Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/08023/2013

THE IMMIGRATION ACTS

Heard at Manchester	**Determination Promulgated**
On 2nd October, 2013	**On 24th October 2013**

Before

Upper Tribunal Judge Chalkley

Between

MUHAMMAD AWAIS LIAQUAT

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms L Mair of Counsel instructed by Silverdale, Solicitors
For the Respondent: Mr Harrison, a Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant was born on 1st March, 1988 and is a citizen of Pakistan.

Immigration History

2. On 27th May, 2012, the appellant entered the United Kingdom with leave to remain until 27th November, 2012, subject to a condition prohibiting employment and recourse to public funds. He had previously visited the United Kingdom in 2008 and 2009; on both occasions to visit his brother, a British citizen. In 2010 the appellant obtained a multiple entry visa and visited twice the United Kingdom in 2011. On the second occasion the appellant met Sobia Awais ("the sponsor"). They were married on 3rd January, 2012 and the appellant then returned to Pakistan in order to apply for a marriage settlement visa. He successfully passed, and obtained his English language certificate and also obtained a TB certificate. The appellant then returned to the United Kingdom and on 4th July, 2012 submitted an application for leave to remain as the spouse of a person settled in the United Kingdom, under paragraph 284 of Statement of Changes in Immigration Rules, HC 395, as amended ("the Immigration Rules").

3. The Secretary of State refused the appellant's application on 25th February, 2013, because the appellant could not meet the requirements of paragraph 284(i) of the Immigration Rules.

4. The judge noted that it was accepted on behalf of the appellant that he could not satisfy the Immigration Rules and went on to consider the appellant's Article 8 appeal. He noted that the appellant and sponsor had a child together, who was born on 28th June, 2012. The sponsor had herself been granted indefinite leave to remain in the United Kingdom on 30th April, 2010. In considering the appellant's Article 8 appeal the Immigration Judge appears to have approached the issue of proportionality on the basis that the appellant and his spouse and child will be separated, but he made no finding that the spouse and minor child could not reasonably relocate to Pakistan. He found that it would not be disproportionate for the family to be separated whilst the appellant re-applied for leave from outside the United Kingdom. The judge noted that reliance was placed on Section 55 of the Borders, Citizenship and Immigration Act 2007 and *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4.

5. The judge appears to be concerned that the appellant had "very blatantly evaded the Rules by his premature return [to the United Kingdom] before applying [for leave to remain]". He found that the appellant had "leapfrogged" over many other applications and deprived the respondent of being in a position to investigate thoroughly the requisite qualifications for entry as a spouse. He noted at paragraph 28 of the determination that the respondent was not in a position to remove the sponsor or child and said:-

> "…She gained status through the respondent's domestic violence policy although, with a sound marriage to a Pakistani subject, she has no need of the concession. The issue is whether the case law saves the appellant from having to apply and qualify in the proper manner. In this case, in so blatant and deliberate a circumvention of the Rules, I find it is not disproportionate for the appellant to have to so apply."

6. The judge went on to note that removal directions had been given and that the decision failed to accord with *Ahmadi* [2012] UKUT 00147 or (*Adamally and Jaferi*) *Section 47 removal decisions; Tribunal procedures*) [2012] UKUT 00414.

7. The grounds of appeal criticise the respondent for having failed to make any findings as to the nature and extent of the appellant's family life in the United Kingdom and the extent which a period of separation (while the appellant re-applies for leave from outside the United Kingdom) would interfere with that family life. I pointed out to Counsel that, reading the determination as a whole, it was clear that the judge did accept that there was family life between the appellant and the sponsor. In any event, there is of course family life between the appellant and his minor child. Mr Harrison accepted that if the appellant were to return to Pakistan to make application for leave, it is more likely than not that the Entry Clearance Officer Post would refer the application to London, given that the appellant has made application in the United Kingdom and been refused. I suggested to Mr Harrison that it was my understanding that in the event that the application were referred to London, this could involve delay of at least six months. Mr Harrison accepted that that was possible.

8. Mr Harrison confirmed that the sponsor had been granted indefinite leave to remain in the United Kingdom on 30th April, 2010. The child, Aminah was born on 28th June, 2012 and since she was born to a mother who was herself settled in the United Kingdom, Aminah was entitled to British nationality. Counsel told me that a British passport had been obtained for her.

9. Mr Harrison, quite properly in my view, accepted that the Immigration Judge had erred by failing anywhere to consider that the best interests of the child would ordinarily be with both his parents. It is clear that given that Aminah is a British subject, she cannot be expected to leave the United Kingdom, but the judge did not appear to have taken this into account. As a result he had failed to consider the best interests of the child.

10. I asked Mr Harrison if he was in a position to concede the appeal. He made it clear to me that he was not.

11. However, he quite rightly pointed out that it was very difficult for him to argue that in the circumstances of this appeal, the respondent's decision was proportionate.

12. I am satisfied that the Immigration Judge **did err in law** in his determination. The judge has noted the arguments set out in the skeleton argument, but failed to consider the best interests of the child. He accepted that the respondent was not in a position to remove the sponsor or the appellant's child, but he failed to consider whether it would be reasonable to expect the appellant's spouse and daughter to relocate to Pakistan. He did not identify what is in the best interests of the appellant's minor daughter.

13. I set aside the judge's decision.

14. The appellant's daughter was born on 28th June, 2012 and is a British citizen. She cannot be expected to leave the United Kingdom. Even assuming that the appellant met the requirements of the Immigration Rules (and on the evidence before the Immigration Judge it appeared at that time at least, he could not do so), were the appellant to return to Pakistan and make application for settlement there would be a separation for at least six months, and possibly longer. Of course, if the appellant did not meet the requirements of the Immigration Rules then the period of separation and thus, the extent of the interference with the appellant's Article 8 rights, could be considerably longer.

15. It clearly is in the best interests of Aminah that she should live with both her parents. Given that were the appellant to return to Pakistan to make application for settlement it could take at least six months and possibly longer, for the application to be considered, I have concluded that the appellant's removal would be a disproportionate interference with the appellant's Article 8 rights and **I allow the appeal.**

Summary

First-tier Tribunal Judge Frankish erred in law in making his determination which I set aside. **I re-make the decision and allow the appellant's Article 8 human rights appeal.**

Upper Tribunal Judge Chalkley