Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/35571/2013

THE IMMIGRATION ACTS

Heard at Bradford	**Determination Promulgated**
On 9th September 2014	**On 3rd October 2014**

Before

UPPER TRIBUNAL JUDGE D E TAYLOR

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

RAJA AKIF AHMED

Respondent

Representation:

For the Appellant: Mrs R Pettersen, Home Office Presenting Officer
For the Respondent: Mr Syed Ali, Immigration Aid

DETERMINATION AND REASONS

1. This is the Secretary of State's appeal against the decision of Judge Upson made following a hearing at Bradford on 13th May 2014.

Background

2. The claimant is a citizen of Pakistan born on 27th April 1982. He arrived in the UK as a student on 25th January 2011. On 29th October 2012 he made an application for leave to remain in the UK on the basis of his private and family life.

3. He married his wife, a British citizen, on 14th July 2012 against the wishes of both of their parents. She has a child from her first marriage who lives with her during the week and with his British father every weekend. The couple also have their own child born on 19th April 2013.

4. In the reasons for refusal letter the Secretary of State accepted that the claimant had a genuine and subsisting relationship with his British partner who had lived in the UK all her life and was in employment here. She had not, however, been provided with evidence of the birth of the child.

5. It is not disputed that the claimant cannot meet the maintenance requirements of the Immigration Rules since his wife, although she has worked in the past, is on sick leave and claiming benefits.

6. The Immigration Judge wrote as follows:

> "I have had regard to Section 55 Borders, Citizenship and Immigration Act 2009 and the best interests of the children in this case. I find that the Appellant is the father of a British child whose mother is also British. In addition I find that the Appellant's wife is the mother of another child who is also a British citizen. His father lives in the UK and I find that he has care of his son every weekend. I find that removal of the Appellant from the UK would be to cause the Appellant's wife to have to make a decision about where she should live. I am satisfied that she would be unlikely to choose to accompany the Appellant out of the UK if that would cause her to leave her older son behind. In those circumstances I find that the Appellant would inevitably be separated from his own son. The best interests of his son are better served if he has the benefit of life in the company of both parents."

7. The judge then referred to the case of Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 640 (IAC) and the requirement, for Article 8 purposes, to consider whether there were arguably good grounds for granting leave to remain outside the Rules if there were compelling circumstances not sufficiently recognised under them. He wrote:

> "I am satisfied that the existence of the children amount to such circumstances."

8. The judge then set out the test outlined in Razgar and on that basis allowed the appeal.

The Grounds of Application

9. The Secretary of State sought permission to appeal on the grounds that the judge had allowed the appeal on the basis that the claimant had children who were British citizens which justified a departure from the Immigration Rules. The judge had given inadequate reasons as to why simply having children amounts to good grounds and compelling circumstances not sufficiently recognised under them.

10. Permission to appeal was granted for the reasons set out in the grounds by Judge Cruthers on 8th July 2014.

Submissions

11. Mrs Pettersen relied on her grounds and submitted that the judge had failed to consider the Secretary of State's interest in maintaining immigration control and the possibility of the claimant making the correct application for entry clearance in the normal way.

12. Mr Ali submitted that there was no error in this determination. The judge was entitled to consider that this was an appropriate case which should be allowed outside the Rules. The claimant and sponsor had custody of both children but the first child could not be taken outside the jurisdiction because he resided with his natural father each weekend.

Findings and Conclusions

13. The reasoning in this judgment is a little compressed which made it vulnerable to appeal. Had the judge set out his reasoning more clearly it is unlikely that permission to appeal would have been sought or granted. Nevertheless the phrase in the grounds

> "inadequate reasons as to why simply having children amounts to arguably good grounds"

is not a proper reflection of the facts of this case.

14. This is not a matter of choice. The claimant and sponsor could not relocate to Pakistan if they wished to do so. Whilst the second child could accompany the claimant and his wife back to Pakistan either to live with him there or whilst he made an application for entry clearance, the first child simply could not do so. He lives part of the week with his British father and his consent would be required to remove him from the jurisdiction. The facts of this case are far removed from the facts in Gulshan.

15. Mrs Pettersen sought to argue that the judge had not properly weighed in the balance the Secretary of State's interest in maintaining immigration control and the claimant's ability to apply for entry clearance but this is not the basis upon which leave was sought. In any event, although it is an argument in favour of the Secretary of State, it was clearly not one which found favour with the judge. At the end of the day the assessment of proportionality is a matter for him.

Decision

16. The judge did not err in law and his decision stands. The claimant's appeal is allowed.

Signed Date

Upper Tribunal Judge Taylor