Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/01066/2014

THE IMMIGRATION ACTS

Heard at Glasgow	**Determination promulgated**
on 3 July 2014	**On 7 July 2014**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SHEHAN ROKMAL FERNANDO

Respondent

For the Appellant: Mr M Matthews, Senior Home Office Presenting Officer
For the Respondent: Mr A Devlin, Advocate, instructed by Mr Neil Barnes, Solicitor

No anonymity order requested or made

DETERMINATION AND REASONS

1) This determination refers to parties as they were in the First-tier Tribunal.

2) The SSHD appeals against a determination by First-tier Tribunal Judge Grimes, promulgated on 10 March 2014, allowing the appellant's appeal under Article 8 of the ECHR, on the following grounds:

> (1) Although the judge made reference to *Gulshan* [2013] UKUT 00640 (IAC), she has failed to identify any compelling circumstances in this case to justify granting the appellant leave to remain outside the Immigration Rules. The appellant's child is still an infant and would not have developed any private life ties outside its immediate nuclear family. It was made clear in *Gulshan* that the Article 8 assessment shall only be carried out when these are compelling

circumstances not recognised by those Rules. In this case the Tribunal did not identify such compelling circumstances and its findings are therefore unsustainable. *Gulshan* also makes it clear that at this stage an appeal should only be allowed where there are exceptional circumstances. *Nagre* [2013] EWHC 720 Admin endorsed the Secretary of State's guidance on the meaning of exceptional circumstances, namely ones where refusal would lead to an unjustifiably harsh outcome. In this case the Tribunal has not followed this approach and thereby has erred.

(2) Further, the appellant and his partner entered a relationship in the full knowledge that his immigration status was precarious. The judge has failed to give adequate consideration to the Secretary of State's legitimate aim of maintaining effective immigration control. In *FK & OK* Botswana [2013] Civ 238 Sir Stanley Burton aid: "The maintenance of immigration control is not an aim that is implied for the purposes of Article 8.2. Its maintenance is necessary in order to preserve or to foster the economic well being of the country, in order to protect health and morals, and for the protection of the rights and freedoms of others … That the individuals in the present case are law abiding (other than in respect of immigration controls) does not detract from the fact that the maintenance of a generally applicable immigration policy is, albeit indirectly, a legitimate aim for the purpose of Article 8."

(3) The Tribunal has failed to apply the income threshold in its Article 8 assessment. In making a decision on an application it is necessary for the decision maker to consider all the legislation relevant to that decision and to give reasons for the way that it applies that legislation to the facts of the case. In this instance the Tribunal had no regard at all to the income threshold requirements of the Immigration Rules. The income threshold ensures that those who choose to establish their family life in the UK should have the financial ability to support themselves and to be able to support their partner's integration into British society. The financial requirement is a measure within the filed of immigration control that is directly concerned with socio-economic policy, an area where decisions are the remit of the democratically accountable branches of government, not members of the judiciary. The income threshold was adopted following expert advice from the Migration Advisory Committee and was also subject to an extensive consultation process, in which responses were provided from a range of organisations, including a large number that represent immigrants and the communities most directly affected by immigration policy. It is therefore inappropriate that the Tribunal should decide to disregard these points in its proportionality assessment.

(4) The judge has failed to consider whether the appellant and sponsor can continue their family life outside the UK and in particular whether there are any insurmountable obstacles to family life continuing outside the UK … the judge has failed to identify any circumstances which would render the appellant's removal unjustifiably harsh.

(5) It is submitted that "insurmountable obstacles" constitute serious difficulties which the applicant and their partner would face in continuing their family life outside the UK, and entail something that could not be overcome, even with a degree of hardship for one or more of the individuals concerned. It is not something that is merely unreasonable or undesirable. The Immigration Rules specify that the existence of insurmountable obstacles to family life continuing outside the UK is a key factor in the proportionality assessment, albeit not a determinative factor. The Rules require an assessment of whether removal is prevented by "insurmountable obstacles" rather than whether it is "reasonable to expect" the family to leave together. 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.

3) Following the grant of permission, the appellant filed the following response under Rule 24:

Denied that the FtT failed to give any reasons or adequate reasons.

1 The Immigration Judge did identify compelling reasons, bearing in mind that insurmountable obstacles is not the correct test and also bearing in mind that the decision has to be read as a whole: the parties were living together (see paragraph 5); they have a son (see paragraph 5); the claimant's wife needs the support of her family who are in the UK as she suffers from depression (see paragraph 6); the parties would be unable to meet the financial requirements of Appendix FM (see paragraph 6; *Chikwamba v Secretary of State for the Home Department [2008] 1 WLR 1420* at paragraph 44 per Lord Brown; *MA (Pakistan) v Secretary of State for the Home Department [2010] Imm AR 196* at paragraph LJ Sullivan; *Secretary of State for the Home Department v Hayat and Treebhowan [2013] Imm AR* at paragraph 30 per LJ Elias; *Kotecha v Secretary of State for the Home Department [2011] EWHC 2070 (Admin)* at paragraph 60 per Mr Justice Burnett); all the claimant's partner's family are in the UK; she has no ties to Sri Lanka; she does not speak Tamil (see paragraph 8; *Yildiz v Austria (2003) 36 EHRR 32* at paragraph 43; *Amrollahi v Denmark Application No 56811/00 ECtHR at paragraph 46; Boultif v Switzerland (2001) 33 EHRR 50* at paragraph 53); the claimant's wife and child are British and EU nationals and it is not reasonable to expect them to relocate to a country outwith the EU (see paragraphs 13, *Ogundimu (Article 8: New Rules: Nigeria) [2013] UKUT 60; Sanade and others (British children – Zambrano – Dereci) [2012] Imm AR 597* at paragraph 95; *VW (Uganda) v Secretary of State for the Home Department [2009] Imm AR* 436 at paragraph 46 per LJ Sedley: *AB (Jamaica) v Secretary of State for the Home Department [20089[1 WLR 1893* per LJ Sedley; *Muhammad Irfan Khan v Secretary of State for the Home Department [2013] CSOH 176* at paragraphs 13, 15, 24-31 per Lord Glennie). In light of the finding that it is not reasonable for the claimant's family to relocate there would be an unjustifiably harsh outcome as family life cannot be continued by way of the occasional visit, email or Skype *(R (on the application of Mansoor) v Secretary of State for the Home Department [2011] EWHC 832 (Admin)* at paragraphs 16 and 42 per Mr Justice Blake; *Latif v Secretary of State for the Home Department [2012] Imm AR 659* at paragraphs 58-61 per Upper Tribunal Judge Taylor; *LD v Secretary of State for the Home Department [2011] Imm AR 99* at paragraphs 11-12, 20-21).

2 This paragraph refers to the FtT not "giving adequate consideration" to the appellant's legitimate aim of maintaining effective immigration control. This is not an error of law and the weight to be given to a particular factor is one for the original decision maker. In any event the FtT finds at paragraph 15 that such removal would be in accordance with the law. The FtT acknowledges the appellant's view of the public interest at paragraph 18. The FtT takes account of the precarious status of the claimant at paragraph 19. At paragraph 20 of the

FtT reaches the view that the decision is not proportionate to the appellant's legitimate aim of the maintenance of an effective system of immigration control. The FtT thus gives adequate consideration to the legitimate aim of maintaining effective immigration control. The FtT reaches a finding which it is reasonably entitled to do.

3 This paragraph does not demonstrate error of law. The income threshold has already been held to be disproportionate (see *R (on the application of MM) v Secretary of State for the Home Department [2014] Imm AR 245).* In any event there would be no sensible reason for expecting the claimant to return to apply for entry clearance having regard to the finding that the parties would not meet the entry clearance requirements, that they were in a genuine and subsisting relationship, that it is only comparatively rarely in cases concerning children should the claimant be expected to return, that there would be a high degree of disruption and delay, and that it is not said that the marriage would not give the claimant a right to reside in the UK (see case law referred to above).

4 This paragraph falls into the error of relying on insurmountable obstacles. This is the wrong test and other factors such as those outlined in paragraph 1 are material factors that can legitimately be taken into account by the FtT (see *MF (Article 8 – new rules) Nigeria [2013] Imm AR 256* at paragraph 37; *Izuazu v Secretary of State for the Home Department (Article 8 – New Rules) [2013] Imm AR 453* at rubric held (4), paragraphs 40, 53, 56, 57, 58, 64, 67' *MF v Secretary of State for the Home Department [2013] EWCA Civ 1192* at paragraph 49 per Master of the Rolls). As noted in paragraph 1 there would be an unjustifiably harsh outcome.

5 This paragraph falls into error. It is clear that insurmountable obstacles is an incorrect criterion to apply. It is clear that insurmountable obstacles are not to be interpreted as literally obstacles which it is impossible to surmount (see *MF* (Court of Appeal), supra). The approach in *Izuazu* has been supported by the Court of Appeal. Thus insurmountable obstacles is the wrong test to apply as there are other material factors to be considered when considering Article 8, ECHR such as nationality, length of residence, and best interests of the child. This paragraph, relied on by the appellant, ignores the current approach as shown in the current case law and such an approach is not well founded. The FtT applied the correct approach and was reasonably entitled to reach the decision it did for the reasons given.

4) Mr Matthews adopted the grounds, and submitted further that "insurmountable obstacles" although not to be interpreted literally is not a low threshold. The case depended to some extent upon the medical condition of the appellant's partner, the medical evidence for which was only a one sentence letter from her GP stating that she "suffers from depression and needs support from her family and partner." There was nothing to justify the judge's finding that insurmountable obstacles existed. The child was not required to leave the UK.

5) Mr Devlin in response pointed out that at the time the relationship began the appellant's immigration status was not precarious and by the time he made the application leading to the present proceedings, his partner was pregnant with her child. The authorities are clear that the test is not one of insurmountable obstacles to relocation but the degree of difficulty that would involve, as one of the factors in the case. The judge had not only the medical report but also direct evidence from the appellant and his partner and the fact that she receives Employment and Support Allowance (ESA), a

benefit which implies a degree of disability, although at the lower end of the disability scale. The determination although brief did refer to significant and relevant factors in the appellant's favour, in particular at paragraphs 7, 8 and 10. Paragraph 13 of the determination implied that the judge thought she was bound to go outside the Rules in a case involving a UK citizen child, an approach supported by Sanade and Izuazu. The concession made by the respondent in *Sanade* has never been withdrawn or modified in a case involving a child. The judge did not fall into the error of casting away the Rules, and amply justified the conclusion at paragraph 18 that removal was not reasonable. Paragraph 19 showed that the public interest had been fully taken into account. The grounds of appeal at paragraph 1 made the point of an infant child not having developed private life outside the nuclear family, but that is not the test. The issue is over the child being deprived of the advantages deriving from UK citizenship.

6) Mr Matthews in reply contended that the appellant's precarious immigration status, from the time it became so, was relevant. He and his partner should have recognised when the relationship was entered into that he did not have long term status in the UK guaranteed, and taken that into account. The test of reasonableness was now incorporated into the terms of the Rules, including cases involving UK citizen children. To be the parent of such a child did not amount to a winning hand. The circumstances of this case are by no means out of the ordinary, but such as encountered in such cases on a daily basis. The crux of the determination was at paragraph 18 which was brief and inadequate for its purposes and did not place the public interest in the correct context. Employment and Support Allowance is not a benefit which triggers exemption from the income thresholds in the Rules.

7) I raised the question whether section 19 of the Immigration Act 2014 setting out public interest considerations in relation to Article 8 of the ECHR (by way of insertions to be made into the 2002 Act) although not yet in force might be a reliable touchstone. Mr Matthews said that his understanding was that the provisions were likely to be brought into force by the end of this month, and that the Immigration Rules would be amended simultaneously to reflect the new provisions. Mr Devlin accepted that the new provisions could be relevant even in advance of their being brought into effect, and, as I understood him, Mr Matthews did not disagree.

8) I reserved my determination.

9) There are various criteria to be applied when considering Article 8. Some, such as "exceptional circumstances", have to be given different meanings according to the context in which they appear. The criterion of "insurmountable obstacles" is not to be interpreted literally. There are also the criteria of "arguably good grounds for leave to remain outside the Rules", "compelling circumstances not sufficiently recognised under the Rules", and an outcome which is "unjustifiably harsh". These expressions may not all mean exactly the same, but they are difficult to distinguish. The SSHD's grounds of appeal maintain that the test is somewhere below literal

"insurmountable obstacles" and somewhere above what is "merely unreasonable or undesirable" or "reasonable to expect". They accept the test of an "unjustifiably harsh outcome". Mr Devlin said that the case law is clear that in a case involving a child the test is simply what is reasonable.

10) The crucial paragraphs in the determination, 18 - 20, find that it is not reasonable to expect the child to leave the UK. By the respondent's concession in *Sanade*, that must be right. The judge finds both that there are insurmountable obstacles to the appellant's partner relocating and that it would be unreasonable. Since she cannot be expected to abandon her child, then whatever the legal test, the finding that partner and child cannot be expected to relocate to Sri Lanka must also be right (other reasons are given, but are incidental). It seems to me that the respondent did not quite identify the crucial final question. It is not whether, on the particular facts, partner and child should also be expected to go to Sri Lanka. It is whether removal of the appellant, on the assumption that it would split up the family members in the long term, is justified by the legitimate public interest in maintaining effective immigration control.

11) The effective final finding at paragraph 20 is that the proportionality balance did not require that. Each case in the end turns on its own facts and on a judgment as to where the balance lies. I think the grounds fall short of identifying any error of legal approach, material omission or factual error by the judge. She sufficiently identified the principles she had to apply. It has not been said that the outcome she reached was one not available to her. If she had said it was "unjustifiably harsh", that would have met the criterion accepted by the respondent. In my opinion the final judgment, however the niceties of legal expression surrounding it should be phrased, is not affected by error of law.

12) I am fortified in that view by reference to the statutory provisions already enacted and expected to come into effect in the near future. When section 117B is inserted into the 2002 Act it will be plain that in the case of a person not liable to deportation, the public interest does not require removal if he has a genuine and subsisting parental relationship with a UK citizen child, and it would not be reasonable to expect the child to leave the UK.

13) The appeal of the SSHD to the Upper Tribunal is dismissed.

14) The determination of the First-tier Tribunal, allowing the appellant's appeal, shall stand.

Hugh Macleman

4 July 2014
Judge of the Upper Tribunal