



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/27962/2012
IA/27965/2012
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THE IMMIGRATION ACTS

Heard at Glasgow
On 11 July 2013

Determination Promulgated
On 18 September 2013

Before
UPPER TRIBUNAL JUDGE JORDAN
UPPER TRIBUNAL JUDGE DEANS
UPPER TRIBUNAL JUDGE MACLEMAN

Between

The Secretary of State for the Home Department

and

(1) Ibrar Ul-Haq
(2) Abrar Zarina, his wife
(3) R, a minor

Appellant

Respondents

Representation:

For the Appellant: Mr A. Mullen, Home Office Presenting Officer
For the Respondents: Mr M. Shoaib, Shoaib Associates

DETERMINATION AND REASONS

Introduction and immigration history

1. The Secretary of State appeals against the determination of the First-tier Tribunal promulgated on 26 February 2013 allowing the appeals of Mr Ul-Haq, his wife and daughter, against her decision made on 15 November 2012 to refuse Mr Ul-Haq's application for indefinite leave to remain. For the sake of continuity, we shall refer to Mr Ul-Haq and his family as 'the appellants' and Mr Ul-Haq, in

particular, as ‘the appellant’, as they were in the First-tier Tribunal. Their appeals were allowed on Article 8 grounds.

2. The appellants are citizens of Pakistan. Mr Ul-Haq was born on 31 August 1983. On 13 January 2007 the appellant was granted limited leave to enter the United Kingdom until 11 December 2011 as a Work Permit Holder. His wife was granted leave to enter the United Kingdom on 3 October 2007 as his spouse. On 4 May 2009, their daughter, R, was born in the United Kingdom and given limited leave to remain in line with that of her parents. She is now four years old.
3. On 6 December 2011, during extant leave, the appellants sought indefinite leave to remain under the Immigration Rules. The decision of the Secretary of State made on 15 November 2012 fell to be decided under the Immigration Rules. In order to meet the requirements for indefinite leave to remain under the Rules, the appellants had to satisfy the requirements contained in paragraph 134. If they did not, the applications had to be refused pursuant to paragraph 135. Paragraph 134 required, amongst other things, that the applicant

(vii)... does not have one or more unspent convictions within the meaning of the Rehabilitation of Offenders Act 1974
4. The appellant did have such a conviction. On 1 April 2010 at Glasgow City Justice of the Peace Court, the appellant pleaded guilty to attempting to pervert the course of justice and was fined £70. Under the terms of the 1974 Act, the conviction will not become spent until 1 April 2015. Accordingly, his application under the Rules was bound to fail.

The Judge’s determination

5. The Judge, however, found that the Rules permitted the Tribunal to exercise a discretion and, without identifying where such a discretion is to be found, (except to say that Parliament must have intended the Tribunal to have one), allowed the appeals under the Rules in the exercise of her discretion. There was clearly no warrant for the introduction of a discretionary power exercisable on the part of the Tribunal to depart from the Rules and the mandatory effect of paragraph 135. This amounts to an error on a point of law.
6. The Judge, perhaps sensing this was the weaker of the two ways in which she might allow the appeals, also allowed them ‘*more powerfully*’ on Article 8 grounds in paragraph 22 of her determination on the basis that either private or family life was engaged and that the interference with it would be disproportionate. (Indeed, in the decision forming the conclusion of the determination, the Judge restricts her decision to allowing the appeals under Article 8 and omits allowing them under the Immigration Rules as she found she was entitled to do in the body of the determination.)

The appellant's case

7. Mr Shoaib submitted that the Judge had done all she was required to do. She had identified the 5-stage test in *Razgar* and had determined that there was no public interest in the appellant's removal because it would result in a disproportionate effect when balanced against the public interest in maintaining immigration control.

Our analysis

8. Removal will not prejudice the appellants' family life as all will be returned to Pakistan together. There are no other family members in the United Kingdom.

The nature of the private life developed by the family

9. Private life is that which has been developed since the appellant entered the United Kingdom in January 2007, significantly shorter than any period that once permitted leave to remain on the basis of long residence or pursuant to any other relevant policy or would normally be sufficient to violate an individual's human rights. More significantly, the appellant had no expectation (legitimate or otherwise) that he would be entitled to remain in the United Kingdom unless he satisfied the conditions for further leave to remain at the time his application for further leave was decided. He was not entitled to assume the requirements of the Immigration Rules would remain unaltered. He would have to meet the requirements of such changes as might later be introduced, see *Odelola v SSHD* [2008] EWCA Civ 308.
10. The private life developed by this family is unremarkable. There is nothing in relation to the quality of the links that they have developed with the community in the United Kingdom that permits any distinction to be drawn between them and any other individual or family who has enjoyed a temporary right to remain in the United Kingdom for a specific purpose, be it as a student or as a work permit holder or in some other capacity.
11. Such links as the appellant and his family have developed with the local community are, we find, the same as the links that any temporary resident will have developed, predicated on the basis that, when leaves expires, the family must return unless they establish a basis under the Rules for further leave to remain.

The private life of the couple's daughter

12. There are no considerations in relation to R, the couple's daughter, aged 4, that prevents her removal with her parents. She was conceived in the United Kingdom when the parents knew they were temporarily resident here. She is not

a British or Union citizen. She will have developed no appreciable private life; certainly none that cannot be replicated with her parents in Pakistan. It is said that she only speaks English. Whilst this might seem surprising, we may assume it to be true but it still does not provide a reason that prevents removal since there is no evidence that she cannot or will not adapt on return to her own country. Considerations of s. 55 of the Borders, Citizenship and Immigration Act 2009 which now provides that, in relation to immigration, the Secretary of State must make arrangements for ensuring that her functions "*are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom*" do not render a return with her parents unlawful. Nor does a consideration, in accordance with *ZH (Tanzania) v SSHD* [2011] UKSC 4, that the best interests of R must be a primary consideration because "*the correct starting point in considering the welfare and best interests of a young child would be that it is in the best interests of a child to live with and be brought up by his or her parents, subject to any very strong contra-indication*", according to paragraph 35 of *E-A (Article 8 – best interests of child) Nigeria* [2011] UKUT 00315 (IAC). She is in no different position from many expatriates across the world who spend a period of their children's childhood working or studying abroad and then return home when the tour of duty ends or studies are completed. None would argue they are prevented from returning home because their children have spent 4 years in a different country or culture.

13. It is apparent from the foregoing that the nature of the private life on which the appellants relied in order to assert that their removal was made unlawful has nothing in itself that is remarkable or raises considerations concerning health, education, the presence of other family members, the time spent in the United Kingdom or links with the United Kingdom such that severance cannot lawfully occur in the exercise of that due balance that an assessment of proportionality requires. We find this is a fact. In so finding, we are neither creating nor applying a legal test, far less a test of exceptionality.

The Judge's approach

14. The Judge's determination raises the question of how a prohibition against removal could be justified in private and family life terms. The answer is apparent from the decision. It is clear that the Judge was not prepared to permit the application of the Immigration Rules as they applied to this family. She did not consider that a person who had received a fine of £70 and whose conviction remained unspent should be prevented from enjoying the benefits that would undoubtedly have accrued to the family if the conviction had not taken place. There can be no doubt that the consequences for this family are serious, perhaps, draconian. However, similar consequences occur in many instances under the Immigration Rules, and the Points Based System in particular, where the failure to meet specific requirements as to funds, income, an English language certificate, the period or type of an educational course or the contents of a CAS letter prevent the applicant from satisfying the conditions for further leave. In effect, the Judge

set aside the requirement of there having to be no unspent conviction and disapplied it. In doing so, she re-wrote the requirements of the Immigration Rules, at least in relation to these appellants.

15. It is not easy to see on what basis this was or could be justified lawfully. There is nothing to suggest it was rationalised on the basis that the conviction only had a few months to run before it was spent. The conviction remains unspent until 1 April 2015 and had 2½ years still to run at the date of decision in November 2012. Were she to have done so, this would effectively amount to the Judge re-writing the definition of an unspent conviction (which under the 1974 Act operates for 5 years in the case of most fines). It appears to be the case that the Judge simply thought that an offence meriting a £70 fine was too trivial to mete out such an effect as the deprivation of indefinite leave to remain. Were this a permissible approach, it would suggest the Tribunal is entitled to reach its own view as to the seriousness of an unspent conviction: £70 was too little to merit removal, but what of £700 or £7 million? Presumably, that is for the Judge to determine in the exercise of another discretion which contains no obvious boundaries.
16. In paragraph 18 of the determination, the Judge classifies the offence as '*a minor traffic offence*' suggesting that it is the triviality of the offence that merited a departure from the need to meet the Immigration Rules. Once again, however, this suggests that the Tribunal has the power to classify the offence by its type in order to determine the proportionality of removal: traffic offences do not merit removal but what of offences of theft or violence?
17. In fact, the Judge was wrong in her classification. The appellant's offence was not a traffic offence but an offence of attempting to pervert the course of justice. The appellant was fined £70 and this provides the true measure of its seriousness. We do not know the circumstances of the offence but assume it was in the nature of giving false details when stopped in the course of the appellant driving, or being driven, in a motor-car. We readily agree with the Judge that whatever the nature of the offence, it was not a serious one, as reflected in the fine imposed.
18. The reasoning of the Judge becomes clear in paragraph 22 of the determination:

"It is difficult to see how in all the circumstances it would be in the public interest to remove this family from the UK. Such interference would be grossly disproportionate to the legitimate aim of the public end sought to be achieved, namely immigration control. To remove a person on such a minor transgression of the law would amount to removal which is arbitrary and on a whim."

The error on a point of law

19. We consider that, regrettably, the Judge was doing no less than re-writing the Immigration Rules because she did not approve of them. We do not consider that this is permissible. We know that there is no such concept as a 'near miss', see *Miah v SSHD* [2012] EWCA Civ 261. We understand the Judge's concern that a

provision that justifies removal on the basis of an unspent conviction covers a range of offences that spans dropping a sweet wrapper on the pavement at one end of the spectrum to acts of terrorism at the other. However, a challenge on the basis of the arbitrary nature of the Rules (as the Judge's determination expressly identifies, '*arbitrary and on a whim*') is to challenge the legislation or the Rules themselves.

20. Whilst this may be possible before the Administrative Court, it is not permissible in the Tribunal. In any event, we would not necessarily regard it as perverse or irrational to require a person who seeks further leave to remain to have committed no criminal offences whilst in the United Kingdom. Were the rule to have been drafted to exclude certain types of offences, the same problem arises as we have identified above, save that the 'tipping-point' alters. The draconian effect occurs between the man fined £99 and the man fined £101 if removal is linked to a fine of £100. The simple rule becomes almost infinitely more complex, distinguishing between types of offence, types of punishment and levels of punishment.
21. Furthermore, there is a discernible movement towards attaching greater weight to the public interest, at least where the public interest is articulated in a detailed way in executive policy or Parliamentary legislation. Thus, while in *MF (Article 8 – new rules) Nigeria* [2012] UKUT 00393 (IAC) the Upper Tribunal identified the weight to be attached to the Secretary of State's view of the public interest articulated in the form of the new Immigration Rules, the Court of Appeal in *SS (Nigeria) v SSHD* [2013] EWCA Civ 550 (22 May 2013) stated, with reference to primary legislation and in the context of automatic deportation pursuant to s.32 of the UK Borders Act 2007, that Parliament itself has identified the public interest there and the weight to be attributed to it and the Tribunal should attach great store to this.
22. The Immigration Rules are not primary legislation but an expression of policy, albeit presented to Parliament. Nevertheless, they identify the circumstances in which the Secretary of State differentiates between those classes of individuals entitled to enter or remain in the United Kingdom and those who are not. The Secretary of State has excluded the appellant as a member of a class from the right to obtain further leave to remain in the United Kingdom. The Rule has not been struck down. Suitable weight should properly attach to these considerations. The decision to allow the appellant's appeal on human rights grounds was not made upon the strength of the appellants' private or family life in the United Kingdom but by emasculating the weight to be attached to the Secretary of State's immigration policy as set out in paragraph 134 of the Immigration Rules. As such, the Judge's approach was impermissible.
23. The Tribunal should be astute to distinguish between the proportionality of removal where there is a disproportionate interference with the private and family life of the appellant's family and where the challenge to the removal

decision is a disguised challenge to the Rules themselves. Whilst the public interest in the effective maintenance of immigration control does not remain static but will vary from case to case, a principal source of the public interest is to be found in the Rules themselves. So much is clear from what is said by the House of Lords in *Huang v SSHD* [2007] UKHL 11 at [20]:

In an article 8 case where this question is reached, the ultimate question for the appellate immigration authority is whether the refusal of leave to enter or remain, in circumstances where the life of the family cannot reasonably be expected to be enjoyed elsewhere, taking full account of all considerations weighing in favour of the refusal, prejudices the family life of the applicant in a manner sufficiently serious to amount to a breach of the fundamental right protected by article 8. If the answer to this question is affirmative, the refusal is unlawful and the authority must so decide. It is not necessary that the appellate immigration authority, directing itself along the lines indicated in this opinion, need ask in addition whether the case meets a test of exceptionality. The suggestion that it should is based on an observation of Lord Bingham in *Razgar* above, para 20. He was there expressing an expectation, shared with the Immigration Appeal Tribunal, that the number of claimants not covered by the Rules and supplementary directions but entitled to succeed under article 8 would be a very small minority. That is still his expectation. But he was not purporting to lay down a legal test.

24. In *SSHD v Hayat (Pakistan)* [2012] EWCA Civ 1054, Elias LJ said of this passage at [76]

“It would also be inconsistent with the observation of Lord Bingham in *Huang v SSHD* [2007] UKHL 11, paragraph 20 to the effect that in practice it would be relatively rare for Article 8 claims to be sustained where an appellant could not remain in the UK in accordance with the Immigration Rules themselves.”

The error of law, setting-aside and remaking the decision

25. A decision on Article 8 grounds favourable to an appellant who fails to meet the requirements of the Immigration Rules cannot be justified by undermining or marginalising the Secretary of State’s expression of the public interest set out in the Immigration Rules. The justification must be based on whether the decision amounts to a disproportionate interference with the private and family life of the appellant.
26. The Judge’s determination failed to approach the appeal in this way. This was an error on a point of law requiring us to set her decision aside and to re-make it.
27. The private and family life developed by the family whilst in the United Kingdom since January 2007 was not, for the reasons we have identified in paragraphs 9 to 13 above, of a quality such as to render removal disproportionate.

DECISION

The Judge made an error on a point of law and we substitute a determination allowing the Secretary of State's appeal in the Upper Tribunal and dismissing the appeal of Mr Ul-Haq and his family against the decision of the Secretary of State to refuse their applications for indefinite leave to remain on all the grounds advanced.

ANDREW JORDAN
JUDGE OF THE UPPER TRIBUNAL
27 August 2013