Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/08993/2012
IA/08994/2012

THE IMMIGRATION ACTS

Heard at Field House	**Determination Sent**
On 6 June 2013	**On 3 September 2013**

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

MR RANA TAHIR IQBAL
MRS SVITLANA FRANCHUK

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Ms T White, Counsel, instructed by Ali Sinclair Solicitors
For the Respondent: Ms A Holmes, Home Office Presenting Officer

DETERMINATION AND REASONS

1. These appeals were before me on 1 March 2013, following which I gave a written Decision. I now set out the background of this appeal, which is in substance what I wrote in my previous Decision.

2. The first appellant, who was born on 11 November 1972, is a national of Pakistan. The second appellant, who was born on 3 August 1968 is a national of the Ukraine. The first appellant entered into this country as a visitor in 2004, but at the expiration of his visa, he overstayed and has been here without permission ever since. The second appellant entered this country on a transit visa in 2003 and has been here without leave since then.

3. The appellants met some time after and it is accepted by the respondent that they are in a genuine relationship. They underwent a religious, Islamic marriage in February 2009 but this marriage is not recognised as a lawful marriage in this country.

4. The appellants applied for leave to remain in the UK on compassionate grounds and in reliance on Article 8 of the ECHR, but their applications were refused by the respondent, who also made a decision on 27 March 2012 to remove them from the UK pursuant to Section 10 of the Immigration and Asylum Act 1999.

5. The appellants appealed against this decision, and their appeals were heard before First-tier Tribunal Judge Gordon, but in a determination promulgated on 12 June 2012, she dismissed their appeals under Article 8. However, her determination was set aside by the Upper Tribunal in a determination dated 22 October 2012 on the basis that when considering whether it was proportionate to remove these appellants, she had failed to consider the effect of separation should they be removed to their respective countries of origin. The Upper Tribunal remitted the appeal for rehearing, and it subsequently came before First-tier Tribunal Judge Fox, sitting at Hatton Cross on 22 November 2012.

6. In a determination promulgated on 26 November 2012, Judge Fox dismissed the appeals.

7. The appellants appealed, yet again, against this decision, and although permission to appeal was originally refused by First-tier Tribunal Judge Chambers, the application for permission to appeal was renewed before the Upper Tribunal and permission was granted by Upper Tribunal Judge Kebede on 14 January 2013.

8. Following submissions on behalf of both parties, I found that Judge Fox's determination had contained material errors of law, such that his decision must be re-made by the Upper Tribunal. I gave my reasons as follows:

> "9. In my judgment, the determination of Judge Fox did contain a material error of law, such that his decision must be re-made by the Upper Tribunal. At paragraph 32, when considering the challenges which there might be to either appellant living in the other's country of origin, he stated that "I do not accept that these amount to insurmountable obstacles". This, as has been made clear by this Tribunal in *MF*, is not the appropriate test when considering whether or not removal is proportionate under Article 8. Further, having considered whether removal would be proportionate, at paragraph 37, Judge Fox states as follows:

> "The available evidence demonstrates that the appellants' private life has been established on the basis of their physical presence in the UK. This is insufficient to engage the respondent's obligations under Article 8 ECHR".

10. He then, at paragraph 38, finds that any interference with their family and private life is proportionate to the legitimate aim in accordance with Article 8(2) ECHR.

11. Mr McGirr, on behalf of the respondent, accepted that the finding that Article 8(2) was not engaged was not adequately reasoned, and I so find.

12. Although Judge Fox records at paragraph 22 that Judge Gordon had failed to consider the effect of separation in the context of Article 8, he does not himself appear to have considered this adequately. He states at paragraph 30 that "it must be observed that the certainty of the appellants' separation would be the result of continued non-cooperation by the appellants", and that "the appellants are not entitled to demand the facilitation of their relationship at their strict convenience". However, while accepting that there may be challenges to the appellants living in each other's country of origin (although these did not amount to "insurmountable obstacles") and while stating that "it is reasonable to conclude that the appellants have chosen to overstate potential difficulties to bolster their continued determination to migrate to the UK without the permission of the UK authorities", Judge Fox does not deal adequately with what these difficulties would be, and what, if any, separation would thereby be caused by the appellants' removal, and for how long."

9. I directed that the appeals should be re-listed before me on 6 June 2013.

The Hearing

10. I heard submissions from Ms White on behalf of the appellants and also submissions on behalf of the respondent from Ms Holmes. In the course of her submissions, Ms White relied upon the skeleton argument which she had submitted prior to the hearing, in which she set out the appellants' case with skill and precision. Both appellants had submitted witness statements, but Ms Holmes did not wish to cross-examine either of them. As I recorded the submissions contemporaneously, and these are contained within the Record of Proceedings, I shall not set out everything which was said during the course of the hearing, but shall refer below only to such parts of the submissions as are necessary for the purposes of this determination. I have, however, had regard to everything which was said to me during the hearing, as well as to all the documents contained within the file, whether or not these are referred to specifically below.

Appellants' Case, as set out in the Skeleton Argument

11. The appellants' claim can be summarised relatively briefly. The first appellant is a Pakistani male and the second appellant is a white Ukrainian female. It is accepted that they cannot satisfy paragraph 276ADE or Appendix FM of the Rules, but it is argued on their behalves that Article 8 should be considered on established jurisprudence outside the Rules, following *MF (Nigeria)* [2012] UKUT 393 and *Izuaza (Nigeria)* [2013] UKUT 45. It is submitted on their behalves that in the circumstances of their case, as set out below, their removal would be disproportionate.

12. The principal facts are not in dispute. The first appellant is a national of Pakistan and has never been in the Ukraine and the second appellant, who is a Ukrainian national, has never been in Pakistan. Both are overstayers, but they met shortly after arriving in this country, and did not leave because they wished to continue their relationship. It is accepted that they are in a genuine relationship, and they had an Islamic marriage in the UK in February 2009, which was genuine, although not recognised as a lawful marriage in this country.

13. Both appellants would suffer significant prejudice in the other's country, but in either case, there would be a very significant delay before either could obtain a visa to live in the other's country, if this was possible at all. On the evidence, it was unclear that the second appellant would be able to obtain leave to enter and live in Pakistan, and as a matter of practicality, the process might take five years. In relation to the Ukraine, although there was a theoretical possibility that a settlement application could be made, it was not at all clear that the first appellant would qualify (because it would be difficult to obtain an attested marriage certificate) and in any event a visa would take a very long time to obtain. The reality was that it was probably (or certainly very possibly) impossible for either to live in the other's country of origin; that there would at the very least be a very long period of separation before one or other of them was able to obtain the necessary visa to live in the other's country of origin; and even then, there would be significant prejudice.

14. There was a considerable body of evidence, including FCO advice, which suggested that racial prejudice was a significant problem in Ukraine. Life for the second appellant in Pakistan, as a white Christian woman who was married to a Muslim man, would also be extremely difficult. Although it was not submitted that in either case the obstacles faced would be sufficient to reach the Article 3 threshold, nonetheless, this was a relevant factor when considering proportionality under Article 8.

15. The appellants' case is summarised succinctly at paragraph 21 of the skeleton argument, as follows:

> "[The appellants] have a genuine family life established in the UK over some 6-7 years. They met here, they have been able to carry on that family life here, and they have never enjoyed that family life anywhere else. It is accepted that their presence has, save for brief periods at the outset, been without leave, but they have been supported by [the first appellant's] work rather than by any access to public funds. There is no suggestion of any breach other than overstaying. The decisions made will unquestionably separate them. The length of separation is unclear but cannot, on the evidence, be thought to be other than protracted. There is a risk that it will be indefinite. Even if one of them is able, from his/her country of nationality, to gain admission to the other's, which is entirely uncertain, there are difficulties amounting to more than mere inconvenience facing each of them in the other's country. Ironically, while Pakistan might be more willing that Ukraine to recognise an Islamic marriage celebrated in the UK (reducing the risk of outright refusal of entry), the risks to [the second appellant] of life in Pakistan are clearer, more severe and far better documented than the risks for [the first appellant] in Ukraine. For all these reasons it is submitted

that these decisions clearly represent a disproportionate interference with a family life which cannot reasonably be expected to be carried on anywhere else but in the UK."

Submissions on behalf of the Respondent

16. On behalf of the respondent, Ms Holmes accepted that the relationship between the appellants was genuine, as had been accepted in the refusal letter.

17. Were it not for the fact that the relationship was genuine, the respondent would be taking a much firmer line, because these appellants had been abusive of this country's hospitality. However, Ms Holmes did not feel she could go behind the country information about either Ukraine or Pakistan. As far as she was concerned, she was aware that it could be potentially very difficult for either party if they were obliged to travel to each other's countries. At the very least, it would appear they would have some difficulties.

18. While some points could be made with regard to the country information, nonetheless she would find it very difficult to argue that the removal of these appellants would in the circumstances be proportionate, but that was a matter for the Tribunal. Whatever reservations she might feel about the evidence, it was clearly not easy being an outsider in either country. A lot would be down to luck.

Submissions on behalf of the Appellants

19. Ms White referred the Tribunal to the evidence which was in the appellants' bundle relating to Pakistan, and particularly the COI Report. In a nutshell, an overview of the evidence was that Pakistan was a patriarchal society where religious minority groups such as Christians (the second appellant is a white Christian) are not just subject to societal and legal discrimination, but, as outlined at 19.10 of the COI, and at 19.9, religious minority groups are subject to frequent violence. The evidence was summarised at paragraph 19 of the skeleton argument. Women, as a social group, are discriminated against as are religious minority groups. None of this societal or legal discrimination, or acts of vigilantes, or abuse of the blasphemy laws are effectively stopped by the government or police. These two appellants would stand out "like a sore thumb". In a place like Pakistan, for a Muslim man to marry a white Christian woman who does not convert would be seen as an affront. The first appellant would be seen as someone who was tolerant of non-Islam and could therefore be a target.

20. In answer to a question from the Tribunal as to whether this was accepted on behalf of the respondent, Ms Holmes replied that although she was sure this was all true, it could not apply in every case. In answer to a further question as to whether in those circumstances it would be reasonable to expect the appellants to take this risk (assuming that the second appellant would get permission to go to Pakistan) Ms Holmes replied that that would depend on how dim a view the Tribunal was to take of the immigration offending. Also, the Tribunal might bear in mind that this couple was resourceful.

21. Moving on to what the couple would expect in the Ukraine, the respondent had not disputed that neither of the appellants' families would be welcoming in either country, and they did not speak each other's home languages.

22. With regard to the situation in the Ukraine, the report from the Asylum Research Consultancy, which was in the appellants' third bundle was summarised at paragraph 18 of the skeleton argument.

23. As Ms Holmes, on behalf of the respondent, in answer to a question from the Tribunal, stated that she did not disagree with the summary at paragraph 18 of the appellants' skeleton argument, I set this out below, as follows:

> "18. That evidence [relating to the situation in the Ukraine] has now been supplemented by the report from the Asylum Research Consultancy, in [the appellants' 3rd bundle]. The length of the document is explained by the inclusion by the reporter not only of relevant excerpts but then of full citations from documents on which she has relied. This enables her assertions and conclusions to be checked against the original material, but that is not a necessary exercise. The meat of the report is at pages 2-10. The conclusions can be summarised as follows:
>
> 18.1 There is significant evidence of state racism in Ukraine. This includes particularly acts by the Police, who should be the source of protection from crime, not its instigators. Instances, vouched by Amnesty International, the US State department and other reputable sources, extend from harassment through unlawful detention to extortion and torture. Victims of xenophobic attacks are themselves prosecuted. Officials are not (see pp2-3);
>
> 18.2 There is significant evidence of societal racism. NGOs working in this field say it is increasing. There is a significant problem of under-reporting (p4). People of 'different' appearance are at risk of physical attack, frequently severe. In 2012 an ultra-nationalist party won 10% of the vote (p5). 44% of foreign nationals questioned had suffered race-related harassment (p6). Prejudice is rife in private sector employment, and there are few, if any cases where anti-discrimination provisions are applied. There is prejudice specifically against Muslims, who are conflated in the public mind with terrorists (pp6-7);
>
> 18.3 There is no effective protection. The government formally recognises the existence of a problem but in practice officials play it down (p7). There are no comprehensive provisions on discrimination, or for effective enforcement or redress. 5 people were convicted of inciting hatred in 2011, of whom 4 were then amnestied and the fifth was freed because of 'active repentance' (p8). There is virtual impunity for racists. Two thirds of Ukrainians (which must mean of all ethnic origins) distrust the police (p9).
>
> In a nutshell, if [the first appellant] can obtain a visa to enter Ukraine he will face significant risks of police harassment or worse, violent racist attacks with no redress, hostility as a Pakistani and as a Muslim, and rampant prejudice if he tries to find a job.

> Being seen as someone who has carried off a white Ukrainian woman is not going to endear him to local racists either."

24. With regard to the appellants' immigration history, having formed their relationship in 2004, this was the reason why they did not return to their respective countries. The reason they worked was a question of economic survival.

25. With regard to the visa problems which each appellant would have, it was very difficult to get information. However, both embassies (that is the Ukrainian and Pakistani) have said it would take time, and the respondent had not shown that entry would be possible to either country.

26. At this point, in answer to a question with regard to Pakistan, Ms Holmes told the Tribunal that the respondent's position had to be that it was not known at present what needed to be done to acquire settlement in that country.

27. With regard to Ukraine, it was submitted that it was very unlikely that the first appellant would get a visa (and the Tribunal was referred to the evidence on this point). Within their limited means, the appellants had done what they could to seek information on settlement. Although it might not be impossible for the first appellant to get a visa, because they could get married lawfully, this would take an unspecified time.

Discussion

28. As accepted on behalf of the appellants, their appeals cannot succeed under the Rules. However, in light of the guidance given by this Tribunal in *MF* and *Izuazu*, I must consider their Article 8 claims outside the Rules, under existing jurisprudence, but giving due weight to the respondent's policy, as now set out in the Rules.

29. The facts are not in dispute. The appellants both remained here for many years after their visas had expired, but a major factor in their decision to overstay for so long was that this seemed the only country where their relationship could continue. If they are removed, it is by no means certain that either would be allowed to settle in the other's home country, and in any event it is more likely than not that the parties would be separated for a significant period of time before an application by either was even considered. Also, there would be significant difficulties either in the first appellant going to the Ukraine or the second appellant going to Pakistan.

30. Other than that, as Ms Holmes fairly put it, both appellants have abused this country's hospitality (by remaining without leave and working without permission), there are no other aggravating circumstances.

31. It is in the context of this background that I now consider the questions posited by Lord Bingham in *Razgar*.

32. Clearly the appellants have a family life together, and, because their removal would involve a separation for an open-ended period, their Article 8 rights would be

engaged. Removal would be lawful and would be necessary for the purpose of maintaining fair and effective immigration control (which promotes the economic wellbeing of the country). The key question in this case, as it is so often, is whether removal would be proportionate for this purpose, once all the factors are taken into account.

33. This is a finely balanced decision. Any Tribunal must, in the words used by Ms Holmes, take a "dim view" of those who, like these appellants, knowingly overstay after their visas have expired. Also, they must have been aware while their relationship was blossoming, that their immigration position was precarious, and that they had no legitimate right to remain in this country. However, I do take note of the fact that it would have been at best very difficult for either to move to the other's home country, and that even if permission had been granted by one or other of these countries, they would have faced serious difficulties.

34. I find, on the balance of probabilities, that the effect of removal on this couple would be that they would be separated for a significant period, which is currently unknown. The effect on their family life would be substantial. I also accept that if allowed to stay, this couple would be unlikely to be a drain on this country's resources and that other than their immigration history, there are no aggravating features as regards their stay in this country.

35. Having taken all these factors into account, and in particular that on behalf of the respondent, Ms Holmes very fairly told the Tribunal that she would find it very difficult to argue that the removal of these appellants would be proportionate, I am just persuaded that it would not be. It follows that their appeals must be allowed.

Decision

I set aside the determination of First-tier Tribunal Judge Fox as containing a material error of law, and substitute the following decision:

The appeal of these appellants is allowed, on human rights grounds, Article 8.

Signed: Dated: 21 August 2013

Upper Tribunal Judge Craig