



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/09588 /2014

THE IMMIGRATION ACTS

Heard at Field House
on 2 February 2015

Determination Promulgated
on 26 February 2015

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL CHANA

Between

MR RIZWAN ALI
(Anonymity direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Mr A Muira, Solicitor

For the respondent: Mr R Peterson, Senior Presenting Officer

DECISION AND REASONS

1. This is an appeal by the Secretary of State for the Home Department against the decision of First-tier Tribunal Judge Hembrough who allowed the appellant's appeal in a determination dated 5 November 2014 outside the Immigration Rules and pursuant to Article 8 of the European Convention on Human Rights. However for the sake of convenience I shall refer to Mr Ali, as the appellant and the Secretary of State as the respondent which are the designations that they had before the First-tier Tribunal.

2. The appellant, who is a national of Pakistan, born on 2 September 1984 appealed against the decision of the respondent dated 31 January 2014 to refuse him leave to remain in United Kingdom. First-tier Tribunal Judge Hembrough dismissed his appeal in a determination.
3. Permission to appeal was granted by First-tier Tribunal Judge on 16 December 2014 stating that it was arguable that the Judge made a material error in allowing the appellant's appeal and did not give full consideration for why the appellant could return to Pakistan and obtain entry clearance to the United Kingdom as a spouse.

The First-Tier Tribunal Judges Findings

4. The Judge noted that the solicitor's letter stated that the appellant did not meet the requirements of Appendix FM as his sponsor is under the age of 18. The appellant was also not able to satisfy the income requirements. Furthermore the provisions of paragraph X one are not available to the appellant because one of the parties to the marriage is under the age of 18. It is also been accepted that the appellant could not meet the requirements of paragraph 276 ADE and therefore the appellant's appeal is dismissed pursuant to the Immigration Rules.
5. The Judge stated that the appellant sponsor is a British citizen, has visited Pakistan and she was born in the United Kingdom. Despite being of marriageable age she is still a minor and it is therefore arguable that there is a continuing duty under section 55 of the Border's Citizenship and Immigration Act 2009 to safeguard and promote her welfare. She is pregnant and the rights of her unborn child, who will be a British citizen, also fall to be considered. Against this background the sponsor could reasonably be required to live in Pakistan the appellant may encounter difficulties with his former extended family there. Although it is observed in passing that internal relocation is available to them in Pakistan. If they were not found in the United Kingdom in a country of 65 million people the Judge found it difficult to believe that they would be discovered in Pakistan in a country of nearly 200 million.
6. The Judge referred to the case of **Bekkou-Betts [2008] UK HL 39** which is still good law and provides that regard must be had on the effect of the appellant's removal on the sponsor and her unborn child. The reality is that sponsor is in need of the emotional and physical support by the appellant and his wider family in the UK and in due course to the child. If the appellant was removed his sponsor would be deprived of that support. She cannot have recourse to her family at whose hands, it has been found she may be at risk of harm. The child would be deprived of the opportunity to establish a bond with his father and the reality is that the sponsor is unlikely, at least for the foreseeable future, to be able to meet the minimum income requirements so as successfully sponsor a future entry clearance application by the appellant from Pakistan. The family life for which the appellant sponsor has sacrificed so much would effectively be brought to an end.
7. Having due regard to these consideration, the Judge gave weight to the exceptional circumstances in this appeal and found that the removal of the appellant would result in consequences that would be unjustifiably harsh for the appellant, his sponsor and their unborn child. He allowed the appeal pursuant to Article 8.

Grounds of Appeal

8. The appellants' grounds of appeal state the following. The judge has considered Article 8 as a general dispensing power which is not the correct approach. The appellant circumstances do not disclose a disproportionate breach with Article 8 as there is a viable remedy open to him to make an application for entry clearance from Pakistan. The judge considers that it is not reasonable for the appellant to leave his sponsor in the United Kingdom as she has cut herself off from her immediate family and would need support. She did not consider the possibility of those family members that are currently supporting the appellant 'wife whilst the appellant returns to Pakistan and make an entry clearance application.
9. The Judge places weight on the fact that it seems that the appellant could not satisfy the financial requirement of the Rules. The prospects of a future application are not a matter for the Tribunal to consider with regard to the instant appeal.
10. In the case of **Sabir (appendix FM-EX.1 not freestanding) [2014] UKUT 00063** whether it states that the likelihood or otherwise of an appellant being able to meet the requirements of the rule for entry clearance is not a relevant consideration. In **SB (Bangladesh) v SSHD [2007] EWCA Civ 28** it was stated that "there has been no evidence which could lead to a conclusion that the proposed interference (namely her hypothetical removal to Pakistan from where she could make an application for entry clearance to return as a spouse) in the claimant's right to respect for her family and private life as a woman married to a British citizen living in working in the United Kingdom is anything other than proportionate to a competing public interest issue."
11. It is appropriate and proportionate to the compelling public interest in the maintenance of an effective immigration control as expressed in section 117B (1) that the appellant makes an application for an entry clearance from Pakistan.

Findings on Error of Law

12. It was conceded before the Judge that the appellant could not meet the requirements of the Immigration Rules. The appellant's appeal was allowed pursuant to Article 8 of the European Convention on Human Rights and therefore outside the Immigration Rules.
13. I find that the Judge fell into material error as he did not give sufficient reasons for why the appellant cannot return to Pakistan to make his application for entry clearance. It was not a matter for the Judge to consider whether the appellant would succeed or not succeed in his application. The Judge also fell into material error by considering the rights of unborn child. An unborn child does not have rights until he is born. I agree with the respondent's grounds of appeal that it is proportionate to require the appellant to make an entry clearance application from Pakistan.

The Hearing

14. I heard evidence from the appellant and his wife who adopted their written statements.
15. The appellant adopted his written statement dated 10 October 2014 gave the following evidence in cross-examination which I summarise. He studied at Luton International College but attained no qualifications. He married in March 2013 and

his sister-in-law, cousins and his wife's mother attended the ceremony. There were 5 to 6 people in total at the ceremony. He lived with Farouk Shah. Asked why it is a different address he said that he lives with his relative's family whose name is Mehaboob Shah. He does not pay rent.

16. Asked about the whereabouts of his father-in-law is, he said that he is in Pakistan. Asked how he knows this, he said that his wife's relatives told his wife. Asked when his wife was told this, he said about a year ago. Asked whether the appellant wife is in touch with her sisters, he said "I don't think so" and added that his wife is not told him whether she has had contact with her family. His wife's sisters live with their mother in London but he does not know where.
17. It was put to him that he submitted information that he is was touch with the police in Luton, yet at the letter at page 36 from the police stated that they have no information to disclose about the appellant. He said that he asked the police for evidence that he has been in touch with them. Asked why they do not have any information on their records about this, he said "I don't know the police took interview I was surprised that they said that there is no information." His father-in-law was charged with domestic offences involving his wife. His father-in-law's family live in Rawalpindi and he is from Punjab which is a three-hour drive away.
18. In questions from me he gave the following evidence which I summarise. His father-in-law wanted his wife to marry her cousin in Pakistan. I asked him why her father would object after the marriage and after pregnancy. The appellant said "we did Islamic marriage before reception party. He said I am not going to accept it and you must end the relationship". I asked the appellant is it not shameful in Islamic culture for a girl to leave her husband after pregnancy and why would her cousin accept and marry his wife. The appellant said "the cousin would accept even though she married me".
19. His father-in-law lives 5 to 6 months in the United Kingdom and the other half in Pakistan. He went to the police who told him that they are watching him and will take action if something happens. His father-in-law has threatened him by mobile telephone. The last time he made threats was about a year ago. He said that he comes from a prophets family who are "very high up" in society and her family is not. He has never asked whether these wife's parents are divorced but he thinks that they may be divorced.
20. The next witness to give evidence was the appellant's wife, Ms Sayeda Sannah Iqbal who adopted her written statement dated 10 October 2014. In cross-examination she gave the following evidence which I summarise.
21. She and the appellant married at Luton and her mother, aunt and the appellant's brother and wife attended. There were three guests at the wedding. There was no procedure that she had to follow when they married at the registrar's office even though she was only 16. She said her mother who attended the wedding was asked to give permission and she gave it. She was asked whether there were questions put to her about her father and she said that her mother said that she was not living with her husband.

22. Her father lives in Pakistan. She does not know for how long he has lived there. If he is not in Pakistan he will be in London but he mainly stays in Pakistan. Her father was not charged of kidnapping in 2014. Her mother reported her father to the police. The appellant complained to the police but they did not take any action. She has not received any threats recently. It was four months ago, if she can remember that she received a threat from her mother through Facebook. She did not go to the police because the actual threats were made on telephone calls. She cannot rely on Mr Farouk for support if she goes to Pakistan. She is scared of her life in Pakistan including fear from her father.
23. Her father lives in Mirpuri but she also has many family members around Pakistan. The appellant comes from Lala Mussa which is 3 to 4 hours' drive from Mirpur. She went to Pakistan in January 2012 and lived there for two years.
24. I asked her if she accedes to her father's request and leave the husband, what would happen to her. He said that she will have to marry her father's sister's son. I asked her whether he would accept a married woman who is pregnant as his wife and she said "I don't think so". I asked whether her cousin would bring up another man's child and she said "I don't think so".
25. I heard submissions from both parties in the full notes of the hearing are in my Record of Proceedings.

Remaking of the Decision

26. In determining whether the appellant's removal from the United Kingdom would constitute a disproportionate interference with his right to respect for private and family life under Article 8, I have considered each of the following issues, as laid down in **Regina v. Secretary of State for the Home Department (Appellant) ex parte Razgar (FC) (Respondent) [2004] UKHL 27** at paragraph 17 of the speech of Lord Bingham of Cornhill:
 - (1) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or family life?
 - (2) If so, will such interference have consequences of such gravity as potentially to engage the operation of Article 8?
 - (3) If so, is such interference in accordance with the law?
 - (4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?
 - (5) If so, is such interference proportionate to the legitimate public end sought to be achieved?
27. The question that I have to decide is whether the refusal of leave to the appellant, 'in circumstances where the life of the family cannot reasonably be expected to be enjoyed elsewhere, taking full account of all considerations weighing in favour of the refusal, prejudices the family life of the applicant in a manner sufficiently serious to

amount to a breach of the fundamental right protected by article 8' (**Huang v Secretary of State for the Home Department** [2007] UKHL 11 ('**Huang**'), para. 20). In considering this question, we have taken into account all factors that weigh in favour of the Appellant's deportation, including the desirability of applying a workable, predictable, consistent and fair system of immigration control (**Huang**, para. 16). Against this, I have taken into account the effect that refusal of leave would have on the enjoyment of the appellant's private and family life in the appellant's case, bearing in mind the core value that Article 8 of the Human Rights Convention seeks to protect and the fact that '[t]heir family, or extended family, is the group on which many people most heavily depend, socially, emotionally and often financially' (**Huang**, para. 18).

28. I have further considered the case recent decision of the House of Lords in **Beoku-Betts (FC) (Appellant) v Secretary of State for the Home Department** [2008] UKHL 39 where the issue for determination was phrased in the following terms:

'In determining an appeal under section 65 of the Immigration and Asylum Act 1999 (the 1999 Act) (now sections 82 and 84 of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act)) against the Secretary of State's refusal of leave to remain on the ground that to remove the Appellant would interfere disproportionately with his article 8 right to respect for his family life, should the immigration appellate authorities take account of the impact of his proposed removal upon all those sharing family life with him or only its impact upon him personally (taking account of the impact on other family members only indirectly i.e. only insofar as this would in turn have an effect upon him)?

29. Baroness Hale observed that 'the right to respect for the family life of one necessarily encompasses the right to respect for the family life of others, normally a spouse or minor children, with whom that family life is enjoyed'. It was further said that: 'Together these members enjoy a single family life and whether or not the removal would interfere disproportionately with it has to be looked at by reference to the family unit as a whole and the impact of removal upon each member. If overall the removal would be disproportionate, all affected family members are to be regarded as victims'. In light of this decision we have to consider the family life of all those who share their family life with the appellant.
30. I have also had regard that from 28 July 2014 section 19 of the Immigration Act 2014 is brought into force: article 3 of the Immigration Act 2014 (Commencement No 1, Transitory and Saving Provisions) Order 2014 (SI 2014/1820). This amends the Nationality, Immigration and Asylum Act 2002 by introducing a new Part 5A which contains sections 117A, 117B, 117D and 117D. Part 5A only applies where the Tribunal considers Article 8(2) ECHR directly.
31. There is no dispute that the four questions in **Razgar** must be answered in the affirmative. Therefore the only question that remains is whether the respondent's decision is proportionate to the respondent's legitimate interest in a fair and transparent immigration control.
32. I guide myself that I must make a fact sensitive assessment of the appellants' circumstances and make my own assessment of proportionality. It is obvious that

respect for a claimant's family and private life under Article 8 (1) is subject to proportionate and justified interferences in pursuit of a legitimate aim under Article 8(2) (**Izuazu**).

33. In considering proportionality specific to this appellant, I consider the submissions made on behalf of the appellant at the hearing and his witness statement as to what why his circumstances should be deemed exceptional such as he should succeed pursuant to Article 8 when he cannot succeed under the Immigration Rules.
34. The gist of the appellant's case as to why his circumstances are so exceptional in that they misplace the respondent's interest in a fair and transparent immigration control is that the appellant cannot return to Pakistan to make his entry clearance application because the appellant's father-in-law who lives in Pakistan will harm him. He claims that he married his wife when she was 16 years old without the permission of his father-in-law. He claims that his father-in-law wanted his daughter to marry a cousin in Pakistan.
35. At the hearing there were inconsistencies in the evidence between the appellant and his wife. The appellant said that he does not know whether his father-in-law is in this country or in Pakistan but he last heard about a year ago that he was in Pakistan. His evidence was that father in law lives six months of the year in this country and six months in Pakistan. He said that sometimes his father-in-law lives in this country for more than a year. However the appellant's wife's evidence was that her father lives in Pakistan most of the time. This inconsistency in the evidence goes to their credibility into the credibility of their claim that the appellant's father-in-law wishes to harm him or that they married against his will.
36. The appellant's wife said that because she was under the age of 18, her mother who attended their wedding ceremony gave permission to marry and there were no questions about her father because the mother told the registrar that she was not living with her father. The appellant however did not know whether his wife's mother is divorced from his wife's father. He said that he has never asked his wife. I do not find it credible that the appellant's mother who gave permission for her to marry would suddenly start threatening her on the telephone and Facebook. The appellant's wife went she was asked at the hearing why she did not make a complaint about her mother's threats on Facebook, she said that all the threats were on the telephone. This is inconsistent with her evidence that her mother threatened her on Facebook.
37. I also do not find it credible that the appellant would not know the situation between his wife's father and mother given that he claims that his father-in-law is threatening him. Furthermore, when asked at the hearing whether his wife is in touch with her sisters, he said "I don't think so" and added that his wife is not told him whether she has had contact with her family. He also said that wife's sisters live with their mother in London but he does not know where. I do not find it credible that the appellant would not know whether his wife is in contact with her sisters in this country or where exactly they live given that he claims that they are going to harm him and it would be expected that he would know more about his wife's contact with his

family. I find that this goes to the credibility of the appellant's claim that he is being threatened by his wife's father-in-law.

38. The evidence is that the appellant's father is a citizen of the United Kingdom. The appellant said that he complained to the police and provided a letter from the police. The letter stated that they have no information on their records. At the hearing the appellant said he does not know why the police said that they have no information because they took a statement from him. I do not find his claim credible that he complained about his father-in-law to the police in this country and the police have no record of it. The more likely explanation is the appellant has not complained to the police because his wife's parents did not object to the wedding.
39. The appellant said that his father-in-law wants his daughter to leave the appellant and to marry his cousin even though she is pregnant with another man's child. He said that the cousin would accept his pregnant wife and marry her. The appellant's wife however in her evidence at the hearing however said that she does not think that the cousin will accept her after she has been married or bring up the appellant's child. This inconsistency in the evidence also goes to the credibility of the appellant's claim that his father-in-law wants his wife to marry her cousin even after she married the appellant and is pregnant with his child.
40. I therefore find there would be no purpose for the appellant's mother and father-in-law to threaten the appellant to leave his wife given that it the marriage is now a fait accompli and she is pregnant with his child. The appellant claims that he comes from the Prophets family which is "very high up" in the community and his wife is not. There is no explanation for why the appellant's father-in-law would not want his daughter to marry socially and culturally upwards.
41. I find that the appellant and his wife are not telling the truth about the circumstances of their marriage and I place no reliance on their evidence that the appellant cannot return to Pakistan to make an application for entry clearance because he would be threatened by his father-in-law.
42. I find that this evidence of being threatened by his wife's mother and father has been made up by the appellant and his wife in order for the appellant to continue to live in this country. This is because the appellant's wife is not working and will not be able to sponsor the appellant as her spouse and satisfy the financial requirements of the Immigration Rules.
43. I have taken into account the case of Chikwamba v SSHD [2008] 121 referred to me by the appellant. It states that "I am far from suggesting that the Secretary of State should routinely apply this policy in all but exceptional cases. Rather it seems to me that the only comparatively rarely, certainly in family cases involving children, should an Article 8 appeal be dismissed on the basis that it would be proportionate and more appropriate for the applicant to apply for leave from abroad."
44. I find that the appellant and his wife have manufactured their evidence of fear of his wife's father-in-law to circumvent the Immigration Rules. I do not read Chikwamba to say that in every case where there is a child, should the appellant not be required

to return to his country of origin to make an application. I also do not really to say that this case can be used to circumvent the requirements of the Immigration Rules.

45. I find in this case there is nothing which precludes the appellant from relocating to Pakistan and making his entry clearance application from that country. If the appellant cannot succeed in his application, then it would be up to the appellant's wife to consider relocating to Pakistan to be with the appellant and enjoy family life in that country with her child. The appellant's wife has her family in this country who can support her as they are now doing. I do not accept her evidence that she is isolated from them.
46. I find there are no compelling circumstances in the appellant's case for him to succeed pursuant to Article 8 when he cannot succeed pursuant to the Immigration Rules for leave to remain in this country.
47. Considering all the evidence in the round I find that even if there is some disturbance in the appellant's and his wife's family life, however it is not sufficient to trump the interests of the respondent as set out in section 117B of the Immigration Act.

Decision

Appeal dismissed

Signed by,

Dated this 25th day of January 2015

A Deputy Judge of the Upper Tribunal

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Mrs S Chana