Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: OA/02252/2013
OA/02253/2013
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THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 23rd May 2014	**On 3rd June 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE LINDSLEY

Between

MRS KALEEM MAQBOOL (1)
MASTER SHUJA RASHEED (2)
MISS SHAWAL RASHEED (3)
MISS FAJAR SHABBIR (4)
(NO ANONYMITY ORDER MADE)

Appellants

and

ENTRY CLEARANCE OFFICER - ISLAMABAD

Respondent

Representation:

For the Appellant: Ms S Mardner, Counsel, instructed by Nasim & Co Solicitors
For the Respondent: Mr C Avery, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

Introduction

1. The first appellant is a citizen of Pakistan born on 4th May 1975, and the other appellants are her children, who are all also citizens of Pakistan. The second

appellant was born on 14th March 2002, the third appellant was born on 15th November 2006 and the fourth appellant was born on 29th November 2011. They applied for entry clearance to join the sponsor, Mr Shabbir Ahmed, a British Citizen. Mr Ahmed is the spouse of the first appellant, the father of the fourth appellant and the step-father of the second and third appellants. The applications were made on 7th July 2012, and refused on 5th December 2012 on the basis that the appellants could not meet the requirements of the Immigration Rules at paragraphs 281 and 301, primarily because there was insufficient income so that the appellants could not show that they would be adequately supported without recourse to public funds. The appeals against the decisions were dismissed by First-tier Tribunal Judge Sharp in a determination promulgated on the 5th February 2014.

2. Permission to appeal was granted by Judge of the First-tier Tribunal Mark Davies on 3rd March 2014 on the basis that it was arguable that the First-tier judge had erred in law in considering whether the sponsor could show an "income threshold" when this was a case under the old Immigration Rules not the new ones at Appendix FM, and so this concept was not relevant.

3. The matter came before me to determine whether the First-tier Tribunal had erred in law. At the start of the hearing I established that the Tribunal file did not contain the appellant's bundle that had been before the First-tier Tribunal, however Mr Avery kindly allowed his copy to be duplicated for the Tribunal.

Submissions – Error of Law

4. Ms Mardner submitted that Judge Sharp had erred in law because he had not looked to see if the sponsor had adequate funds in accordance with KA and Others (Adequacy of Maintenance) Pakistan [2006] UKAIT 00065 but instead had looked to see if sponsor could show "a regular income in excess of the threshold at either the time of application or the decision", see paragraph 16 of the determination. Also Judge Sharp had failed to properly consider the appeal under Article 8 ECHR, saying most peculiarly that: "Article 8 of the ECHR does not apply to people in his position" with reference to the sponsor. Article 8 ECHR applies to existing family life and to the development of family life, see R (on the application of Ahmadi) v SSHD [2005] EWCA Civ 1721. The sponsor had lived in the UK for 16 years and was a British citizen lawfully and genuinely married to the first appellant, and was the father /step-father of the other appellants.

5. Mr Avery submitted that Judge Sharp had not erred in law in relation to his determination of the appeal under the Immigration Rules. Judge Sharp had clearly dismissed the appeal under the Immigration Rules because there was no evidence that an adequate amount of income could be shown. At paragraph 16 he says that he was only satisfied that the sponsor had an income of a little in excess of £800 a month as there was so little evidence. There was no reason to think that any use of the word "threshold" meant that Judge Sharp had the wrong Immigration Rules in mind. Ultimately this case failed due to lack of evidence of adequate income, and given the finding about the level of income clearly the appeal would have failed on this point under paragraphs 281 and 301 of the

Immigration Rules. Mr Avery accepted that Judge Sharp should not have said that Article 8 did not apply to people in the sponsor's position. He also accepted that there was a lack of detail in the analysis, although Article 8 ECHR was addressed at paragraph 20 of the determination.

6. I told the parties that I did not find that Judge Sharp had made a material error of law in respect of his determination of the appeal under the Immigration Rules. However, I did find that Judge Sharp had erred in relation to determination of the appeal under Article 8 ECHR. The reasons for my decision are set out below. I set aside the decision of Judge Sharp under Article 8 ECHR at paragraph 20 his determination.

Evidence and Submissions for re-making the appeal under Article 8 ECHR

7. The sponsor adopted his statement and confirmed it was true and correct, and that there had been no significant changes in circumstances since it was made. The sponsor explained that he stood by his claim that he had a net income of £1890 per month from his newsagent, on line business, and helping another shop owner at the time of decision. He said he found it very difficult to maintain his family life by making trips to Pakistan as the three trips he had made cost about £12,000 and he was away for 6 weeks each time which seriously disrupted his businesses. His youngest child would be three years old in November 2014 and he had only seen her three times since she was born. His business would not survive if he continued in this way, whereas if his wife was in the UK this would help him in his business. In answer to questions from me the sponsor explained that it would not be possible for him to set himself up in business in Pakistan as he was now seen as someone from the UK. He would face a lot of demands for money as the system was very corrupt in Pakistan, and those from the UK were viewed as very wealthy. He had seen others go back to Pakistan and try to establish themselves in business and fail due to this problem.

8. Mr Avery submitted that he relied upon the entry clearance decision and the findings under the Immigration Rules made by Judge Sharp. Mr Avery submitted that the fact that the appellants could not succeed under the new Immigration Rules was a relevant consideration to Article 8 ECHR even though the application had been made prior to the Article 8 ECHR being part of the Rules and despite of the transitional provisions. This was clear from the case of Haleemudeen v SSHD [2014] EWCA Civ 558. If Article 8 ECHR was considered generally then the decision was proportionate as the sponsor cannot show adequate support for all the appellants and has not shown sufficient evidence that he could not reasonably have his family life in Pakistan.

9. Ms Mardner submitted that it would be disproportionate for the sponsor and appellants to have their family life in Pakistan because the sponsor had lived in the UK for 16 years; he could adequately support his family in the UK; and he would lose the investment he had made in his business in the UK or be forced only to see his family via visits which meant he had only seen his daughter on three occasions and was not able to bond with his step-children.

10. At the end of the hearing I reserved my determination.

Conclusions – Error of Law

11. The only issue at the appeals under paragraphs 281 and 301 of the Immigration Rules was that of adequate accommodation and financial support. Judge Sharp was satisfied that there was adequate accommodation.

12. Judge Sharp has not clearly set out the legal basis on which he assessed the issue of the adequacy of financial support in his determination. He should have cited KA Pakistan or the principles set out in that case, and measured the sponsor's income against these. His reference to a "threshold" was unhelpful and possibly confusing. However there is no evidence that Judge Sharp had applied the financial amounts under Appendix FM, and he certainly did not apply the evidential requirements in Appendix FM-SE.

13. Judge Sharp makes it plain that he did not have evidence before him in terms of payslips, letters from an accountant or other evidence that satisfied him that the there was "sufficient" income. He found that the only evidence which related to the time of decision showed that the sponsor earned a little over £800 a month, and this was not enough (see paragraph 16 of the determination). Even if Judge Sharp did not adopt a clear framework for the financial assessment he did make reasoned findings of fact as to the level of income of the sponsor that he was entitled to reach on the evidence before him. Ms Mardner did not draw my attention to any evidence which showed that Judge Sharp's conclusions on the facts as to the amount of income of the sponsor were perverse or factually wrong.

14. The amount of income the appellants and sponsor would have needed to equal that provided by Income Support at the time of decision (the proper measure of adequacy under KA Pakistan) would have been £2227 (£1327 of income support for a couple plus three children plus £900 for the monthly rent). Thus if Judge Sharp had made a legal error in not directing himself clearly on this point it was not a material error, as the level of monthly income the sponsor had shown on the balance of probabilities at the time of decision (around £800 a month) fell well below that needed to satisfy the Immigration Rules relating to financial support when properly understood.

15. Judge Sharp did err however in his determination of Article 8 ECHR. It was profoundly wrong for him to state that Article 8 ECHR did not apply to the sponsor: Article 8 ECHR applies to everyone in the jurisdiction which clearly includes the appellant. The Supreme Court in Quila v SSHD [2011] UKSC 45 also clarified that no difference should be made between family life in an entry case as opposed to an expulsion case, as there was no different standard in relation to positive or negative obligations. In Quila Lord Wilson explained that the old authority of Abdulaziz v UK 7 EHRR 471 should no longer be followed, and that issues of the possible reasonableness of family life being exercised elsewhere should be dealt with in consideration of whether the decision to refuse entry clearance is justified. Judge Sharp therefore erred in not finding that family life both existed in this case and was subject to an interference by the refusal of entry

clearance, and by failing to conduct a reasoned proportionality assessment to ultimately decide if refusal of entry clearance was a breach of Article 8 ECHR.

Conclusions – Re-making

16. As set out above I am satisfied that the appellants and sponsor have family life together. The first appellant and sponsor are genuinely married, and have had a child together (the fourth appellant), and the second and third appellants are the sponsor's step-children from the first appellant's previous marriage. There is a further child, Sharjeel Rasheed born on 13th March 2008 whom it was also intended to apply to bring to the UK in the future, who also forms part of the family. The sponsor has made three visits to Pakistan since his marriage on 2nd April 2011, and is clearly distressed by his separation from the appellants. I find that the refusal of entry clearance interferes with the family life of the appellants and sponsor, and that the interference is of sufficient gravity to engage Article 8 ECHR.

17. The appellants cannot satisfy the Immigration Rules for the reasons set out above so the decision to refuse entry clearance is in accordance with the law. The respondent justifies the interference with the appellants' family life in the interests of the maintenance of economic order by applying a consistent system of immigration control. It is not argued that the appellants have criminal records or otherwise are not of good character.

18. I must finally consider whether the significant interference with the appellants' family life rights that refusal of entry clearance represents is justified as proportionate, and a fair balance between the competing considerations of the appellants' family life and the respondent's desire to maintain economic order by applying a consistent system of immigration control.

19. In favour of the appellants is the fact that the sponsor cannot be reasonably expected to relocate to Pakistan by virtue of his British citizenship. In Sanade & Others (British Children -Zambrano – Dereci) [2012] UKUT 48 at point 5 of the head note it says as follows: "Case C-34/09 Ruiz Zambrano now makes it clear that where the child or indeed the remaining spouse is a British citizen and therefore a citizen of the European Union, as a matter of EU law it is not possible to require the family as a unit to relocate outside of the European Union or for the Secretary of State to submit that it would be reasonable for them to do so."

20. Further at the time of decision the sponsor rented his own home in the UK and like Judge Sharp I am satisfied that there was adequate accommodation at the time of decision for all the appellants to join him here (this is verified by the tenancy agreement). The sponsor clearly has strong private life connections in the UK having lived here for seventeen years at the date of decision, having come to the UK on 30th September 1995.The sponsor is a business man with two businesses, namely SKT Stars Limited and Mazzbro Sports Limited. This was accepted by Judge Sharp in his findings and is supported by evidence from Companies House for both businesses, a letter from Sarwar & Co chartered accountant regarding Mazzbro Sports Ltd, and amazon information about on-line

sales. Judge Sharp also accepted the the fact that the sponsor also did some employed work for another lady running another shop called Sirwa Karem at the time of decision, and I note that the appellants' bundle contains six payslips dated 2013 for the sponsor from Sirwa Karem.

21. The sponsor has not evidenced his contention that he would struggle to set up a business in Pakistan due to issues of corruption and attitudes towards those who have settled for long periods in the UK. Whilst there is some logic behind this contention, and the pervasive extent of corruption in Pakistani society is very clear from the Country of Origin Information Report on Pakistan 2013, I cannot find that he would be unable to find work in Pakistan given his historic links with that country and understanding of a relevant language and culture. However it is clear that a lot of hard work in building businesses in the UK would be sacrificed if the sponsor had to leave this country.

22. I note in addition that the appellants in this case are of good character with no adverse immigration history; from the visa applications forms it is clear that the first, second and third appellants have suffered the tragic loss through death of their previous husband and natural father in 2011; and that the first appellant has satisfied the respondent that she has the necessary basic level of English language to integrate in this country.

23. Mr Avery has argued that weight must be given to the fact that the appellants could not meet the new Article 8 ECHR compliant Immigration Rules, despite the fact that this application was made prior to the coming into force of these Rules and in spite of the fact that transitional provisions in HC 194 provide that the application was therefore to be dealt with under the old Rules (with no Article 8 ECHR provisions) as existed on 8th July 2012. He cites the case of Haleemudeen in support of this. However I note that the Court of Appeal authority of Edgehill and Bhoyroo v SSHD [2014] EWCA Civ 402 supports my view that the new Rules can have no applicability to Article 8 ECHR applications made before 9th July 2012 as otherwise the express provision in the transitional provisions would be contradicted. I will therefore proceed on this basis as Haleemudeen does not deal with the judgment in Edgehill or address the issue of the transitional provisions in any way.

24. In favour of the respondent is the fact that the appellants cannot show an adequate level of financial support in the UK as Judge Sharp found the evidence taken as a whole only showed an income of about £800 a month for the sponsor, which would have only been approximately equivalent to the monthly rent and left the family with no other income whatsoever. I am guided by Mr Justice Blake in MM (on the application of) v SSHD [2013] EWHC 280 in his summary of conclusions from paragraph 142. It is legitimate that the Secretary of State try to ensure that migrant families are not living at or near subsistence level and not perceived to be a long term drain on the public purse through increased access to state benefits. This case does not fall within the "less intrusive" responses set out at paragraph 147 as, for instance, the level of income of the sponsor does not reach the minimum level proposed, there is no evidence of savings and there is no evidence that the first appellant could contribute to the household budget.

Further I have insufficient information to find that there are other matters which would counter balance the lack of income in this case: for instance I have no statements or other information about any compassionate circumstances relating to the situation of the appellants in Pakistan so must assume that there are none. Ultimately I find the very low income shown in this case means that the decision to refuse entry clearance was proportionate in accordance with the UK's obligations under Article 8 ECHR despite the factors in the appellants' favour, primarily concerning the sponsor's citizenship and connections to the UK, listed above.

25. This is not a consideration in reaching my conclusion under Article 8 ECHR but merely an observation. The sponsor has claimed in his witness statement to have a gross annual income in excess of £35,000. If this is true, and if he produces the very extensive documentary evidence required by Appendix FM-SE, for which he may benefit from very careful legal advice from qualified immigration law experts, then fresh applications by the appellants under Appendix FM would look likely to succeed on financial grounds. They should be aware however if any required documentary evidence is not supplied in the precise form set out in Appendix FM-SE that this is likely to lead to further refusals.

Decision

26. The decision of the First-tier Tribunal involved the making of an error on a point of law in the determination of the appeal under Article 8 ECHR.

27. The decision of the First-tier Tribunal dismissing the appeal under Article 8 ECHR is set aside.

28. The appeal under Article 8 of the ECHR is re-made and dismissed.

Deputy Upper Tribunal Judge Lindsley
2nd June 2014