Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/13270/2013

THE IMMIGRATION ACTS

Heard at Bradford	**Determination Promulgated**
On 24th March 2014	**On 04th April 2014**

Before

UPPER TRIBUNAL JUDGE D E TAYLOR

Between

MR RAZA ABBAS

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Janjua, Janjua Associates
For the Respondent: Mr Diwncyz, HOPO

DETERMINATION AND REASONS

1. This is the Appellant's appeal against the decision of Judge Sarsfield made following a hearing at Bradford on 15th August 2013.

Background

2. The Appellant is a citizen of Pakistan born on 19th January 1991. He came to the UK on 20th April 2011 on a student visa valid to 10th August 2012. On 4th August 2012 he applied for leave to remain as a spouse, having married his wife on 21st May 2012.

3. It was accepted that the Appellant could not meet the maintenance requirements of the Rules. His wife is employed earning £15,480 per annum and has £20,000 in savings. The Appellant, as a student, is only able to work for ten hours a week and he earns £2,575 per annum. Even if his earnings were able to be taken into account, they fall short of the financial threshold by £545.

4. The Judge stated that he could not be satisfied that the Appellant would not be able to meet any financial criteria should a fresh application have to be made; there was insufficient evidence to show that a fresh application would not succeed. If the Appellant had return, any separation would be for a limited period.

5. He wrote as follows:

> "Under Article 8 the Appellant's wife must have been aware that the Appellant might have to leave the UK. She admits knowing his status before marriage so she entered a relationship knowing exactly what the situation was. She must have been aware that she might have to make changes in her life in order to continue their relationship even temporarily. Konstantinov v Netherlands [2007] said that where family life was created at a time when the immigration status of one party was precarious from the outset then it is likely to be only in the most exceptional circumstances that removal will violate Article 8. I do not consider that these circumstances are exceptional.
>
> I conclude that a fair balance between the interests of the public and those of the Appellant and his wife would be met by removing the Appellant from the UK and it is proportionate to do so. He can return and apply to re-enter and has a home to stay in Pakistan. Applications there are dealt with expeditiously and separation would be for a limited period only. The evidence does not suggest it would be unsuccessful. I conclude that there would be no prejudice that would amount to a breach of Article 8 if the appeal was refused."

The Grounds of Application

6. The Appellant sought permission to appeal on the grounds that at the time that the couple married in May 2012, they only had to show that they could be accommodated and maintained in the UK without additional recourse to public funds. The Judge's statement that the Sponsor was aware that she might have to move to another country is not based on the facts and the evidence available. The Judge failed to take into account the fact that the Sponsor has lived in the UK since her birth, all her family are here and she has never been to Pakistan other than as a visitor. The Appellant is of good character, has fully integrated into the host

community, and no reasons have been given for ignoring the impact of his removal on his wife, a British citizen.

7. Permission to appeal was initially refused by Judge Robinson on 10th September 2013.

8. Upon renewal permission was granted by Judge Latter who said that in the light of the judgment in MM [2013] EWHC 1900 (Admin) that a number of relevant matters might not have been taken into account in assessing proportionality.

9. On 5th November 2013 the Respondent served a reply. The Respondent submitted that she considers that the income threshold must remain at a level of £18,600 which reflects her legitimate aim of preventing burdens on the taxpayer in the long term and promoting good integration outcomes. The current level was informed by the advice of the Independent Migratory Advisory Committee as to the level at which a couple once settled, and taking account of any dependent children, cannot generally access income related benefits. This is a matter of public policy for the government and Parliament to determine. The Respondent invites the Tribunal to consider the application as a two stage process, firstly under the Rules and then separately under Article 8 case law. She accepts that the factors identified in MM should form part of the proportionality balancing exercise and the impact of those other factors should also be weighed in the balance.

Submissions

10. Mr Diwnycz relied on his grounds and submitted that since the Appellant could not meet the requirements of the Rules the appeal had to fail.

11. Mr Janjua submitted that MM remained good law and it would be unfair, harsh and unreasonable to expect the Appellant to have to return to Pakistan.

Findings and Conclusions

12. Mr Justice Blake declined to grant the applicant in MM relief by quashing the Rules and concluded that it was not appropriate to strike down the requirements of the Rules under challenge.

13. However in his summary of conclusions he wrote as follows:

> "In summary I accept that there is a legitimate aim that the families of migrants should be encouraged by the terms of admission to integrate, not live at or near the subsistence level and not be perceived to be a long term drain on the public purse in the form of increased access to state benefits. A subordinate aspect of such an aim is transparency and clarity although administrative convenience cannot be an end in itself or justify the separation of spouses. However the combination of features identified above amount together to a disproportionate interference with the rights of British citizen Sponsors and refugees to enjoy respect for family life. In terms of the Strasbourg approach they do not

represent a fair balance between the competing interests and fall outside the margin of appreciation or discretionary area of judgment available in policy making in the sphere of administration. I accept that a wider margin of appreciation is likely to be relevant to foreign Sponsors who are voluntary migrants but not British citizens or refugees…

Nevertheless the rights are of such fundamental importance and the effect of the five aspects on which I have focused attention are so intrusive that I conclude that taken together they are more than is necessary to promote the legitimate aim. The substance of this claim is both the human rights of the Sponsor claimant to enjoy respectful family life and the constitutional right of the British citizen to reside in the country of nationality without let or hindrance. From this perspective the application of the combination of the five factors to people in the position of these claimants is not merely disproportionate as a matter of human rights law but also an irrational and unjustified restriction on rights under the law relating to recognised refugees and the constitutional rights of British citizens.

I do not accept the claimant's case that the Secretary of State was required to adhere to the Rule 281(v) formula in all cases of entry clearance application by spouses of British citizens and recognised refugees. She was justified in concluding that greater resources than £5,500 per annum for a couple without children and adequate accommodation were needed in pursuit of the aims she has identified. It may be that the £18,600 minimum income without recourse to other sources of funding would be within the limits of the Secretary of State's margin of appreciation in setting the terms in which foreign Sponsors can bring in their spouses and partners, even though this represents a radical departure from the norm in the European Union based on the family reunion directive.

However I conclude that this measure is disproportionate when applied to British citizens and recognised refugees. In particular it is more intrusive in its restrictions on family life to ensure that couples are self-sufficient at the times of the spouse's first admission and are above the level of recourse to public funds at the end of the five year period when the party's application for settlement is being considered.

There are a variety of less intrusive responses available. They include:

(i) reducing the minimum income required of the Sponsor alone to £13,500; or thereabouts;

(ii) permitting any savings over the £1,000 that may be spent on processing the application itself to be used to supplement the income figure;

(iii) permitting account to be taken of the earning capacity of the spouse after entry or the satisfactorily supported maintenance undertakings of third parties;

(iv) reducing to twelve months the period for which the pre-estimate of financial viability is assessed.

It is neither necessary nor desirable in these applications to go further than this judgment does in identifying what might be a proportionate financial requirement. It will be for the Secretary of State if she sees fit to make such adjustments to the rules as will meet the observations in this judgment. My conclusions, if they prove durable, are equally designed to assist people in the position of the claimants and their families as to whether there is a reasonable prospect of success in making an entry clearance application, and judges of the First-tier and Upper Tribunals who will have the difficult task of determining on the basis of particular facts as found or are undisputed whether Article 8 requires the admission of the particular person. By contrast with decisions on deportation or decisions affecting children where the principles are now established and clear, the problems facing Judges on appeal to decide on human rights in individual cases without some assessment by the higher courts of whether the essential package is a legitimate starting point would be formidable."

14. The Sponsor earns £15,480 per annum, above the figure of £13,500 suggested by Blake J, is British, has never lived in Pakistan and has £20,000 in savings. The Appellant himself has shown that he has the capacity to earn by working for his permitted hours whilst he is studying. Furthermore there is no evidence of any abuse so far as the Immigration Rules are concerned.

15. However, the refusal was not just on the basis of an inability to meet the financial requirements of the Rules. According to the reasons for refusal letter the Sponsor had not provided evidence of her earnings from her employment with the Cooperative Group other than bank statements showing payments made on a monthly basis. So far as his own income was concerned, the Appellant had not provided any evidence other than a letter to show that he received wages or salary as an employee.

16. Furthermore, the Respondent stated that, in reliance on paragraph E-LTRP.4.1, the Appellant had not provided any evidence to show that he had an academic qualification which met the relevant requirements and had not provided evidence to show that he had passed an acceptable English language test approved by UKBA for this purpose. He was not exempt from the test because he is not a national of a majority English speaking country.

17. There is a letter in the Appellant's bundle from Trinity College London recording that he has a Grade 2 in spoken English but no indication that Trinity College is a recognised provider and no reference to his passing other relevant examinations. In any event, it is eleven months postdecision.

18. Since MM only offers the Appellant potential relief in relation to the level of earnings required to satisfy the maintenance requirements of the Rules, and is silent in respect of the evidential requirements and the English language requirements, it is not

authority for the proposition that the removal of this Appellant would be disproportionate.

19. No arguments have been put forward to show that it would be unreasonable for the couple to live in Pakistan other than the fact that the Sponsor's family are here. No practical issues relating to the possibilities of relocation raised, and no non standard features relied on to show that removal would be unjustifiably harsh – Gulshan (Article 8 – new Rules – correct approach)[2013] UKUT 00640. The Appellant can make his application for entry clearance from there, ensuring that he meets the relevant requirements of the Rules.

20. There is no indication in this determination that the Judge engaged with MM, to which he did not refer. However, had he done so it would have made no material difference to his decision.

Decision

21. The original Judge did not err in law. The Appellant's appeal is dismissed.

Signed Date

Upper Tribunal Judge Taylor