Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/10157/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 10 March 2014	**On 22nd April 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE RIMINGTON

Between

MS R K
(ANONYMITY DIRECTION)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Hoare instructed by H & S Solicitors
For the Respondent: Mr C Avery, Home Office Presenting Officer

DETERMINATION AND REASONS

The application for permission to appeal was made by the respondent but I shall refer to the parties as they were addressed before the First Tier Tribunal that is Ms R K as the appellant and the Secretary of State as the respondent.

1. The appellant is a citizen of India and her date of birth is 12 February 1986 and she appealed against the decision made on 19 March 2013 to refuse her application for leave to remain dated 23rd January 2012 and to

remove her from the UK under Section 47 of the Immigration and Asylum Act 2002.

2. The appellant is a qualified nurse and taught other nurses prior to arriving in the UK. She entered on 23 May 2011 with leave to enter as the spouse of a Tier 1 (Post-Study Work) Migrant valid until 27 January 2012. Her sponsor was Mr A S M whom she married in India on 1 June 2010.

3. The marriage ran into difficulties and she claimed to be the victim of domestic violence once in the UK and she left the former matrimonial home on 16 June 2011. She made her application for leave to remain on 23 January 2012.

4. In February 2012 she moved into the home of Mr A U, a friend of the appellant's father. She then became romantically involved with their adult son, S U, who is a British citizen and born in the UK.

5. In June 2012 the appellant and Mr M were divorced and she commenced a romantic relationship with their son and on 16 August 2013 their daughter A was born. S, her husband, was diagnosed with paranoid schizophrenia and needed indefinite treatment and the appellant was nominated as his carer.

First Tier Tribunal Determination

6. First-tier Tribunal Judge Behan dismissed the appeal further to the Immigration Rules [2002] but allowed the appeal further to the Article 8 ECHR.

7. An application for permission to appeal was lodged by the respondent on the basis that "the judge had correctly established that the Immigration Rules do not assist the appellant". However the appeal was subsequently allowed under the ECHR. It was submitted that the judge was misdirected in this approach and that the case should only be allowed on such basis where it is exceptional in some way. Exceptional meant circumstances which although the requirements of the Rules had not been met, refusal would result in an unjustifiably harsh outcome. At paragraph 27 the judge concluded that relocation to India was "not seen as a realistic prospect" and therefore the judge considered it unlikely that Mr U, the appellant's partner, would live permanently in India. This was made on the basis of Mr U's condition, his risk of relapse and his need for a support network. It was submitted that this finding did not appear to rely on objective evidence nor consider that he would have the support of his partner.

8. Furthermore, it was submitted that in allowing the appeal on Article 8 grounds was misdirection as the appellant could return to India to make an appropriate application for leave to remain or live in India as a family. The appellant had failed to satisfy the Rules which were a detailed expression of government policy and control in immigration and protecting the public. As such it was submitted that it was for the appellant to establish that there was an "exceptional basis for granting leave outside the Rules (i.e.

exceptional or very compelling circumstances) or to seek to comply with the Rules.

9. At the hearing Mr Avery submitted that the approach by the judge was fundamentally wrong and at paragraph 22 she merely discounted the Rules. The Rules were an expression of Article 8 and informed the overall approach to be taken. The judge had not said enough in this regard.

10. Mr Hoare relied on the respondent's notice which set out the background. He stated that the couple would have married if they had had access to the appellant's passport and they had a British daughter. It was spelt out to the First-tier Tribunal that the appellant's partner was a paranoid schizophrenic with a lifetime condition. He submitted that the provisions of EX.1 were satisfied in that the appellant had a genuine relationship with the child and it was not reasonable to expect the child to leave the UK.

11. Under EX.1 it should be allowed.

12. Mr Avery submitted that the judge should have looked in detail at whether the appeal succeeded under the Rules and whether it was reasonable to expect the child to leave the UK.

13. Mr Hoare submitted that there was policy guidance issued on 14 January 2014 which stated that in the case of a British child the Home Office would not require a British citizen child to leave the UK. In these circumstances the child would have to accompany the mother as the child was so young. He submitted that EX.1A(1) and (2) were both satisfied particularly bearing in mind the fact that the father himself required care and thus the appellant's removal would require the daughter's removal. The test of insurmountable obstacles had no foundation in law. He submitted that there was not much consideration by the judge of the Immigration Rules but this made no material difference because the same analysis in Article that the judge conducted would have been conducted.

14. He also submitted that the appellant's leave was not precarious at the time that she developed her relationship with her partner as she had leave to remain and was awaiting a decision. There was no scope for finding that this was a precarious relationship.

15. Had the Rules been explicitly considered in the formula suggested the conclusion would have been the same. The conclusion was available under the Rules as well as the old style Article 8. **Gulshan** (**Article 8: new rules: correct approach) [2013] UKUT 640 (IAC)** did not exclude a residual application in accordance with the jurisprudence and the judge did give proper consideration to the best interests of the child.

16. Mr Avery submitted that the appellant did not inform the Secretary of State on the application of the new circumstances although he acknowledged it was raised in the Section 120 notice. Mr Avery submitted that the appellant had failed to make an application and thus could not succeed under R-LTRP.1.1 and she could not succeed under EX.1 alone as it was parasitic.

Conclusions

17. **Gulshan** (**Article 8: new rules: correct approach) [2013] UKUT 640 (IAC)** states at paragraph 24(b) and within the head note that "after applying the requirements of the Rules, only if there may arguably be good grounds for granting leave to remain outside them is it necessary for Article 8 purposes to go on and consider whether there are compelling circumstances not sufficiently recognised under them: **Nagre**.

18. As identified at paragraph 21 of **Gulshan,** the new Rules contemplated that there would be cases falling outside them in which a right to remain could be established although it was identified that the new Rules provided better explicit coverage of the factors identified in case law than was formerly the position. On a thorough review of the Strasbourg guidance Sales J (**Nagre**) concluded that the rules were lawful and in a precarious family life case only in exceptional circumstances would removal of the non-national family member constitute a violation of Article 8.

19. However the subsequent Court of Appeal case of **MF (Nigeria) v Secretary of State for the Home Department [2013] EWCA Civ 1192** confirmed that the test of exceptionality had ***not*** been resurrected and further the court remarked obiter that if "insurmountable" obstacles were literally obstacles which it is impossible to surmount their scope was very limited indeed and that for the reasons stated in **Izuazu (Article 8: new rules) [2013] UKUT 45 (IAC)** such a stringent approach would be contrary to Article 8.

20. Thus the use of the term "exceptional circumstances" in the new Rules does not restore the pre-**Huang** exceptionality test rather the term is employed in the sense to be found in the Strasbourg case law where ties are forged in the knowledge that immigration status is precarious.

21. The judge at paragraph 22 was clear that she did consider Appendix FM and considered R-LTRP subparagraph 1.1(b). She found that this paragraph required an applicant to have made a valid application for limited or indefinite leave to remain as a partner and that no matter the extent to which the appellant is required to and/or does meet the other many and various requirements of the Rule, she may not be granted leave to remain under it. The judge made clear why she proceeded not to analyse the detailed provisions of this Rule further in the determination.

22. Mr Avery confirmed at the hearing that the appellant could not succeed under the Immigration Rules because she had made no application as a partner although she had submitted her additional grounds of appeal further to the Section 120 notice. I note that EX1 is parasitic and merely by fulfilling the provisions of EX.1 it is clear from case law, **Sabir (Appendix FM EX.1 not freestanding) [2014] UKUT 63** that the appellant cannot succeed.

23. What is clear from the determination set out at paragraph 2 to 7 is that the appellant's partner has been diagnosed with paranoid schizophrenia and that she and her partner have a British citizen daughter. Evidence was put before the judge that the partner needed exactly the same medication and the support of his care co-ordinator to remain stable. Thus I do not accept that the judge speculated in this regard.

24. The judge also considered paragraph 276ADE because it was clear that this was refused by the respondent.

25. The judge noted, although it was not the fault of the respondent because further grounds had been submitted, that the new relationship or the birth of their child had not been considered by the respondent and thus for these reasons there were arguably good grounds for further 'old style' consideration of Article 8 in the context of the background history. Bearing in mind the evidence given and the fact that the judge found the relationship to be credible and although fortuitous did not find that it had a hint of contrivance it was open to the judge to make the findings she did. It was not submitted by the respondent before the First-tier Tribunal that the relationship of the appellant was founded when her immigration status was precarious.

26. The judge found that the appellant met several elements of the Rule R-LTRP but as stated above could not fulfil all the relevant requirements.

27. The judge acknowledged at paragraph 23 that although the respondent intended Appendix FM to set out a complete code for the assessment of Article 8 rights she was required to go on and consider those rights independent of, though informed by, the respondent's Rules and she rightly set out **MF (Nigeria)** whereby a Tribunal is obliged to consider all of the relevant case law concerning Article 8.

28. I find she correctly considered in the context of the whole determination that there were arguably good grounds for moving on to a consideration of Article 8 outside the Rules and had correctly made findings within those Rules. She bore in mind the guidance in **Razgar** and considered the weight of the public interest and the legitimate aim of firm and fair immigration control encapsulated in the immigration rules.

29. At paragraph 26 in particular the judge considered whether the decision would be proportionate. I do not find that the judge has speculated in relation to the decision regarding Mr Uppal and she considered the child's best interests further to **ZH (Tanzania)** not least that the decision would have the effect of separating a genuine couple and separating Arshiya from one of her parents. The judge recognised the child's best interests were not a trump card. She also noted that the child was a UK citizen and although the judge did not refer to or allude to **Sanade (British children – Zambrano – Dereci)** [2012] UKUT 00048 (IAC), I find this would be a factor.

30. I find that as Mr Hoare pointed out the judge stated that her immigration status was precarious but this was not the case. Even if it were the judge

had factored this in and noted that the child could not be held responsible for the actions of her parents.

31. Overall, I find that the judge has given consideration to the Immigration Rules, and proceeded to find that there were good grounds for considering the matter further to Article 8.

32. In sum, the judge found that overall in the circumstances she was satisfied that the need for immigration control was outweighed by the effect on family life. Further to Razgar and Huang I find that the judge assessed the evidence and gave a reasoned decision.

33. Even if the judge did not fully examine the Immigration Rules I find that there were compelling grounds for her to consider the appellant's Article 8 rights outside the Rules and this is what she has done.

34. My final point is to underline that the application dated 23rd January 2012 must have contained an application regarding human rights as the statement of grounds of appeal referred to a statement accompanying the application which referred to the breakdown of marriage owing to domestic violence. I note that the skeleton argument before the First Tier Tribunal confirmed that the appellant made a valid in time application on the basis of domestic violence and human rights. The application form refers to a statement attached. This skeleton argument was settled by Mr Hoare who had conduct of the case from January 2012 and whose name was cited on the application form. In this regard I accept that this appeal rests on an application dated 23rd January 2012 and which was, in turn, based on human rights and made ***prior*** to the introduction of Appendix FM and **Gulshan** would not apply.

35. For the reasons given above, I find there is no error of law in the determination and the determination shall stand.

Direction regarding anonymity – rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date 18th April 2014

Judge Rimington

Deputy Upper Tribunal Judge