



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: AA/10665/2013

THE IMMIGRATION ACTS

Heard at Field House
On 5 March 2014

Determination sent
On 28 March 2014

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

REHANA ARSHAD

(NO ANONYMITY DIRECTION)

Respondent

Representation:

For the Appellant: Mr C Avery, a Senior Home Office Presenting Officer
For the Respondent: Mr A Miah of Counsel instructed by Sony Sadaf Haroon Solicitors

DETERMINATION AND REASONS

1. The Secretary of State appeals with permission against the decision of the First-tier Tribunal to allow on human rights grounds the claimant's appeal against her decision to set removal directions to Pakistan after refusing her asylum,

humanitarian protection and/or leave to remain in the United Kingdom on human rights grounds.

2. First-tier Tribunal Judge Sanderson dismissed the claimant's asylum and humanitarian protection claims and her appeal under Articles 2 and 3 ECHR. He was satisfied that she could not bring herself within the provisions of Appendix FM and paragraph 276ADE of the Immigration Rules which bring Article 8 within the Immigration Rules HC 395 (as amended).
3. He then considered Article 8 outside the Rules and whether there were any exceptional circumstances or insurmountable obstacles to this family continuing their family life in Pakistan. The circumstances which he took into account are set out at paragraphs 30 to 41 of the determination. The claimant married her husband, a recent widower with three very young children, in an Islamic ceremony in Pakistan on 16 June 2013. Her husband and his children are all British citizens.
4. A civil marriage ceremony is booked in the United Kingdom for a date in March 2014, and the claimant is six months' pregnant with her husband's child. The parties were found to be credible witnesses and the relationship between them genuine and subsisting.
5. The First-tier Tribunal found that the children had been badly affected by the loss of their mother and that there was a warm and genuine relationship between the claimant and her three step-children, (the youngest is 5 and the eldest is 12 years old). Her relationship with the children had been of significant assistance to them in recovering from the death of their mother. At paragraphs 40 to 41 the Immigration Judge says this:-

"40. I am satisfied that questions 2, 3 and 4 posed in *Razgar* can be answered in the affirmative and I therefore move on to a proportionality assessment. I find, in terms of the judgment in *EB (Kosovo)* that the effect of the [claimant's] removal would be to sever a genuine and subsisting relationship between the [claimant] and her step-children and her partner. In carrying out my assessment I have also taken into account s.55 of the Borders, Citizenship and Immigration Act 2009 which recognises that the interests of a child in circumstances such as this is a primary consideration and the decision of the Supreme Court in *ZH (Tanzania) v SSHD* [2011] UKSC 4 where it was stated that in making the proportionality assessment under article 8, the best interests of the child must be a primary consideration which means they must be considered first but can be outweighed by the cumulative effect of other considerations. In terms of the case of *Beoku-Betts*, the family unit must be considered as a whole and all family members are potential 'victims' of removal. The [claimant's] partner is a British citizen as are each of his children. They are settled in this country, the children are educated here and family and other relationships have been formed here. The partner is employed here. It would not be reasonable to expect the partner and his children to follow the [claimant] if she were returned to her country of origin. Nor, given the disruption that could occur, would it be reasonable to expect the [claimant] to make an entry clearance application from her country of origin given the close family ties that have been formed here and the fact that the [claimant] is

expecting a child, the biological father being her partner. The interests of the children are a primary consideration and other factors in this case either singly or cumulatively do not outweigh this consideration. It falls therefore to determine whether the interference is proportionate to the legitimate public end to be achieved, namely the control of immigration.

41. Having considered the question of proportionality and striking a balance between the rights of the [claimant] together with the victims of the interference and the interests of the community I find, for the reasons given above, that the public benefit in effecting the [claimant's] forced departure from the United Kingdom does not outweigh the interference with her family life. The decision requiring the [claimant] to leave the United Kingdom is disproportionate when looking at the case in the round having considered all the competing considerations and has led the United Kingdom to be in breach of our obligations under Article 8 of the ECHR."

6. The Secretary of State appealed on the basis that the First-tier Tribunal had failed to consider the observations in *Rota Nagre v Secretary of State for the Home Department [2013] EWHC 720 (Admin)* relating to insurmountable obstacles and whether it was reasonable to expect the family to leave together for Pakistan. In the grounds of appeal she says this:

"...It is submitted that the changes to the Immigration Rules with the Article 8 provisions introduced in July 2012 clarified an important issue on this point. Prior to that time case law listed possible relevant factors but left it to the individual decision-maker in an individual case to determine how best to balance the relevant factors, based on that person's perception of public policy considerations. This resulted in divergent outcomes as decision-makers had to reach their own view on the public policy imperatives, without a clear statement from the Secretary of State and Parliament on where the public interest lies. Since the new Rules came into force, decision-makers no longer operate in a policy vacuum.

It is acknowledged that the facts of the individual case are the starting point when considering proportionality, but they are also the starting point which then has to be balanced against the public interest as reflected in the new Rules. The public interest achieved by applying clear Rules must be measured by the effect of the Rules across the board, not just in relation to an individual case. In this case the Tribunal did not apply this approach and thereby misdirected itself in law."

7. The grounds of appeal do not engage with the facts of the individual case in this appeal. Nevertheless, First-tier Tribunal Judge Hodgkinson granted permission to appeal, noting that:

"...the respondent relied on recent relevant case law such as *Nagre* and *Gulshan* and that whilst the judge made reference to the decision in *Gulshan* in his determination he nevertheless arguably applied the wrong test when considering proportionality."

8. I have heard submissions from Mr Avery in similar terms to the grounds of appeal. Mr Avery acknowledges that now that the claimant is six months' pregnant it would be very difficult to remove her to Pakistan and was unable to assist me much,

beyond the very general terms of the grounds of appeal. He contended that the First-tier Tribunal's proportionality conclusion is erroneous at the level of an error of law.

9. I did not consider it necessary to call upon Mr Miah, who represents the claimant. The grounds of appeal do not identify why it was not open to this judge, on these facts, to conclude that there were insurmountable obstacles to return to Pakistan. The evidence was that the claimant had lawfully married a British citizen with three citizen children, who were in a bad way following the recent death of their mother. The relationships were genuine and subsisting, and the children had already lost one mother. The claimant is carrying a child which is their sibling and her husband's child, and as they are British citizens, the Secretary of State has accepted that the father's future, and that of his children, lies in the United Kingdom. On those facts, I consider that it was unarguably open to the First-tier Tribunal Judge to conclude that this was a case in which removal was disproportionate.
10. Despite his best efforts Mr Avery has not persuaded me to the contrary. There is no material error of law in the First-tier Tribunal determination.

Conclusions

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

I do not set aside the decision.

Consequential Directions

Forthwith on receipt of this decision the respondent shall grant the claimant leave to remain for such period as is necessary to give effect to this determination.



Signed
Upper Tribunal Judge Gleeson

Date 14 March 2014