Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/42936/2014**

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 30 July 2015	**On 3 August 2015**

Before

Deputy Upper Tribunal Judge MANUELL

Between

MS SAIMA ASGHAR
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms T Murshed, Counsel (Direct Access)
For the Respondent: Mr S Whitwell, Home Office Presenting Officer

DETERMINATION AND REASONS

Introduction

1. The Appellant appealed with permission granted by First-tier Tribunal Levin on 1 April 2015 against the determination of First-tier Tribunal Judge Parkes who had dismissed the Appellant's appeal against the refusal on 9 October 2014 of her application made under paragraph 287 of the Immigration Rules for leave to remain as the spouse of a British Citizen and on human rights grounds (Article 8 ECHR family life) in a decision and reasons promulgated on 30 January 2015.

2. The Appellant is a national of Pakistan, born on 2 January 1980. The Appellant had entered the United Kingdom as a spouse on 19 April 2011 with leave to enter until 19 July 2013. She applied for further leave to remain on 14 January 2014, after her leave to enter had expired. Removal Directions were made against her. It was accepted that the Appellant had not passed the test required in Appendix KoLL and so could not meet paragraph 287 of the Immigration Rules. The judge found that the Appellant had had time and opportunity to pass the test but had not done so, without good reason: see [11] of the decision and reasons. The judge found that the Appellant's two young British Citizen children could remain in the United Kingdom with their father while the Appellant applied for re-entry from abroad once she had passed the test, alternatively that the family could relocate to Pakistan without very significant difficulties.

3. Permission to appeal was granted by First-tier Tribunal Judge Levin because he considered that it was arguable that the judge had erred in his consideration of paragraph EX.1(a) in failing to have regard to the fact that the children are British, their young age and best interests. It was also considered arguable that the judge should have considered Article 8 ECHR outside the Immigration Rules. There was, however, little merit in the contention that the judge had erred in finding that there were no insurmountable obstacles to the Appellant's husband moving to Pakistan.

4. Standard directions were made by the tribunal, indicating that the appeal would be re-decided immediately if a material error of law were found. A rule 24 notice in the form of a letter dated 10 April 2015 had been filed on the Respondent's behalf opposing the onwards appeal.

Submissions

5. Ms Murshed for the Appellant relied on her skeleton argument, the grounds of onwards appeal and the Upper Tribunal's grant of permission to appeal. In summary, she mounted a sustained attack on the decision and reasons, contending that the judge had failed to take account of all of the evidence before him. Counsel contended that the Appellant's husband refused to allow his children to go to Pakistan for family reasons. There had been no proper consideration of Article 8 ECHR family life issues. It was a particular omission that the judge had failed to deal with the consequences of temporary separation if the Appellant returned to Pakistan, in that both children were very young and the Appellant's husband would be physically unable to look after them in his wife's absence. He also had responsibility of his elderly parents. He would have to leave his job. This would all have grossly disproportionate consequences. The judge had failed to deal with Article 8 ECHR at all, which was a further material error of law. The determination should be set aside and the decision remade in the Appellant's favour.

6. Mr Whitwell for the Respondent relied on the rule 24 notice. There was no error of law and the determination should stand. Although the determination was not very detailed, the judge had covered all relevant and material points. Whether there would be a family split was, as the judge explained, was a question of choice for the family concerned. There was nothing for the judge to have added about Article 8 ECHR as everything relevant to the facts of the present case had been covered by paragraph EX.1.

7. In reply, Ms Murshed reiterated that the judge had failed to address the impact of temporary separation. Chikwamba [2008] UKHL 40 and Chen [2015] UKUT 00189 (IAC) applied. There would be significant interference with the Appellant's Article 8 ECHR rights, even where separation was temporary.

8. Mr Whitwell responded to the Chen point, submitting that nothing in the determination failed to recognise the principles discussed there.

9. The tribunal indicated at the conclusion of submissions that it reserved its determination, which now follows.

No material error of law finding

10. In the tribunal's view the grant of permission to appeal to the Upper Tribunal was generous. The grounds of onwards appeal were little more than an attempt, as so often seen in the Immigration and Asylum Chamber, to dress up a difference of opinion or a disagreement with a First-tier Tribunal Judge's proper findings as an error of law. It may be said that the experienced judge's decision and reasons were notably compressed, but they were none the worse for that, and addressed all key issues.

11. Seeking to do the best for her clients, Ms Murshed's submissions resembled an attempt to reargue the appeal. Any change in the underlying evidence (if significant) must form the basis of a fresh application to the Secretary of State, not a complaint about the judge's treatment of the evidence which was before him. The judge accurately summarised that evidence and the various competing factors. The Appellant had made certain choices in the past and had to accept the consequences of failing to comply with the Immigration Rules. The judge was entitled to find that the Appellant now was faced with the choice of moving to Pakistan with her husband and British children, or returning there on her own to seek entry clearance once she had passed the relevant test: see [13] and [14] of the decision and reasons. The children could be adequately cared for by her husband in her absence. The judge considered the relevant medical issues adequately at [15] and [16].

12. Chen (above) does not appear to have been cited to the judge. In Chen it is noted by Upper Tribunal Judge Gill that the question of

whether it would be disproportionate to expect an individual to return to his home country to make an entry clearance application to rejoin family members in the United Kingdom, i.e., temporary separation, was not addressed in Appendix FM. Any disproportionality resulting from temporary separation is however a matter to be proved by the applicant.

13. The consideration of the impact of temporary separation was implicit if not explicit in the judge's analysis of the evidence: again see [13] and [14], and also [17] of the decision and reasons. It hardly need to have been said that any separation, even a temporary one, was not in the children's best interests, but (a) such separation was neither necessary nor inevitable as the family could relocate to Pakistan, which was a choice open to them, and (b) the children's interests were not paramount and could, as here, be outweighed by the legitimate objective of immigration control as embodied in the Immigration Rules. The impact of temporary separation was thus not shown to be disproportionate.

14. Further, the judge found that there were no compelling or compassionate circumstance which required the consideration of the exercise of discretion by the Secretary of State outside the Immigration Rules: again see [17]. It was open to him to find, as he did at [12] of his decision and reasons, that the long term Article 8 ECHR family life issues were covered in Appendix FM, paragraph EX.1 of the Immigration Rules. He might have added that Article 8 ECHR does not provide a "general dispensing power" to the tribunal (see Patel v SSHD [2013] UKSC 72), but there was no need to cite such a well-known authority.

15. The tribunal finds that there was no error of law in the succinct yet sufficient decision and reasons and there is no proper basis for interfering with the experienced judge's decision.

DECISION

The making of the previous decision did not involve the making of an error on a point of law and stands unchanged

Signed **Dated**

Deputy Upper Tribunal Judge Manuell