Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/14553/2014

THE IMMIGRATION ACTS

Heard at Newport	**Decision & Reasons Promulgated**
On 26th April 2016	**On 19th May 2016**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

NI
(ANONYMITY DIRECTION MADE)

Appellant

and

ENTRY CLEARANCE OFFICER – ISLAMABAD

Respondent

Representation:

For the Appellant: Ms C Grubb instructed by Qualified Legal Solicitors
For the Respondent: Mr I Richards, Home Office Presenting Officer

DETERMINATION AND REASONS

1. I make an anonymity order under rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698 as amended) in order to protect the anonymity of the sponsor's children. This order prohibits the disclosure directly or indirectly (including by the parties) of the identity of the appellant or her children. Any disclosure and breach of this order may amount to a contempt of court. This order shall remain in force unless revoked or varied by a Tribunal or court.

Introduction

2. The appellant is a citizen of Pakistan who was born on 2 April 1981. The appellant and "MI" (the sponsor) married in January 2014 in Pakistan.

3. MI was previously married to a British citizen and he and his ex-wife have three children: F, born on [ ] 2000; R, born on [ ] 2006 and K, born on [ ] 2010. Consequently, they are now 16, 9 and 6 years old respectively.

4. F and K live with their mother in the UK. R lives with the sponsor in the UK. The living arrangements are as a result of an agreement reached between the sponsor and his ex-spouse and local Social Services at the time of his divorce in 2013 (see document at page 114 of the bundle).

5. On 16 April 2014, the appellant made an application for entry clearance under Appendix FM to join the sponsor in the UK as his spouse.

6. On 22 October 2014, the ECO refused that application on the basis that the appellant could not establish that he had the required maintenance funds under Appendix FM (namely a gross annual salary of £18,600) and the appellant had not submitted a certificate to satisfy the English language requirement of the Rules.

7. That decision was upheld by the Entry Clearance Manager on 7 January 2015.

8. The application was also refused on the basis that the appellant could not establish a breach of Art 8 of the ECHR.

The Appeal to the First-tier Tribunal

9. The appellant appealed to the First-tier Tribunal. In a determination promulgated on 30 June 2015, Judge Britton dismissed the appellant's appeal. First, he was not satisfied that the appellant met the requirements of the Immigration Rules, namely Appendix FM as a spouse. The appellant was unable to establish, on the basis of the specified documents, that at the date of the application the sponsor had an annual gross income of £18,600 from his self-employment as a double glazing salesman. Further, the appellant had not submitted an original English language test certificate (although she had submitted a copy) which, as a result, was insufficient to establish that she met the English language requirement of the Rules. Secondly, Judge Britton held that the respondent's decision did not breach Art 8 of the ECHR.

Appeal to the Upper Tribunal

10. The appellant sought permission to appeal to the Upper Tribunal against the decision to dismiss her appeal under Art 8. No challenge was made to the judge's decision to dismiss the appeal under the Immigration Rules. It is not suggested that the appellant met the requirements of the Rules at the date of the ECO's decision.

11. The grounds argue that the judge failed properly to consider the best interests of the sponsor's three children and failed properly to make an assessment of proportionality under Art 8 of the ECHR.

12. On 22 October 2015, the First-tier Tribunal (Judge Fisher) granted the appellant permission to appeal on both grounds.

13. On 29 October 2015, the respondent filed a rule 24 response seeking to uphold the judge's determination on the basis that the judge had properly considered the children's best interests and the appellant had failed to demonstrate, given that she could not comply with the requirements of the Rules, why she should not make a further application.

The Judge's Decision

14. Having set out the five stage approach in Razgar [2004] UKHL 24 at para 19 of his determination, the judge dealt with Art 8 in paras 23-24 as follows:

> "23. In relation to Article 8 the sponsor is able to travel to Pakistan and throughout the south of England and Wales although he suffers from back ache.
>
> 24. I have considered section 55 of the Borders, Citizenship and Immigration Act 2009 which states that the respondent must have regard for the need to safeguard and promote the welfare of children who are in the United Kingdom. I have also considered what is in their best interest. There is no evidence before me why his first wife cannot look after the three children if the sponsor went to live with the appellant in Pakistan. He can visit the children and keep in touch with them through Skype and other electronic means. However, it is a matter for him if he wishes to join his wife. The appellant has had no family life in this country. I find that any interference with the appellant's private and family life is proportionate to the legitimate aims of applying the immigration policy of the United Kingdom".

Error of Law

15. Ms Grubb, who represented the appellant, submitted that the judge's treatment of Art 8 in his determination at paras 23-24 was legally inadequate. It was a superficial assessment which failed to take properly into account in accordance with the case law, the three children's best interests. In fact, Ms Grubb submitted that the judge had not made any finding in respect of their best interests. But, in any event, he had failed to carry out the appropriate balancing exercise taking those interests into account. She submitted that there was no assessment of the family's current arrangements. Ms Grubb submitted that the judge was wrong to say that there was no evidence that the sponsor's ex-wife could not look after the three children if the sponsor went to live with the appellant in Pakistan. In fact, there was evidence from the sponsor himself that his ex-wife would not be able to look after all three children particularly given that the eldest child, F, suffered from Autistic Syndrome Disability and required more care and attention than the other two children.

16. Mr Richards, on behalf of the Entry Clearance Officer, accepted that the judge had not engaged in a comprehensive analysis of the children's best interests or Art 8. He

accepted that there was no specific finding in relation to their best interests but that it was clear on reading the judge's determination what he had decided. He submitted that those best interests were not a trump card and the judge was entitled to find that there was no evidence that the sponsor's ex-wife could not look after all the children and that the sponsor could live with the appellant in Pakistan. Mr Richards submitted that had the judge approached the issue of proportionality in a more structured and detailed manner, it was difficult to see how the outcome could have been any different.

17. There are, in my judgment, a number of difficulties with the judge's treatment of Art 8.

18. First, despite setting out the Razgar test, in paras 23 and 24 the judge jumps straight to the final issue of proportionality without identifying what, if any, private and family life exists and the nature of any infringement affected by the respondent's decision.

19. Secondly, the judge does not make any explicit finding in relation to the best interests of the three children. There was, as Ms Grubb submitted, at least the oral evidence of the sponsor that his ex-wife would be unable or unwilling to look after the three children if he went to Pakistan. Apart from that, and the judge's stated view that the children could keep in touch with the sponsor by electronic means, the judge does not engage with any impact there might be upon the children including what, if anything, he made of the sponsor's evidence that the eldest child suffered from Autistic Syndrome Disability.

20. Thirdly, in assessing proportionality the judge fails to apply the proper structured approach of first considering whether the appellant succeeds under the Rules (which of course he did consider) but then going on to determine whether there were "compelling circumstances" sufficient to outweigh the public interest (see SSHD v SS (Congo) and Others [2015] EWCA Civ 387).

21. In my judgment, Judge Britton has failed properly to consider the appellant's claim under Art 8. In AG (Eritrea) v SSHD [2007] EWCA Civ 801 at [37] Sedley LJ said this:

> "What matters is not that the courts and Tribunals should adopt a set formula for determining proportionality, but they should have proper and visible regard to relevant principles in making a structured decision about it case by case. It is not sufficient, as still happens, for the Tribunal simply to characterise something as proportionate or disproportionate: to do so may well be a failure of reasoning amounting to an error of law".

22. Although Judge Britton does not fall into the trap of simply characterising the respondent's decision as proportionate, for the reasons I have given he has failed adequately to reason through in a structured way the appellant's claim under Art 8. That, in my judgment, amounts to an error of law.

23. In addition, the judge makes no reference to the factors set out in s.117B of the Nationality, Immigration and Asylum Act 2002 which, by virtue of s.117A(2), he was

mandated to have regard to in determining the "public interest question", namely that of proportionality under Art 8.2.

24. Although Mr Richards sought to argue that any error was immaterial and it was difficult to see how the outcome could have been any different, I do not accept that submission. The lack of reasoning and necessary findings leaves me unable to conclude on reading the judge's determination alone that his error could have no effect on his decision.

25. For those reasons, the judge's decision to dismiss the appellant's appeal under Art 8 is set aside and must be re-made.

Re-making the Decision

26. I now turn to re-make the decision under Art 8. Art 8 of the ECHR provides as follows:

> "**Article 8**
>
> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority of the exercise of this right except such as is in accordance with the law and is 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".

27. The burden is upon the appellant to establish on a balance of probabilities that the failure to grant her entry clearance to join the sponsor in the UK will breach Art 8. The burden is upon the Secretary of State to justify any interference with the appellant's right to respect for her private and family life under Art 8.2.

28. In applying Art 8, the five stage test set out in the opinion of Lord Bingham of Cornhill in R (Razgar) v SSHD [2004] UKHL 27 at [17] is as follows:

> "(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 (as the case may be) 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?"

29. At [20], as regards the issue of proportionality, Lord Bingham said this:

> "[it] always involve(s) the striking of a fair balance between the rights of the individual and the interests of the community which is inherent in the whole of the Convention. The severity and consequences of the interference will call for a careful assessment at this stage".

30. As this is an entry clearance case, and not a removal case, the appeal engages the state's "positive obligation" rather than the negative obligation not to interfere with an individual's private and family life. However, the approach to Art 8, whilst not identical, is analogous in such positive obligation cases (see, SSHD v SS (Congo) and others [2015] EWCA Civ 387 at [39(ii)]).

31. Further, as the appellant does not argue that she can succeed under the Immigration Rules, the appellant must establish that there are "compelling" circumstances sufficient to outweigh he public interest such that her continued exclusion from the UK would be disproportionate (see SS (Congo) at [40]). In determining whether there is a breach of Art 8 in this appeal, by virtue of s.117A(2) I must have regard to the factors set out in s.117B of the NIA Act 2002 in determining the "public interest question", i.e. proportionality under Art 8.2. Section 117B provides as follows:

> "**117B Article 8: public interest considerations applicable in all cases**
>
> (1) The maintenance of effective immigration controls is in the public interest.
>
> (2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English –
>
> (a) are less of a burden on taxpayers, and
>
> (b) are better able to integrate into society.
>
> (3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons –
>
> (a) are not a burden on taxpayers, and
>
> (b) are better able to integrate into society.
>
> (4) Little weight should be given to –
>
> (a) a private life, or
>
> (b) a relationship formed with a qualifying partner, that is established by a person at a time when the person is in the United Kingdom unlawfully.
>
> (5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.
>
> (6) 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

(b) it would not be reasonable to expect the child to leave the United Kingdom".

32. Further, I must have regard not only to the rights of the appellant but also the rights of the sponsor and the sponsor's children (see Beoku-Betts v SSHD [2008] UKHL 39).

33. In that regard, the best interests of the sponsor's three children are a "primary consideration" (see ZH (Tanzania) v SSHD [2011] UKSC 4). Although a primary consideration, the best interests of the children are not necessarily determinative of the issue of proportionality since those interests can be outweighed by sufficiently strong or weighty considerations of the public interest (see also Zoumbas v SSHD [2013] UKSC 74 at [10]).

34. I turn now to consider the evidence and to make relevant findings in relation to Art 8.

35. The evidence is somewhat sparse. The sponsor gave oral evidence before Judge Britton and I was referred to relevant parts of that evidence by Ms Grubb. There was also a written statement from the sponsor dated 27 April 2015 dealing with the Art 8 issues at paras 11-18. The bundle of documents before the First-tier Tribunal contained some relevant documents to which I was referred, including the parental responsibility agreement (page 114); documents relating to the sponsor's back pain and physio treatment (at pages 111-113). Ms Grubb did not seek to introduce any further evidence before me.

36. I am satisfied that the appellant has established family life with the sponsor following their marriage in January 2014. I did not understand Mr Richards to dispute that. The sponsor's evidence was that he had remained with his wife following the wedding and had made a number of visits since that time including taking his son R with him. I also accept that the appellant has established a relationship with R which, if not yet family life, is a close relationship in her role as step-mother amounting to private life.

37. The sponsor has three children from his previous marriage living in the UK. They are all British citizens aged 16, 9 and 6 years respectively. The eldest and youngest child live with their mother. The middle child, R, lives with the sponsor. I accept the sponsor's evidence that he has a close relationship with his children and that he takes the younger two to school each day and the youngest comes to stay with him. His eldest son, he sees more sporadically, perhaps because of his age and he comes to see him 'as and when'.

38. Before Judge Britton the sponsor gave oral evidence that his eldest son suffered from Autistic Syndrome Disability. The sponsor makes no mention of that in his written statement and there is no supporting evidence of a diagnosis or in relation to the elder son's claimed condition. Whilst I am prepared to accept that the sponsor was not seeking to mislead Judge Britton, even if his eldest son does suffer from that

condition, there is no evidence before me as to the implication that has for his son or his future care by his parents or others. It is, however, curious that the matter was not referred to in the sponsor's written statement provided to the First-tier Tribunal and, if a diagnosis has been made, that no supporting documentation was submitted.

39. That said, I accept that there is family life between the sponsor and his three children in the UK.

40. Turning to the children's best interests, Mr Richards did not actively pursue an argument that their best interests lay other than remaining in the UK.

41. It is generally in the interests of children to have both parents and, despite the possibility of electronic communication (for example via Skype), that cannot be a fully adequate substitute for actual face to face contact in daily life which each of his children currently enjoys with the sponsor. Further, it is not, in my judgment, in the best interests of the children or reasonable to expect them to live other than in the UK. They are all British citizens and their lives have, so far as I am aware, always been in the UK. It would not be in their best interest to uproot them, if the sponsor were to leave the UK to live with the appellant in Pakistan, and leave behind their lives in the UK including their mother.

42. Consequently, I am satisfied that it is in their best interests that the sponsor should remain in the UK with them.

43. As regards the sponsor, I accept that it would not be reasonable for him to leave the UK, leaving behind his three children. Whilst I accept that modern electronic forms of communication, in particular such as Skype, allow for an ever increasing degree of maintained contact between families, that cannot be a fully adequate substitute for contact where a parent and children are able to meet and interact in the same place.

44. Consequently, in my judgment, the effect of the respondent's decision (if maintained) it is likely that the sponsor and appellant will not (subject to any future successful application for entry clearance by the appellant) live together in the same place on an on-going basis. That said, of course, the sponsor could, as he has in the past, make visits to see the appellant in Pakistan such that some actual contact as well as electronic contact through Skype can be maintained. Even if his former spouse could not look after all 3 children on a long-term basis there is nothing in the evidence she would be unable or unwilling to do so on a short-term basis.

45. Ms Grubb submitted that it was in the best interests of the children that the appellant should be admitted to the UK as she could then further her relationships with the children, support the sponsor and allow for his and the children's (particularly R's) family life to be enhanced. In his statement, the sponsor speaks of his chronic back pain and of his need for support in "household" chores. It would also, he says, assist that he has the support of the appellant in order to help his work, which involves travelling, by for example, helping pick up his son from school and preparing evening meals. I take these matters into account but there is no evidence before me that the sponsor is unable to cope with his current family arrangements in the UK

despite the fact that the appellant does not live with him and, indeed, that the current arrangements were unsatisfactory even before his marriage to the appellant.

46. I now turn to s.117B of the NIA Act 2002.

47. First, looking at s.117B, the appellant cannot meet the requirements of the Rules and the maintenance of effective immigration control is in the public interest (see s.117B(1)).

48. Secondly, it is in the public interest that the appellant should be able to speak English (see s.117B(2)). Whilst the appellant was unable to produce the original English language certificate at the required level, she has produced a copy and, for these purposes, I am prepared to accept that she is able to speak English. Mr Richards made no submission to the contrary. The appellant can, however, gain no positive benefit from this fact (see AM (S 117B) Malawi [2015] UKUT 260 (IAC) and Forman (ss 117A-C considerations) [2015] UKUT 412 (IAC))

49. Thirdly, it is in the public interest that the appellant should be financially independent (see s.117B(3)). Here, the appellant was unable to meet the financial requirements in Appendix FM based upon establishing that the sponsor had the required income of £18,600. It may be that that sets the required level of "financial independence". But, for the purposes of this appeal, I am content to accept that the evidence before Judge Britton did not suggest that the appellant would be, in fact, reliant upon public funds.

50. Finally, s.117B(4), (5) and (6) have no application in this appeal. Nevertheless, the circumstances in which the appellant and sponsor formed their family life is relevant under Art 8.2 applying the Strasbourg and domestic jurisprudence. In SS (Congo) at [39(i)], the Court of Appeal – reflecting the existing case law - stated that:

> "Article 8 does not confer an automatic right of entry, however. Article 8 imposes no general obligation on a state to facilitate the choice made by a married couple to reside in it ... the state is entitled to control immigration ...".

51. Here, the appellant and sponsor formed their family life at a time when neither could have any expectation that they could carry on their family life in the UK unless they met the requirements of the Immigration Rules which they do not.

52. In SS (Congo), the Court of Appeal (at [40]) recognised that the:

> "state has a wider margin of appreciation in determining the conditions to be satisfied before [leave to enter] is granted, by contrast with the position in relation to decisions regarding [leave to remain] for persons with a [non-precarious] family life already established in the United Kingdom. The Secretary of State has already, in effect, made some use of this wider margin of appreciation by excluding Section EX.1 as a basis for the grant of [leave to enter], although it is available as a basis for grant of [leave to remain]. These [leave to enter] Rules therefore maintain, in general terms, a reasonable relationship with the requirements of Article 8 in the ordinary run of cases. However, it remains possible to imagine cases where the individual interests at stake are of particularly pressing nature so that a good claim for [leave to enter] can be established

> outside the Rules. In our view, the appropriate general formulation for this category is that such cases will arise where an applicant for [leave to enter] can show that compelling circumstances exist (which are not sufficiently recognised under the new Rules) to require the grant of such leave".

53. That is the approach I must apply in this appeal.

54. Separation of a married couple does not necessarily breach Art 8: a balance has to be struck between the impact upon the couple of continued separation and the public interest (see, e.g. SSHD v Huang [2007] UKHL 11 at [20]). The appellant and sponsor have no automatic right to live together in the UK. They formed their family life when they had no expectation of remaining unless they met the requirements of the Rules. There will, of course, be an impact upon them if they cannot live together in the UK. As I have already indicated, I do not consider it reasonable to expect the sponsor to relocate to Pakistan leaving behind his children. There remains, of course, the opportunity for visits (as in the past) to Pakistan and contact through such means as Skype. The appellant can, at any time, make a fresh application under the Rules once the sponsor is in a position to demonstrate his income meets the financial requirements of the Rules. That is, and remains, an important reflection of the public interest. I am not satisfied that the evidence establishes any significant or serious impact upon the appellant and sponsor beyond that ordinarily resulting from the separation of a married couple.

55. Ms Grubb placed some reliance upon the cases of Chikwamba v SSHD [2008] UKHL 40 and SSHD v Hayat and Treebhowan [2012] EWCA Civ 1054 especially at [30]. These cases were concerned with the proportionality of removing an individual only to seek entry clearance where their failure to meet the requirements of the Rules for leave whilst in-country turned upon a lack of lawful leave in circumstances where it was plain that, on return to their own country, they would meet the requirements for entry clearance. Unless there was a "sensible" or "good" "reason" for enforcing the requirement of seeking entry clearance, the House of Lords held that it was likely that even a temporary disruption to their private and family life, particularly where children were adversely affected, would be disproportionate under Art 8. In my judgment, those cases cannot assist the appellant in this appeal. This is not a removal case. There is no question of "sending back" an individual to seek entry clearance: it is an entry clearance case in any event. The appellant is already outside the UK and she cannot, at present, satisfy the requirements for entry clearance. The case is not about whether temporary interference with private and family life in the UK enjoyed by the appellant is or is not justified by requiring the appellant to obtain entry clearance which he or she would self-evidently obtain. Here, the appellant has not established that she can presently meet the requirements for entry clearance and the issue is whether there are "compelling" circumstances such that maintaining the status quo is not proportionate.

56. I remind myself that he best interests of the children are not determinative and may be outweighed by a sufficiently strong public interest. The public interest in effective immigration control is, in my judgment, a weighty consideration in this appeal. Having considered all the circumstances and the best interests of the

sponsor's children, I am not satisfied that there are compelling circumstances so as to outweigh the public interest clearly reflected in the fact that the appellant cannot meet the requirements of the Rules, in particular the financial requirements. It remains open to the appellant to make a fresh application for entry clearance when she can meet the requirements of the Rules.

57. For all these reasons, the appellant has not established on a balance of probabilities that the respondent's decision to refuse her entry clearance breaches Art 8 of the ECHR.

Decision

58. Thus, the decision of the First-tier Tribunal to dismiss the appellant's appeal under Art 8 involved the making of an error of law. That decision is set aside.

59. I re-make the decision dismissing the appellant's appeal under Art 8.

60. The First-tier Tribunal's decision to dismiss the appellant's appeal under the Immigration Rules is not challenged and stands.

Signed

A Grubb
Judge of the Upper Tribunal
Date 19th May 2016

TO THE RESPONDENT
FEE AWARD

No fee award is payable.

Signed

A Grubb
Judge of the Upper Tribunal
Date 19th May 2016