IAC-AH-VP-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/34572/2013

THE IMMIGRATION ACTS

Heard at Bradford **Determination Promulgated**
On 18 June 2014 **On 6 November 2014**

Before

UPPER TRIBUNAL JUDGE ROBERTS
UPPER TRIBUNAL JUDGE CLIVE LANE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
Appellant

and

MT
(ANONYMITY DIRECTION MAINTAINED)

Respondent

Representation:

For the Appellant: Mr M Diwncyz, a Senior Home Office Presenting Officer
For the Respondent: Ms S Khan, instructed by Maz Shah Legal

DETERMINATION AND REASONS

1. The respondent, Muhammad Tufail, was born on 14 August 1985 and is a male citizen of Pakistan. I shall hereafter refer to the respondent as the appellant and the appellant as the respondent (as they were respectively before the First-tier Tribunal).

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2. The appellant entered the United Kingdom on 20 January 2007 in possession of a visit visa. He overstayed and did nothing to regularise his immigration status. He married his wife here on 14 July 2009 and they have a child (ST) born in February 2012. On 27 June 2013, the appellant's application to remain in the United Kingdom was refused without a right of appeal. Subsequently, a decision to remove the appellant was made on 7 August 2013 and it was against that decision that the appellant appealed to the First-tier Tribunal (Judge Shimmin) which, in a determination promulgated on 30 November 2013, made the following decision:

> I allow the appeal to the extent that the decision is unlawful as it does not consider the appellant's position under the Immigration Rules. The respondent should consider the decision in the light of my findings.
>
> I allow the appeal under Article 8.

3. The Secretary of State now appeals, with permission, to the Upper Tribunal.

4. Judge Shimmin noted [35] that the appellant was in a genuine and subsisting parental relationship with his child and in a subsisting relationship with the child's mother. She was a Pakistani citizen at the time of the appeal before the First-tier Tribunal but she had indefinite leave to remain in the United Kingdom. As a consequence of her "settled status" her child had been born a British citizen.

5. Judge Shimmin recorded at [32] that the appellant's wife has diabetes and had suffered from mental health problems (depression) for several years.

6. Although Judge Shimmin carried out a very detailed examination of the evidence, there are aspects of his determination which are problematic. The judge has had regard to the Immigration Rules and in particular Appendix FM (and EX1(b)). He identified [36] that "What is in dispute is whether it would reasonable to expect the child to leave the UK." At [49], he concluded that "taking into account all my findings I am satisfied on the balance of probabilities that insurmountable obstacles do not exist to the appellant's family life with his wife and child continuing outside the UK." Having made that finding, he proceeded to consider Article 8 ECHR outside the Immigration Rules. His analysis led him to allow the appeal on Article 8 grounds. The judge considered that the respondent had not considered the appellant's position under the Rules. That is not the case. There are two immigration decisions in respect of this appellant. The first is dated 27 June 2013 and is the refusal of the appellant's application for leave to remain. The appellant had made his application six years after his leave as a visitor had expired. As a consequence, he had no right of appeal against that decision. The decision, however, contains a detailed analysis of the appellant's position under the Immigration Rules in force following 9 July 2012. As Judge Shimmin had done in his determination, the letter considers "insurmountable obstacles" and the reasonableness of expecting the British child to leave the United Kingdom. In both cases, the respondent concluded that the child did not satisfy the Rules and, in consequence, the appellant had no right to remain as the child's father. The appellant himself did not qualify under paragraph 276ADE.

7. The second immigration decision (to remove the appellant under Section 10 of the Immigration and Asylum Act 1999, a decision which did give him a right of appeal) is dated 7 August 2013. That decision was not accompanied by a detailed consideration of the Immigration Rules or, indeed, Article 8 ECHR outside the Rules. The respondent has, however, considered the appropriate Immigration Rules, albeit not a decision which attracted a right of appeal. It is not clear to us why the judge allowed the appeal to the extent of remitting the matter to the respondent to consider the appellant's position under the Immigration Rules. It was not appropriate for him to do so. Such a procedure should generally only be adopted where the respondent has failed to exercise a discretion which, (for example, under a policy) because it lies outside the Immigration Rules, is outside the jurisdiction of the Tribunal. The practice of remitting decisions to the Secretary of State in circumstances where it was incumbent upon the Tribunal either to allow or dismiss an appeal is to be deprecated. We find, therefore, that Judge Shimmin erred in law.

8. We have decided to set aside the determination and to remake the decision. As we have noted above, the decision in respect of the Immigration Rules is incorrect and, for reasons which will become apparent below, there was no need for the judge to allow the appeal under Article 8 ECHR.

9. Judge Shimmin correctly identified the issues arising under the Immigration Rules, namely the existence of "insurmountable obstacles" which will prevent this family returning to Pakistan in order to enjoy their life together. There is also the question of reasonableness as regards requiring the child of the couple to leave the country of his nationality. In her detailed skeleton argument, Ms Khan has set out the relevant provisions of the Immigration Rules. The respondent needs to show that he satisfies the requirements of R-LTRP (requirements for limited leave to remain as a partner) 1.1:

R-LTRP.1.1. The requirements to be met for limited leave to remain as a partner are-

(a) the applicant and their partner must be in the UK;

(b) the applicant must have made a valid application for limited or indefinite leave to remain as a partner; and either

(c) (i) the applicant must not fall for refusal under Section S-LTR: Suitability leave to

remain; and

(ii) the applicant meets all of the requirements of Section E-LTRP:

Eligibility for leave to remain as a partner; or

(d) (i) the applicant must not fall for refusal under Section S-LTR: Suitability leave to

remain; and (ii) the applicant meets the requirements of paragraphs E-LTRP.1.2-1.12. and E-LTRP.2.1.; and

(iii) paragraph EX.1. applies.

10. We would agree with Ms Khan that the appellant would qualify for leave to remain under R-LTRP1.1(d). The appellant would also need to satisfy the requirements of SLTR (suitability – leave to remain). We cannot see that the appellant falls to be refused under any of the requirements of SLTR:

S-LTR.3.1. When considering whether the presence of the applicant in the UK is not conducive to the public good any legal or practical reasons why the applicant cannot presently be removed from the UK must be ignored

11. Further, we find that the appellant meets the requirements of E-LTRP1.2-1.12:

E-LTRP.1.2. The applicant's partner must be-

(a) a British Citizen in the UK;

(b) present and settled in the UK; or

(c) in the UK with refugee leave or as a person with humanitarian protection.

E-LTRP.1.3. The applicant must be aged 18 or over at the date of application.

E-LTRP.1.4. The partner must be aged 18 or over at the date of application.

E-LTRP.1.5. The applicant and their partner must not be within the prohibited degree of relationship.

E-LTRP.1.6. The applicant and their partner must have met in person.

E-LTRP.1.7. The relationship between the applicant and their partner must be genuine and subsisting.

E-LTRP.1.8. If the applicant and partner are married or in a civil partnership it must be a valid marriage or civil partnership, as specified.

E-LTRP.1.9. Any previous relationship of the applicant or their partner must have broken down permanently, unless it is a relationship which falls within paragraph 278(i) of these Rules.

E-LTRP.1.10. The applicant and their partner must intend to live together permanently in the UK and, in any application for further leave to remain as a partner (except where the applicant is in the UK as a fiancé(e) or proposed civil partner) and in any application for indefinite leave to remain as a partner, the applicant must provide evidence that, since entry clearance as a partner was granted under paragraph D-ECP1.1. or since the last grant of limited leave to remain as a partner, the applicant and their partner have lived together in the UK or there is good reason, consistent with a continuing intention to live together permanently in the UK, for any period in which they have not done so.

E-LTRP.1.11. If the applicant is in the UK with leave as a fiancé(e) or proposed civil partner and the marriage or civil partnership did not take place during that period of leave, there must be good reason why and evidence that it will take place within the next 6 months.

E-LTRP.1.12. The applicant's partner cannot be the applicant's fiancé(e) or proposed civil partner, unless the applicant was granted entry clearance as that person's fiancé(e) or proposed civil partner.

As noted above, the appellant's partner is present and settled in the United Kingdom because she has indefinite leave to remain.

12. The appellant must satisfy EX1 because he is an overstayer. EX1 provides:

EX.1. This paragraph applies if

(a)

(i) the applicant has a genuine and subsisting parental relationship with a child

who-

(aa) is under the age of 18 years, or was under the age of 18 years when

the applicant was first granted leave on the basis that this paragraph

applied;

(bb) is in the UK;

(cc) is a British Citizen or has lived in the UK continuously for at least the 7 years immediately preceding the date of application ;and

(ii) it would not be reasonable to expect the child to leave the UK; or

(b) the applicant 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 there are insurmountable obstacles to family life with that partner continuing outside the UK.

13. As Judge Shimmin correctly observed, we must consider whether there exist "insurmountable obstacles to family life .. continuing outside the UK." At this point of the analysis, we accept fully Ms Khan's submission that, had Judge Shimmin been properly directed to the relevant jurisprudence, he would not concluded that there were no insurmountable obstacles in this appeal. Of relevance here is the decision of the Tribunal in *Ogundinu* [2013] UKUT 60 in particular at [106-113]:

106. We finally, therefore, turn to the requirements of paragraph 399(b)(ii) of the rule; whether there are insurmountable obstacles to family life with JD continuing outside the United Kingdom.

107. In her refusal letter the Secretary of State fails to pay any regard to the circumstances of TS when considering this issue. TS is a nine year old British citizen (and therefore a citizen of the European Union). She is the daughter of JD. The fact that her mother, JD, is her primary carer is corroborated by Ms Best's statement, and we accept that this is so.

108. In Sanade and others (British children - Zambrano – Dereci) [2012] UKUT 48 (IAC) the Upper Tribunal [Blake P and UTJ Jordan] asked the following question of the Secretary of State (recorded at paragraph 93 of the decision):

"Does the respondent agree that in a case where a non-national parent is being removed and claims it is a violation of that person's human rights to be separated from a child with whom he presently enjoys family life as an engaged parent, that a consequence of the CJEU's judgment is that it is not open to the respondent to submit that an interference can be avoided because it is reasonable to expect the child (and presumably any other parent/carer who is not facing deportation/removal) to join the appellant in the country of origin? If not why not?"

109. Mr Devereux, at that time the Assistant Director UKBA and Head of European Operation Policy, responded as follows:

"We do accept, however, that in a case where a third country national is unable to claim a right to reside on the basis set out above it will not logically be possible, when assessing the compatibility of their removal or deportation with the ECHR to argue that any interference with Article 8 rights could be avoided by the family unit moving to a country which is outside of the EU".

110. Having considered the Secretary of State's response the Tribunal concluded (paragraph 95):

"This means that where the child or indeed the remaining spouse is a British citizen and therefore a citizen of the European Union, it is not possible to require them to relocate outside of the European Union or to submit that it would be reasonable for them to do so…"

111. The Tribunal further clarified, when looking at the particulars facts of the case before it, that:

"…as British citizens, Mrs Sanade and her children are citizens of the European Union and as such entitled to reside in the Union. The respondent properly accepts that they cannot be required to leave the Union as a matter of law…"

112. In the case of Izuazu [2013] UKUT 45 (IAC) the Secretary of State has confirmed that the response continues to apply, subject to a clarification that it only extends to the British citizen spouse or partner where there is in addition a British citizen child. This approach is consistent with the recent decisions of the Court of Appeal in DH (Jamaica) [2012] EWCA Civ 1736, and of the CJEU in O, S -v- Maahanmuuttovirasto [C -356/11 and 357/11: 6 December 2012].

113. Thus, in this appeal, TS cannot be required to leave the European Union to join the appellant in Africa. She needs her mother in order to exercise her residence rights in the Union. To require her mother to join the appellant in Nigeria (a country with which she has no ties of any sort and has never visited) is either to require the child to leave the European Union, or the mother to leave the child. In the latter eventuality there is no evidence of anyone else able to adequately care for the child and so the first issue would be reopened. It is certainly unreasonable to expect either TS or JD to relocate to Nigeria. In our judgment the obstacles to the mother relocating when she has to look after her young child in the United Kingdom are insurmountable, whatever the term means.

14. As Ms Khan submitted, although *Ogundinu* concerns to a deportation appeal, the wording of the non-deportation provisions of the Rules (paragraph 339(ii)(b)) is identical and we accept her submission that the ratio of *Ogundinu* applies in the present case. In short, the respondent cannot expect a British citizen (i.e. the child of the appellant and his partner) to live outside the European Union and be denied the benefits of its citizenship. Not only do insurmountable obstacles exist as a consequence, but it would also not be reasonable to expect the child to reside outside the European Union where he would be denied the benefits of its membership. Different considerations apply in deportation cases where possibility and consequences of the separation of deportees from their family members is the focus of the Immigration Rules. In the present case, it is not argued by the respondent that the appellant should be separated from his partner and child.

15. It follows from what we have said that the appellant is entitled to leave to remain under the Immigration Rules. As a consequence, there was no need to consider the application of Article 8 ECHR outside the Rules; for that reason, Judge Shimmin's decision to allow the appeal on Article 8 ECHR grounds is also wrong in law.

DECISION

16. The determination of the First-tier Tribunal which was promulgated on 13 November 2013 is set aside. We have remade the decision. The appellant's appeal against the

decision of the respondent dated 7 August 2013 to remove him from the United Kingdom is allowed under the Immigration Rules.

Anonymity direction maintained.

Signed Date 19 June 2014

Upper Tribunal Judge Clive Lane