Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: IA/17114/2014

THE IMMIGRATION ACTS

Heard in Manchester	**Decision & Reasons Promulgated**
On 25 February 2015	**On 13 March 2015**

Before

UPPER TRIBUNAL JUDGE DAWSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MUHAMMAD QASIM CHAUDHRY

Respondent

Representation:
For the Appellant: Mr M Diwnycz, Senior Presenting Officer
For the Respondent: Miss S Khan, instructed by Parkview Solicitors

DECISION AND REASONS

1. This is an appeal by the Secretary of State. The case concerns a national of Pakistan (the claimant) who was born on 11 July 1987. He arrived in the United Kingdom with permission as a visitor on 23 August 2013 and thereafter made application for leave to remain as the spouse of a British national, Tahria Khan. The couple had married in Pakistan on 10 June 2012.

2. The Secretary of State refused to grant leave to remain on this basis. The application was refused under the partner route of Appendix FM in the light of the nature of the claimant's immigration status. There were no

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children thus the requirements of EX.1(a) were not met. The relationship was accepted as genuine and subsisting but there were no insurmountable obstacles to the relationship continuing in Pakistan and thus EX.1(b) was not met. The respondent did not come within any of the provisions for private life under paragraph 276ADE and it was not considered there were any exceptional circumstances. It was acknowledged that Ms Khan was pregnant and due to give birth in June but it was not unreasonable for the claimant to return to Pakistan and apply for entry clearance.

3. Although the respondent was not given a right of appeal on the basis that he had made his application after expiry of leave, the First-tier Tribunal Judge accepted the evidence of the respondent that an in time application had been made. By the time Judge A Parker heard the appeal on 2 September 2014, the British citizen child had been born (2 July 2014).

4. The judge accepted the Presenting Officer's argument that as the respondent had entered as a visitor, the partner or parent route was not available and thus considered the case solely under Article 8. He applied the relevant provisions of Part 5A of the Nationality, Immigration and Asylum Act 2002 and concluded that,

   (i) it is in the best interests of the child to be with both parents;

   (ii) the mother and child do not wish to reside in Pakistan and as British citizens that is an important consideration;

   (iii) there was no realistic prospect of a successful settlement application by the respondent under the Rules and

   (iv) it was unreasonable to expect the child or the father to live elsewhere than the United Kingdom.

   On this basis he allowed the appeal under Article 8.

5. The challenge by the Secretary of State is in terms that the judge had erred in law in his approach to the Article 8 assessment. With reference to *Gulshan* (Article 8 – new Rules) [2013] UKUT 00640 (IAC) and *R (On the application of Nagre) v Secretary of State for the Home Department* [2013] EWHC 720 [2013] EWHC 720 (Admin) it is submitted that the circumstances of the claimant were neither compelling nor exceptional. With reference to s.117B, the decision to remove the claimant was proportionate. The grounds continue:

   > "The [claimant] cannot speak English and will therefore be unable to integrate into society. He will therefore have no prospect of employment and as his wife is not working he will not be financially independent and will therefore also be a burden on tax payers. It is submitted that there is no insurmountable obstacles to his wife and child from relocating to Pakistan and would be reasonable for them to do so if they so wish. Their reluctance to do so is one of choice rather than necessity and therefore any separation will purely be their own making. It remains their own choice whether they

> remain here without the [claimant] or relocate with him. If they chose not to, they can remain in contact via modern methods of communication and visits as they have done previously. It is submitted that it is proportionate for the [claimant] to return until the requirements are met so that he is not a burden on tax payers and so a fair and effective immigration system is maintained."

6. By way of a Rule 24 response, it is first argued that the respondent was exempt from meeting the minimum income requirement, the English language requirement and immigration status by virtue of his subsisting relationship with a British citizen child and s.EX.1. Miss Khan no longer relies on this argument.

7. The second point raised was that the judge had identified and properly applied the principles in *Gulshan* and *Nagre* in order to reach a conclusion that there were compelling circumstances not sufficiently recognised under the Rules. The challenge was a disagreement with the judicial findings and did not amount to an arguable error of law. Any decision to remove the respondent would be a disproportionate breach of his Article 8 rights.

8. In order to consider the materiality of any error if found, I invited submissions on the Secretary of State's current guidance on the family life provisions in the Rules (Immigration Directorate Instruction Family Migration: Appendix FM Section 1.0b dated November 2014) in particular paragraph 11.2.3 from which I quote the initial paragraphs:

> "Save in cases involving criminality, the decision-maker must not take a decision in relation to the parent or primary carer of a British citizen child where the effect of that decision would be to force that British child to leave the EU, regardless of the age of that child. This reflects the European Court of Justice judgment in *Zambrano*.
>
> The decision maker must consult the following guidance when assessing cases involving criminality:
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> - Criminality guidance in ECHR cases (internal)
>
> - Criminality guidance in the ECHR cases (external)
>
> Where a decision to refuse the application would require a parent or primary carer to return to a country **outside the EU**, the case must always be assessed on the basis that it would be unreasonable to expect a British citizen child to leave the UK with that parent or primary carer. In such cases it will usually be appropriate to grant leave to the parent or primary carer, to enable them to remain in the UK with the child, provided there is satisfactory evidence of a genuine and subsisting parental relationship.
>
> It may, however, be appropriate to refuse to grant leave where the conduct of the parent or primary carer gives rise to considerations of such weight as to justify separation, if the child could otherwise stay with another parents or alternative primary carer in the UK or in the EU.

The circumstances envisaged could cover amongst others:

- Criminality falling below the threshold set out in paragraph 398 of the Immigration Rules;

- A very poor immigration history, such as where the person has repeatedly and deliberately breached the Immigration Rules."

In considering whether refusal may be appropriate the decision maker must consider the impact on a child of any separation. If the decision-maker is minded to refuse, in circumstances where separation would be the result, this decision should normally be discussed with the senior case worker and, where appropriate, advice may be sought from the Office of the Children's Champion on the implications of the welfare of the child, in order to in form the decision..."

9. The remainder of paragraph 11.2.3 is in terms that the decision-maker must first consider an application under the Rules and then look at exceptional circumstances. Guidance is also given where neither category avails an applicant the case must be referred to European case work where all the following criteria are met:

"(i) the child is under the age of 18; and

(ii) the child is a British citizen; and

(iii) the primary carer (care responsibilities and court orders are examples of evidence) if the child is a non-EEA national in the UK; and

(iv) there is no other parent/guardian carer upon whom the child is dependent or who could care for the child if the primary carer left the UK to go to a country outside the EU."

10. Miss Khan argued that the reasonableness of the decision by the claimant's British citizen wife was the aspect that required analysis in this case in the light of the child in the UK. The test was not one of insurmountable obstacles. She contended that there had been no change since this aspect was considered by the Upper Tribunal in *Sanade and Others* (British children – Zambrano – Direci) [2012] UKUT 00048 (IAC).

11. Mr Diwnycz accepted that as the removal of the respondent would result in a split in the family this would not be in accordance with current UKBA guidance. In his view, that guidance where there is no criminality is confined to the first paragraph of 11.2.3. He acknowledged that the test was not one of insurmountable obstacles.

12. In the light of this approach Miss Khan made only short submissions. The judge had had regard to primary legislation and had carefully considered the case law and arrived at occlusions open to him. There was no material error and in the light of the submissions made by Mr Diwnycz, the Secretary of State had not made out her case.

13. By way of response, Mr Diwnycz considered that he had nothing to add to these submissions. He clarified that he did not challenge the reasonableness of the decision of the claimant's wife that she and the child should not accompany him to Pakistan; it was open to her to make that decision and there was no “mechanism” whereby he could criticise it.

14. In the circumstances my decision can be shortly stated.

15. Section 117B(vi) provides:

> “(vi) in the case of a person who is not liable to deportation, the public interest does not require the person's removal where –
>
> (a) the person has a genuine and subsisting parental relationship with a qualifying child, and
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> (b) it would not be reasonable to expect the child to leave the United Kingdom.”

16. The judge correctly identified the need to consider whether it would be unreasonable to expect the child to leave the United Kingdom in [26] of his decision. At [30] he found that it would be unreasonable for the claimant and the child to live elsewhere other than the UK.

17. Although not relevant to the considerations under s.117B(vi), Miss Khan pointed out that the respondent had produced evidence of his competence in English; his wife had been working as a hairdresser although she was required to give this up on the birth of the child.

18. As Mr Diwnycz has accepted that it would be unreasonable for the British citizen child to go to Pakistan it follows that the public interest does not require the claimant's removal under section 117B. Furthermore, Mr Diwnycz has conceded that as removal of the claimant would split the family, such removal would not be in accordance with the Secretary of States guidance to her staff. Taking these matters together, the challenge to the judge’s decision under article 8 is now academic.

19. Accordingly this appeal is dismissed and the decision of the First-tier Tribunal stands.

Signed Date 11 March 2015

Upper Tribunal Judge Dawson