private life formed in such circumstances. The Immigration Judge failed to give adequate reasons for his decision to allow the appeal under Article 8.

The Hearing

8. At the hearing I heard representations by both parties. The appellant pointed out that his bundle of documents for the UT hearing had been supplied on 12 March 2015. I confirmed that I had a copy of that.

9. I was referred by Mr Tufan for the Secretary of State to the cases of **VW** and **MO [2008] UKAIT 00021.** In that case Sedley LJ, at paragraph 31, considered the question of reasonableness/seriousness and the need to strike a balance between the interests of the individual and the wider community. Mr Tufan pointed out that the new Rules had come into effect in 2012 and had overtaken the earlier case law. The new rules provided the factors to be taken into account when carrying out such a balancing exercise. The present case was made under the new Rules. The decision in the case of **Nagre [2013] EWHC 720 (Admin)** broadly upheld the approach in the new Rules and said that there have to be "compelling circumstances" justifying a departure from those Rules. Only where such circumstances existed would the finder of fact be justified in considering the case under the ECHR. I was also referred to a case called **Singh [2015] EWCA Civ 74** in the Court of Appeal, which states that it is not necessary to look at Article 8 in every case. It was submitted that compelling circumstances must be shown which justify departure from the Rules. I was also referred to **SS (Congo) [2015] EWCA Civ 387**. At paragraph 5 of that decision the Court of Appeal confirmed that **Nagre** contained an accurate statement of the law (see paragraph 5 thereof). Mr Tufan then went on to explain why the decision in this case was wrong. He pointed out that the Immigration Judge had launched into a free-standing Article 8 assessment without first considering whether it was appropriate to do so having regard to the requirements of the Rules. The Immigration Judge ought at least to have referred to Appendix FM and paragraph 276ADE of those Rules. The Secretary of State did not dispute the finding that there was a genuine and subsisting relationship between husband and wife, but no clear reason had been given as to why that family life could not continue in Pakistan. Mr Tufan also referred to paragraph 25 of the case of **Agyarko**, another decision of the Court of

Appeal made in 2015 (**[2015] EWCA Civ 440**). In paragraph 25 of that case Immigration Rules referred to the obstacles which existed to Mrs Agyarko going to live with the appellant in Ghana but the assertion that, because the appellant had lived in the UK all his life and had a job here, he could not relocate did not constitute an insurmountable obstacle. Difficulty or reluctance to relocate were insufficient reasons and I was referred to the **SS (Congo)** case at paragraph 51 in support of that submission. There, Lord Justice Richards explained why compelling circumstances had to be shown to justify a grant of leave to enter or remain where the Rules were not complied with.

10. Mr Tufan then referred to the other recent case of **Chen [2015] UKUT 189 (IAC)**. In that case the point was made that Appendix FM does not include the consideration of the question whether it would be disproportionate to expect an individual to return to his home country to make an application for entry clearance. There may be cases where there are no insurmountable obstacles to family life being enjoyed outside the UK and where temporary separation to enable an individual to make the appropriate application may not be disproportionate. The appellant had to place evidence before the Secretary of State that such temporary separation will interfere disproportionately with his protected rights. I was also referred to **Agyarko** at paragraphs 27-31 where the point was made that there may be a proper purpose in requiring a married partner to return to his own country.

11. Paragraph 21 of the Immigration Judge's findings appeared to show that he accepted that the appellant's status in the UK was precarious. Indeed, he went on to find at paragraph 22 of the Immigration Judge's decision where he referred to the fact that the appellant had a "chequered" immigration history. In the circumstances, he ought to have found it not disproportionate to require the appellant to return to Pakistan to make the appropriate application. The Immigration Judge had the documents to consider whether the appellant had satisfied the Immigration Rules. Whilst it was accepted that he met the income requirements he had not satisfied other requirements.

12. I then heard from the appellant who submitted that paragraph 21 of the decision showed that the Immigration Judge had adequately considered the provisions of the Immigration Act 2014. I was also referred to paragraph 22(iii) where the Immigration Judge made it clear that he found it disproportionate to require the appellant to return to Pakistan to make an application for entry clearance to the UK. The evidence was "impliedly" considered. It was submitted that in the event that I found that a free-standing application was not one the Immigration Judge should have considered, it was submitted that it should be remitted to the Secretary of State to make a fresh decision.

13. As far as the "free-standing principles" were concerned, it was accepted that the appellant did not qualify under the Rules. However, no part of the sponsor's income information was submitted until the hearing. There were

grave difficulties in relocating as the Immigration Judge found at paragraph 22. The sponsor had dealt with these difficulties in paragraph 16 of her witness statement. They were a cross-caste couple who were westernised. Objective evidence before the judge demonstrated how difficult it would be for them to settle in Pakistan. Both the case of **Chen** and **Agyarko** had post-dated the hearing. The appellant was relying on a family life, not a private life.

14. By reply, Mr Tufan said that no reasonable judge could have concluded that this appellant could not return to Pakistan and make an application there. I was referred to the definition of "precarious" given by Vice President Ockelton in the case of **AM** and urged to accept that the issue was whether the "seriousness" threshold was engaged or not.

Discussion

15. The Immigration Judge purported to decide this appeal, partly, under Rule 284 of the Immigration Rules. However, I agree with the respondent that this must be an error. The present application was not made until 18 November 2013. It was made on the basis that Article 8 made his removal unlawful.

16. The issue in the appeal is whether the Immigration Judge was entitled to conclude, as he appears to have, that it was "unreasonable to expect the sponsor to live in Pakistan".

17. The correct test (in EX.1 found in Phelan "Immigration Law Handbook 9th ed at 1155) was: whether there were "insurmountable obstacles" to the appellant's family life with the sponsor continuing outside the UK, not whether it was "unreasonable" for the respondent to expect the sponsor to live outside the UK. In addition, Section 117B (4) and (5) of the Nationality, Immigration and Asylum Act 2002 ("2002 Act") provided that:

> "(4) Little weight should be given to –
>
> (a) a private life, or
>
> (b) a relationship formed with a qualifying partner,
>
> that is established by a person at a time when the person is in the United Kingdom unlawfully.
>
> (5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious".

18. It was pointed out by Mr Tufan that the appellant did not have a good immigration history in that on 15 November 2013, having outlived previous periods of leave, he was found working illegally and served with an IS.151A as an overstayer. It was as a result of that notice that the

appellant's representatives (Berkshire Law Chamber) wrote requesting that their client's case be considered under Article 8.

19. It was submitted by Mr Tufan that the application should have been considered first of all under paragraph 276ADE (private life) and/or under Appendix FM (family life). Mr Tufan also made frequent references to the requirement for "insurmountable obstacles". It appears this requirement, introduced into the Rules on 9 July 2012, is to be found in Appendix FM Section EX at sub-paragraph (b) which deals with "genuine and subsisting relationships" with a partner who is in the UK.

20. Based on Mr Tufan's analysis, there is no doubt that the appellant's status in the UK throughout was "precarious" in the sense that he was dependent on the grant of further leave throughout his period of residence in the UK. His residence in the UK became unlawful when he was arrested for being an illegal overstayer on 15 November 2013. The appellant became engaged to Ms Ali on 14 February 2010 and claims to have married her the following January. It was therefore during his first period of lawful entry into the UK where his status was, technically, precarious. Thus, little weight should have attached to his private life formed here.

21. As far as the appellant's family life was concerned, this depended on the application of the "insurmountable obstacles" test to the facts of this case.

22. The sponsor was of Pakistani heritage and spoke Bengali, as the Immigration Judge acknowledged. She had also visited Pakistan on occasions. It appears from paragraph 25 of the refusal dated 4 June 2014 that in fact she had visited Pakistan on numerous occasions. This included visits throughout 2010, 2012 and 2013.

23. Whilst the Immigration Judge was entitled to reach a generous view of the extent of the family life that had been formed in the UK, his primary task was to consider whether the application could succeed under the Immigration Rules before he embarked on a "free-standing" analysis under Article 8. This is clear from a number of recent authorities, a number of which Mr Tufan referred me to, including **AM [2015] UKUT 260**, **Nagre [2013] EWHC 720 (Admin)** and **Gulshan [2013] UKUT 640 (IAC)**.

24. Those cases, which have been approved by the Court of Appeal, show that it is only exceptionally that a person who cannot succeed under the Immigration Rules ought to be eligible under Article 8. Every case should first consider the Rules and ask whether the appellant qualifies. If he does not, the tribunal would consider whether there were some exceptional circumstances justifying departure from the requirements of the Rules.

25. Here, whilst the appellant had formed a private life in the UK his immigration status had been precarious. Difficulties which were said to exist in the sponsor adjusting to life in Pakistan did not constitute exceptional circumstances. As a matter of law, the Immigration Judge

ought to have attached weight to the requirements of the Rules and the respondent's for refusing to grant leave to remain on that basis. I am in any event sceptical as to whether the sponsor would have been "in extreme danger" or to have "stuck out like a sore thumb" in Pakistan and it could be realistically be argued that there was no place in Pakistan that she and her husband could live safely.

26. The test in the case of **Chikwamba [2008] UKHL 40**, which deals with the reasonableness of requiring a temporary separation for the overseas national to return to his own country to comply with the immigration rules relating to partners, must now be applied in the light of later case law including **Chen [2015] UKUT 189.** In that case Upper Tribunal Judge Gill explained that the question was: whether a temporary separation to enable an individual to seek entry clearance disproportionate? It would be for the individual to put before the respondent evidence that such temporary separation would be a disproportionate interference with his protected human rights. I am not satisfied that the Immigration Judge asked this question, nor did he come to any conclusion on this point.

Conclusions

27. The respondent appears to have reached a detailed and careful analysis based on the Immigration Rules that applied at the date that the application was considered. Whilst the Immigration Judge made reference to Section 117 of the 2002 Act, he also referred to the wrong Immigration Rule and he should have made detailed reference to the requirements of paragraph 276ADE, Appendix FM and the insurmountable obstacles test in EX.1. In my view there were in fact no compelling circumstances justifying departure from the requirements of the Rules in this case and I would not describe the obstacles to the parties continuing their family life outside the UK as being "insurmountable".

28. At paragraph 21 of his decision, The Immigration Judge appears to have accepted that the appellant's status was "precarious" and that the respondent's decision was lawful (see paragraph 21). The circumstances were such that there may be difficulty or reluctance on the part of the sponsor to relocate but they did not constitute insurmountable obstacles as a matter of law (see paragraph 25) in the case of **Agyarko [2015] EWCA Civ 440**. Thus the circumstances pertaining in the appellant's case were not such as to entitle the Immigration Judge to conclude, as he seems to have, that there were insurmountable obstacles.

29. For these reasons the Immigration Judge's decision did contain material errors of law such as require it to be set aside.

30. Having carefully considered the evidence including the favourable findings that the appellant and sponsor were in a genuine and subsisting relationship, I nevertheless conclude that the correct course is to substitute the decision of this Tribunal which is to dismiss the appeal against the respondent's decision.

Notice of Decision

The Upper Tribunal finds a material error of law in the decision of the First-tier Tribunal so that the decision of the First-tier Tribunal must be set-aside. The Upper Tribunal substitutes its decision which is to dismiss the appeal against the respondent's refusal to refuse further leave to remain.

No anonymity direction was made by the First-tier Tribunal and I make no anonymity direction.

No fee award was made by the First-tier Tribunal and I make no fee award.

Signed Date

Deputy Upper Tribunal Judge Hanbury