Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/05184/2014

THE IMMIGRATION ACTS

Heard at Birmingham Sheldon Court	**Determination Promulgated**
On 23 December 2014	**On 21 January 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE McCARTHY

Between

RAJWINDER KAUR

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr J R Neville, instructed by Sehgal & Co
For the Respondent: Mr N Smart, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, who was born on 23 May 1993 and who is a citizen of India, appeals against the decision of First-tier Tribunal Judge Hawden-Beal, promulgated on 16 July 2014. Permission to appeal was granted by First-tier Tribunal Judge Colyer on 24 September 2014.

2. Judge Hawden-Beal dismissed the appellant's appeal against the Secretary of State's decisions of 10 January 2014 refusing to vary her leave to remain and to remove her by way of directions. The appellant had sought to vary her leave to remain either on

the basis of being married to a British citizen (she married Dilbaagh Singh Derewal on 21 September 2013) and/or because she is the mother of a British citizen (her son Sahib Singh Derewal was born on 13 September 2013). In so doing, the appellant relied on the partner and parent routes of appendix FM to the immigration rules.

3. In addition, the appellant had sought to rely on her rights under articles 3 and 8 of the human rights convention. She asserted that she would not be safe in India because her son had been born when she was not married. She relied on her private and family life rights as an alternative to her reliance on appendix FM.

4. The appellant also raised one other issue in her appeal to the First-tier Tribunal. She asserted that she had a derivative right of residence under regulation 15A(4A) of the Immigration (European Economic Area) Regulations 2006 (as amended) because she was the primary carer of a British citizen child who because of his young age would have to leave the UK and the combined territories of the Union should she be removed to India.

5. The appellant presented six grounds of appeal. I take each in turn, detailing the relevant submissions of Mr Neville and Mr Smart as relevant.

Ground 1

6. The first ground is that Judge Hawden-Beal erred in law by failing to find that she could consider the provisions of paragraph EX.1. of appendix FM to the immigration rules.

7. In paragraph 22 of her determination, Judge Hawden-Beal found that it was not possible to interpret the immigration status requirements under either the partner or the parent route to engage paragraph EX.1. Although she did not cite the reported case, Sabir (Appendix FM – EX.1 not free standing) [2014] UKUT 63 (IAC), it is clear that she applied the principles set out in that case. In addition, at the hearing I handed down an unreported Upper Tribunal decision (IA/18270/2013) in which Upper Tribunal Judge Coker and I had considered the immigration status requirements in detail and where we had reached a similar conclusion albeit for more detailed reasons. I gave time to Mr Neville and Mr Smart to read that case. Mr Neville did not concede the first ground but accepted that he had little left to argue, the points he made in his skeleton argument being ones considered by Judge Coker and myself.

8. Although I formally rule that the first ground is not made out, this is not particularly material to the outcome of this appeal because by seeking to engage with paragraph EX.1. the appellant was in essence seeking to ensure that the First-tier Tribunal carried out a proportionality exercise. As has become clear through recent case law (e.g. Oludoyi [2014] UKUT 539 (IAC)), it is incumbent on judges to ensure that any protected rights are respected and, where it is not possible to carry out a proportionality exercise within the immigration rules, then such an exercise must be carried out outside the rules by direct reference to article 8 of the human rights convention.

9. The recent developments in case law – which postdate Judge Hawden-Beal's determination and from which she could not benefit – confirm that there is no

threshold test. The jurisprudence also explains that a full Razgar [2004] UKHL 27 assessment will not be required in every case, although it will be necessary to carry out the proportionality assessment encompassed by the fourth and fifth steps in cases where private or family life is not disputed. Mr Neville and Mr Smart both acknowledged this development.

Ground 2

10. Such considerations move me to the second ground of appeal. The appellant argues that Judge Hawden-Beal erred by finding at paragraph 23 that there was no need to carry out a proportionality assessment. She stated in the middle of that paragraph that she was "*not satisfied that there are arguably good reasons for granting leave outside the rules which would then lead me to consider the question of whether the decision is proportionate under* ***RAZGAR (2004UKHL27)***."

11. On its face, this second ground would appear sound. However, it fails to take into consideration that, in the four paragraphs after paragraph 23, Judge Hawden-Beal examines the proportionality of the immigration decisions. This is clear from the language she uses and the factors she considers. Although it is unclear why the judge considered these issues given what she said in paragraph 23, it is nevertheless what she did.

12. In paragraph 24, Judge Hawden-Beal found that it was reasonable to expect the appellant to return to India to make an entry clearance application through the usual channels. In reaching her conclusion, the judge considered the fact that it would be for the family group to decide whether it was appropriate for the appellant's husband and/or son to accompany her. She took into account the short period of time the appellant had been in the UK and the fact her husband had spent a period of some 7 to 8 months in India between December 2012 and December 2013.

13. I have not recorded here the findings made by Judge Hawden-Beal in relation to the appellant not facing a real risk of serious harm in India or of her being the primary carer of her son. I will return to those findings below when I consider other grounds.

14. In paragraph 25, the judge considered the argument that the appellant would not be able to meet the financial requirements of appendix FM in relation to the partner route because she would be unable to provide the specified evidence required by appendix FM-SE. The judge recognised that the appellant's arguments did not cover all possibilities and that there were alternatives open to her to satisfy the immigration rules in an entry clearance application.

15. In paragraph 26, the judge considered the impact the appellant's removal might have on her husband and son. The appellant claimed that she had become the main carer for her mother-in-law but Judge Hawden-Beal did not accept that because the claim was not supported by relevant and reliable evidence.

16. This theme continues in paragraph 27 where the judge recognises the appellant's and her husband's desire that she be allowed to remain in the UK. However, the judge considers the public interest in maintaining effective immigration controls and in the absence of any unjustifiably harsh factor that would compel the Secretary of State to

vary the appellant's leave to remain, the judge found the public interest outweighed any arguments presented by the appellant.

17. There is nothing in the grounds of appeal or in the submissions made by Mr Neville to indicate that Judge Hawden-Beal failed to take into consideration any factor that she would have had to consider had she formally undertaken a proportionality exercise.

18. Mr Neville did suggest that the judge had failed to give adequate reasons, citing that she had not made any findings as to the best interests of the appellant's child or the likely effect relocation might have on the child. In particular, Mr Neville suggested that the judge failed to give any consideration to the wellbeing of the appellant's son should he be separated from his mother for even a few months. However, it is clear from the judge's comments in paragraph 24 that she took into consideration the evidence about the best interests of the child. The child best interests were to remain in the care of his parents but it would be for his parents to decide where he should live at any particular time. That finding was open to the judge and there is nothing wrong in law with it given the limited evidence provided.

19. I conclude that I cannot find an error on a point of law in relation to the second ground. This is because I find that despite saying she would not do so, Judge Hawden-Beal clearly carries out the required proportionality assessment. It is sufficiently detailed to deal with each factor identified by the appellant. Nothing has been overlooked.

Ground 3

20. I move on to the third ground of appeal. This is a development of the second ground, looking specifically at whether it was proportionate to expect the appellant to leave the UK to make an entry clearance application from overseas. The appellant relies on a number of cases, but as clarified by Mr Neville, her focus is on the judgment of the House of Lords in Chikwamba [2008] 1 WLR 1420.

21. This ground fails because although it identifies one of the key aspects of the House of Lord's judgment it does not take into consideration the different circumstances of the appellant in that case and the appellant in this case. In that case the only obstacle to immigration control was the formality of an entry clearance application. In this case there is a major obstacle in that there is insufficient evidence to show that the appellant met the financial requirements of the immigration rules.

22. In addition, the immigration rules and statutes have changed significantly since the House of Lord's judgment in terms of strengthening the weight to be given to the public interest in maintaining effective immigration control. The European Court of Human Rights has recently confirmed that, *"The corollary of a State's right to control immigration is the duty of aliens … to submit to immigration controls and procedures and leave the territory of the Contracting State when so ordered if they are lawfully denied entry or residence."* (paragraph 100 of Jeunesse v the Netherlands (unreported, appl. No. 12738/10, 3 October 2014).

23. In addition to these general points, Mr Neville argued that Baroness Hale had said at paragraph 8 of Chikwamba that, *"Even if it would not be disproportionate to expect a*

husband to ensure a few months separation from his wife, it must be disproportionate to expect a four year old girl, who was born and has lived all her life here, either to be separated from her mother for some months or to travel with her mother to ensure the "harsh and unpalatable" conditions in Zimbabwe simply in order to enforce the entry clearance procedures." Mr Neville argued that the appellant and her son would be in a similar situation and the judge has failed to carry out a proportionality exercise by referring to an "unduly harsh" test in paragraph 24 of her determination.

24. This argument fails because Mr Neville has misread what Judge Hawden-Beal says in paragraph 24. I quote from the second half of the paragraph, *"I am satisfied that it is quite reasonable for the appellant to return back to India and apply through the usual channels for entry clearance, whether she takes her son and whether her husband accompanies her is a matter for them, but it is not unjustifiably harsh to expect them to do that."* The judge uses similar wording at the end of paragraph 27.

25. Not only is the judge not describing the situation in India as "unduly harsh!" but she is considering what is reasonable. Reasonableness and proportionality are two sides of the same coin. As I have already indicated, in terms of article 8 of the human rights convention, the determination shows that the judge carried out an adequate proportionality assessment.

Ground 4

26. The next ground of appeal takes a different tack. It asserts that Judge Hawden-Beal has not given adequate consideration of the appellant's submission that she is entitled to a derivative right of residence under regulation 15A of the 2006 EEA Regulations.

27. Although there is nothing about EU law in the original grounds of appeal, it is clear from the final phrase of paragraph 24 of the determination that Judge Hawden-Beal was considering the appellant's Community rights. It is accepted that the only possible arguments on this point were those relating to regulation 15A(4A) as the appellant's child is a British citizen. I therefore reject any argument that the issue of derivative rights of residence was not before the judge.

28. Regulation 15A(4A) requires:

> Derivative right of residence
>
> 15A. (1) A person ("P") who is not an exempt person and who satisfies the criteria in paragraph (2), (3), (4), (4A) or (5) of this regulation is entitled to a derivative right to reside in the United Kingdom for as long as P satisfies the relevant criteria.
>
> …
>
> (4A) P satisfies the criteria in this paragraph if—
>
> (a) P is the primary carer of a British citizen ("the relevant British citizen");
>
> (b) the relevant British citizen is residing in the United Kingdom; and
>
> (c) the relevant British citizen would be unable to reside in the UK or in another EEA State if P were required to leave.
>
> …

29. The question in relation to this ground is whether the judge made adequate findings in relation to regulation 15A(4A). In the middle of paragraph 24 she observes, "*The appellant also claims that she is her son's main carer. I would expect that to be the case given his tender years but if she had to leave the UK and return to make an application for entry clearance he would still have his father in the UK to care for him.*" I am satisfied this is sufficient to engage with each of the three points contained in regulation 15A(4A). Although Judge Hawden-Beal recognised that the appellant is her son's primary carer, she also recognised that he would be able to reside in the UK if the appellant left because of the presence of his father here.

30. I add that in the remainder of paragraph 24 and in paragraph 27 Judge Hawden-Beal reflects the proportionality of this decision and thereby follows not only the requirements of article 8 of the human rights convention but also a fundamental principle of EU law. Although there are some technical differences in the two schemes of proportionality, those differences do not apply here and therefore the same proportionality assessment applies to both legal issues.

31. I conclude that the fourth ground is not made out. Although I accept that Judge Hawden-Beal might have made life easier for the reader had she separated out this issue, her failure to do so does not give rise to any legal error since her findings are sound on this point.

Ground 5

32. The appellant argues under this heading that Judge Hawden-Beal misunderstood the requirements of appendices FM and FM-SE insofar as she explains how the appellant could overcome the claimed evidential difficulties should her husband accompany her to India. In paragraph 25 of her determination, Judge Hawden-Beal suggests a way that the appellant could provide the Entry Clearance Officer with six months' wage slips for her husband to meet the requirements of appendix FM-SE.

33. The appellant argues that this proposal is absurd because it would suggest that the appellant's husband abandons his job and deceives the Entry Clearance Officer. The appellant's husband is employed by an agency and would be unable to respond to any offers of work whilst overseas. In addition, it would require the appellant to overstay an additional six months. The appellant also submits that if she meets the minimum income requirements, then to require her to make an application from overseas is to require her to comply with a formality contrary to Chikwamba.

34. The appellant's arguments are misguided for the following reasons. Judge Hawden-Beal does not make a finding that the appellant can meet the minimum income requirement. At the end of paragraph 25 she clearly states that she has been shown no evidence to show that the appellant's husband earned over the £18,600 threshold. The judge mentions that the appellant's husband had £19,000 in savings and that would be taken into account when assessing whether the minimum income requirement is met. That is as far as her findings go in relation to whether the appellant meets the financial requirements of appendix FM.

35. The allegations made against the other findings are unsustainable. The grounds suggest that the appellant's spouse would have to abandon his agency work if he returned to India with the appellant. This fails to take into consideration the nature

of agency work. The appellant's husband would be able to advise the agency if he was going abroad and would not have to leave that employment. He would simply not accept offers of work made whilst absent from the UK. This is what must have happened when he was out of the UK between December 2012 and December 2013 since he retained his employment despite being overseas.

36. As to the issue of the appellant having to overstay for a further six months, the argument fails to take account of the fact that the appellant and her husband have been in the UK for well over six months already and therefore on return to India the appellant could provide the necessary wage slips assuming the appellant's husband has been working during this period.

37. The issue of whether the appellant meets the minimum income requirement is not the same issue as whether the immigration rules would prevent the appellant making an application for entry clearance by imposing an unfair evidential burden on her. The rules do not impose such a burden and nor do her circumstances. However, the evidence once submitted will have to be assessed and if the financial requirements are not met then it will be open to the Entry Clearance Officer to refuse the application. This is compatible with human rights law as made clear by the Court of Appeal in MM (Lebanon) [2014] EWCA Civ 895.

38. In his skeleton arguments, Mr Neville adds to the above the fact that if the appellant cannot meet the financial requirements, then the judge's findings about the impact of separation or of living abroad upon her son will be undermined. This argument is wrong in that it expects the judge to speculate far away from any evidence. It also fails to take into consideration that if the minimum income requirement is not met, then there will be human rights reasons to interfere in the wishes of the family group to live together in the UK, as discussed in MM (Lebanon).

39. For all these reasons this fifth ground fails.

Ground 6

40. This final ground is a mixture of complaints about paragraph 27 of Judge Hawden-Beal's determination. This ground argues that paragraph 27 is barely coherent and that it conflates asylum with harshness under the immigration rules and article 8. The ground also argues that the paragraph contains broad sweeping statements about choice of residence and criticises the appellant's claims notwithstanding the fact that the judge did not reject the factual matrix made by the appellant about her fear of returning to India with her child. The final criticism is that the appellant was ambushed as the issues were not canvassed at the hearing and the appellant was not given an opportunity to deal with the issues raised by the judge.

41. As I pointed out to Mr Neville, this ground is misplaced for two key reasons. First, Judge Hawden-Beal dealt with the appellant's protection claim in the second half of paragraph 23 of her determination. She found that the evidence presented did not show that the appellant had a real risk of serious harm or persecution in India. The judge gave good reasons for her findings, based on the very limited evidence presented. The argument that the judge failed to make relevant findings on the protection issues is unfounded.

42. Secondly, the appellant was not ambushed. The grounds of appeal originally settled by the appellant made clear reference to protection issues and to article 3 in particular. The judge was required to deal with all grounds of appeal and therefore had to make findings in relation to the protection issues raised. The fact the appellant did not provide satisfactory evidence and that she was not called to give evidence was a decision she took with her legal representatives. The judge had no basis to intervene as to do so would be to step impermissibly into the arena. But she had to make findings on what evidence there was. It is unsurprising that the evidence was found to be weak.

43. The sixth ground also alleges that the appellant's fear would go towards the question of justification even if it fell below the threshold for asylum. Given that the protection issue was assessed at the lower standard and found to be lacking, it would fail at the normal civil standard. Therefore, there is no merit in this argument that relates to potential social stigma because there is insufficient evidence, the appellant's own account being rejected.

44. The only possible criticism in this aspect of the determination might be that the judge has referred to asylum when the appellant referred to article 3. But as is made clear in vast amounts of case law, the two are interchangeable in most situations in respect of assessing real risk so any such error would not be material to the outcome.

45. For all these reasons, the sixth ground also fails.

Other issues

46. No other issues were canvassed during the hearing.

Conclusion

47. Given the fact that none of the grounds of appeal is made out, the appeal to the Upper Tribunal fails and the decision of Judge Hawden-Beal is upheld.

Decision

The appellant's appeal to the Upper Tribunal is dismissed because the determination of Judge Hawden-Beal does not contain an error on a point of law.

Signed Date 19.01.2015

Deputy Judge of the Upper Tribunal