Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: OA/14171/2013**

THE IMMIGRATION ACTS

Heard at Field House
On June 27, 2014

Determination Promulgated
On July 1, 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

ENTRY CLEARANCE OFFICER

Appellant

and

MR MG
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Ms Everett (Home Office Presenting Officer)
For the Respondent: Mr Chowdhury (Legal Representatrive)

DETERMINATION AND REASONS

1. Although this is an appeal by the Secretary of State for the Home Department I will refer below to the parties as they were identified at the First-tier Hearing namely the Secretary of State for the Home Department will from hereon be referred to as the respondent and Mr MG as the appellant.

2. The appellant, born January 18, 1972, is a citizen of Georgia. On March 26, 2013 he applied for entry clearance as a spouse of a person settled in the United Kingdom under Appendix FM and article 8 ECHR.

3. The respondent refused his application on June 11, 2013 on the grounds she was neither satisfied:

   a. The marriage was genuine and subsisting
   b. The parties intended to live together as husband and wife
   c. The maintenance requirements of Appendix FM were met.

4. On July 2, 2013 the appellant appealed under section 82(1) of the Nationality, Immigration and Asylum Act 2002. The respondent reviewed her decision on December 10, 2013 but upheld the original decision.

5. The matter was listed before Judge of the First-tier Tribunal Bennett (hereinafter referred to as "the FtTJ") on March 14, 2014 and in a determination promulgated on March 31, 2014 he allowed his appeal.

6. The respondent appealed that decision on April 8, 2014. Permission to appeal was granted by Judge of the First-tier Tribunal Heynes on May 12, 2014 who found it was arguable that the FtTJ had erred in his approach to the human rights claim and had not given adequate reasons for finding the child's medical condition amounted to exceptional circumstances.

7. The matter was listed before me on the above date and the sponsor was in attendance.

SUBMISSIONS

8. Ms Everett submitted the FtTJ had misdirected himself in paragraph [36] and she argued the FtTJ had concentrated too much on paragraph EX.1 of Appendix FM and the fact the appellant could not benefit from this provision as it did not apply to entry clearance cases. She accepted the FtTJ gave reasons for considering the case outside of the Immigration Rules but in considering proportionality the FtTJ placed no weight on the fact:

   a. The appellant did not satisfy the maintenance requirements of the Rules.
   b. The status quo could have been maintained.

c. The fact that the appellant spent long periods away from the family.

The reports submitted were dated and there was no reliable medical evidence to support the appellant's case.

In summary, MS Everett submitted the FtTJ erred in his approach to the article 8 argument even though the ultimate decision, if carried out properly, was the same.

9. Mr Chowdhury submitted there was no error in law. The FtTJ concluded the appellant could not meet the Immigration Rules and then set out all of the factors he felt were relevant to the appeal under article 8. Whilst he may not have mentioned Razgar [2004] UKHL 00027 he clearly had the test in mind as he ultimately found it would be disproportionate to refuse the appellant entry. He found the fact it was unreasonable and unduly harsh to require their British daughter to go and live in Georgia especially as she had health issues. He submitted if there was an error in approach it was not material.

ERROR OF LAW ASSESSMENT

10. The appellant applied for entry clearance to join his wife and spouse. From the evidence presented it seems they met in Georgia in 1997 and began a relationship shortly afterwards. That relationship ended after eight months and the appellant's wife subsequently came to live in the United Kingdom on September 21, 1999 and later became a naturalised British citizen. In August 2004 the appellant came to the United Kingdom and they rekindled their relationship and the sponsor gave birth to their daughter, D, on May 24, 2005. The appellant's leave had expired in February 2005. After that date and until he left the United Kingdom he was an overstayer.

11. On July 24, 2012 he left the United Kingdom and returned home. The sponsor and their daughter travelled to Georgia on September 11, 2012 but were unable to settle for the reasons contained in paragraph [14] of the sponsor's witness statement. The evidence submitted to the FtTJ suggested the appellant spent large periods of time away from the family through work (illegal work) although there was a letter dated December 20, 2013 that suggested from September 2008 the appellant worked as a parent support group member in the Georgian school D was attending at that time. The FtTJ referred in paragraphs [23], [24], [31] and [32] to various reports and letters.

12. It is against this background that the FtTJ considered the application. At paragraph [25] of his determination the FtTJ found that the appellant could not meet the requirements of paragraph EX.1 of Appendix FM of the Immigration Rules. The appellant's wife received income support and so they could not meet the financial requirements of Appendix FM and as this was an entry clearance application the FtTJ correctly found the appellant could not apply under paragraph EX.1. He identified that this was a case that could be considered outside of the Immigration Rules if there were good arguable grounds. He concluded there were and today Ms Everett does not submit that he was wrong to do so despite the original grounds of appeal.

13. Having established that article 8 applied the FtTJ should have considered the appeal having regard to the principles established in Razgar [2004] UKHL 00027. His approach is contained between paragraphs [27] and [36] of his determination.

14. What he did was to consider what would have happened if he had remained in the United Kingdom instead of returning. He concluded that if he had remained he would have succeeded in his application under paragraph EX.1 because a successful application under that Rule overrides the failure to meet the maintenance requirement and the fact he was in breach of the Immigration Rules as an overstayer. He found it would have been unreasonable to expect D to leave the United Kingdom. At paragraph [35] of his determination he concluded-

> "… It does not follow from this that the appellant should be granted entry clearance because a policy decision has been taken, which has had parliamentary approval, that Section EX.1 should only apply to applications made in this country. It is not for this Tribunal to substitute its views about matters of policy which have been approved by parliament simply because it might have reached a different view."

15. Having established this thought process the FtTJ then reached his conclusion in paragraph [36] of his determination. The FtTJ did not consider whether the interference was in accordance with the law or whether the interference was in pursuit of one of the legitimate aims set out in Article 8(2). He merely concluded that consideration of him leaving on what he said was probably correct legal advice at the time counterbalanced

the policy decision and refusing him entry would be a disproportionate interference with the appellant's family life.

16. The FtTJ should have started his article 8 assessment with the following findings:

    a. There was family life between the appellant, his wife and child.
    b. Refusing his application would mean they could not live together in the United Kingdom as a family.
    c. The refusal was in accordance with the law because he could not meet the requirements of paragraphs E-ECP 3.1 and E-ECP 3.3 of Appendix FM.
    d. The interference was in pursuit of one of the legitimate aims set out in Article 8(2) namely the economic well being of the country.

17. The FtTJ failed to consider the matters set out in paragraph [16] above and in particular subsections (c) and (d). His whole conclusion centred around the fact he would have met paragraph EX.1 and as Ms Everett argued this was an error. The FtTJ failed to have any regard in his assessment of proportionality of the fact the appellant lived and worked here illegally for seven years or that the sponsor was on benefits and they could not meet the financial requirements of the Rules.

18. I therefore find that the FtTJ materially erred in his approach to article 8. Both representatives accepted that no further evidence was necessary and the submissions made to me along with the evidence I already had would be sufficient to enable me to remake the decision.

ASSESSMENT UNDER ARTICLE 8 ECHR

19. Ms Everett does not dispute that the appellant had a good arguable case that would enable me to consider his appeal outside of the Immigration Rules. She disputed his appeal should be allowed under article 8 ECHR.

20. I considered the Razgar tests in paragraphs [15] and [16] above and that is my starting point. Having reached the position I did in paragraph [16] above I must then consider proportionality. The decisions of R (Nagre) v Secretary of State for the Home Department [2013] EWHC 720 (Admin) and MF (Nigeria) v Secretary of State for the Home Department [2013] EWCA Civ 1192 appear to give the Rules greater weight rather than merely being a starting point for the consideration of the proportionality of an interference with Article 8 rights.

21. The Court of Appeal made clear in Haleemudeen v The Secretary of State for the Home Department [2014] EWCA Civ 558 it is necessary to find "compelling circumstances" for going outside the Rules.

22. The assessment of proportionality is not a pure question of law or fact. In Mukarkar v Secretary of State for the Home Department [2006] EWCA Civ 1045 Carnwath LJ stated that the assessment of proportionality involves factual judgments which are often not easy, and as to which different tribunals, without illegality or irrationality, may reach different conclusions on the same case.

23. I therefore have approached the issue of proportionality from the premise that the appellant did not satisfy the Immigration Rules when he applied for entry clearance. His application failed for the reason set out in paragraph [16(c)] above. These factors, according to the decisions of various Courts and Tribunals, are more than a starting point and are significant factors to take into account when considering proportionality. I also accept that as the appellant's wife is on benefits the admission of the appellant into the United Kingdom could affect the economic well being of the country. I must also have regard to the importance of immigration control because the appellant overstayed in the United Kingdom for seven years and worked illegally. He deliberately chose to remain here and work even though he knew he had no right to remain and he had spoken to various legal advisors and had even visited the Georgian Embassy to ascertain his legal position.

24. Mr Chowdhury submitted the following matters outweighed these arguments:

    a. Both the appellant's wife and D are British citizens although the appellant's became a naturalised citizen as against being born British.
    b. D has lived almost all her life in the United Kingdom.
    c. D has significant ties to the United Kingdom as evidenced by the papers in front of me.
    d. The appellant was in a genuine and subsisting relationship with his wife.
    e. The appellant lived with his wife and child in the United Kingdom for large periods of time and took part in school activities.
    f. The appellant has demonstrated an ability to work and support both himself and his family.

25. The Tribunal in MK (Best interests of child) [2011] UKUT 00475 (IAC) set out the correct approach to take where there are children. The Tribunal found at paragraphs [23] and [24]-

> "23. There is in our view a fourth point of principle that can be inferred from the Supreme Court's judgments in ZH (Tanzania). As the use by Baroness Hale and Lord Hope of the adjective 'overall' makes clear, the consideration of the best interests of the child involves a weighing up of various factors. Although the conclusion of the best interests of the child consideration must of course provide a yes or no answer to the question, 'Is it in the best interests of the child for the child and/or the parent(s) facing expulsion/deportation to remain in the United Kingdom?', the assessment cannot be reduced to that. Key features of the best interests of the child consideration and its overall balancing of factors, especially those which count for and against an expulsion decision, must be kept in mind when turning to the wider proportionality assessment of whether or not the factors relating to the importance of maintaining immigration control etc. cumulatively reinforce or outweigh the best interests of the child, depending on what they have been found to be.
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> 24. The need to keep in mind the 'overall' factors making up the best interests of the child consideration must not be downplayed. Failure to do so may give rise to an error of law although, as AJ (India) makes clear, what matters is not so much the form of the inquiry but rather whether there has been substantive consideration of the best interests of the child. The consideration must always be fact-sensitive and depending on its workings-out will affect the Article 8(2) proportionality assessment in different ways. If, for example, all the factors weighed in the best interests of the child consideration point overwhelmingly in favour of the child and/or relevant parent(s) remaining in the UK, that is very likely to mean that only very strong countervailing factors can outweigh it. If, at the other extreme, all the factors of relevance to the best interests of the child consideration (save for the child's and/or parent(s) own claim that they want to remain) point overwhelmingly to the child's interests being best served by him returning with his parent(s) to his country of origin (or to one of his parents being expelled leaving him to remain living here), then very little by way of countervailing

considerations to do with immigration control etc. may be necessary in order for the conclusion to be drawn that the decision appealed against was and is proportionate."

26. A useful summary of the learning on the "best interests" of children in the context of immigration is to be found in the determination of Azimi-Moayed and Others (decisions affecting children; onward appeals) [2013] UKUT 197 (IAC):-

> "13. It is not the case that the best interests principle means that it is automatically in the interests of any child to be permitted to remain in the United Kingdom, irrespective of age, length of stay, family background or other circumstances. The case law of the Upper Tribunal has identified the following principles to assist in the determination of appeals where children are affected by the decisions:
>
> (i) As a starting point it is in the best interests of children to be with both their parents and if both parents are being removed from the United Kingdom then the starting point suggests that so should dependent children who form part of their household unless there are reasons to the contrary.
>
> (ii) It is generally in the interests of children to have both stability and continuity of social and educational provision and the benefit of growing up in the cultural norms of the society to which they belong.
>
> (iii) Lengthy residence in a country other than the state of origin can lead to development of social, cultural and educational ties that it would be inappropriate to disrupt, in the absence of compelling reason to the contrary. What amounts to lengthy residence is not clear cut but past and present policies have identified seven years as a relevant period.
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> (iv) Apart from the terms of published policies and rules, the Tribunal notes that seven years from age four is likely to be more significant to a child than the first seven years of life. Very young children are focussed on their parents rather than their peers and are adaptable.

(v) Short periods of residence, particularly ones without leave or the reasonable expectation of leave to enter or remain, while claims are promptly considered, are unlikely to give rise to private life deserving of respect in the absence of exceptional factors. In any event, protection of the economic well being of society amply justifies removal in such cases."

27. Even more recently, the Supreme Court has held as follows in Zoumbas v Secretary of State for the Home Department [2013] UKSC 74:-

> "24. There is no irrationality in the conclusion that it was in the children's best interests to go with their parents to the Republic of Congo. No doubt it would have been possible to have stated that, other things being equal, it was in the best interests of the children that they and their parents stayed in the United Kingdom so that they could obtain such benefits as health care and education which the decision-maker recognised might be of a higher standard than would be available in the Congo. But other things were not equal. They were not British citizens. They had no right to future education and health care in this country. They were part of a close-knit family with highly educated parents and were of an age when their emotional needs could only be fully met within the immediate family unit. Such integration as had occurred into United Kingdom society would have been predominantly in the context of that family unit. Most significantly, the decision-maker concluded that they could be removed to the Republic of Congo in the care of their parents without serious detriment to their well-being …"

28. Against the matters set out above in paragraph [23] Mr Chowdhury's main argument is that D has lived her whole life in the United Kingdom apart from a short period when she and her mother attempted to settle in Georgia. She is a British citizen and has now lived in the United Kingdom for nine years save for a short period when she lived in Georgia. D, although able to converse in Georgian, clearly has her roots in the United Kingdom and preferred to speak English. These are factors I must take into account. There are school and other reports and having considered the reports I accept D has had some difficulties but the FtTJ recorded her asthma problems would not be significantly greater in Georgia than they would be here

if she chose to return there but the reports, with the exception of the school report, are dated.

29. The London Borough of Hounslow provided a statement October 19, 2011 into her special educational needs. This made a number of recommendations including that she attend a mainstream school and that she see an occupational therapist. Ealing Hospital provided a report dated December 21, 2012 and that concluded she was making steady progress in the areas addressed by Occupational Therapy and was discharged from the service. There are no updated reports from any organisation and the only recent letter from any organisation is one dated March 12, 2013 from D's school that indicated she has presented with challenging behaviour. There is no reliable evidence to suggest that this is due to her father living in Georgia.

30. I have therefore considered all of these matters and whilst I note the arguments presented by Mr Chowdhury I have concluded that refusing the appellant entry clearance would not be disproportionate. My reasons are as follows:-

    a. The appellant overstayed seven years and only left because he was advised he would be unable to succeed with an application to remain. During his time here he worked illegally. He deliberately chose to remain here and was aware he had no status after February 2005.

    b. His application under the Immigration Rules failed and as case law states that is an important point to take into consideration in the proportionality assessment.

    c. D is British and she is not being required to leave the United Kingdom. Ideally, both her parents should bring her up but sometimes that is not always possible.

    d. The evidence is that she has spent lengthy periods apart from her father and it was the appellant's choice not to live full-time with his family.

    e. It has been said many times that being British is not a trump card but merely one of the factors to take into account. D is not being required to leave this country as she can remain here with her mother until such time the appellant can meet the Rules. D can continue to take advantage of all the United Kingdom has to offer.

    f. If the appellant met the Immigration Rules then he would of course be admitted. The fact he did not meant I have to

consider all of the circumstances. An application under article 8 does not mean I ignore the negative aspects of the appeal. I have to take into account all matters including the economic well being of the country and the importance of immigration control.

31. For these reasons I dismiss the appeal under article 8 ECHR.

DECISION

32. There is a material error of law.

33. I set aside the original decision and I remake the decision I dismiss the appeal under both the Immigration Rules and article 8 ECHR.

34. Under Rule 14(1) The Tribunal Procedure (Upper Tribunal) Rules 2008 (as amended) the appellant can be granted anonymity throughout these proceedings, unless and until a tribunal or court directs otherwise. An order has been made in the First-tier Tribunal and I extend that order.

Signed: Dated: 01 July 2014

Deputy Upper Tribunal Judge Alis

TO THE RESPONDENT

I make no alteration to the fee award made by the First-tier Tribunal.

Signed: Dated:

Deputy Upper  Tribunal Judge Alis