IAC-AH-CO-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/34697/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 13 November 2014	**On 18 November 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE MCWILLIAM

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR YUSUF EBRAHIM KHERIWALA

Respondent

Representation:
For the Appellant: Mr T Melvin, Home Office Presenting Officer
For the Respondent: None

DECISION AND REASONS

1. The respondent whom I shall refer to as the appellant as he was before the First-tier Tribunal is a citizen of India and his date of birth is 29 August 1978.
2. The appellant made an application on 18 July 2012 for leave to remain on the basis of his private and family life here. The application was refused by the Secretary of State in a decision of 6 August 2013. The application was considered under the partner route in Appendix FM. The appellant's spouse, Maria Shabbir Hussian is a citizen of Pakistan and she has leave to remain in the UK as a Tier 2 (General) Migrant to 1 August 2014. The decision maker decided that the appellant's application could not succeed

under Appendix FM and the application was also refused under paragraph 276ADE of the Immigration Rules.

3. The appellant entered the UK in 2010 having been granted permission to enter as a Tier 2 (Student). His leave was extended until 4 September 2012. The appellant's wife is in the UK on a work permit having come here originally in 2007.

4. The appellant appealed against the decision of the Secretary of State and his appeal was allowed under Article 8 by Judge Monro following a hearing on 29 July 2014 in a decision that was promulgated on 4 August 2014.

5. Permission to appeal against the decision of Judge Monro was granted by Judge McClure on 9 October 2014. Thus the matter came before me. The appellant attended the hearing alone and unrepresented.

The Findings of the FtT

6. The findings of the First-tier Tribunal are as follows:-

> "24. In accordance with **Gulshan** I find that her are good grounds to consider whether the refusal of leave to remain is a breach of the UK obligations under the wider law relating to Article 8 ECHR as there are features relating to the appellant's wife and child which are not sufficiently recognised by the Immigration Rules which would make a failure to do so unjustifiably harsh.
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> 25. In considering the position under Article 8 I have applied the staged approach as set out in Razgar [2004] INLR 349. The appellant has established family life with his wife and child. Potentially the decision interferes with that family life and it does interfere with the appellant's private life and engages Article 8 (AG Eritrea) v Secretary of State for the Home Department [2007] EWCA Civ 801).
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> 26. Section 55 of the Borders, Citizenship and Immigration Act 2009 requires the UK Border Agency to carry out its existing functions in a way that takes into account the need to safeguard and promote the welfare of children in the UK. The respondent did not consider the welfare of the appellant's child as at the time the application was made his child had not been born. I consider Adam's welfare in the course of this Determination.
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> 27. The decision is in accordance with the law and pursues the legitimate aim of a fair and firm immigration policy.
> 28. In considering whether the removal would be proportionate I have had regard to the decisions in Huang [2007] UKHL 11 and KR (Iraq) [2007] EWCA Civ 514. and bear in mind that at paragraph 19 in the Huang decision, reference was made with approval to the decision in Razgar in which it was stated that the judgement on proportionality

"must always involve the striking of a fair balance between the rights of the individual and the interest of the community which is inherent in the whole of the Convention. The severity and consequences of the interference will call for careful assessment at this stage."

29. ...

30. The appellant and his wife have claimed that neither could live in the other's country, but they have not demonstrated that this is anything other than a choice each is making. Although Muslims are a minority, India has the world's second largest Muslim population, according to the USRF 2009 Report. The appellant has not given any history of being discriminated again because of his religion. I do not accept that if his wife lived in India with him this would be to her detriment or that of their son. I do not have any documentary evidence that indicates that it would be impossible for the appellant to live in Pakistan with his wife.

31. However I note that the appellant's wife will have been lawfully in the United Kingdom for ten years next year, and she is well on track to qualify for indefinite leave to remain; and that would confer British citizenship on their son with the advantages those will bring to him. If she were to leave the United Kingdom Mrs. Kherwala would lose her prospects of a future in this country and it would be unreasonable to expect her to give those up. If she remained while her husband left the UK to make an application to join her as a spouse, I accept her evidence that she would be placed in an intolerable position as far as her work is concerned; she has to date relied on her husband to assist with child care; and at one time her mother came to stay while he was working. Without child care support, she would probably have to leave work and her future would then be very troubled. Indeed she might then be unable tot sponsor her husband to join her.

32. In considering the interests of Adam, which in this jurisdiction are a primary consideration I take into account Lord Hope's comments in ZH (Tanzania) 2011 UKSC 4 'there is an obvious tension between the need to maintain a proper and efficient system of immigration control and the principle that, where children are involved, the best interests of the children must be a primary consideration'; the proper approach....is, having taking this as the starting point, to assess whether their best interests are outweighed by the strength of any other considerations. ...it would be wrong to devalue what was in their beset interest by something for which they would have in no way be held to be responsible'.

33. ...

34. To date Adam has had the benefit of growing up with both of his parents. I have already commented on the fact that if his mother were to leave the UK at this point, he would lose the opportunity of acquiring British nationality in the event that his mother obtains indefinite leave to remain next year. That would be a significant loss

to him. I accept that at the age of two, his significant attachments are to his parents, and leaving the UK as such would not be to his detriment, leaving aside his future prospects here. If his father were to leave for an indefinite period of time then Adam would remain with his mother but their future would be rendered precarious by her likely inability to work full time. It is hard to see how the interest of the community would be served by making the life of this child and his mother precarious when the continued presence of the appellant would enable the family to flourish.

35. In considering the pubic interest question, I take into account that the appellant has always been in this country lawfully; he speaks English; has a Masters Degree obtained in this country; that he and his wife have demonstrated that they are able to support themselves financially. This is not a case where the appellant has overstayed and is now pleading that marriage and a son should turn his unlawful stay. He has been able to work in the past and there is every prospect that he will be able to do so again if he remains here. I do not ignore his criminal conviction, but have to consider this in its context; in the light of his wife's evidence and support for the appellant; and the light sentence; and taking into account the lack of evidence that there is any likelihood of a recurrence of such behaviour. I find that there are factors relating to this appellant that outweigh the public interest in his removal, and that there are compelling circumstances not sufficiently recognised under the rules to warrant a grant of leave to remain outside the rules."

The Grounds Seeking Leave to Appeal and Oral Submissions

7. The Secretary of State's grounds seeking permission to apply can be summarised.

8. Ground 1 argues that asserts that the Judge misdirected himself at [17] in relation to the standard of proof. He referred to the case of **Kacaj (Article 3 – Standard of Proof – Non-State Actors) Albania [2001] UKIAT 00018,** but this applies to Article 3 and not Article 8.

9. Ground 2 argues that the Judge went behind a criminal conviction which is contrary to Section 117C(1) of the Nationality, Immigration and Asylum Act 2002. The Judge was required by statue to give weight to the appellant's conviction conviction.

10. Ground 3 argues that the Judge misdirected himself in relation to Article 8. The Tribunal failed to give any or adequate reasons for finding that there are arguably good grounds for conducting an assessment outside the Rules. The approach is at odds with the decisions of **Izuazu (Article 8 – new rules) Nigeria [2013] UKUT 45 (IAC)**, **MF (Nigeria) [2013] EWCA Civ 1192**, **Nagre [2013] EWHC 720 (Admin)** and **Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 040 (IAC).**

11. The grounds argue that the Judge's decision that it would be in the best interests of the appellant's child to remain in the UK is entirely speculative and it is irrelevant to the proposition that the appellant should return to India to make an application for entry clearance or that the family should relocate. The court failed to direct itself in relation to **EV (Philippines) & Ors [2014] EWCA Civ 874** where it was held that the best interests of the children should be assessed "in the real world", and not in isolation to the particular circumstances of the child. The appellant's presence in the UK is not conducive to the public good and there are two other countries in the UK where family life could continue. The child is very young and has not developed a significant private life here (**Azimi-Moayed and Others (decisions affecting children; onward appeals) [2013] UKUT 197 (IAC**).

12. Mr Melvin made oral submissions in the context of the grounds of appeal. The appellant made submissions which can be summarised. He confirmed that he has filed a complaint with the IPCC (Independent Police Complaints Commission) in relation to his conviction and the investigation of the offence. He has been married for five years. His wife can apply for indefinite leave to remain in six months' time and then their child will be entitled to British citizenship. He is not able to go back to India alone because the appellant's wife is dependent on him for childcare to enable her to work. They would not be able to meet the financial requirement of the Rules because the appellant's wife would not be able to work without him here in the UK. She would not be able to return with him as she would lose his job. In India the police have been told about his conviction and he has been written to and told that he must report daily to the police station there. He would be in a difficult position in India having married a Pakistani woman whose brother is in the Pakistani army. He referred in submissions to recent convictions of Muslim men in India. His connection with a Pakistani family would put him in a difficult position.

Error of Law

13. There is no error of law by the First-tier Tribunal in relation to the appellant's criminal conviction (sexual assault committed on his wife). The appellant is not a foreign criminal as defined in the UK Borders Act 2007 ("the 2007 Act") or the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") because it was not established by the Secretary of State that has been convicted of an offence which causes "serious harm." In my view Section 117C of the 2002 Act does not apply to this case. It is not an appeal against a deportation decision and the appellant is not a foreign criminal. I do not agree that the Judge went behind the findings of the Magistrates' Court. The Judge was entitled to take into account that the appellant was not given a custodial sentence and he heard evidence from the appellant's wife who was the complainant in the matter. The Judge clearly took into account the criminal conviction (see [35]); however, it was a matter for the Judge what weight and significance took place on it.

14. The appellant could not satisfy the requirements in Appendix FM. The Judge found that there were features relating to the appellant's wife and child which are not sufficiently recognised by the Immigration Rules and on this basis he went on to consider whether or not there was a further Article 8 claim. Although he found that it is a matter of choice that the family has decided not to live in either India or Pakistan [30], he accepted the evidence that without child care support from the appellant his wife would probably have to leave work which may mean that she would be unable to sponsor the appellant to enable him to join her here. The challenge is that the Judge gave inadequate reasons for finding that there are arguably good grounds for conducting an assessment outside the Rules and the Judge having embarked on a freewheeling Article 8 analysis. In the light of the findings of the Court of Appeal in **MM (Lebanon) & Ors, R (On the Application Of) v Secretary of State for the Home Department [2014] EWCA Civ 985** there is in my view little merit in this ground.

15. The Judge assessed Adam's best interests on the basis that he is entitled to British citizenship. However, Adam is not a British citizen and nor is his mother to date. He was not entitled to it at the date of the hearing before the FtT. The Judge assessed his best interests on the basis of Adam losing British citizenship and this amounts to a material error of law. The Judge in my view took into account irrelevant considerations and in my view this amounts to a material error of law. The error is compounded by the application of the wrong standard of proof. The error is material and I set aside the decision to allow the appeal pursuant to Section 12(2)(a).

16. I indicated to the parties that I would go on to remake the decision pursuant to Section 12(2)(b)(ii) without the need for a rehearing as contemplated in the directions to the parties issued by the Upper Tribunal. Mr Melvin did not object to the admission of further evidence namely documents relating to his complaint against the police. However, the evidence is not material to the error of law of the inevitable outcome of the appeal.

Conclusions

17. The appellant cannot satisfy the requirements under Appendix. In this case Appendix FM is not a complete code; but, there are in my view no compelling circumstances.

18. Adam's best interests are to remain with his parents. He is not a British citizen and there is no evidence to support the assertion that it would be in his best interests to remain here in the UK. His mother has a right to be here on a temporary basis. His father has no right to be here. Adam is very young (his date of birth is 28 September 2012). He has not started education in the UK and Judge Monro did not find that there would be any difficulties in the appellant and his wife relocating to India or Pakistan. I

note the appellant and his wife are educated and employable (in either Pakistan or India). I accept that the appellant's wife has been here for some time and there may be career and economic advantages to her staying here, but it has not been shown the family cannot make an application to come to the UK and work here at some stage in the future or that it is not reasonable to expect the family to relocate.

19. The appellant gave evidence at the hearing before me about difficulties that he would encounter on return to India, but there is no good reason why that evidence was not before the First-tier Tribunal. It is my view that the appellant was simply responding to the Judge's findings at [30] of the determination and exaggerating the problems that his family would face on return to India. There is no reason for me to go behind the findings of the FtT.

20. It would be reasonable and proportionate to expect the family to relocate to India or Pakistan. However, it is a matter for them should they decide that it would be preferable for the appellant to return alone to India in order to make an application for entry clearance. I accept that there may well be difficulties in relation to child care, but I do not accept that the evidence establishes that the appellant's departure from the UK would inevitably lead to his wife having to resign from her position of employment. The decision is proportionate to the legitimate aim. The maintenance of effective immigration control is in the public interest (section 117B of the 2002 Act). The appeal is dismissed on substantial Article 8 grounds.

The Decision

21. The appeal is dismissed under the Immigration Rules.

22. The appeal is dismissed under Article 8 of the 1950 Convention on Human Rights.

Signed Date **13 November 2014**

Deputy Upper Tribunal Judge McWilliam