Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/27376/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
on 6th May 2014	**On 8th May 2014**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

S B M
(Anonymity order made)

Respondent

Representation:

For the Appellant: Mr Melvin – Senior Home Office presenting Officer.
For the Respondent: Mr Oommen instructed under the Direct Access provisions.

DETERMINATION AND REASONS

1. This is an appeal against a determination of First-tier Tribunal Judge Lingam promulgated on 3rd February 2014 following hearing at Taylor House in which the Judge dismissed the appeal under the Immigration Rules but allowed it under Article 8 ECHR.

2. SBM is a citizen of Malawi born in March 1985. Her immigration history shows she entered the United Kingdom on 25th October 2004 as a visitor. She was granted leave to remain which was varied to permit her to study until 31st July 2006 and thereafter until 31st October 2009. The final period of leave granted on 5th August 2010 was to allow her to remain as a spouse, valid until 5th August 2012.

3. By an application dated 30th July 2012 SBM sought to vary her leave further on the basis of being the spouse of a person present and settled in the United Kingdom. This application was refused by the Secretary of State in a decision dated 18th June 2013 which included, in addition to the decision to refuse, a removal direction made pursuant to section 47 of the Immigration, Asylum and Nationality Act 2006.

4. The Judge considered the written and oral evidence and sets out her findings from paragraph 13 of the determination. The Judge found that SBM failed under the Immigration Rules [13 -31]. The Judge noted at the hearing that SBM adduced evidence of a son born in October 2009. There is no contact with the child's natural father. It is not disputed that SBM is married to MR.

5. In paragraphs 35 and 36 the Judge finds:

> 35. Thus, whilst the appellant fails to discharge her burden under the Suitability criteria and therefore fails to benefit the provisions under paragraph EX.1; she can show, on a balance, under paragraph 276ADE (vi) that she has built a lawful significant private life of nine and a half years in the UK and that she has no social or cultural ties to the country nominated to effect removal.
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> 36. On balance, the appellant makes out her claim under the above provision of the Immigration Rules. I go on to consider the appellant's alternative Article 8 ground as follows.

6. The Judge finds that at the date of hearing SBM remains in a subsisting relationship with her husband [37]. It is acknowledged that the Secretary of State was not provided with an opportunity to consider the relationship with her son [37] which is a finding made because SBM failed to mention that she had a son in her application for further leave.

7. Having set out the Razgar guidelines [38 -44] the Judge accepted that if SBM were compelled to seek a settlement visa from either Malawi or Zimbabwe, she would be forced to survive in Malawi where she has no family or social support network and equally in Zimbabwe where she would probably be without accommodation or financial support. Accordingly the Judge accepted that a forced return to either country would be unreasonable [45].

8. The Judge then considered the best interests of the child, T, and discussed a number of cases [46–57] before concluding that SBM's son T, who is four years old and who was born in the United Kingdom but who is not a British national, and who has recently commenced nursery education, has a close bond with his mother and probably has developed a close bond with his stepfather [58].

9. The Judge accepted that if SBM had to leave the UK she will have no option other than to take her son with her which may result in uncertainties with regard to maintenance and accommodation for T. It was also said that T's relationship with his stepfather would also suffer due to uncertainty with regard to the length of time away from the UK and for these reasons it was accepted that the best interests of T will be for him to remain in the UK [59].

10. There was little evidence of SBM's husband's employment in the United Kingdom although the Judge accepted that he might be employed. He is a British national and the Judge found that requiring him to leave the UK with his wife would interrupt his work, his relationship with his mother and siblings and a son from a previous relationship. He has no ties to Malawi or Zimbabwe and it was therefore held unreasonable to require him to leave the UK with his wife [60].

11. The Judge refers to the public interest in paragraph 61 and SBM's willingness to engage in deceit against the Secretary of State in paragraph 62 although then concludes: "I accept for my reasons stated above that requiring the departure of the appellant, her son or [MR] for the purpose of maintaining effective immigration control and economic interest of the public, would lead to hardship that would go beyond the baseline. Therefore, I accept the removal of the appellant would be a disproportionate and unjustified measure against the respondent's lawful obligation" [62]. It is on this basis the appeal was allowed under Article 8 ECHR.

12. The Secretary of State challenges the determination on the basis of an alleged failure to give adequate reasons for findings made and a failure to properly assess the human rights elements of the appeal.

Discussion

13. The Judge was required to consider the merits of the human rights claim in accordance with the approach set out by the Court of Appeal in MF (Nigeria) [2013] EWCA Civ 1192, the High Court in Nagre [2013] EWHC 720 (Admin) and by the Upper Tribunal in Gulshan [2013] UKUT 640, as confirmed by Shahzad (Art 8: legitimate aim) [2014] UKUT 00085 (IAC). These judgments have made it clear that the question of proportionality must be looked at in the context of the Immigration Rules with no need to go on to a specific assessment under Article 8 if it is clear from the facts that there are no particular compelling or exceptional circumstances requiring that course to be taken.

14. That approach is consistent with what the Court of Appeal said in MF (Nigeria) and with the approach of the House of Lords, particularly in cases such as Huang [2007] UKHL 11 and Razgar [2004] UKHL 27. In Shahzad it was found that where an area of the Rules does not have such an express mechanism such as that found in the deportation provisions, the approach in Nagre ([29]-[31] in

particular) and Gulshan should be followed: i.e. after applying the requirements of the Rules, only if there may be arguably good grounds for granting leave to remain outside them is it necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under them.

15. The starting point for the Judge was to look at the Rules and see whether the Applicant was able to meet their requirements. If not, the question arises whether the decision would lead to a breach of Article 8 but in the context of whether there are factors not covered by the Rules which give rise to the need to consider Article 8 further.

16. The key question in relation to the assessment of Article 8 is whether the decision to refuse to grant leave will result in compelling circumstances giving rise to unjustifiably harsh consequences for the Applicant or any family member, such as to establish an arguable case at this time. In Gulshan it was held that the term "insurmountable obstacles" in provisions such as Section EX.1 are not obstacles which are impossible to surmount They concern the practical possibilities of relocation. In the absence of such insurmountable obstacles, it is necessary to show other non-standard and particular features demonstrating that removal will be unjustifiably harsh. The material provided to the Judge did not arguably establish that such circumstances exist.

17. This approach has been further confirmed by the Court of Appeal in the more recent case of Haleemundeen v SSHD [2014] EWCA Civ 558 in which the Court found :

> 40 I, however, consider that the FTT Judge did err in his approach to Article 8. This is because he did not consider Mr. Haleemudeen's case for remaining in the United Kingdom on the basis of his private and family life against the Secretary of State's policy as contained in Appendix FM and Rule 276ADE of the Immigration Rules. These new provisions in the Immigration Rules are a central part of the legislative and policy context in which the interests of immigration control are balanced against the interests and rights of people who have come to this country and wish to settle in it. Overall the Secretary of State's policy as to when an interference with an Article 8 right will be regarded as disproportionate is more particularised in the new Rules than it had previously been. The new Rules require stronger bonds with the United Kingdom before leave will be given under them. The features of the policy contained in the Rules include the requirements of twenty year residence, that the applicant's partner be a British citizen in the United Kingdom, settled here, or here with leave as a refugee or humanitarian protection, and that where the basis of the application rests on the applicant's children that they have been residents for seven years.

18. It was also acknowledged by the Court of Appeal that the authorities make it clear that the focus of any assessment whether an interference with private life pursuant to the requirements of immigration control is proportionate should be whether the Secretary of State's decision is in accordance with the new provisions [42]. The Court refer to Nagre and the judgment of Sales J at [26] and [29] that it is necessary to find "particular factors in individual cases… of especially compelling force in favour of a granted leave to remain" even though

those factors are not fully reflected in and dealt with in the new Rules and "to consider whether there are compelling circumstances not sufficiently recognised under the new rules to require the grant of such leave" [43].

19. In paragraph 44 the Court state; "…….. at least in this court, in light of the authorities, it is necessary to find "compelling circumstances" for going outside the Rules.

20. The Judge does refer to the cases of Nagre and Gulshan and to the fact SBM failed under the Rules and the suitability requirements of S-LTR.2.2(a) which refers to false information, representations or documents having been submitted in relation to the application. The refusal notice refers to the fact that in support of her claim to be in a genuine relationship with her British partner she provided a number of documents including Halifax bank statements as evidence of her cohabitation. The Halifax bank statements have been confirmed as being false. The Judge considered the explanation provided and notes that SBM accepts they are not genuine documents although did not find any other aspect of the explanation provided to be credible. In paragraph 28 of the determination the Judge finds "Therefore, I accept that the appellant has been deliberate in misleading the respondent with the false document, which is intended to bolster the application". In addition the Judge found that SBM failed under S-LTR.2.2 (b) which relates to a failure to disclose material facts in relation to the application as she admitted she had left her sons details out in her application form merely to save costs.

21. As a result of SBM's deliberate acts of deceit she failed under the Immigration Rules in relation to the "partner" route as well as 276ADE. Both rules include a requirement to satisfy specified criteria before moving on to consider the individual elements. The Judges finding that the appeal under the Immigration Rules must be dismissed is correct in law as is the direction in paragraph 29 that the outcome under the Rules has an impact on the remaining considerations although the Judge arguably errs in law when stating that that impact is limited to consideration of the remaining requirements under the Rules. Such a statement suggests an arguable compartmentalisation in the Judges mind of the claims made under the Rules and that under Article 8 ECHR which is an impression further reinforced by the statement in paragraph 36 [page 7 of the determination prior to the error in numbering which occurs thereafter] where the Judge stated that she was going on to consider SBM's alternative Article 8 grounds as if such claim could somehow be separated from the findings under the Immigration Rules. This is a structural failure and a material misdirection in law.

22. SBM was unable to succeed under the Immigration Rules and so the requirement upon the Judge was to consider whether on the particular facts of this case there are any especially compelling circumstances such as to require a grant of leave to remain. It was for this reason that the case before the Upper

Tribunal proceeded with a discussion relating to whether the error identified was material in light of the findings the Judge had made.

23. I find that there are a number of further difficulties with the determination in addition to that set out above. The first of these is that in paragraph 45 the Judge claims SBM has no family or social support network in Malawi or Zimbabwe and will probably be without accommodation or financial support. There is no reference in the determination to the statement in the reasons for refusal letter that depending upon the case reintegration assistance and support for a sustainable return may be available. Mr Melvin was asked during the hearing whether such support will be available and although he did not specifically commit himself, as this is a decision that will be made by others and in relation to which he has no specific authority, he did confirm that the facts of SBM's case fit within the relevant criteria. This appears to be a case in which it is reasonable to expect that such support will be provided to SBM meaning that she and T will not be destitute or without the means to find suitable accommodation and to facilitate her reintegration into society in her home state. It has not been shown that such ties as may be required to live effectively in such society cannot be reformed, even if currently lost.

24. The finding that it is unreasonable for her husband to return based upon his connections with the United Kingdom do not appear to have been assessed against the relevant criteria set out in the case law although if he has ongoing contact with a son from a previous relationship it may not be reasonable to expect him to return with SBM, meaning this is a family splitting case.

25. The failure to consider the evidence adequately means that the finding that it would not be reasonable for SBM to return due to the economic reality is infected by legal error and unsustainable and based on a failure to consider all the available evidence and a lack of adequate reasoning. Indeed applying the relevant standard, the balance of probability, it is likely that such support as may be required will be available according to Mr Melvin's response.

26. The claim to be entitled to remain based upon her private life in the United Kingdom fails under the Rules. Notwithstanding the fact that SBM has remained lawfully to date, and been granted leave in the past, she chose to undertake acts of dishonesty which effectively excluded her from the right to remain under the Rules. That is illustrative of the weight approved by Parliament that should be given to such acts of dishonesty in relation to individual seeking to remain on private or family life grounds.

27. It has not been shown that sufficiently compelling circumstances exist such as to entitle SBM to remain based upon her relationship with her husband and time in the UK, on the evidence. The question is, therefore, whether the circumstances of T are such that return would result in consequences of sufficient severity so as to warrant a grant of leave. The finding by the Judge in

paragraph 62 that return would lead to hardship that would go "beyond the baseline" is inadequately reasoned as the Judge fails to define what that baseline may be and, in light of her apparent segregation of the assessment of Article 8 under the Rules and ECHR, it may be either. The Court in Haleemundeen remark on the formidable hurdle created by the new Rules (Appendix FM and Paragraph 276ADE) when considering the issue of proportionality under Article 8 which is the correct staring point.

28. The Judge is of the opinion that it would not be in the best interests of T to have to return with his mother due to the findings regarding the situation on return and the child's relationship with his stepfather. The Secretary of State was unable to consider T's situation in the refusal notice as SBM failed to include any reference in section 4 of the form to the child. Such an omission may indicate that she was not in fact seeking any form of leave for her son although her explanation provided to the Judge was that she was trying to save costs, which must be interpreted as a deliberate attempt to avoid having to pay the required fee for a child applicant. Notwithstanding her failure to mention her son she seeks to rely upon his situation as a means to avoid removal.

29. In Zoumbas v Secretary of state for the Home Department [2013] UKSC 74, at paragraph 10, the Court paraphrase the principles arising from the cases of ZH (Tanzania) [2011] 2 AC 166, H v Lord Advocate [2012] SC (UKSC) 308 and H(H) v Deputy Prosecutor of the Italian Republic [2013] 1 AC 338, as follows:

(1) The best interests of the child are an integral part of the proportionality assessment under article 8 ECHR;

(2) In making that assessment, the best interests of the child must be a primary consideration, although not always the only primary consideration; and the child's best interests do not of themselves have the status of the paramount consideration;

(3) Although the best interests of the child can be outweighed by the cumulative effect of other considerations, no other consideration can be treated as inherently more significant;

(4) While different judges might approach the question of the best interests of the child in different ways, it is important to ask oneself the right questions in an orderly manner in order to avoid the risk that the best interests of the child might be undervalued when other important considerations were in play;

(5) It is important to have a clear idea of a child's circumstances and what is in a child's best interests before one asks oneself whether those interests are outweighed by the force of other considerations;

(6) To that end there is no substitute for a careful examination of all relevant factors when the interests of the child are involved in an article 8 assessment; and

(7) A child must not be blamed for matters for which he or she is not responsible, such as the conduct of a parent.

30. There is insufficient evidence of an adverse affect upon the child if he is removed from the United Kingdom in relation to any bonds that he may have with his stepfather. The child is four years of age and it has not been shown that his needs cannot be met by his mother in the UK or elsewhere. Had a child application being made it has not been shown that T could have succeed under the relevant section of Appendix FM, which sets out the requirements for leave to remain as a child. One of the necessary requirements is that a valid application for leave to remain must have been made (which it was not) although I appreciate that GEN.1.9 of Appendix FM specifies that the requirement to make a valid application will not apply when an Article 8 claim is raised in an appeal (GEN.1.9 (iv)). The requirement for there to be serious and compelling (my emphasis) family or other considerations which make the exclusion of the child undesirable has not been established on the facts. There is also the issue that the financial requirements of Rules have not been shown to be met on the limited evidence; although it was accepted that SBM's husband was working.

31. Having considered all the material available to the Judge I find that she has erred in law in a way material to her decision to allow the appeal under Article 8 ECHR for the reasons set out above. Although Mr Melvin submitted that it appears to be a determination written to allow SBM to remain in the United Kingdom I make no such finding. Any judge will be fully aware that the obligation upon them is to apply the law to the facts properly, irrespective of any view they may have as an individual regarding whether a person should be allowed to remain in the United Kingdom or not.

32. I set aside the decision. SBM's immigration history, composition of the family, attributes of its members, and the finding under the Immigration Rules shall be preserved findings. I find in addition that the conclusion SBM's husband cannot be expected to leave the United Kingdom is preserved as this is not challenged by the Secretary of State.

33. In light of the fact there are resources available to SBM and T on return and that on balance she would be able to access such resources, I do not find that it has been shown that there are particularly compelling or exceptional circumstances that necessitate a separate assessment under Article 8 outside the Rules although if such an assessment was undertaken, for the sake of completeness, it will be necessary to look at whether the evidence establishes the existence of compelling circumstances giving rise to unjustifiably harsh consequences for

SBM or any family members such as to establish an arguable case at this time. There may be difficulties regarding relocation but it has not been shown that it is unreasonable to expect SBM in all the circumstances to do so or that other non-standard and particular features exist demonstrating that the removal of SBM and T will be unjustifiably harsh. The Judge touched on the period of separation but this is not a situation in which the Secretary of State is seeking to enforce a policy to remove SBM from this country with a view to making a fresh application to return. It is a case involving a failure to be able to meet the requirements of the Rules as a result of deliberate acts of deceit by SBM. This is an additional requirement in this case which sets it apart from other similar cases for which SBM is responsible.

34. I find T's best interests will be to remain with his mother who is his primary carer and with whom he has his primary bond. It has not been shown that he will suffer adverse consequences such as to enable him to succeed or for SBM to remain in line based upon the consequences of his removal with his mother.

Decision

35. **The First-tier Tribunal Judge materially erred in law. I set aside the decision of the original Judge. I remake the decision as follows. This appeal is dismissed.**

Anonymity.

36. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make that order (pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 to protect the identity of the child.

Signed…….
Upper Tribunal Judge Hanson

Dated the 7th May 2014