Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/19308/2012

THE IMMIGRATION ACTS

Heard at Field House
On 3 July 2013

Determination Promulgated
On 24 July 2013

Before

UPPER TRIBUNAL JUDGE STOREY
UPPER TRIBUNAL JUDGE POOLE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR K B

Respondent

ANONYMITY ORDER MADE

Representation:

For the Appellant: Mr J Parkinson, Home Office Presenting Officer
For the Respondent: Mr L Fransman and Mr S Sayeed, Counsel, instructed by Gherson & Co

DETERMINATION AND REASONS

1. The respondent (hereafter "the claimant"), a citizen of India, last entered the UK on 2 March 2011 on a multiple entry visit visa. Several weeks before this was due to expire he applied for leave to remain in the United Kingdom as the representative of an overseas business. On 23 August a decision was made to refuse to vary leave to remain and to remove him by way of directions under s.47 of the Immigration, Asylum and Nationality Act 2006.

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2. The claimant's appeal was heard by Designated Judge Peart and Judge A R Williams ("the panel"). On 26 February 2013 they promulgated a decision dismissing the appeal under the Immigration Rules but allowing it under Article 8 ECHR. (They also found the decision of the appellant (hereafter "the SSHD") under s.47 of the 2006 Act to be "not in accordance with the law" but the respondent does not seek to challenge that aspect of the panel's decision.) The panel hearing was heard in camera and subject to anonymity directions. With the agreement of both parties we have maintained the anonymity directions and likewise heard the case in camera.

3. The panel's decision on Article 8 is challenged vigorously by the SSHD on two grounds, the second seen by the judge who granted permission to appeal to split into two.

4. At the outset of the hearing Mr Parkinson sought to renew the application of the SSHD for an adjournment which had been made on 14 and 27 June 2013. Reminding the panel that the Home Office Presenting Officer who had represented before the First-tier Tribunal (Mr Wilding) had already sought an adjournment on the basis that he had a long-standing holiday booked for the date fixed for hearing, Mr Parkinson submitted that the bundles in the case were voluminous and that he had had less than one day to prepare. Fairness dictated that the Tribunal should adjourn so that there was adequate time for him to prepare. Mr Fransman opposed this application. Having heard both sides' submissions, we ruled that the hearing would proceed. The SSHD's initial application for an adjournment, based on her wish for the case to be presented by the same Presenting Officer who had appeared before the First-tier Tribunal (Mr Wilding), had been refused on 14 June and she would have been fully aware by then at the latest of the need to make alternative plans for representation. Yet even though Mr Parkinson confirmed that Mr Wilding remained at work up until the day before the hearing, the SSHD had not even produced a skeleton argument. Further, as will become apparent from what we say below, the SSHD's grounds of appeal were narrowly drawn and did not challenge the panel's primary finding of fact and hence detailed inspection of the background documents was unnecessary. In such circumstances our decision was that it was not in the interests of justice that the hearing should be adjourned. We explained that only if we decided that the First-tier Tribunal had erred in law and that its decision should be set aside, would we consider a possible need for the SSHD to be given more time to prepare the case, for then the background documentation could be extremely relevant.

5. Having been informed of the rejection of his application to adjourn, Mr Parkinson served a detailed typed skeleton argument. Although late in the day we were grateful to receive it and, like that prepared by Mr Fransman (which was served in accordance with Tribunal directions), it has assisted us in deliberating in this case. We do not summarise the oral submissions we received from Mr Parkinson, Mr Fransman and Mr Sayeed but we would record our gratitude to all three for the clarity of their arguments.

6. The SSHD's first ground alleged that the First-tier Tribunal failed to have regard either to the relevant sections of the new Immigration Rules or to those Rules as a detailed expression of government policy on controlling immigration and protecting the public. In relation to the latter aspect, the grounds cited **MF (Article 8 new rules) Nigeria [2012]** which at [48] stated:

> "… in our view provisions in the new rules dealing with Article 8 claims have two functions:
>
> (a) They create new provisions which must be given legal effect, although it is left as a matter for the tribunal and courts whether their application is contrary to a person's Article 8 rights; and
>
> (b) They operate to enhance judicial understanding of the 'public interest' side of the scales."

Discussion

7. So far as concerns the alleged failure to have regard to "relevant sections of the Immigration Rules", Mr Parkinson conceded that this ground had little traction because the claimant's application had been made under Part 8 of the Rules and the new Rules had not sought to incorporate any specific Article 8 considerations into that Part, certainly not in relation to the provisions made for sole representatives of an overseas business. The SSHD refusal letter had sought to rely on the claimant's failure to meet either the requirements of Appendix FM (dealing with family life) or the private life provisions of paragraph 276ADE, but the claimant had not sought leave to remain under these provisions and they were not applied to applications under Part 8. The lack of specific Article 8 provision in the Rules in relation to sole representatives of an overseas business was a clear demonstration of the finding made in **MF** that in relation to Article 8 the new Rules were not a "complete code". Finally, as conceded by Mr Parkinson, the new Rules were inapplicable to the claimant as his application was made before they came into force and stood to be decided under pre-existing Rules.

8. As regards the contention that the panel erred in failing to have judicial regard to the new Rules as a detailed expression of government policy on controlling immigration and protecting the public, we are not persuaded that the First-tier Tribunal's failure evinces any such failure. It is true that the panel makes no express mention of **MF**, but both parties had addressed this aspect of **MF** in their submissions and it cannot be suggested that the panel was not fully aware of the need to balance the claimant's Article 8 rights against what it described in [81] as "the wider rights and freedoms of others in the general public interest".

9. In any event, we doubt (although it is not necessary for us to reach a definite conclusion on the matter) that **MF** intended that the enhanced judicial understanding of the "public interest" side of the scales afforded by the new Rules was to be applied

in cases falling under the old Rules. As correctly noted by Mr Sayeed, the panel in **MF** was careful to qualify its attribution of such an enhanced understanding to cases falling under the new Rules: see [38] and [60] of **MF**.

Ground 2

10. Turning to the second ground, the SSHD alleged that the First-tier Tribunal panel failed to give adequate reasons for concluding that the refusal decision was disproportionate. The SSHD sought first of all to rely on what both parties have described as "the precariousness point", it being argued that established case law had identified that "[k]nowledge on the part of one spouse at the time of the marriage that the rights of residence of the other were precarious militates against a finding that an order excluding the latter violates Article 8" (**Mahmood R (on the application of) v SSHD [2000] EWCA Civ 315**). The claimant had entered as a visitor and had sought to apply for leave to remain in full knowledge that his stay in the UK was limited and that he had not obtained the correct entry clearance for making such an application. His wife joined him in March 2011 and she had a limited basis of stay herself as a Tier 1 (Investor) Migrant and once her leave expires she may be required to return to India. Further, the appellant's son, who lives with the claimant and his wife, also only has limited stay in the UK having been granted leave to remain as a student until July 2016.

11. It was pointed out, secondly, that the First-tier Tribunal panel had failed to provide reasons as to how the claimant's ties to his wife and her stepchildren went beyond normal emotional ties. Prior to his arrival in March 2011, the claimant had not resided in the UK on a full-time basis. His stepdaughter had never been reliant upon him in the past.

12. It was pointed out, thirdly, that the First-tier Tribunal panel had failed to give adequate reasons why the claimant and his wife could not return to India and continue their relationship together as they had done for many years or why the claimant could not return to India and seek to visit his wife in the UK or vice versa. Whilst at [92] the First-tier Tribunal had found that the claimant would still face a risk of difficulties in India, it had failed to provide adequate reasons as to why this was so. This was important because it had found that in India no criminal charges had been levelled at the claimant in the 3 years since he left India. The Tribunal had failed to provide reasons as to why the claimant could not continue his family life from outside the UK.

13. A similar point was advanced in relation to the claimant's private life, it being emphasised that he had only resided in the UK since March 2011; a period which was "neither lengthy nor significant".

Discussion

14. Concerning the precariousness point, we would accept that the panel did not address it specifically, but they did record submissions they received regarding it: see [56] (Mr Wilding) and [61] (Mr Fransman). We consider that in that context the panel's clear findings that:

    (i) the claimant had come to the UK with genuine visitor intentions;

    (ii) he had only been prevented from travelling to Dubai to make an entry clearance application from there by the decision of the Indian authorities on 3 March 2011 to formally revoke his Indian passport; and

    (iii) his wife had not misrepresented her husband's position when she applied for and obtained leave to enter as a Tier 1 Investor,

    all fed into its finding at [66] that the claimant had been "in effect stranded in the UK ever since" and at [89] that "he has not been in breach of immigration law and has behaved as a perfect citizen". We note that the respondent's grounds do not challenge these strong findings of fact and in our view these findings entailed that the "precariousness" point had limited application. It was not a case where an applicant had entered into family or private life relationships despite knowing his own immigration status was precarious (which was what Phillips LJ had in mind in **Mahmood**). The panel clearly considered that the claimant's stay in the UK had not been contrived or manufactured: he was the victim of circumstances outside his control.

15. The points made by the SSHD in relation to the claimant's family life ties are not entirely clear-cut. It appears as drafted to argue that a man's relationship with his wife is not family life simply because they do not always live together for reasons of business. That is contrary to authority. That aside, the points founder on the plain fact that at [82]-[87] the panel did provide reasons for finding that the claimant's relationship with his wife, his (student) son and his stepdaughter fell within the meaning of "family life". The panel's emphatic finding at [87] is that the claimant's family life is "indeed centred in the United Kingdom and is of very great strength". Such finding was in any event amply borne out by the supporting evidence.

16. We are at a loss to understand the contention that the panel failed to provide adequate reasons as to why the claimant and his wife could not return to India or he return to India and apply to visit his wife. The panel devoted considerable effort to setting out under the heading of "Our Findings" why it accepted the claimant's evidence that it would be unsafe for him to return to India.

17. It was submitted by Mr Parkinson, with reference to [5] of the written grounds of appeal, that the panel had overlooked that no criminal charges had been brought against the claimant by the Indian authorities in over 3 years and so its findings about lack of safety were unreasoned. It is true that the only specific conclusion that is stated on this issue is in brief terms: at [88] the panel refers to the "very real risk

that he may well face in his home country". But at [62]-[66] the panel set out the state of the evidence as to these risks in considerable detail.

18. It was further submitted by Mr Parkinson that the panel's findings failed to take into account the evidence before it indicating that the claimant would have adequate protection in India. He drew our attention to the judgment of the High Court of Delhi which had indicated that protection would be available. In our judgment this submission is ill-founded. Whilst it correctly highlights the fact that the evidence as to protection was not all one-way, it incorrectly overlooks that there was also considerable evidence going the other way. In our view it was within the remit of the First-tier Tribunal, having looked at all of the evidence for and against, to have concluded there was a very real risk. It was not challenged by the respondent that the claimant had only made the decision to come to the UK on his visit visa when he had found out on his return to India on 13 May 2010 that his police protection had been reduced to two policemen, both unarmed (up to 11 May he had had eight fully armed police in two cars). The unchallenged evidence was that the claimant had been the subject of death threats from the head of the Mumbai underworld following unequivocal rejection by him of requests that he facilitate the fixing of cricket matches. As a result the Mumbai police had provided the claimant's son with 24 hour security whilst the claimant was in South Africa. There was credible evidence of the existence of a plan to assassinate the claimant and an attempt had in fact been made on his life in December 2009 when he was in Thailand. The continuing dangers presented to the claimant's life, and the political background to why the Indian authorities had drastically reduced their level of protection of the claimant, were attested to by credible witnesses. The panel's assessment of risk was entirely within the range of reasonable responses to the evidence.

19. As regards the claimant's private life, we have no doubt that the panel fully took into account that it was of relatively short duration, although the claimant had a history of visiting the UK previously and had established ties and friendships here. So far as concerns the SSHD's contention that the claimant's residence was "neither lengthy nor significant", it seems to us that this fails to have regard to the panel's finding that the claimant's private life, although of relatively brief duration, had qualitative significance because the claimant "through his business is able to help the economic well-being of the country … This [claimant] is a man of considerable substance and the potential economic benefits to this country are legion". The panel properly directed themselves in accordance with **UE (Nigeria) [2010] EWCA Civ 975** that an individual's value to the community is relevant to the Article 8 balancing exercise. As noted earlier the panel did give adequate reasons why neither family life nor private life could be continued from India.

Ground 3

20. We refer to the closing point made in the written grounds as Ground 3 because that is what the judge who granted permission termed it. In his formulation the SSHD's argument is that the panel misdirected itself with regard to the application of the relevant Immigration Rule, specifying paragraph 147 of the Immigration Rules whereas the SSHD considered that the only valid rule was paragraph 144.

21. This ground concentrates on what the panel discussed at [71]-[73] wherein it said that paragraph 144 was the correct immigration rule and one that it could consider of its own motion.

22. We think this ground misses the point. It was obvious from the basis on which the claimant had made his application and the respondent had responded to it that there was no issue between the parties that the claimant could not succeed under either paragraph 147 or paragraph 144, paragraph 147 because it was confined to extension of leave for persons who had already been granted leave as a representative of an overseas business and established themselves as such a representative, and paragraph 141 because its requirements included that of possession of entry clearance. Hence the only basis for consideration of these Rules was as a relevant framework of consideration of how close or far the claimant had come in terms of meeting the substantive requirements of the Rules.

23. In our judgment this was all that the panel had in mind when it stated that paragraph 144 was the "correct Immigration Rule for us to consider". Significantly, the panel's specific finding – that the claimant met "all the substantive requirements of paragraph 144" – was not challenged in any way by the SSHD. To the extent that the SSHD seeks to submit that this finding was wrongly considered to be relevant to the Article 8 balancing exercise, we strongly disagree. It is apparent from the case law cited by the panel itself at [77] - (**Chikwamba [2008] UKHL 40**; **MA (Pakistan) [2009] EWCA Civ 953** and **SZ (Zimbabwe) [2009] EWCA 590**) - that such considerations are relevant. The consideration of the fact that the claimant met the substantive requirements of paragraph 144 and that he could not go abroad and claim entry clearance under paragraph 144 (because his passport had been revoked) lent considerable force to the panel's assessment that the decision constituted a disproportionate interference with his right to respect of private and family life. In our judgment Ground 3 is a damp squib.

24. In our judgment this is a case in which the factual foundation of the claimant's case was extremely strong and the panel was amply justified in making the findings which it did. The SSHD did not challenge virtually any of the primary findings of fact and those limited aspects of the panel's decision she chose to challenge have been found to be adequately reasoned. In such circumstances it would be wholly unjust of us to interfere in those findings.

25. For the above reasons:-

The decision of the First-tier Tribunal to allow the claimant's appeal on Article 8 grounds shall stand.

The decision of the same Tribunal to find the s.47 decision not in accordance with the law shall also stand.

Signed Date

Upper Tribunal Judge Storey