



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/08905/2013

THE IMMIGRATION ACTS

Heard at Bradford
on 11th October 2013

Determination Promulgated
On 17th October 2013

Before

UPPER TRIBUNAL JUDGE HANSON

Between

FOZIA HAMEED

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Hussain instructed by RKS Solicitors.

For the Respondent: Mrs Pettersen –Senior Home Office Presenting Officer.

DETERMINATION AND REASONS

1. This is an appeal against a determination of First-tier Tribunal Judge Birkby, promulgated on the 16th July 2013, in which he dismissed the Appellant's appeal against the refusal of her application for leave to remain in the United Kingdom as the spouse of a person present and settled here under both the Immigration Rules and on human rights grounds.
2. In relation to the Rules the Judge found the Appellant could not meet the requirements relating to maintenance for the reasons set out in paragraphs 13 to 16 of the determination. In relation to the human rights claim the Judge states this was considered both by reference to the ECHR and the Immigration Rules. The core finding is to be found at paragraph 19 of the determination in the following terms:

19. I am satisfied that the Appellant and Sponsor are in a subsisting relationship. I am satisfied that the Appellant is expecting a child in August of this year. I am further satisfied that both the Appellant and the Sponsor enjoy a family and private life in the United Kingdom. To an extent therefore the decision of the Respondent interferes with the Appellant's right to respect for her private and family life. However, I find that the decision is lawful and pursues the legitimate aim of immigration control. I also find that the decision is proportionate. The Appellant does not meet the requirements of the Immigration Rules for settlement as a spouse. The Appellant states that she came to the United Kingdom as a student. She came in May 2011. She no longer studies. She married her husband on 30th July 2012. Her husband started work in the UK on 2nd July 2012. He has provided evidence that he works in the United Kingdom for a company called Hyder Beds. The most recent evidence of his payslips indicates that his net take-home pay exceeds £300 per week. It is clear that the Appellant and the Sponsor would have been aware of the need to meet the Immigration Rules at the time that they married in the United Kingdom. I accept that the Appellant is expecting a child in the United Kingdom and that will have a great effect on their lives. The Sponsor stated that the Appellant's family, her mother, father, brothers and sisters were in Pakistan. He stated that the Appellant lived with them before she came to the United Kingdom. I am satisfied that there are no insurmountable obstacles which would prevent the Appellant returning to Pakistan in re-establishing her life there. I also find that the Sponsor could return with her should he choose so that they could establish a life together in Pakistan. I believe that the Appellant would have the care and support of her own immediate family during the early months when help may be needed to care for her newly born child. In my judgment it would be reasonable for the Appellant to return to Pakistan in all the circumstances. It would also be reasonable in my judgment that the Sponsor return with her should he so choose. Should he choose not to return with the Appellant to Pakistan, she could clearly make an application in the coming months or thereafter for entry clearance to the United Kingdom in the usual way, if it could be proved that the appropriate Immigration Rules were met. In the interim period if the sponsor remained in the United Kingdom, clearly communication could be maintained by using modern methods of communication, or indeed, if the Sponsor were to have holiday entitlements from his work he will be able to visit the Appellant in Pakistan for short periods of time. I know that bank accounts of the parties showed funds in the order of £10,000 and so in that sense finance would not be prohibitive.

Discussion

3. In relation to the Immigration Rules; the maintenance requirements for a spouse wishing to settle in the United Kingdom are to be found in Appendix FM in the following terms:

Financial requirements

E-ECP.3.1. The applicant must provide specified evidence, from the sources listed in paragraph E-ECP.3.2., of-

- (a) a specified gross annual income of at least-
 - (i) £18,600;

.....

4. The Judge refers to the evidential requirements, in paragraph 14 of the determination, which are to be found in Appendix FM-SE. These state that wage slips should cover:
 - i. A period of six months prior to the date of application if the applicant has been employed by their current employer for at least six months (and where paragraph 13 (b) of this appendix does not apply); or
 - ii. Any period of salaried employment in the period of 12 months prior to the date of application if the applicant has been employed by their current employer for less than six months (or at least six months but the person does not rely on paragraph 13 (a) of this appendix), or in the financial years relied upon by a self-employed person.
5. The requirement to produce wage slips relating to “any period of salaried employment in the period of twelve months prior to the date of application” is somewhat ambiguous. The Secretary of State's interpretation of this provision is that an applicant must provide wage slips covering the whole of the twelve month period if they have not been employed by their current employer for a period of at least six months. It may also be argued that all that is required to be provided by this wording is evidence of periods of salaried employment undertaken within the period of twelve months prior to the date of application, provided the applicant has not been employed by a current employer for at least six months, allowing for breaks in employment without there being any specific requirement in the Rules for the wage slips to cover the whole of the period of twelve months prior to the date of the application.
6. Whilst it is arguable that a period of six months current employment or evidence of twelve months previous employment will establish a pattern of employment suggesting consistency, as most probationary periods in employment contracts are for six months, the Secretary of State's interpretation prevents a person who may have worked for say five months from being able to satisfy the evidential requirements as will a person who may not have six months with their current employer but may have more than eleven but less than twelve months other employment with different employers which may apply, for example, to agency workers. During that period the income earned could be greater than that required by the Rules yet they would be unable to

satisfy the evidential requirements. If one compares that to the previous test under the Rules for the requirement to provide 'adequate maintenance' there was no such restriction and all that had to be proved was that sufficient income was available at the date of decision (in ECO cases), based upon the applicants and their spouses circumstances relating to a hypothetical future date of entry to the United Kingdom.

7. The application leading to the decision under appeal is dated 9th August 2012 which is the point at which the relevant evidence must be provided. The Appellant and her husband provided letters confirming they started their jobs in May and July 2012 respectively. At the date of application they had not worked for their employer for a period of six months and so could not meet the evidential requirement in (i) above and therefore had to satisfy (ii).
8. The Secretary of State imposes a two-part test the first element of which must be to show that the minimum £18,600 is available. On the evidence it is accepted before me that the available income exceeded this minimum requirement. There is then a second requirement summarised in the Immigration Directorate Instructions (IDI) as follows:

IDI Chapter 8 Appendix FM (Family Members):

5.3. Category B: Less than 6 months with current employer or variable income – person residing in the UK

- 5.3.1. This category can be used where the applicant's partner (and/or the applicant if they are in the UK with permission to work) is in salaried or non-salaried employment at the date of application, but has **not** been with the same employer and/or **not** earning the income level relied upon in the application for at least 6 months prior to the date of application. It can therefore be used by those who have been with their current employer for less than 6 months, or who have been with their current employer for at least 6 months but earning a variable income and wish to be considered in this category rather than under Category A.
- 5.3.2. Under Category B, the financial requirement must be met and evidenced in **two parts**.
- 5.3.3. **First**, where the applicant's partner and/or the applicant (if they are in the UK with permission to work) is in salaried employment at the date of application and has been with the same employer, or earning the amount relied upon, for less than the last 6 months, they can count the gross **annual** salary at the date of application towards the financial requirement.
- 5.3.4. Gross income from non-salaried employment will be counted on the same basis as income from salaried employment where the person has been with the same employer, or earning the amount relied upon, for less than 6 months at the date of application.

5.3.5. Non-salaried employment includes that paid at an hourly or other rate (and the number and/or pattern of hours required to be worked may vary) or paid an amount which varies according to the work undertaken. Salaried employment includes that paid at a minimum fixed rate (usually annual) which is usually subject to a contractual minimum number of hours to be worked.

5.3.6. The only difference in Category B between salaried and non-salaried employment is how gross annual salary or employment income at the date of application is calculated:

Where the person is in **salaried employment** – the level of gross annual salary will be as at the date of application. This must be evidenced by the latest payslip or the signed contract of employment (if a payslip does not provide this information).

Where the person is in **non-salaried employment** – the level of gross annual employment income relied upon in the application can be no greater than the annual equivalent of the person's average gross monthly income from non-salaried employment in the 6 months prior to the date of application, **regardless** of whether that employment was held throughout that period. The calculation will include all non-salaried employment undertaken during that 6 month period, and will be calculated over that 6 month period regardless of how much of that period was spent in employment.

To calculate this annualised average for non-salaried employment in Category B the following calculation should be used:

(Total gross income from **all employment** undertaken during the 6 month period, divided by 6) multiplied by 12 = Income from non-salaried employment that can be counted towards the financial requirement.

5.3.7. If necessary to meet the level of the financial requirement applicable to the application, the applicant can **add** to this:

- ☐ The gross amount of any specified non-employment income received by the applicant's partner, the applicant or both jointly in the 12 months prior to the application, provided they continue to own the relevant asset (e.g. property, interest from shares) at the date of application;
- ☐ An amount based on the cash savings **above** £16,000 held by the applicant's partner, the applicant or both jointly for at least the 6 months prior to the date of application and under their control. At the entry clearance/initial leave to remain stage and the further leave stage, the amount above £16,000 must be divided by 2.5 (to reflect the 2.5 year or 30-month period before the applicant will have to make a further application) to give the amount which can be added to income. At the indefinite leave to remain stage, the

whole of the amount above £16,000 can be added to income; and/or

- ☐ The gross **annual** income from any State (UK or foreign) or private pension received by the applicant's partner or the applicant.

5.3.8. **Second**, the person must **in addition** have received **in the 12 months prior to the date of application** the level of income required to meet the financial requirement, based on:

- ☐ The gross amount of salaried or non-salaried employment income of the applicant's partner (in the UK or overseas) and/or the applicant (if they are in the UK with permission to work);
- ☐ The gross amount of any specified non-employment income received by the applicant's partner, the applicant or both jointly, provided they continue to own the relevant asset (e.g. property, interest from shares) at the date of application; and/or
- ☐ The gross amount of any State (UK or foreign) or private pension received by the applicant's partner or the applicant.

5.3.9. So, under Category B, the assessment of the financial requirement is based on:

- (1) The gross annual salary or income from salaried or non-salaried employment at the date of application. This source can be combined with Category C: non-employment income, Category D: cash savings and Category E: pension; **and**
- (2) The actual amount of gross income received from any salaried or non-salaried employment in the 12 months prior to the application. This can be combined with the actual gross income received from Category C: non-employment income and Category E: pension over the same 12-month period. Category D: cash savings cannot be used under (2).

5.3.10. **Case studies – Category B: Less than 6 months with current employer or variable income – person residing in the UK**

Example (b)

The applicant's partner works in the UK. She started a new job 3 weeks ago. Her gross annual salary is £20,000. She meets part (1) of the calculation for Category B because she is in salaried employment at the date of application and her gross annual salary at the date of application meets the financial requirement.

In addition, she must have received in the 12 months prior to the application the level of income required to part (2) of the calculation for Category B. But she has had no other job in the last 12 months as she has been travelling.

The financial requirement is met under part (1) of Category B because the applicant's partner is currently in a job paying at least £18,600, but not under part (2) as she has not earned at least £18,600 from employment in the last 12 months. Therefore the applicant cannot meet the financial requirement using Category B.

9. The above example mirrors closely that of the Appellant who cannot prove that she received in the twelve months prior to the application the required minimum level of income, as there is no evidence she or her husband had a job for the whole of the previous twelve months. On the basis of the Secretary of State interpretation of the Rules I find no legal error in the Judge's analysis and finding that the Appellant was unable to meet the requirements of the Immigration Rules relating to maintenance. The Appellant is unable to meet the requirements of the Immigration Rules in relation not only to Appendix FM but also paragraph 276ADE, for the reasons set out in the refusal letter dated 11th March 2013.
10. The second challenge relates to Article 8 under both the Rules and ECHR. The grant of permission to appeal refers to the decision of MM and Others v Secretary of State for the Home Department [2013] EWHC 1900 (Admin) in which it was held that the SSHD's June 2012 amendments to the Immigration Rules HC 395 (as amended) concerning the maintenance requirements for the admission of spouses to the UK, including raising the minimum income level to be provided by a UK sponsor to £18,600, had a legitimate aim in promoting measures that required spouses to be maintained at a somewhat higher level than the bare subsistence level set under previous interpretations of the Rules. The measures were, however, so onerous in effect as to be an unjustified and disproportionate interference with the ability of spouses to live together contrary to their rights under Article 8 of the ECHR.
11. The Secretary of State in her Rule 24 response referred to the fact this case is subject to a grant of permission to appeal to the Court of Appeal although no decision has been made by that Court and, although not binding as it is a High Court judgment, it can be taken into account and applied by this Tribunal.
12. When considering the proportionality of the decision the Judge proceeded on the basis that the fact the Appellant was unable to succeed under the Rules in relation to maintenance was determinative of this element without considering the actual available funds which exceeded the minimum requirements and are supplemented by £10,000 worth of savings, as part of the proportionality exercise. I note the challenge by the Secretary of State on the basis that the minimum requirement reflects the Secretary of State's legitimate aim of preventing burdens on the taxpayer in the long-term and promoting good

integration outcomes. I find, however, that the Article 8 assessment is inadequate not only for this reason but also as a result of failure by the Judge to give adequate reasons for why it was reasonable in all the circumstances for the Sponsor to return to Pakistan with her and, if he was unable to return, why it was proportionate to expect the Appellant to return to make an application to re-enter, without considering relevant case law.

13. The Sponsor is settled in the United Kingdom and in permanent employment. He is a British citizen. The evidence does not show that the loss of his ability to enjoy his rights of citizenship, as both a British and European citizen, is proportionate in the circumstances of this appeal. The fact the Sponsor has recently obtained full-time employment and his prospects of retaining that employment if he left the United Kingdom for any period of time should have been factored into the account, especially in today's economic climate.
14. The Judge's finding there were no insurmountable obstacles preventing the Appellant returning to Pakistan and re-establishing her life may be correct in relation to her individual private life but not so in relation to her family life, which it is accepted exists recognised by Article 8, if she and her husband were separated. In the recent decision in MF (Nigeria) v SSHD [2013] EWCA Civ 1192 the Court of Appeal considered the meaning of the phrase 'insurmountable obstacles' and found:
 47. Before we come to the decision that was made on the facts of this case, we need to say something about "insurmountable obstacles". It will be recalled that one of the situations in which para 399 applies is where the person has a genuine and subsisting relationship with a partner who is in the UK and is a British citizen, settled in the UK or in the UK with refugee leave or humanitarian protection, and the partner satisfies the condition stated in para 399(b)(i) and "there are insurmountable obstacles to family life with that partner continuing outside the UK".
 48. At para 38 of their determination, the UT said that they were bound by authority to hold that the proper test for article 8 purposes is "reasonableness". It is not in dispute that MF has a genuine and subsisting relationship with SB and that SB satisfies the condition stated in para 399(b)(i). As already noted, it was conceded on behalf of the Secretary of State before the UT that it would not be "a reasonable option" for SB and F to be relocated with MF to Nigeria and that there were "insurmountable obstacles" to family life with SB and F continuing outside the UK.
 49. In view of the concession made before the UT, the question of the meaning of "insurmountable obstacles" does not arise. We did, however, hear argument on the point. We would observe that, if "insurmountable" obstacles are literally obstacles which it is *impossible* to surmount, their scope is very limited indeed. We shall confine ourselves to saying that we incline to the view that, for the reasons stated in detail by the UT in *Izuazu* at paras 53 to 59, such a stringent approach would be contrary to article 8.
15. There is a reference to the Sponsor having a period of holiday and it could be argued that it would not be disproportionate for him to return with his wife while she made an application to re-enter the United Kingdom lawfully if this

meant a limited period of absence from the UK. The Judge found that if the Sponsor could not return to Pakistan the Appellant could return to make an application for entry clearance "in the usual way" if it could be proved that the appropriate Immigration Rules were met. What is missing from the findings is an analysis whether the requirements of the Rules could be met. This is something the Judge is required to do in case involving a finding that it would be proportionate to return to make an application to re-enter – see below.

16. The proposed scenario has been considered both by the Tribunal and higher courts in the number of reported authorities/judgments. The House of Lords in Chikwamba v SSHD [2008] UKHL 40 said that in deciding whether the general policy of requiring people such as the Appellant to return to apply for entry in accordance with the rules of this country was legitimate and proportionate in a particular case, it was necessary to consider what the benefits of the policy were. Whilst acknowledging the deterrent effect of the policy the House of Lords queried the underlying basis of the policy in other respects and made it clear that the policy should not be applied in a rigid, Kafka-esque manner. The House of Lords went on to say that it would be "comparatively rarely, certainly in family cases involving children" that an Article 8 case should be dismissed on the basis that it would be proportionate and more appropriate for the Appellant to apply for leave from abroad.
17. This is not a case similar to LE (Turkey) v Secretary of State for the Home Department [2010] CSOH 153 it was held that the combination of a long term breach of immigration control, the recent establishment of a relationship in the full knowledge of such breach and the relative weakness of that relationship, militated strongly against the Claimant's Article 8 claim, distinguishing Chikwamba and MA (Pakistan) v Secretary of State for the Home Department [2009] EWCA Civ 953.
18. The Court of Appeal considered this issue further in Secretary of State for the Home Department v Hayat; Secretary of State for the Home Department v Treebhowan (Mauritius) [2012] EWCA Civ 1054 in which the Court outlined the following guidance as to the effect of Chikwamba and the subsequent decision of the Court of Appeal in TG (Central African Republic)[2008] EWCA Civ 997 and SZ (Zimbabwe) [2009] EWCA Civ 590 and MA (Pakistan) [2009] EWCA Civ 953 in which it had been considered:
 - (i) Where an applicant who did not have lawful entry clearance pursued a claim under Article 8, a dismissal of the claim on the procedural ground that the policy required that the applicant should have made the application from his home state might, but not necessarily would, constitute a disruption of family or private life sufficient to engage Article 8, particularly where children were adversely affected;

- (ii) Where Article 8 was engaged, it would be a disproportionate interference with family or private life to enforce such a policy unless there was a sensible reason for doing so;
- (iii) Whether it was sensible to enforce that policy would necessarily be fact sensitive, and potentially relevant factors included the prospective length and degree of disruption of family life and whether other members of the family were settled in the UK;
- (iv) Where Article 8 was engaged and there was no sensible reason for enforcing the policy, the decision maker should determine the Article 8 claim on its substantive merits, having regard to all material factors, notwithstanding that the applicant had no lawful entry clearance;
- (v) Nothing in *Chikwamba* was intended to alter the way the courts should approach substantive Article 8 issues as laid down in seminal cases as **Razgar and Huang**;
- (vi) If the Secretary of State had no sensible reason for requiring the application to be made from the home state, the fact that he had failed to do so should not thereafter carry any weight in the substantive Article 8 balancing exercise (para 30).

19. In *Hayat* at paragraph 17, Elias LJ states:

17. In *Chikwamba* the Article 8 claim was particularly strong. But in my view it is clear from paragraph 44 of his judgment that Lord Brown's objection to the routine enforcement of the policy was not limited to such cases. His observation that a one-stop appeal process should generally be adopted is equally valid where the claim might appear to be weak. It is true that the enforcement of the policy is likely to be particularly futile where entry clearance will ultimately be granted because it is requiring a temporary disruption of family life for no good purpose. To that extent, a preliminary assessment that the substantive merits are strong may be relevant to determining whether the policy should be enforced or not. But often the merits will not be clear until a careful assessment of the facts is made, and the dogmatic adherence to policy may in those cases too be a disproportionate interference with Article 8 rights.

20. The evidence considered at the appeal hearing makes it unlikely the Appellant would be able to succeed in an application to re-enter under the Rules as the Judge dismissed that aspect of the appeal. If the only issue was whether six months wage slips could be provided showing that the required minimum level of maintenance was available, any application made after a return shortly after the date of decision would no doubt be supported by six months wage slips provided by the Sponsor, confirming employment generating an income above the minimum required levels for at least the minimum required period. It is not claimed the other requirements of the Rules could not be met. If the Appellant is able to meet the requirements of the Rules why is it necessary for her to return to apply and re-enter shortly thereafter?

21. An additional issue is that the Appellant is pregnant. The child has not been born and therefore is not a legal entity who can claim the benefits of the Human Rights Convention but the birth was due to take place in August 2013, one month after the appeal hearing, and so at such a late stage of the pregnancy, which was viable, the child will form part of the private life of both parents. It is also unlikely that the Appellant will be permitted to fly so late in pregnancy. Airlines have different rules regarding the upper limit beyond which they would not allow a pregnant woman to fly. As a general guide, almost all airlines decline to fly women beyond 36 weeks of gestation and for some it is 34 weeks. In the phase between 28 and 36 weeks, most airlines will demand that the passenger bring her doctor's letter stating that she is fit to fly and that she is unlikely to go into labour within 36 hours. It was therefore foreseeable that the Appellant will only return after the birth of her British and European national child.
22. I set the determination aside in relation to the findings under Article 8 ECHR. The findings relating to the Immigration Rules shall be preserved findings. Having considered the evidence in the round with the degree of care required in an appeal of this nature I am not satisfied the Secretary of State has discharged the burden of proof upon her to the required standard show that in all the circumstances it is necessary in this democratic society to interfere with the family life of this couple to the extent proposed. I find no sensible justification established for requiring her to return to Pakistan to make an application to re-enter. It has not been proved that it is proportionate when balancing the legitimate aim relied upon with the interference to the family and private life that exists between her and her husband as a couple or that which will exist in the new family unit including their child. It has not been proved that requiring the Appellant's husband and/or child as British and European citizens to leave this country and Europe, and hence be denied the benefit of exercising rights to which they are lawfully entitled, is proportionate in all the circumstances. I do not find it proved that the Appellant or her husband will place a burden upon the social welfare system of the United Kingdom. The decision has not been shown to be proportionate.

Decision

23. **The First-tier Tribunal Judge materially erred in law. I set aside the decision of the original Judge. I remake the decision as follows. This appeal is allowed.**

Anonymity.

24. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order (pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008) as no application for anonymity was made and no basis for such an order established on the facts.

Fee Award.

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

25. In the light of my decision to re-make the decision in the appeal by allowing it, 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: Although she has succeeded under Article 8 the reason the SSHD rejected this claim was a lack of evidence of the existence of the relationship relied upon. That is the responsibility of the Appellant.

Signed.....
Upper Tribunal Judge Hanson

Dated the 16th October 2013