Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/31183/2013

THE IMMIGRATION ACTS

Heard at Manchester **Determination Promulgated**
On 16th May 2014 **On 6th August 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

MR MUBARAK PATEL
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J Holt, Counsel
For the Respondent: Mr G Harrison, Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is an appeal by Mr Mubarak Patel a citizen of India born on 20th December 1982. The Appellant has a very extensive immigration history which is set out in detail at paragraph 4 of the reason for refusal letter dated 12th July 2013. In brief the Appellant entered the United Kingdom on 15th June 2003 with a spousal visa valid from 19th May 2003 until 19th May 2005. Between May 2005 and 4th May 2011 the Appellant appears to have

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remained in the United Kingdom as an overstayer and on 4th May 2011 he was arrested by Greater Manchester Police who subsequently referred him to the Home Office in respect of his immigration status. The history is set out in detail thereafter at paragraph 4 of the reason for refusal letter but on 21st June 2013 the Appellant submitted an application for indefinite leave to remain in the United Kingdom as the victim of domestic violence. That application was refused on 12th July 2013.

2. The Appellant appealed and the appeal came before Judge of the First-tier Tribunal Judge Ransley sitting at Manchester on 20th November 2013. In a determination promulgated on 27th November 2013 the Appellant's appeal was dismissed under the Immigration Rules but was allowed on the basis that the Respondent's decision to remove the Appellant would breach Section 55 of the UK Borders and Immigration Act 2009 and was disproportionate by reference to Article 8(2) of the ECHR.

3. On 6th December 2013 the Secretary of State lodged Grounds of Appeal to the Upper Tribunal. The grounds asserted that the Immigration Judge had materially misdirected herself in law with regard to her analysis of Article 8 and that it was still the case that decisions pursuant to the lawful operation of immigration control will be proportionate on all save the minority of exceptional cases identifiable on a case-by-case basis. Further it was contended that the judge had materially misdirected herself in law and had found that a preference test for the Appellant to remain with the family constituted best interests under Section 55 which was the wrong test.

4. On 14th January 2014 First-tier Tribunal Judge Keane granted permission to appeal. The judge considered that generally the grounds reflected no more than a disagreement with the findings of Judge Ransley, findings which were properly open to her on the evidence presented to her and accordingly disclosed no arguable error of law. However Judge Keane noted that it was also contended in the grounds that the judge did not identify those exceptional circumstances which she had in mind in finding that the removal of the Appellant from the United Kingdom would interfere with his right to respect for family life under Article 8 of the Human Rights Convention. He considered that it was perhaps not incumbent upon the judge to refer to "exceptional circumstances" as long as the circumstances which she mentioned in her assessment of the proportionality of the decision under appeal were indeed exceptional.

5. Judge Keane considered that a careful reading of the judge's determination suggested that the judge had in mind the family life which the Appellant had formed with his sister Sabiha and Sabiha's five children after he moved into their home in July 2006. If those were the exceptional circumstances which the judge had in mind when striking the balance in favour of the Appellant he considered that she made an arguable error of law but for which the outcome of the appeal might have been different and that the application for permission was granted but limited to that ground.

6. No Rule 24 response appears to have been lodged in reply by the Appellant's instructed solicitors. For the purpose of continuity throughout the proceedings Mr Mubarak is referred to in this determination as the Appellant and the Secretary of State as the Respondent. The Respondent appears by his instructed Counsel Mr Holt. Mr Holt is familiar with this matter having appeared before the First-tier Tribunal. The Secretary of State appears by her Home Office Presenting Officer Mr Harrison.

Submission

7. Mr Harrison acknowledges that the Grounds of Appeal predate the decision in *Gulshan* but do make reference to *R (Nagre) v SSHD [2013] EWHC 720* but the issue before me is whether or not the judge has identified exceptional circumstances. He relies on the grounds of appeal and accepts the view expressed by Judge Keane that in the main the decision of Judge Ransley is well-reasoned but (to use Mr Harrison's words) "she subsumed Section 55 of the 2009 Act within Article 8." The Secretary of State considers that the Immigration Judge has failed to take into account that the best interests of children are to remain with their mother in the UK and that whilst they may enjoy the Appellant's presence it is not necessary to their best interests. He points out that the Immigration Judge has not made findings as to whether the Appellant's sister could obtain the necessary level of support from another family member in the UK to enable her to parent the children effectively. He asked me to set aside the decision of Judge Ransley and to remit the decision to the First-tier Tribunal for rehearing.

8. Mr Holt starts by stating that it is difficult within the grant of permission to see any error of law, although it is contended that the judge has failed to identify "in exceptional circumstances" but states that there could be family life maintained by the Appellant with his sister and her children and takes me to paragraph 34 of the judge's determination. He states that the relationship is accepted by Dr Moore in his report and points out that Mr Harrison when the Home Office Presenting Officer before the First-tier Tribunal only made a very limited challenge to Dr Moore's report and that he did not seek to challenge Dr Moore's assessment regarding the impact of the removal directions on the children. That was noted by Immigration Judge Ransley and he submits that that was a conclusion she was entitled to reach. He asked me to find that there is no material error of law and to dismiss the Appellant's appeal.

The Law

9. Areas of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial consideration, reaching irrational conclusions on fact or evaluation or to give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.

10. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every

factual issue of argument. Disagreement with an Immigration Judge's factual conclusion, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence which was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because an Immigration Judge concludes that the story is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

Findings

11. The challenge made herein by the Secretary of State is that the judge has materially misdirected herself with regard to her analysis of Article 8 and that the judge should not have allowed the appeal outside the Immigration Rules. Certain facts however have to be acknowledged in this matter. The first of these is that this determination was produced in November 2013 before a considerable number of cases were determined to provide guidance both to judges and practitioners as to what constituted exceptional circumstances that would enable a judge to allow a case under Article 8 outside the Immigration Rules. Secondly the issue arises as to whether the Respondent's decision to remove the Appellant would breach Section 55 of the 2009 Act and is disproportionate by reference to Article 8(2) of the ECHR.

12. These issues are addressed by Immigration Judge Ransley at paragraph 34 of her determination. She made findings of fact that the Appellant had been in his sister's house since July 2006 a period of some seven years at date of decision and that the Appellant formed a strong family life with her and her five children aged respectively 14 to 9 at date of decision and consequently were aged between 7 and 2 at the date that he moved in. Certainly so far as the younger children are concerned there can be little doubt that the Appellant has provided the predominant father figure for the children throughout their lives. This is acknowledged by Judge Ransley at paragraph 34. She has accepted that Dr Moore's report is well-reasoned and that the removal directions would seriously prejudice the best interests of the children. This factor was not challenged by Mr Harrison for the First-tier Tribunal and that is acknowledged at paragraph 30.

13. In *LD [2010] UKUT 278 (IAC)* the Tribunal stated:-

> "The interests of the minor children and their welfare are a primary consideration in the balance of competing considerations in this case and their educational welfare as part of the UK educational system point strongly to their continued residence here as necessary to promote those interests."

14. It is, of course, well-established that, where the Appellant is in the UK and removal will interfere with the family life/private life he (and since *Beoku-Betts v SSHD [2008] UKHL 39* his family) already enjoy in the UK, then Article 8 can be engaged. In *Ullah and Do [2004] UKHL 26* the House of Lords accepted that Article 8 could, in principle, be relied upon if the effect was that the infringement of the Appellant's rights would occur in the country to which he was to be removed.

15. The law was recently considered in *Zoumbas v the Secretary of State for the Home Department [2013] UKSC 74*. Paragraph 10 of that determination sets out the basic principles the court needs to follows:

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

    (2) in making that assessment, the best interests of a 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 paramount consideration;

    (3) although the best interests of a 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 a 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 a 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 of 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 a 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.

16. The above sets out the law and whilst *Zoumbas* postdates the hearing before the First-tier Tribunal and gives added clarity as to the approach to be adopted by the judiciary it is clear that the judge has given full consideration to all competing factors and the interests of the children in reaching her determination.

17. Further it is accepted herein that the Appellant cannot succeed under the Immigration Rules. The judge has gone on to consider this matter under Article 8 and has provided a detailed and thorough analysis. I acknowledge that *MF Nigeria [2013] EWCA Civ 1121* confirms that the new Rules are a complete code and consequently if an appeal is to be allowed

under Article 8 it is necessary that exceptional circumstances considered in the balancing exercise involving the application of a proportionality test.

18. The Tribunal in *Gulshan* made clear and has repeated subsequently in *Shahzad (Article 8: legitimate aim) [2014] UKUT 00085 (IAC)* at paragraph (31):

> *"Where an area of the rules does not have such an express mechanism, the approach in R (Nagre) v Secretary of State for the Home Department [2013] EWHC 720 (Admin) ([29]-[31] in particular and Gulshan (Article 8 - new Rules - correct approach) [2013] UKUT 640 (IAC) 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."*

19. In this instant case the judge when considering Article 8 has looked very carefully at the impact of removing the Appellant bearing in mind his relationship with his nieces and nephews. Whilst acknowledging that the judge has not adhered in detail to the concept of exceptional circumstances purely because the authorities were not before her at that time she has given due consideration both to the factual circumstances and comprehensive report of Dr Moore. She has recited within the determination Dr Moore's conclusion that the enforced removal of the Appellant would have a lasting negative psychological effect on the children, that the appellant has effectively a paternal relationship with the younger children and has gone on to note the impact on the children that removal of the Appellant would have particularly bearing in mind the fact that the Appellant's sister (the mother of the children) is receiving medical help for stress related mental health difficulties. Judge Ransley confirms that she has no reason to disagree with the assessment and conclusions made by Dr Moore nor indeed the Home Office Presenting Officer. In such circumstances applying the relevant case law particularly *ZH (Tanzania) [2011] UKSC 4* the judge has made findings of fact that she is entitled to. I am not determining whether or nor I, or any other judge, would have come to the same conclusions. The question is was there a material error of law in the decision of the First-tier Tribunal. There is nothing within her determination to show that the decision is perverse. The decision discloses no material error of law and in such circumstances the appeal of the Secretary of State is dismissed and the decision of the First-tier Tribunal is maintained.

Decision

20. The decision of the First-tier Tribunal does not disclose a material error of law. The appeal is dismissed and the decision of the First-tier Tribunal is maintained.

21. The First-tier Tribunal did not make an order pursuant to Rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. No application is made to vary that order and none is made.

Signed Date

Deputy Upper Tribunal Judge D N Harris 31st July 2014