Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/11642/2012

THE IMMIGRATION ACTS

Heard at Field House
On 19 September 2013

Determination Sent
On 16 October 2013

Before

UPPER TRIBUNAL JUDGE KING TD

Between

ALI AKBAR SHAHZAD

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss N Bustani of Counsel, instructed by Paul John & Co Solicitors.
For the Respondent: Mr L Tarlow, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Pakistan, born on 21 May 1981.

2. On 10 February 2012 he applied for entry clearance to settled in the United Kingdom as a spouse.

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3. The application was refused on 21 May 23012 on the limited basis that he had failed to demonstrate that he had sufficient knowledge of the English language and failed to provide evidence that he had obtained level A1 or above in speaking and listening from a provider on the approved UKBA list.

4. Since that occasion he has passed the requisite language test with an approved provider.

5. The appellant sought to appeal against this decision which appeal came before First-tier Tribunal Judge Wiseman on 24 May 2013. The Judge dismissed the appeal both in respect of the Immigration Rules and under Article 8 of the ECHR.

6. Grounds of appeal were submitted against that decision. Leave to appeal was granted.

7. Thus the matter comes before me in pursuance of that grant.

8. Fundamentally there were two arguments advanced before the First-tier Tribunal Judge. The first argument was that the Immigration Rule was itself defective because it sought to refer to material, namely the list of providers, when that list itself had not been approved by Parliament. Reliance was placed upon the case of **Alvi v SSHD [2012] UKSC 33**. Miss Bustani, who represented the appellant on that occasion and represents him before me, invited me to find that the judge had not engaged with that aspect of the matter in any event. The second matter raised was that of Article 8 given the situation and circumstances of the appellant and his family. Once again it was submitted that the judge did not fully engage with that matter.

9. The case of **Alvi** was a decision of the Supreme Court of the United Kingdom [2012] UKSC 33, judgment being given on 18 July 2012.

10. The appellant in that particular case was a citizen of Pakistan who obtained leave to remain in the United Kingdom as a qualifying work permit holder. The subsequent leave was refused on the basis that he did not hold one of the skilled occupations required by the Rules.

11. Essentially there were a list of skilled occupations required by paragraph 82(a)(i) of Appendix A to the Immigration Rules. The argument advanced was that the list of skilled occupations was not part of the Immigration Rules as the document in which that list was set out had not been laid before Parliament under Section 3(2) of the Immigration Act 1971. At the Court of First Instance his appeal was dismissed on that ground on the basis that it was the intention of Parliament that the list of skilled occupations, which was to be found in the UK Borders Agency's website, should be an intrinsic part of the Immigration Rules or subject to specific Parliamentary approval. The Court of Appeal, however, allowed his appeal

on that argument and quashed the Secretary of State's decision. The Secretary of State sought to appeal to the Supreme Court which appeal was dismissed.

12. Section 3(2) of the 1971 Act provides that the Secretary of State shall from time to time lay before Parliament statements of the Rules, or any changes in the Rules, laid down by him as to the practice to be followed in the administration of the Act for regulating entry into and stay in the United Kingdom.

13. It was common ground that the Code of Practice document referred to in refusal letter, which stated that the appellant's job role which was to be below NSVQ level 3, had not been laid before Parliament under this subsection.

14. Thus questions as to the meaning and effect of Section 3(2) of the 1971 lay at the heart of the appeal.

15. It was noted that the codes contained a list of occupations that are recognised by the Secretary of State as sufficiently skilled to qualify under Tier 2. The code set out details about what was required and the various levels of occupation.

16. The issue was noted in paragraph 21 of the judgment. The question which lay at the heart of the appeal was whether the reference in paragraph 82(a)(i) of Appendix A to the United Kingdom Border Agency's list of skilled occupations was sufficient to satisfy the requirements of Section 3(2) of the 1971 Act. Neither the statement in the preface to the list that the job must be skilled and NSVQ level 3 or above be nor the list itself which showed that Mr Alvi's occupation was below that level formed part of the Immigration Rules as laid before Parliament.

17. The judgment is wider ranging considering the negative resolution procedure, the **Pankina** line of cases.

18. At paragraph 55, in particular, it was recognised that an enormous amount of detail had been built into the Immigration Rules. It made good sense for guidance and codes or practice which are designed to assist those who must make the system work to be kept separate from the Rules themselves. There was, however, a balance to be made between what ought to be in the Immigration Rules themselves and what can properly be dealt with by referring to extraneous material. It is recognised that the balance has not always been struck in the right place.

19. What is to be considered as part of the Rule and what should be guidance was recognised not to be of particularly easy decision to make.

20. It was noted in paragraph 57 that the codes contain material which is not just guidance but detailed information, the application of which will

determine whether or not the appellant will qualify. It was felt that any requirement which, if not satisfied, will leave to an application for leave to enter or remain being refused is a Rule within the meaning of Section 3(2). The provision which is of that character is a rule which in the ordinary meaning of that word. Thus a fair reading of Section 3(2) requires that it be laid before Parliament. The problem facing the Supreme Court was how to apply that simple test to the material that was before them in the Alvi case. The challenge mounted to the Secretary of State's decision by Mr Alvi was upheld. As was found at paragraph 66

> "The statements in the code that all qualifying jobs must be skilled with NSVQ level or above and that the job of a psychotherapy assistant is below that level both as to a Rule that ought to be laid before parliament under Section 3(*2) of the 1971 Act."

21. For similar reasons the other law lords agreed with that decision.

22. It was highlighted by Lord Walker at paragraph 111 that the appeal was an unusually stark illustration of the tension in public law decision making between flexibility in the decision making process and predictability of its outcome. The conclusion of non-mandatory or advisory material cannot affect the validity of the Rules, where it may make them longer and possibly less clear. The omission of a mandatory provision – that is, a condition which an appellant must satisfy if the application is to succeed – would be a serious defect.

23. Miss Bustani seeks to argue that the same principles applies to the list of approved language providers which imposes a mandatory requirement that the appellant obtain his language qualification from one of those.

24. Subsequent to the case of **Alvi** and indeed the requirement for such providers has been incorporated as part of the Rules in Appendix O.

25. The complaint by Miss Bustani is that the judge has failed to engage with the argument at all.

26. As to Article 8, it is submitted that that was a particularly strong case in the circumstances of this appellant. He married the sponsor on 20 October 2010 in Karachi. She is a British citizen. They have one child together born on 4 June 2011. The child lives with the sponsor in the United Kingdom at the family home. Her parents and siblings live at that address. The sponsor is in employment.

27. The appellant himself is a proprietor of a tyre shop and is motivated to work when he comes to the United Kingdom. There has been no suggestion made that there is any overcrowding in the property in the United Kingdom, nor is there any concern expressed as to maintenance and accommodation generally. The only reason he fails to qualify for entry clearance is simply because he submitted the incorrect language

document. In any event he has now completed the ESOL tests post-decision . There is a second son born on 27 October 29012. the judge found that there was a genuine subsisting relationship that existed.

28. Nevertheless the Judge felt constrained not to circumvent the Rules. Miss Bustani submits that the judge did not engage with the merits of the Article 8 claim which she submitted was very strong in all the circumstances.

29. It seems to me that for the reasons advanced the judge did not engage with either argument and thus I find there to be a material error of law such as to set aside the decision and to remake it.

30. Having looked at Appendix O it cannot be said that the list relating to language qualifications is particularly simple. It may be that the list of providers is perhaps much more straightforward to understand than the list of skilled occupations as was the subject itself. Nevertheless it seems to me that the principle which has been addressed by the Supreme Court is one that has the potential to apply also to any Rule which relies upon the mandatory requirements not in the Rules.

31. It is perhaps relevant to note that the requirements as to providers are now set out in the Rules, which perhaps is an indication of an acceptance by the respondent that the principle as set out in **Alvi** was one to be applied.

32. Thus applying the principles of **Alvi** I conclude that the immigration decision itself is one that was not in accordance with the law in that it purported to make an mandatory requirement such condition was not within the Rules themselves.

33. In any event, and quite separate from that consideration, I have regard to the aspect of Article 8 of the ECHR. I remind myself of the date of decision being 21 May 2012

34. Part of that consideration of course is the consideration under Section 55, namely the best interests of the children.

35. I remind myself of the principles set out in **Razgar**. The presence of family and private life is not in dispute but rather it is an issue of proportionality.

36. Mr Tarlow submits that Article 8 should not be used to circumvent the failure to meet an Immigration Rule, albeit to a minor extent. He contends that the appellant could make a fresh application now, armed with his language certificate.

37. It is relevant, however, to note that the requirements of the Immigration Rules have now been met, albeit that that is perhaps post-decision evidence. What is clear, however, was that at the time of the decision

there was family life as between the appellant and sponsor and that one child had been born to that relationship at that time. Although I have in mind the principles as set out in judicial decisions concerning near miss, it is relevant to note that at the time of the decision the only impediment to family unity was the issue of the language certificate. It was clear that at the time of decision the Appellant could demonstrate a knowledge of English and judging by the speed in which he obtained the authorised certificate I find that he would have satisfied the test at the date of decision had he realised that such was required. The nature of course of the family life has now ostensibly increased with the arrival of a second child but I focus upon the time of decision.

38. It was and remains important, as I so find, that this young family are able to live together as soon as possible. I find that it was in the best interests of the child at the time in question that the family be united. Given the status as a British citizen of both the sponsor and of the children I deem that it would have been unreasonable to have expected to expect them to live with the appellant outside UK. In that connection the rights of the sponsor and of the child were to be bourn in mind In those circumstances I find that it was disproportionate at the material time to deprive the appellant of the opportunity to live with them in the United Kingdom.

39. Taking account of all matters, as at the time of the decision I find that Article 8 was engaged such that it was disproportionate to exclude the appellant from the United Kingdom. It goes without saying that the birth of the second child makes it even more disproportionate to exclude him now. It is my hope that the ECO will respond without delay to grant the necessary leave.

40. The appeal is allowed against the immigration decision to the extent that it remains at large to be remade. In any event the appeal in respect of Article 8 is allowed.

Signed Date

Upper Tribunal Judge King TD