IAC-YW-LM-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/40086/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 3rd September 2014	**On 22nd October 2014**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ASWATHY ANILKUMAR
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr L Tarlow, Senior Presenting Officer
For the Respondent: No appearance or representation

DECISION AND REASONS

1. This is the Secretary of State's appeal against the decision of the First-tier Tribunal (Judge Fox) who, in a determination promulgated on 28th January 2014, allowed the appeal of the Respondent against the decision of the Secretary of State to refuse to vary leave to remain in the United Kingdom. Whilst this is an appeal by the

Secretary of State, for convenience I will refer to the parties in the determination as they appeared before the First-tier Tribunal.

2. The history of the appeal is as follows. The Appellant is a citizen of India, born on 31st May 1982. She is now 31 years of age. On 19th October 2010 she entered the United Kingdom with a spouse's visa valid from 23rd September 2010 until 23rd December 2012. Her son, her dependant, entered the United Kingdom on the same day with a visa to accompany his mother. Before her leave expired, she made an application on 19th November 2012 for leave to remain. The Appellant's son also made an application as a dependant of his mother. The applications were refused on 21st June 2013.

3. The reasons given for refusing the Appellant's application were as follows; her extension of stay as the spouse of a person present and settled in the United Kingdom was refused under paragraph 284 and in particular (ix)(a) the applicant was required to provide an English language test certificate in speaking and listening from an English language test provider approved by the Secretary of State which must meet or exceed level A1 of the CEFR. The Appellant, it was stated, only submitted evidence to show that she had passed the life in the UK test but that was only acceptable for a settlement application and not for leave to remain, therefore the Secretary of State was not satisfied that she had provided an English language test certificate and that she was exempt from such a requirement. Thus her application was refused under paragraph 286 with reference to paragraph 284(ix)(a) of HC 395 (as amended).

4. The refusal letter also gave consideration to family life under Article 8 under Appendix FM and EX.1 of the Rules. It was recognised that the Appellant and her spouse, who was a British citizen, had a son together but that he had only resided in the UK since 2010 and that it was not unreasonable to expect him to leave the UK as he had spent the majority of his life in India. In respect of their relationship it was noted that he was previously an Indian national until he was naturalised on 25th September 2012 and had spent the majority of his life in India before he entered in 2005. It made reference to his employment and therefore it was noted that whilst relocation would cause a degree of hardship there were no insurmountable obstacles preventing them from continuing their relationship in India. Thus the application was refused. In respect of her son he was refused in line with her as she did not meet the English language requirement. No reference was made in the refusal letter to any issues raised under Article 8.

5. The Appellant issued Grounds of Appeal against that decision and to it attached a statement in which it was said that there had been a genuine mistake when she had submitted evidence to satisfy the Immigration Rules under paragraph 284 and that she had undertaken an examination in English language after the date of the decision and provided a copy of that certificate dated 8th July 2013 from the Elizabeth College London confirming that she had been awarded the ESOL Skills for Life Speaking and Listening/National Qualifications Unit in ESOL by English Management Direct (EMD) Board. She accepted that she was not in an exempt category but that she had

made a genuine mistake. There were other matters set out in her grounds relating to her personal circumstances, those of her husband who was a British citizen and her child who was in education in the United Kingdom since he had arrived in 2010.

6. The appeal came before First-tier Tribunal Judge Fox on 17th January 2014 who decided the case on the papers. He set out in his determination the issues between the parties and it is plain at [12] that she could not meet the Immigration Rules under paragraph 284 because at the date of decision she had not demonstrated that she had met the English language requirement by providing the requisite qualification at [12]. However, it is also clear from the determination that the Appellant's account was that it was a genuine mistake to provide the Life in the UK test and that since she received the refusal she had provided confirmation that she did meet the English language requirement, albeit after the decision.

7. The judge considered the reasons why the application did not meet the requirements of Appendix FM and considered it on the basis of the material provided by the Appellant. The judge accepted that there was merit in the Respondent's argument under Appendix FM but reached the conclusion that that was not the end of the examination of the facts (see [14]). The judge therefore considered the case "outside the Rules" under Article 8 and took into account at [16] and [17] the factual circumstances demonstrated by the evidence before him which he found were the "relevant factors" at [16], including the steps that the Appellant would have to take to re-establish a fresh application to join her husband and the success of that, the fact that her husband was a British national who had been residing in the UK for ten years, that he was in gainful employment, that the Appellant had lost ties to her home country since her arrival and that her family were her husband and her child. She had established herself in the United Kingdom culturally, socially and economically, demonstrated by her proficiency as established now in her English language and passing the Life in the UK test, her son had been attending school in the UK and has integrated well and excelling in his studies and that removal from studies and the environment in which he had previously lived would have a detrimental effect upon him. The judge also found at [17] that if a fresh application was made she would meet the relevant criteria and would succeed in an application to join her husband but that the additional consideration such as the short-term breakup of the family and the disruption to the child's life were matters that were also relevant.

8. At [18], it is clear that he weighed those identified factors against the public interest but found that on the facts as established and balancing all the material factors that return was not proportionate to the legitimate aim to be achieved, thus he allowed the appeal on Article 8 grounds. At [22] he also was satisfied that leave should be issued to the Appellant and as a consequence to her son.

9. The Secretary of State sought permission to appeal that decision and permission was granted on 7th April 2014.

10. The Appellant did not appear nor was she represented before the Upper Tribunal at the hearing on 3rd September. However, a letter from her representatives had been sent requesting that the appeal be considered on the papers and that the Appellant could not attend the hearing. The file demonstrated that this was a case that had been transferred to Field House, it previously having been listed at Glasgow as the Appellant lives in Scotland. The appeal came before the Upper Tribunal sitting at Glasgow in July but it was recorded at that time that whilst the Appellant, her husband and son had attended the hearing their solicitor was unable to act on their behalf as he was a solicitor who qualified in England and it appears that an application was made to transfer to Field House. It is not clear to me why such an application was made when they live in Glasgow but nonetheless the application was made.

11. I am therefore satisfied from the letter that had been sent by her solicitors that they were content for the matter to be considered by the Tribunal on the basis of what had been set out, the determination of the judge and the grounds that had been produced on behalf of the Secretary of State.

12. Mr Tarlow appeared on behalf of the Secretary of State and relied upon the grounds as drafted. He submitted that the judge did not give consideration to Article 8 under the Rules as to why her husband and child could not return with her to India and re-establish family life there. He reiterated that the child concerned had not been in the UK for more than seven years and that he would look to the family rather than to any private life that he had established outside of that unit. He turned to ground 3 in which it was asserted that the Tribunal had failed to apply the income threshold in its Article 8 assessment. However, that was not the basis of any original refusal made by the Secretary of State; the only refusal related to the failure to provide an English language certificate. In those circumstances he did not seek to rely on paragraph 3.

13. The skeleton argument that had been attached to the solicitors' letter had been provided to Mr Tarlow. In that document, it made reference to "transitional provisions" that might lead to the Appellant falling within the small range of individuals as those who had entered lawfully prior to the Rule change. However, the skeleton argument did not provide any transitional provisions or any properly articulated argument in respect of this matter. He recognised that Part 8 of the IDIs could possibly apply to this Appellant given that she had entered the UK on 19th October 2010, having entered lawfully as the spouse of a person present and settled in the United Kingdom and that that was a time shortly before the entry requirement included the need to pass an approved English language test to the appropriate standard which was introduced in November 2010. Thus, whilst the skeleton argument did not properly identify any IDI that was relevant to this Appellant but merely made reference to "transitional route", he was aware of such an IDI relevant to this Appellant.

14. I reserved my determination.

15. The grounds of the Secretary of State submit at [1 and 2] that the judge failed to give any or any adequate consideration to the issue of insurmountable obstacles to family life continuing outside of the United Kingdom and that this was a key factor in the proportionality assessment, albeit not a determinative one. At paragraph 2 of the grounds it is submitted that the Tribunal in finding that the best interests of the child demonstrated that removal was disproportionate, the evidence before the Tribunal was that he had spent less than seven years of continuous residence and the judge had given no consideration to this. Whilst the grounds at [3] submitted that the Tribunal had failed to apply the income threshold in his Article 8 assessment, it is plain from reading the refusal letter that that had not been an issue raised, this being a case which was refused solely on the basis that the Appellant had not produced the requisite English language certificate and Mr Tarlow recognised in those circumstances that he did not seek to rely on paragraph 3.

16. I therefore considered those grounds. The grounds do not articulate any challenge to the decision on the basis that he had not followed the approach set out in **Gulshan [2013] UKUT 640** 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. The issue raised relates to his consideration of insurmountable obstacles to family life which he considered under Article 8. At paragraph 14 of the determination the judge recited that he proposed to consider the Appellant's claim "independent of the Rules and Appendix FM" but also recorded "I accept that there is merit in the argument vis-à-vis Appendix FM but that is not the end of the examination of the facts". He then went on to consider all the relevant factors demonstrated by the particular factual matrix in relation to this Appellant under Article 8 "outside the Rules" and it is plain that within this context he considered the issue of insurmountable obstacles. Whilst the Secretary of State has not articulated in the grounds any criticism in the sense that the judge did not follow the structured approach that I have identified earlier in accordance with **Nagre [2013] EWHC 720**, thus under the present law the starting point was to look at the Rules, to see if the Appellant met the requirements and before considering Article 8 "outside the Rules". However, it can be reasonably inferred from [14] that the judge recognised that the Respondent did not consider that the Appellant could meet those Rules. Whilst I consider that it was incumbent on the judge to consider the appeal under Appendix FM, I have considered the determination in the light of the grounds raised by the Secretary of State and whether any error in that respect was material in the light of the findings of fact made by the judge on the evidence before him and his decision on proportionality under Article 8, whether made inside or outside the Rules.

17. There were a number of factual matters relevant to the decision made by the judge. Those findings can be summarised as follows; the Appellant and her son had entered the United Kingdom lawfully as the spouse of a settled person. He was a British citizen and had lived in the United Kingdom since 2005. Her son also entered the UK lawfully as a dependant of a settled person. Both the Appellant and her husband were in gainful employment and the evidence before the First-tier Tribunal was that

both were employed at the Station Hotel in Aberdeen (see [16]). The parties were in a genuine and subsisting marriage. She had erroneously provided the certificate demonstrating that she had passed the Life in the UK test which did not meet the Rules but on 7th July 2013 had passed the English language requirement and therefore shortly after the decision made on 13th June and at the date of the hearing in January 2014 she had passed the English language requirement which had been the only matter raised in the decision letter which gave rise to her refusal under paragraph 284. The Appellant's Sponsor was a British national and had resided in the UK for ten years although he had previously lived in India prior to that time.

18. Whilst the grounds make reference to the judge being required to consider the issue of insurmountable obstacles to family life continuing outside of the UK, the judge did consider that issue, albeit outside of the Rules, finding that in the context of the proportionality of the decision that it would be disproportionate to break up the family and that the Appellant and her son would have to live apart from their father and Sponsor respectively and that there would be disruption to their child, who had been attending school, had integrated well and had excelled in his studies. It was further found that if a further application was made she would meet the relevant criteria as she had already obtained the English language certificate and there was no issue raised concerning the income threshold criteria. Therefore the judge identified the relevant factors in favour of the balance struck on the Appellant's side, including the issue of insurmountable obstacles. In the light of those factual findings, it is not submitted on behalf of the Secretary of State that it would not be unjustifiably harsh for the family to return. Indeed, there are no countervailing circumstances identified by the Secretary of State. It is not being suggested that the Appellant was not in a genuine or subsisting relationship with her husband nor that she had been in the UK unlawfully. Nor is it stated that the English language certificate which she provided shortly after the decision did not meet the correct requirements.

19. The judge considered the factual matters outlined above and weighed them against what he described as those "against the rights and needs of the UK to control the entry of non-nationals into its territory". It is plain from reading the determination at [18] that he weighed those identifiable factors, including whether there were insurmountable obstacles, against the public interest but reached the conclusion that to remove the Appellant and her son was not proportionate to the legitimate aim to be achieved.

20. I have therefore concluded that any error, although not clearly articulated in the grounds, is not a material one and in the light of the specific factual matrix of this Appellant and her son that the findings made by the judge on Article 8 were within the range of permissible decisions. He considered on the evidence before him and concluded that while she could not meet the requirements of the Rules, the decision to refuse leave to remain was disproportionate when considering it in the context of the public interest but on the particular factual matrix presented.

21. I have outlined earlier the alternative submission set out in the Appellant's skeleton argument and the failure to adequately particularise that issue. Nonetheless it may be said that this Appellant falls within what may be a small category of Appellants

having entered the UK lawfully as the spouse of a person present and settled in the UK in October 2010 shortly before the entry requirement included the need to pass an approved English language test to the appropriate standard which was introduced in November 2010. Mr Tarlow was aware of the Home Office IDI of April 2013 Chapter 8 which could apply to this Appellant in terms of the second category in the heading namely, "Applications made by persons who were granted entry clearance or limited leave to remain under Part 8 of the Rules before 9th July 2012 and that leave is still extant where there is a requirement at Part 8." Thus it is arguable on the factual matrix that the Appellant fell within Part 3 of Chapter 8 of the IDI as her application was leave to remain as a spouse of a person present and settled in the United Kingdom and had been granted entry clearance before 9th July 2012. The IDI goes on to consider at 3.1 "Key points" and a number of key points dealt with a number of circumstances including granting leave to remain at 3.7, "If there is no reason to doubt that the marriage is genuine then, provided the key points are satisfied, leave to remain should be granted for two years on Code 1."

22. Thus there was in existence an IDI that was relevant to this Appellant when considering paragraph 284 and when exercising discretion as her circumstances fell within them and arguably she would have benefited from those published provisions. However, it is not necessary for me to decide this issue further as I have reached the conclusion that any error of law made by the judge was not material and would not justify the setting aside of the decision for the reasons set out. He considered the best interests of the child and the issue of insurmountable obstacles but also in the context of what were the factual circumstances of this Appellant; the Appellant and her son having lawfully entered the United Kingdom and having been in the UK lawfully, the fact that both parties were in gainful employment, which would have entailed the choice of her husband giving up his employment or being separated from his wife, she could meet the Immigration Rules if she made a fresh application having demonstrated her English language proficiency to the required standard and that the child was settled in the United Kingdom at school and that there would be disruption to that family life. In those circumstances, the balance on proportionality was found to weigh in favour of the Appellant and I have found that that was within the range of permissible decisions and thus I do not set aside the decision.

Notice of Decision

The appeal of the Secretary of State is dismissed; the decision stands.

No anonymity direction is made.

Signed Date: 21st October 2014

Upper Tribunal Judge Reeds