EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2017] CSIH 63
P348/16

Lord Drummond Young
Lady Clark of Calton
Lord Pentland

OPINION OF THE COURT

delivered by LORD DRUMMOND YOUNG

in the petition of

SAMI SIRELKHATIM MOHAMED AHMED

Petitioner and Reclaimer

against

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

for

Judicial Review of a decision of the Upper Tribunal (Immigration and Asylum Chamber) dated 13 January 2016 refusing permission to appeal to itself

Petitioner and Reclaimer: Lindsay, QC, Winter; Drummond Miller LLP
Respondent: Pirie; Office of the Solicitor to the Advocate General

13 October 2017

[1] The petitioner is a citizen of Sudan born on 4 September 1976. On 14 August 2014 an official acting on behalf of the Home Secretary refused him entry clearance to the United Kingdom as the partner of his wife, Dalia Yassein, under Appendix FM of the

Immigration Rules. The application was refused because the financial requirements of the Rules could not be met. The entry clearance officer further considered a claim for leave outside the Rules based on Article 8 of the European Convention on Human Rights. He found that there were no exceptional circumstances in relation to respect for the petitioner's family life or private life. The entry clearance officer also considered the best interests of the petitioner's children, who live in the United Kingdom with his wife. He found that it would not be disproportionate for the application to be refused notwithstanding this factor.

[2] The petitioner met his wife at university in Sudan in 2003. They married on 10 January 2005, and have three children, born respectively on 26 June 2006, 27 December 2009 and 12 April 2013. The petitioner's wife and his children are all British citizens, and currently reside in the United Kingdom. The petitioner accepts that he cannot meet the financial conditions of Appendix FM of the Immigration Rules, and consequently must apply for leave outside the Rules. He is not working at present, and his wife is in receipt of benefits in the United Kingdom. The petitioner at one time worked as an advertisement designer for a newspaper in Sudan, but he lost his job in July 2012. He now does casual work. The petitioner's wife and children have gone to Sudan four times since they came to live in the United Kingdom; his wife's uncle pays for those trips. The two eldest children are in full-time education in Edinburgh and the youngest child was due to start nursery in 2015.

First-tier Tribunal

[3] The petitioner appealed to the First-tier Tribunal against the refusal of entry clearance. On 15 July 2015 the judge of the First-tier Tribunal dismissed the appeal both under the Immigration Rules and under Article 8 of the European Convention on Human Rights. She first considered the best interests of the three British children and the provisions of section 55

of the Borders, Citizenship and Immigration Act 2009. She noted that the two older children were at school, and had learned to read and write in English. Their mother, however required an interpreter in court, and the judge thought that the children probably spoke Arabic at home with her. The two oldest children had been born in Sudan and started their lives there. At that time they lived with both of their parents as a family. After reciting these facts the judge continued (at paragraph 34):

> "In most cases it is in the children's best interests to live with both their parents but if the Appellant is not able to come to the United Kingdom because his circumstances cannot meet the terms of the Immigration Rules there is nothing to stop their mother and the children all returning to join the Appellant in Sudan where they can live together as a family. The fact that they are in the United Kingdom with their mother is a matter of choice by their mother, accepted by the Appellant. I find that the children are young enough to return to Sudan and start their education again there. It is not too late for a 9 year old to carry on with his education in Sudan and certainly not too late for a 5 year old to do so".

[4] The judge then noted (paragraph 35) that, if the petitioner and his wife found that it was in the children's best interests to be educated and to live in the United Kingdom, they could continue their relationship with their father as they had done for four years, on the telephone, using Skype and paying him visits. The judge expressly took into account the fact that the petitioner's wife and three children all had British nationality. She noted that the petitioner's wife is a dual citizen and nothing had been put before her to indicate that the children could not go to live in Sudan; two of them had already lived there. She further stated (paragraph 36):

> "I accept… that as a British citizen the Sponsor cannot be required to leave the United Kingdom, and neither can her children. They have a right to live here and they can continue to do so. This case is about choice".

The judge observed that it was not explained why the petitioner had taken four years to apply to join his wife and children in the United Kingdom. The fact that this occurred had weakened the family life case, and family life could be continued as at present.

[5] The judge stated that she had taken into account the case of *R (Razgar)* v *Home Secretary* [2004] UKHL 27; [2004] 2 AC 368; she had to decide whether it would be disproportionate to refuse the petitioner's application to join his wife in the United Kingdom as a partner. In that respect the judge noted that she had to consider the public interest question and Part 5A of the Immigration and Asylum Act 2002, in particular sections 117A-D. The sponsor in this case (the petitioner's wife) lived on benefits in the United Kingdom, and was hoping to do an English for Work course at Edinburgh College. She therefore did not expect to be working within the next year. As already noted, she used an interpreter in court. The judge observed that she had to consider the maintenance of effective immigration control in the United Kingdom, which is in the public interest. The petitioner and his wife were not financially independent and would therefore be a burden on the taxpayer. If the appeal were dismissed the children would not require to leave the United Kingdom; they could remain here with their mother. It was the mother's choice whether to remain in the United Kingdom without the petitioner or to go to Sudan with the children and live there as a family. There was no clear evidence or reason as to why the usual policy considerations would not apply. Consequently there were no exceptional circumstances or compassionate and compelling factors in the case which would lead to the application's being allowed outside the Rules.

Upper Tribunal

[6] The petitioner applied for permission to appeal to the Upper Tribunal. On 27 November 2015 a judge of the First-tier Tribunal refused the application. The petitioner

then applied to the Upper Tribunal for such permission. On 13 January 2016 that application was refused. The application was founded on the proposition that it was unreasonable to expect a British parent and British children to relocate to a country outside the European Union, and accordingly refusal of entry was disproportionate. The judge of the Upper Tribunal found that it was open to the First-tier Tribunal to find that the requirements of the Immigration Rules were not met and that there was no arguable case that there were good grounds for granting leave to enter outside the Rules by reference to Article 8. He described the case as "an unexceptional spouse appeal where the financial requirements of the Rules were not met". No compelling or unusual factors were present. The judge had correctly considered the age of the children, the closeness of the relationship with their mother in the United Kingdom, and whether the family could live together elsewhere. The fact that the best interests of the children were in issue did not simply provide a trump card. There was accordingly no material error of law.

Outer House

[7] The petitioner then presented a petition for Judicial Review to the Court of Session in which he sought reduction of the Upper Tribunal's decision of 13 January 2016 refusing permission to appeal to itself. The central contention was that it was unreasonable to expect a British parent (the petitioner's wife) and British children to relocate to another country. Three supplementary arguments were advanced: first, the Upper Tribunal did not engage with that central issue; secondly, the Upper Tribunal applied the wrong test; and thirdly, the Upper Tribunal did not consider whether the decision was proportionate. When the case called before the Lord Ordinary, he refused permission to proceed on the ground that there were no real prospects of success.

[8] In relation to the first of the three specific arguments, the Lord Ordinary held that the Upper Tribunal had engaged with the central issue, and decided that in the light of the whole circumstances the decision of the First-tier Tribunal was not unreasonable. In relation to the second specific argument, the Lord Ordinary held that the Upper Tribunal had considered whether there was anything out of the ordinary, even though the petitioner had not identified any such factor. There was no warrant for suggesting that the First-tier Tribunal judge had applied the wrong test or that another such judge would arrive at a different result. No mistake leapt off the page; it appeared to be a rote decision. As to the third specific argument, on a plain reading the First-tier Tribunal had evaluated proportionality. A person had no absolute right to enter the United Kingdom simply because he or she had married a United Kingdom national: *Khan* v *Home Secretary*, [2016] CSIH 13; 2016 SC 536 at paragraph [20]. For these reasons the Lord Ordinary refused permission for the petition to proceed on the basis that there was no real prospect of success.

Appeal

[9] The petitioner has reclaimed against the Lord Ordinary's decision, contending that it was wrong in law, and that the error was such that there was a compelling reason for permitting an appeal to the Upper Tribunal. He relies on the fact that his wife and three children are British citizens resident in the United Kingdom. He has maintained contact with them while living in Sudan, using means such as Skype and WhatsApp, and they have paid him a number of visits, paid for by the petitioner's wife's uncle. In this way a measure of family life has been secured, but the family now wish to live together in one place. For the petitioner it is submitted that, because his wife and children are British, it would be unreasonable to expect them to move to Sudan to be with him. For this reason the

proportionality of interference with family life should not be assessed simply on the basis that the whole family should live together in Sudan. If the family cannot be expected to move to Sudan, the interference with family life will involve separation over a prolonged period, and the proportionality assessment should proceed on that basis. The countervailing factor in that assessment was the maintenance of immigration control, and the critical question was about whether pursuing that objective was proportionate to the prolonged separation of the family. This was not the way in which the First-tier and Upper Tribunals had proceeded; they had assumed that the family could be reunited in Sudan, but that was an error in view of the British and EU citizenship of the petitioner's wife and children. That error by the First-tier and Upper Tribunals, it is said, vitiated their decisions. The argument that they were in error demonstrated a real prospect of success, and that in itself was a compelling reason for allowing the petition for Judicial Review to proceed.

[10] If the petition to the Court of Session is to be permitted to proceed, three requirements must be satisfied. First, there must be a realistic prospect of establishing an error of law by the Upper Tribunal. Secondly, there must be a realistic prospect of establishing that such error is material. Thirdly, the appeal challenging that error must either raise an important point of principle or practice or there must be another compelling reason for allowing it to proceed. In the present case, it is contended for the petitioner that there was a compelling reason for permitting a further appeal. It is said that the decisions of the First-tier and Upper Tribunals were plainly wrong, in that they failed to respect principles of law laid down in the prior decision of the Upper Tribunal in *Ogundimu (Article 8-New Rules) Nigeria*, [2013] Imm AR 422, at paragraphs 102-103 and 133, the subsequent decision of the Upper Tribunal in *SF and others (Guidance, post-2014 Act) Albania*, [2017] UKUT 00120 (IAC), paragraphs 7-9, and the subsequent decision of the UK Supreme Court in *R (Agyarko)* v *Home Secretary* [2017] UKSC 11; [2017]

1 WLR 823. The result of the Tribunals' decisions in the present case would be a lengthy separation between the petitioner and his family, which would be an affront to justice. That, it was submitted, was a sufficiently compelling reason to permit an appeal to proceed.

[11] We will consider first whether there was an error of law by the Upper Tribunal in refusing permission to appeal against the decision of the First-tier Tribunal; secondly, whether any appeal from the First-tier Tribunal would have realistic prospects of success; and thirdly whether there is a sufficiently compelling reason to permit an appeal to proceed.

Whether there was an error of law by the Upper Tribunal

[12] In our opinion the petitioner has failed to demonstrate any error of law on the part of either the First-tier Tribunal or the Upper Tribunal. The critical issue is the assessment of proportionality in respect of the right to family life of the petitioner and his family, in accordance with Article 8 of the European Convention on Human Rights. The judge of the First-tier Tribunal accepted (at paragraph 36) that, because the petitioner's wife and children were British citizens, they could not be required to leave the United Kingdom, and had a continuing right of residence there. The judge correctly identified that the issue was one of proportionality (at paragraphs 38-39), and that in considering that question she required to consider the public interest. A number of factors were identified as relevant to this question. First, the maintenance of effective immigration control is regarded as being in the public interest. Secondly, both the petitioner and his wife would be dependent on state benefits, and would therefore be a burden on the United Kingdom taxpayer. Thirdly, the petitioner and her children were entitled to remain in the United Kingdom and to maintain contact with the petitioner as they do at present, using electronic means of communication such as Skype and WhatsApp, with occasional visits to the petitioner in Sudan. Fourthly, the petitioner's wife

and children were entitled to go to Sudan and live there with the petitioner as a family. It was on the basis of these considerations that the judge decided that it had not been disproportionate for the Home Secretary to refuse entry clearance.

[13] We consider that this assessment of proportionality cannot be faulted. All the material considerations are taken into account and balanced against the right of the petitioner's wife and children to reside in the United Kingdom and the obvious desire of the whole family to be reunited in the United Kingdom. There is nothing unusual about these considerations; as the Lord Ordinary observes in the reasons that he initially gave for refusing permission to proceed, the decision appeared to be "a rote decision". For the petitioner it was contended that the proportionality assessment should have proceeded on the hypothesis that the petitioner's wife and children would remain in the United Kingdom, as is their right, with the result that there would be a prolonged separation of the family. In our opinion there was no requirement to proceed on that basis. We note that in *Khan* v *Home Secretary*, *supra*, it was stated by the Lord President at paragraph [18] that there was no reason to require a decision-maker to assume that a couple will inevitably be separated by removal from the United Kingdom; frequently relocation to an applicant's country of origin outside the European Union may involve minimal inconvenience.

[14] Furthermore, in *R (MM (Lebanon))* v *Home Secretary*, [2017] UKSC 10; [2017] 1 WLR 771, where a number of claims for leave to enter the United Kingdom were considered, it was stated (at paragraph 41):

> "There is no general obligation to respect a married couple's choice of country in which to reside or to authorize family reunification. It will depend upon the particular circumstances of the persons concerned and the general interest. Factors to be taken into account are the extent to which family life would effectively be ruptured; the extent of the ties in the host country; whether there are 'insurmountable obstacles' (or, as it has sometimes been put in other cases, 'major impediments'…) in the way of the family living in the alien's home country; and whether there are factors of

> immigration control (such as a history of breaches of immigration law) or public order weighing in favour of exclusion".

In the present case the petitioner's application for leave to enter was presented in accordance with the rules: no false asylum claim was made, and he has not been guilty of criminal conduct. Thus the last of the foregoing factors was absent. Nevertheless, the other factors were taken into account by the judge of the First-tier Tribunal, to the extent that arguments were presented to him. The judge thus reached a decision that accorded with the guidance that has been given for cases of this nature.

[15] The importance of family life in immigration cases was further considered in *R (Agyarko)* v *Home Secretary*, *supra*. The primary issue in that case, and an associated case decided with it, was the position of persons who had remained in the United Kingdom unlawfully after the expiry of limited leave to enter but had married British citizens. That is distinct from the present case, in that the petitioner is not unlawfully in the United Kingdom but has sought entry clearance in an entirely proper manner. Nevertheless, the UK Supreme Court made observations on a number of matters that are pertinent to the present case: the weight to be accorded to the policy enshrined in the Immigration Rules; the public interest in immigration control; and the significance of the rights accorded by European citizenship status. The court emphasized the importance of the Immigration Rules as embodying public policy, in a manner that was consistent with the European Convention on Human Rights, and in particular Article 8 of the Convention. At paragraph 47 it is stated:

> "The Rules therefore reflect the responsible Minister's assessment, at a general level, of the relative weight of the competing factors when striking a fair balance under article 8. The courts can review that general assessment in the event that the decision-making process is challenged as being incompatible with Convention rights or based on an erroneous understanding of the law, but they have to bear in mind the Secretary of State's constitutional responsibility for policy in this area, and the endorsement of the Rules by Parliament. It is also the function of the courts to consider individual cases which come before them on appeal or by way of judicial review, and that will require

> them to consider how the balance is struck in individual cases. In doing so, they have to take the Secretary of State's policy into account and to attach considerable weight to it at a general level, as well as considering all the factors which are relevant to the particular case".

That perhaps reflects a higher level of respect for the Rules as an embodiment of government policy than in previous case law, although in cases such as *MS* v *Home Secretary*, [2013] CSIH 52, the importance of the Rules as a factor in evaluating proportionality for the purposes of Article 8 has been emphasized.

[16] An important policy contained in the Rules is that persons who seek to enter the United Kingdom on a permanent basis should be financially independent. In *MM supra*, the court (at paragraphs 75-76) discussed the weight that should be given to judgments made by the Home Secretary in the exercise of her constitutional responsibility for immigration policy. In relation to the Convention, the Strasbourg court has permitted a considerable margin of appreciation in relation to "intensely political" issues, such as immigration control. It did not follow that everything in the Rules should be treated as high policy or peculiarly within the province of the Home Secretary. Nevertheless the underlying public interest considerations are to be treated with respect, as reflecting fundamental immigration policy. That extended in particular to "rules reflecting the Secretary of State's assessment of levels of income required to avoid a burden on public resources, informed as it is by the specialist expertise of the Migration Advisory Committee" (paragraph 76). Thus the financial requirements of the Rules are entitled to considerable weight. The judge of the First-tier Tribunal took this factor into account (for example at paragraph 39), and he was clearly entitled to do so.

[17] In *Agyarko*, *supra,* the court discussed the question of when the removal of a non-national family member might constitute a violation of Article 8: see paragraphs 54 *et seq*. It was pointed out that the European Court of Human Rights had stated that, in cases of

precarious family life, it was likely only to be in exceptional circumstances that such removal might involve a contravention of Article 8. In the present case, of course, the petitioner does not enjoy precarious immigration status within the United Kingdom. He has applied for leave to enter the United Kingdom. That lacks the element of disregard for the immigration system that frequently attaches to precarious status. Nevertheless, such a person *ex hypothesi* lacks any existing formal right to enter or remain in the United Kingdom. It is therefore difficult to see why an applicant for leave to enter should be treated in a fundamentally different way from a person with precarious immigration status; neither has an existing right to be in the United Kingdom. It follows that some form of "exceptional" circumstances may be required if a court or tribunal is to find a violation of Article 8 in such a case. The word "exceptional" is perhaps ambiguous: see *MS*, *supra*, at paragraph [27]. The word has now been clarified for the purposes of the Rules as denoting "circumstances in which refusal [of leave to enter or remain] would result in unjustifiably harsh consequences for the individual such that the refusal of the application would not be proportionate": *Agyarko*, *supra*, at paragraph 60. Such an approach is entirely consistent with the views expressed in the present case by the First-tier Tribunal and endorsed by the Upper Tribunal and in the Outer House.

[18] The strength of the petitioner's ties to the United Kingdom is clearly a material factor in assessing the importance of family life: *MM*, *supra*, at paragraphs 40-42. It is likewise relevant to consider the existence or otherwise of obstacles to prevent the family as a whole relocating to the petitioner's home country: *ibid*. In the present case, for reasons stated by the First-tier Tribunal, the petitioner has no pre-existing ties to the United Kingdom; his only connection is through his wife and children who are citizens of the United Kingdom. The First-tier Tribunal further held that there was nothing to prevent the family from relocating to Sudan. The judge specifically considered the children's education, and concluded that the

older children were of an age where return was entirely practical. Moreover, he thought that the older children probably spoke Arabic: paragraph [34].

[19] We were informed that the petitioner's wife and children do not wish to move to Sudan, and it was contended that assuming that they could do so was an unreasonable basis for conducting the proportionality exercise, in view of their British citizenship. In our opinion the recent authorities lend no support to such an argument. The fact that they are British citizens who do not want to leave the United Kingdom is not a decisive factor; it is rather one of a number of factors that require to be balanced in conducting the proportionality exercise. Such a conclusion appears clearly from the lengthy discussion of the significance of British citizenship in *Agyarko*, *supra*, at paragraphs 61-68. We consider that the British citizenship of the petitioner's wife and family and their wish to remain in the United Kingdom were properly taken into account in the proportionality exercise conducted by the First-tier Tribunal. We would, moreover, emphasize that the fact that the petitioner's wife and children are British citizens does not give the family the right to insist that it should be reunited in the United Kingdom; it does no more than give the wife and children the right to reside there.

Further Cases

[20] For the foregoing reasons we are of opinion that the reasoning of the First-tier Tribunal in conducting the proportionality exercise under Article 8 is correct and discloses no error of law. Consequently the decision of the Upper Tribunal to refuse permission to appeal on this ground cannot be faulted. We should, however, refer briefly to certain further cases that were relied on by the petitioner. The first of these was *Ogundimu*, *supra*, which involved an attempt to deport the claimant, a Nigerian citizen, because of his persistent contraventions of criminal

law. The claimant had been granted indefinite leave to remain, and had relationships with his son, who was aged 8, and a current partner and her daughter. It was held that under a conventional Article 8 assessment those relationships amounted to genuine family life. That family life had been established when the claimant had indefinite leave to remain, and consequently substantial weight should be attached to it. In those circumstances it would not be reasonable to expect the claimant's son or his partner and her child to relocate to Nigeria. On its facts that case is distinguishable from the present case, in that the various family members had no ties to Nigeria; indeed the claimant's partner had never been to Nigeria. In the present case, by contrast, the parties met in Sudan and lived there as a family for a number of years. Furthermore, in its reasoning the Upper Tribunal relied on the fact that the deportation would prevent the claimant's returning to the United Kingdom for ten years, which would effectively prevent contact with his family: paragraphs 130 *et seq*. That is another element that distinguishes the present case. Furthermore, the recent decisions in *Agyarko*, *supra*, and MM, *supra*, both postdate *Ogundimu*. For that reason we do not consider that the decision in the latter case is of significance for present purposes.

[21] Reference was also made to the decision of the Upper Tribunal in *SF and others (Guidance, post-2014 Act) Albania*, *supra*. In our opinion that case cannot be relied on for present purposes. The case concerned the application of section 117B(6) of the Nationality, Immigration and Asylum Act 2002, but it is conceded that that provision has no application to the present case.

Prospects of Success

[22] As we have indicated, we consider that the reasoning of the First-tier Tribunal cannot be faulted, and the same applies to the reasoning of the Upper Tribunal in refusing permission

to appeal against that decision and to the decision of the Lord Ordinary in refusing permission to proceed with the petition to the Court of Session. In our opinion no arguable error of law is demonstrated. In particular, in view of the approach adopted in *Agyarko*, *supra*, and *MM*, *supra*, it cannot be argued, as the petitioner does, that it was unreasonable in conducting the proportionality exercise to expect the petitioner's wife and children to relocate to Sudan. The critical question for present purposes is whether the petitioner's argument that the Tribunals and Lord Ordinary erred in law has any realistic prospect of success. In our opinion it has no such prospect. As the judge of the Upper Tribunal remarked in his opinion, this was "an unexceptional spouse appeal where the financial requirements of the Rules were not met". Furthermore, no compelling or unusual factors were present, and the judge of the First-tier Tribunal had correctly considered the question of proportionality in relation both to the children and to the petitioner and his wife. The case is therefore very clear.

Second Appeals Test

[23] In addition, if permission to proceed with the petition is to be granted, it is necessary to satisfy the second appeals test, laid down in cases such as *Eba* v *Advocate General*, 2012 SC (UKSC) 1, that either the petition raises an important point of principle or practice or that there is a compelling reason for permitting an appeal or petition to proceed and which demonstrated a realistic prospect of success. It is no longer contended for the petitioner that the present case raises an important point of principle or practice; indeed, following the decisions in *Agyarko*, *supra*, and *MM*, *supra*, such an argument could hardly be maintained. For the reasons that we have already given we do not consider that any appeal against the decision of the First-tier Tribunal or any proceedings in the Court of Session to challenge the

decisions of the Tribunals would have any realistic prospect of success. On that basis alone the second appeals test is not satisfied.

[24] In addition, we are of opinion that no compelling reason for permitting the petition to proceed has been shown. The argument for the petitioner was, in essence, that the decision of the Upper Tribunal had been plainly wrong and that there were high prospects of success in challenging the decision. This was based on the hypothesis that proportionality had to be assessed on the basis that the petitioner's wife and children would not leave the United Kingdom and that a long period of separation of the family was therefore inevitable. For the reasons given above, in particular at paragraphs [17]—[18], we consider that the petitioner's claim for leave to enter the United Kingdom should not be assessed on that basis. The correct basis is rather, as the Tribunals and the Lord Ordinary held, that the family have a choice: either they can be reunited in Sudan or the petitioner's wife and children can remain in the United Kingdom and continue to enjoy contact with the petitioner as they do at present.

Conclusion

[25] For the foregoing reasons we refuse the reclaiming motion.