Upper Tier Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/39262/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 1 April 2015	**On 10 April 2015**

Before

Deputy Upper Tribunal Judge Pickup

Between

Secretary of State for the Home Department

Appellant

and

Md Khairul Alam
[No anonymity direction made]

Claimant

Representation:
For the claimant: Ms C Magrath, instructed by ICS Legal
For the appellant: Mr E Tufan, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is the appeal of the Secretary of State against the decision of First-tier Tribunal Judge Roopnarine-Davies promulgated 10.12.14, dismissing on immigration grounds, but allowing on human rights grounds, the claimant's appeal against the decision of the Secretary of State, dated 25.9.13, to refuse him further leave to remain in the UK as a Tier 4 Student. The Judge heard the appeal on 2.12.14.

2. First-tier Tribunal Judge Parkes granted permission to appeal on 10.2.15.

3. Thus the matter came before me on 1.4.15 as an appeal in the Upper Tribunal.

Error of Law

4. In the first instance I have to determine whether or not there was an error of law in the making of the decision of the First-tier Tribunal such that the determination of Judge Roopnarine-Davies should be set aside.

5. At the conclusion of the hearing I reserved my decision, which I now give.

6. Judge Roopnarine-Davies found, for cogent reasons provided in the decision, that the claimant could not meet the requirements of paragraph 319C of the Immigration Rules. The Secretary of State has not appealed that part of the decision and there is no cross-appeal by the claimant against that decision. I note that although there is what purports to be a Rule 24 response in the claimant's bundle prepare for this error of law hearing, no such response was served in compliance with directions.

7. It follows that the decision that the appeal be dismissed on immigration grounds must stand, which was accepted before me by the claimant's representative. The remaining issue is whether there is any material error of law in the making of the decision to allow the appeal outside the Rules on the basis of article 8 ECHR.

8. As drafted, the grounds rely on Gulshan [2013] UKUT 00640 (IAC) to suggest that an article 8 assessment should only be conducted where there are compelling circumstances not recognised by the Immigration Rules. It is submitted that the judge failed to identify any such compelling circumstances which would lead to an unjustifiably harsh outcome.

9. However, it is arguable that the suggested approach is no longer valid. In R(MM (Lebanon)) v SSHD [2014] EWCA Civ 985 the Court of Appeal stated:

> "135. Where the relevant group of IRs [immigration rules], upon their proper construction provide a "complete code" for dealing with a person's Convention rights in the context of a particular IR or statutory provision, such as in the case of "foreign criminals", then the balancing exercise and the way the various factors are to be taken into account in an individual case must be done in accordance with that code, although reference to "exceptional circumstances" in the code will nonetheless entail a proportionality exercise. But if the relevant group of IRs is not such a "complete code" then the proportionality test will be more at large, albeit guided by the *Huang* tests and UK and Strasbourg case law."

10. In Ganesabalan and other cases it has been held that the Rules are not a 'complete code' for the consideration of article 8 issues. The latest in the line of authorities on this issue is Singh v SSHD [2015] EWCA Civ 74, where the Court of Appeal made clear that the 'second-stage' can be satisfied by the decision-maker concluding that any family or private life issues raised by the claim have already been addressed in the first stage, the consideration under the Rules, "in which case obviously there is no need to go through it all again." If the decision-maker's view is straightforwardly that all the article 8 issues raised have been addressed in determining the claim under the Rules, all that is necessary is to say so.

11. Although it was intended that the new Rules in force from 9.7.12 would properly reflect the article 8 private and family life requirements in the generality of cases, so that it should only be exceptionally that an application would have a valid claim under article 8 which fell outside the scope of the Rules, it is now settled that the right course in any case where an applicant relies on his or her private or family life is to proceed by considering first whether leave should be granted under the relevant provisions of the new Rules and only if the answer is no to go on to consider article 8 in its unvarnished form (the so-called 'two-stage approach'): Singh v SSHD [2015] EWCA Civ 74.

12. Mr Tufan's argument is that whilst the Rules are not a 'complete code' for consideration of article 8 private and family life, and it is now clear that there is no intermediary or threshold test, the judge should have first considered any private and family life claim by reference to the Immigration Rules and then considered whether there were 'exceptional' or compelling circumstances not adequately addressed in the Rules which required the judge to go on to make a second-stage article 8 assessment, applying the Razgar stepped approach. Mr Tufan complains that the judge identified no such compelling or exceptional circumstances. Only if there are insurmountable obstacles to continuing family life in Bangladesh, or that, following Nagre, to expect the family to continue family life outside the UK would be unjustifiably harsh, should the appeal have been allowed under article 8.

13. On the other side of that coin is the argument of the claimant that given that there was no consideration of article 8 private and family life within the Rules, and neither could there be as he did not meet the requirements, and thus there was and could be no proportionality assessment under the Rules, there had to be such an assessment outside of the Rules, which the judge conducted, giving reasons for finding the decision to remove the claimant disproportionate. It was also suggested that if the only public interest in removing the claimant is so that he can make an application from outside the UK for leave to enter as a dependant of his wife, then Chikwamba suggests that would be disproportionate. He lives with his wife and two children and she has leave to remain until 2017. I was also urged to consider the best interests of the two children and the genuine and subsisting relationship the claimant has with his wife and children.

14. Although Judge Roopnarine-Davies went on to consider article 8 ECHR, that was not done with regard to private and family life considerations under the Immigration Rules, the first stage. There is no reference in the decision to Appendix FM in relation to family life, or paragraph 276ADE in relation to private life. As is clear from Singh, if all the relevant factors have already been considered within an assessment of private and family life within the Rules, there is no purpose in repeating the exercise by reference to article 8 ECHR and it suffices for the judge simply to say so.

15. Ms Magrath accepted that the claimant could not meet either set of requirements, including to demonstrate that there are very serious obstacles to his integration in Bangladesh.

16. However, the concern is that it would be difficult to make any sustainable article 8 assessment outside the Rules without having first considered whether the claimant met the requirements of Appendix FM or paragraph 276ADE, and in doing so the various factors relevant to such an assessment arising from the claimant's circumstances. Only then could the judge assess whether or not there are other factors, compelling circumstances inadequately recognised in the Rules, so as to render the decision to remove unjustifiably harsh or otherwise disproportionate. That process was not followed and the judge did not identify any such compelling circumstances.

17. Whether the claimant could meet those requirements of the Rules must be highly relevant to any article 8 proportionality balancing exercise. Further, the fact that the claimant vigorously asserts that he can fully meet a paragraph 319C application for leave to remain as the dependant of a points-based system (PBS) migrant with leave to remain until 2017, must surely demonstrate that it cannot be disproportionate to private and family life rights to refuse the application as made, as an alternative to removal is available. He is entitled to make a 319C application from within the UK, taking care to ensure that the evidential requirements under Appendix E are met, and in such circumstances 319C clearly provides that leave will be granted. From that perspective, this is not a Chikwamba or Hyat situation, as it is not necessarily the case that, despite the removal direction already issued, that the claimant will be removed. On the facts relied on in the claimant's case there is no real prospect of his being removed from the UK, provided he can make such an application within 28 days of the resolution of this appeal and thus the termination of his section 3C leave to remain.

18. In the circumstances, I am satisfied that there was a material error of law in the approach of the First-tier Tribunal Judge to the making of the decision in relation to article 8 ECHR outside the Rules. The article 8 assessment was flawed for failure to consider private and family life within the Rules; failing to identify compelling or other circumstances inadequately recognised in the Rules; and more significantly failing to take account of the fact that it remains open to this claimant to make an application for leave to remain under 319C without having to leave the UK to do so, so that the article 8 assessment that was made was unbalanced and ultimately unsustainable.

19. It follows that the decision must be set aside and remade.

20. I discussed with the representatives whether if I found an error of law it was necessary for any further submissions or evidence before remaking the decision. Neither party suggested that was necessary, as if I found no error of law the decision of the First-tier Tribunal stands, and if I found a material error of law sufficient to set the decision aside it would logically follow that I also found there was no basis for allowing the appeal on article 8 ECHR private or family life.

21. It being accepted that the claimant does not meet the requirements of Appendix FM in respect of family life, as neither partner nor children have

settled status, nor the requirements of paragraph 276ADE(vi) not having lived in the UK for 20 years and it being accepted that he could not demonstrate very serious obstacles to integration in Bangladesh, I find no compelling circumstances that would render the decision unjustifiably harsh. That is because, despite the removal decision, it remains open to the claimant to make an application under the route provided under paragraph 319C for leave to remain in the UK with a PBS migrant. However, in the event that he does not make such an application I find nothing unjustifiably harsh or disproportionate in requiring the claimant to leave the UK. None of the family have settled status in the UK. They are citizens of Bangladesh where the parents have spent most of their lives. In the light of her PBS leave, it will be up to his wife to decide whether to accompany him, but their status in the UK is entirely temporary and does not give rise to any legitimate expectation of being able to settle in the UK, simply because that is their choice or future intention. Article 8 is not a shortcut to compliance with the Immigration Rules and the fact that he failed to demonstrate that he could meet 319C, even if such an application had validly been made, which is doubtful, must be highly relevant to the proportionality balancing exercise. There is a route open to him to remain without having to leave the UK and in those circumstances I find it difficult to understand how the decision of the Secretary of State to refuse the application could be regarded as disproportionate. The decision does not of itself separate the family; it being his wife's choice and in respect of the children the family's joint choice, to decide whether to return together as a family to Bangladesh where they have lived most of their lives, and where they retain family, social and cultural ties.

22. In respect of private life, Patel and Nasim demonstrate that temporary residence in the UK as student or PBS migrant does not give rise to private life to be protected by article 8 ECHR. In Nasim and others (article 8) [2014] UKUT 00025 (IAC), the Upper Tribunal considered whether the hypothetical removal of the 22 PBS claimants, pursuant to the decision to refuse to vary leave, would violate the UK's obligations under article 8 ECHR. Whilst each case must be determined on its merits, the Tribunal noted that the judgements of the Supreme Court in Patel and Others v SSHD [2013] UKSC 72, "serve to re-focus attention on the nature and purpose of article 8 of the ECHR and, in particular, to recognise that article's limited utility in private life cases that are far removed from the protection of an individual's moral and physical integrity."

23. Insofar as section 55 and the best interests of the children are concerned, given their young ages those are undoubtedly to remain with their parents and if the parents are returning to Bangladesh then it is entirely reasonable to expect the children to accompany them. No credible evidence has been adduced to suggest that either of the children have any independent right to remain on the basis of article 8 private life.

24. It follows that in remaking the decision in the appeal, the claimant can neither succeed on immigration grounds nor on human rights grounds.

Conclusions:

25. For the reasons set out above, I find that the making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside.

I set aside the decision.

I re-make the decision in the appeal by dismissing it.

Signed

Deputy Upper Tribunal Judge Pickup

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Given the circumstances, I make no anonymity order.

Fee Award **Note: this is not part of the determination.**

In the light of my decision, I have considered whether to make a fee award (rule 23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007).

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: The appeal has been dismissed and thus there can be no fee award.

Signed

Deputy Upper Tribunal Judge Pickup