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Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/47139/2013**

THE IMMIGRATION ACTS

Heard at Columbus House, Newport	**Decision & Reasons Promulgated**
On 15th October 2014	**On 28 November 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE HARRIES

Between

A R
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr C Yeo, Counsel
For the Respondent: Mr I Richards, Home Office Presenting Officer

DECISION AND REASONS

Details of the Appellant and Proceedings

1. The appellant was born on 12th October 1968 and is a citizen of Canada. He entered the United Kingdom as a visitor on 3rd May 2012 with leave until 3rd November 2012. On 20th June 2012 he married the sponsor, Mrs A, a British citizen, born on 17th February 1971. On 16th October 2012 the appellant applied for leave to remain in the United Kingdom outside the Immigration

Rules on the basis of his private and family life under Article 8 of the ECHR. The respondent refused the application on 24th October 2013 under Appendix FM and paragraph 276ADE of the Immigration Rules. She found no exceptional circumstances to engage Article 8 and considered the matter no further. A further decision was made to remove the appellant from the United Kingdom by way of directions under section 47 of the Immigration, Asylum and Nationality Act 2006.

2. The appellant appealed against these decisions before First-tier Tribunal Judge Troup (the Judge) at a hearing in Newport on 6th May 2014. In a determination promulgated on 12th May 2014 he dismissed the appeal under Article 8 of the ECHR. The appellant was ultimately granted permission in the Upper Tribunal on 2nd August 2014 to appeal against the Judge's decision. Upper Tribunal Judge Chalkley for the following reasons:

> Having found compelling circumstances to engage Article 8 (but not having identified them (do they include the matters referred to in paragraph 34, for example?)), the Judge appears not to have applied *Razgar v SSHD [2004] UKHL27* and does not say what he finds in relation to his consideration of the best interests of the children.

3. Upper Tribunal Judge Chalkley directed that, subject to any submissions from the parties within the following 14 days, he proposed to find that the First-tier Tribunal Judge did materially err in law in his determination and to set aside the determination without preserving any findings and to list the appeal for hearing before himself without an oral hearing. Given that the evidence heard by the First-tier tribunal is recorded in the determination, he did not propose to hear any further evidence.

4. In a written response, dated 13th August 2014, under Rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008 the respondent indicated opposition to the appeal and requested an oral hearing. The matter accordingly came before me for an initial hearing to determine whether the making of the decision in the First-tier Tribunal involved the making of an error on a point of law.

Background Facts and Evidence

5. The Judge set out a full record of the background facts in the matter before him as follows, referring to the appellant as "H" and the sponsor, his wife, as "W". The Appellant Husband ("H"), a citizen of Canada, is 45 years old. H is married to his Sponsor Wife ("W") Mrs A, a British citizen born on 17 February 1971. H and W live together in Newport. W has two children by her first marriage, namely, Miss I R who was born on 29 July 1994 in Islamabad; T R who was born on 19 November 1997 in Lahore. H & W have between them two children of their own, namely, R R born in Newport on

20 June 2007 and E R born in Newport on 6 April 2010. All four children are British citizens.

6. The relevant chronology is therefore as follows:

- 29th July 1994, I R born in Pakistan
- 19th November 1997, T R born in Pakistan
- June 2005, the sponsor arrived in the UK with her 2 children and was granted asylum
- September 2005, the relationship between the appellant and sponsor began
- 16th September 2006, the parties entered an Islamic marriage
- 20th June 2007, R R born
- 6th April 2010, E R born
- 2012, the sponsor became naturalised as a British citizen
- 3rd May 2012 H arrived in the UK as a visitor
- 20th June 2012 Civil marriage
- 16th October 2012, appellant makes application
- 24th October 2013, the respondent refuses the application

7. The appellant, the sponsor and the two older children gave oral evidence before the Judge which he sets out as follows in his determination:

> <u>The Evidence of the Appellant ("H")</u>
>
> 9. H produced his Witness Statement at pages 1-5 of the Appellant's Bundle of 826 pages.
>
> 10. He said that he had known W since 1986 when they were both living in Pakistan.
>
> He migrated to Canada in 1995 and became a citizen of that country in 2001.
>
> He has been visiting W in the UK since September 2005 on an annual basis.
>
> It was not possible for W and the children to join him in Canada whilst she was a refugee and, conversely, she could not sponsor his entry to the UK whilst she had that status. However, his intention has always been to join W and the children in the UK.
>
> W was granted indefinite leave to remain in the UK in 2011 and British citizenship in 2012.
>
> 11. H is very close to all four children. He has an active role in their upbringing and they rely on him for emotional support. The children are well settled here. English is their first language. T R and R R attend school and H has attended parents' meetings at the schools whenever he is in the country.

Relocation to Canada would be very disruptive to the lives of all members of the family.

I R is in the second year of a law degree at the University of Coventry in London.

The stepchildren regard H as their own father.

H has not claimed state benefits at any time and wants the opportunity to provide for his family. He has an offer of employment from M and R Parts Limited of Rainham, Essex and he produced a confirmatory letter from that company dated 6 March 2014 (page 703 of the Bundle).

12. In cross examination H said that he had not made an application for entry clearance to the UK whilst in Canada as the process would take too long. He conceded that he had made no enquiries about the actual length of the process but accepted Ms Jones' assertion that it would take no more than 40 days. He said that in any event an application for entry clearance as a spouse would fail as W could not meet the financial requirements of the Rules.

13. In Canada since 2000 he has worked variously as a warehouseman, taxi driver, taxi dispatcher, and driver and in the last four months before leaving the country as a kitchen hand in a restaurant. He has never sent money to W but said that he has savings of about £700. He is living on his savings and financial contributions from his brother, as to which he produced his brother's "*financial documents*" at pages 735-750 of the bundle, including a bank statement with a closing balance on 7 March 2014 of €20,450.99

14. H has no property or accommodation in Canada and had always rented when there. He said it would be possible to obtain a job in Canada to support W and the children but his concern is what is to become of the stepchildren.

15. On arrival in May 2012 it was H's intention to marry and settle here. W had been in receipt of benefits but is now in receipt of Job Seeker's Allowance and is undertaking some voluntary work at a school.

16. The job offer that has been made to him (page 703) comes from Mr A R, a Director of the company. He is W's cousin. The job involves answering the telephone and dispatching orders; he would be paid the minimum wage.

<u>The Evidence of Aisha Ashi ("W")</u>

17. W produced her Witness Statement at pages 6-9 of the Bundle. She recited her immigration history, H's arrival here and the marriage.

18. The Respondent's Decision means that W would have to go to Canada to remain with H. It would upset the lives of the children considerably. They are British citizens and this is their permanent home. The two younger children were born here and have not lived anywhere else.

    The two elder children are dependent upon W for emotional and physical support. H is a guiding figure in the children's lives.

19. W is gaining work experience as a teaching assistant at an infant school in Newport and voluntary work at a local charity. As the children grow older, she hopes to engage in fulltime paid work.

20. In cross examination W said that the marriage had been planned before H's arrival here. It was agreed between her and H that he would come to the UK, they would marry and he would stay permanently.

21. W is in receipt of Job Seeker's Allowance, Child and Housing Benefit and Child Tax Credits.

22. H has visited every year since 2005. In his absence, they keep in touch by telephone, Skype and FaceTime.

    As W does not work, she is unable to sponsor H as she does not meet the financial requirements of the Rules.

23. W was asked if H had to return to Canada whether she would join him there. She replied:-

    "*Circumstances do not allow for me to go*".

    The two younger children were born here. Removal to Canada would disturb their lives. I R is at university and T R is taking GCSEs this year.

24. The children are used to having H with them. They are disturbed by the thought of him returning to Canada. His removal would disturb them emotionally. They would miss him and his absence would affect their education.

    W said that she has registered with two agencies in her hunt for work.

<u>The Evidence of T R</u>

25. T R produced his Witness Statement at pages 10-11. He is 16 years old. He first met H, his stepfather, in 2005. He is distraught at the thought of W having to leave for Canada to be with H for even a short period of time. He is very attached to W and is not independent in any way. H is a key figure in his life.

He would be distraught by H's removal. He needs his guidance and "*If he goes, mum has to go with him, which would affect my education. It would destroy our relationship*".

26. He said that there is no contact with his biological father who is in Pakistan.

T R is taking GCSEs this year and wants to undertake A levels and wishes to attend university.

His preference is to remain here but if H and W were to go to Canada, he would join them albeit reluctantly. Moving to Canada would mean starting a new life. There would be delay in his education. It is better for the family to remain in the UK where they are all settled.

T R was born in Pakistan and came to the UK when he was seven. He is settled at school where he has friends.

The Evidence of I R

27. I R produced her Witness Statement at pages 12-13. She is 19 years old, was born in Pakistan and came to the UK with W in 2005. She regards H as her father, having first met him in 2005.

28. I R is studying for a law degree in London and plans to return to the family once she has graduated. She has never been independent and is very dependent upon H and W. She returns home most weekends. The family is all that she has and she will be forever dependent on her parents.

29. In cross examination she said that her mother has cousins in the UK who she sees about once a year at family gatherings in London.

8. Having considered the evidence and submissions the Judge accepted for the purposes of Gulshan (Article 8 – new rules- correct approach [2013] UKUT 00640 (IAC) that Article 8 is engaged and that family life exists between the appellant, the sponsor and all the children. He found that the key issue was of proportionality, namely whether the competing interests of each member of the family on the one hand is outweighed by the public interest in maintaining a fair and effective system of immigration control on the other.

9. The Judge took into account that both the appellant and sponsor conceded in evidence that when applying for a visit visa in 2012 the appellant's intention was not to limit his stay to a few months, but to marry and to settle here permanently. It was therefore a blatant attempt to circumvent the Immigration Rules. They recognised that a settlement application as a spouse could not succeed on financial grounds and the appellant arranged travel to the UK as a visitor in order to make an Application under Article 8. The Judge found that the appellant should not be rewarded for that.

10. The Judge directed himself that the children's interests are indeed a primary consideration and the two younger children were born in Newport. He reminded himself that the older children, I R, then aged 19 years, had been in the UK since she was 9 or 10; T R, then aged 16 years, had been in the UK since he was 5 or 6 years old. The judge reminded himself that all the children are British citizens and the three minor children are at school. The Head Teacher of the primary school described the two younger children as polite and courteous. The Judge had no doubt that all three are prospering and are well settled.

11. However, the judge went on to find that this is not a case in which it is inevitable that the family unit will be divided. The sponsor had said in evidence: circumstances did not allow her to go to Canada but she indicated that she would accompany her husband to Canada if the children remained with her; the witness statements of T R and I R mentioned their mother accompanying the appellant to Canada. The Judge took into account T R evidence that he would accompany the appellant and his mother to Canada, albeit reluctantly.

12. The Judge then found that, notwithstanding the respondent's decision and the appellant's removal, the family can remain together. He found that I R is no longer a minor; she was in her second year of university and living in London. She did not regard herself as independent but the Judge found her to be so for all practical purposes. He found that her relationship between I R and her parents does not go beyond the usual emotional ties between parents and their daughter; he took into account that Canada is a western, English-speaking country.

13. In paragraph 45 of his determination the Judge recognised the disruption involved were the family to migrate to Canada because the children would leave behind familiar surroundings, friends and school. He found, however, that the upheaval would not be long term; he found that the family would remain together and would settle into new surroundings over time. He attached considerable weight to the public interest in maintaining immigration control, the economic wellbeing of the country and the protection of the rights and freedoms of others.

14. The Judge returned to his finding that the appellant had flouted UK Immigration control and had set out on a course designed to secure his residence in the UK regardless; "He has, as it were, 'jumped the queue' ahead of legitimate applicants. He has not demonstrated that his presence here is in the country's economic interest." In conclusion, at paragraph 47 of his determination, the Judge found that the public interest prevailed in the light of his finding the family unit can remain together in Canada. He found the respondent's Decision to be proportionate and he dismissed the appeal under Article 8.

Submissions and Finding on Error of law

15. The respondent's Rule 24 opposition to the appeal is on the basis that the Judge is submitted to have directed himself appropriately; the grounds are submitted to amount to a mere disagreement with his findings. The respondent states that the Judge was entitled to find that there were compelling circumstances to warrant consideration outside the Rules and the decision is not flawed by any failure to identify these. The Judge was entitled to take into account the appellant's adverse immigration history in the Article 8 balancing exercise; he was entitled to take the view that in the light of Canada being an English speaking country it would not be disproportionate for the family to relocate there. The Judge was further entitled to find that the disturbance to family life would not constitute long term upheaval. He may not, in the respondent's submission, have applied Razgar, however, this is not necessarily a material error of law.

16. In his submissions to me Mr Yeo said that although the Judge had stated the children's best interests to be a paramount consideration, he had paid no deference to their status as British citizens or presence in the UK for 7 years. The public interest had been found to outweigh those of the children without any reference to 7 years of residence in the UK. The family had not been considered as a whole and the Judge took no account at all of the sponsor's status as a refugee; she and her children have suffered trauma in the past and no weight was attributed to this factor in expecting them all to relocate in Canada.

17. Mr Yeo relied upon the grounds of appeal stating that the Judge has failed to take any account of relevant case law including Chikwamba v SSHD [2008] UKHL 40, ZH (Tanzania) –v- The Secretary of State for the Home Department [2011] UKSC 4 and Beoku-Betts v SSHD [2008] UKHL 39. The decision of the Judge runs counter to the best interests of the children which are clearly shown by the evidence not to be served by going to live in Canada.

18. The Judge is submitted to have erred in the proportionality assessment by misunderstanding or ignoring the strong evidence and important factors in the appellant's favour. He has failed to take account of the strong possibility that the appellant will have great difficulty in future in gaining entry to the United Kingdom as a visitor which will have a strong and negative impact upon the children. Mr Yeo relied on the grounds of appeal asserting that the basic factual evidence has not been taken into account, in particular, the upheaval to the sponsor and the children, as British citizens, having to move to Canada.

19. Mr Yeo agreed that the respondent had correctly refused the application under EX 1 which might otherwise apply to the appellant in the light of the respondent's acceptance that he has a genuine and subsisting parental

relationship with the children. EX 1 cannot apply as the appellant fails to meet the necessary additional and mandatory eligibility requirements by virtue of his status as a visitor in the United Kingdom. At the time of the marriage Mr Yeo submitted that the Rules then in force did not permit a refugee, such as the sponsor in this case, to sponsor a spouse. When the Rules subsequently changed in 2011 it would have been an astute applicant who knew that new spouses were then allowed to be sponsors. Mr Yeo returned to the crux of his submissions, namely that the decision of the judge fails to recognise the best interests of the children in this case, all of whom are British citizens.

20. Mr Yeo submitted that the judge had erred by finding that the children can relocate because of parental misdemeanours; they should, however, not be punished for the mistakes of their parents in accordance with the case of ZH (Tanzania) –v- The Secretary of State for the Home Department [2011] UKSC 4. The judge had taken no account of this case.

21. In his response on behalf of the respondent Mr Richards asked me to find that the decision of the Judge contains no material error of law. He refuted the suggestion in the permission to appeal that the Judge had failed to apply Razgar v SSHD [2004] UKHL27; he had done so, following the appropriate steps and finding a legitimate aim. The Judge had considered the case of Gulshan and had arrived at a proportionality assessment taking account of the competing interests on either side. In paragraph 40 of the determination the Judge had taken account of the children's length of residence in the United Kingdom and their British citizenship. He had directed himself that the children's best interests are a primary consideration and he had thoroughly analysed the relevant issues.

22. Mr Richards submitted that the Judge had properly directed himself and had been mindful of the consequences of removal; he was entitled to come to the finding in paragraph 39 of the determination that the appellant had flouted the requirements of immigration control in a blatant attempt to circumvent the Rules; he found that the appellant had "jumped the queue". The Judge was entitled to balance the rights of individuals against the wider public interest in the maintenance of fair and firm immigration controls. In paragraph 46 the Judge found that the job offer relied upon was not genuine and he had in all the circumstances reached a conclusion properly open to him after appropriate analysis. Mr Richards invited me to dismiss the appeal in the Upper Tribunal.

Decision on Error of Law

23. At the conclusions of the submissions I reserved my decision which is as follows. The Judge's determination is detailed and contains a carefully-written, full record of the evidence. It is accepted that he was entitled, after considering the case of Gulshan, to move to a free-standing consideration of

the appeal under Article 8 of the ECHR. I find that he did not fall into error by failing to adopt the 5-step Razgar approach. The case is not referred to by name but the Judge has nonetheless adopted a staged consideration of the issues concluding that proportionality is the key question. He properly directed himself that the interests of the children are a primary consideration.

24. I do, however, find that the Judge fell into error thereafter by failing to make a finding about the best interests of the children. Those interests were not identified and were accordingly not given primary consideration. I find error in the absence of consideration of the findings or principles of case law, specifically, Chikwamba v SSHD [2008] UKHL 40 and in particular ZH (Tanzania) –v- The Secretary of State for the Home Department [2011] UKSC 4. I accept the respondent's submission that the Judge did refer in the determination under the proportionality consideration, at paragraph 40, to the children's British citizenship but the weight attached to this factor is not identified.

25. The Judge did not direct himself in accordance with ZH when taking account of the immigration history of the appellant or direct himself that the sins of the parent must not be visited on the child. ZH also established that it is not enough to say that a young child may readily adapt to life in another country. The Judge in my view erred by placing weight on the fact that the upheaval to the family would not be long term if they go to Canada without taking account of the loss to the children of all the intrinsic values of their British citizenship.

26. Whilst their British nationality is not a trump card and their best interests can be outweighed by the cumulative effect of other considerations, the best interests of the children must be identified and considered first, including their community links here, their unqualified right of abode in the United Kingdom, their right to education, childcare facilities, health care, medical, social, and economic support. A proportionality assessment should reflect as a primary consideration that these rights cannot be exercised if the children move to another country. I find that the decision of the First-tier Tribunal does not identify these best interests of the children and falls to be set aside and remade.

The Law

27. Article 8 of the ECHR provides that:

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime,

for the protection of health or morals, or for the protection of the rights and freedoms of others.

28. The burden of proof in relation to Article 8 of the ECHR lies with the appellant to prove on the balance of probabilities that private or family life is established and will be interfered with as a result of the respondent's decision. Once he has established that he enjoys this protected right which is threatened with violation the burden shifts to the respondent to show that the interference is lawful and in pursuit of a legitimate aim. The respondent must show that the violation is justified and that it does not impair the right any more than is necessary; in other words, whether the interference is proportionate.

29. On 28th July 2014 section 19 of the Immigration Act 2014 made amendments to the Nationality, Immigration and Asylum Act 2002 by introducing a new Part 5A which contains sections 117A, 117B, 117D and 117D. These statutory provisions apply to all appeals heard on or after 28 July 2014, irrespective of when the application or immigration decision was made. Part 5A applies where the Tribunal considers article 8(2) ECHR directly. Section 117A is as follows:

> 117A Application of this Part
>
> (1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts—
> (a) breaches a person's right to respect for private and family life under Article 8, and
> (b) as a result would be unlawful under section 6 of the Human Rights Act 1998.
> (2) In considering the public interest question, the court or tribunal must (in particular) have regard—
> (a) in all cases, to the considerations listed in section 117B, and
> (b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.
> (3) In subsection (2), "the public interest question" means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).

Section 117B is as follows:

> 117B Article 8: public interest considerations applicable in all cases
>
> (1) The maintenance of effective immigration controls is in the public interest.
> (2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—
> (a) are less of a burden on taxpayers, and
> (b) are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—
  (a) are not a burden on taxpayers, and
  (b) are better able to integrate into society.
(4) Little weight should be given to—
  (a) a private life, or
  (b) a relationship formed with a qualifying partner, that is established by a person at a time when the person is in the United Kingdom unlawfully.
(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.
(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—
  (a) the person has a genuine and subsisting parental relationship with a qualifying child, and
  (b) it would not be reasonable to expect the child to leave the United Kingdom.

Remaking of Decision

30. At the conclusion of the submissions in relation to the error of law the representatives agreed that should the decision fall to be set aside it could appropriately be remade in the Upper Tribunal without the need for further evidence or another oral hearing. I heard further submissions from the parties about the remaking of the decision which are set out in the record of proceedings and are fully taken into account by me, along with all the other evidence and documents submitted. I carry forward my findings in relation to the error of law and the decision is remade as follows.

31. The appellant fails to meet the eligibility requirements of the Immigration Rules because of his status as a visitor in the United Kingdom; he fails for the same reason to come within EX 1. The respondent accepts that the appellant may have a genuine and subsisting relationship with his wife, although at the date of decision there was a lack of supporting documentary evidence of, for instance, their co-habitation. The genuine and subsisting relationship with the children was, however, accepted.

32. The appellant fails to meet the requirements of the Immigration Rules under the parent route; he does not have sole responsibility for the children and at the time of application he failed to meet the immigration status requirement because of his status as a visitor in the United Kingdom; the requirements of E-LTRPT.2.3 and E-LTRPT.3.1 are not met. The requirements of paragraph 276ADE are not met in relation to private life because the appellant has not been in the United Kingdom for at least 20 years; he is not aged under 18 years and nor is he between the ages of 18 years and 25 years having lived for half of his life continuously in the United Kingdom. He clearly retains

ties with Canada in the light of his residence there from 2001 until his departure for the United Kingdom as a visitor in May 2012.

33. The respondent explicitly accepted in the Rule 24 response that the judge had properly applied the case of Gulshan and was entitled thereafter to undertake a free-standing Article 8 consideration of the case. Mr Richards maintained this position in his submissions to me and I am satisfied that such consideration is warranted. The application was made outside the Rules from the outset and there are grounds for such consideration because aspects of the claim are not encompassed by the Rules, particularly in relation to the children's situation and the primary importance of their best interests. There are arguably good grounds for granting leave outside the Rules which do not provide a complete code in this case.

34. The appellant is now aged 46 years of age; his wife is aged 43 and her older children, I R and T R, were aged 20 years and 16 years old respectively at the date of hearing before me. T R is still a minor and has been in the UK for a period of 9 years, since 2005. Rayyan is now 7 years old and Eshaal is 4 years old; they were born in the UK and have never lived elsewhere. I am satisfied from the consistent evidence of the appellant, his wife and their children set out above that there is a genuine and subsisting relationship between them all. The evidence was tested under cross-examination at the hearing in the First-tier Tribunal. I accept the existence of family life between the appellant and sponsor and their minor children.

35. The respondent challenges the existence of family life with the oldest child, I R, who is now aged 20 years and attends university. She is submitted by the respondent to be to be living independently as an adult, notwithstanding her evidence that she plans to return to the family once she has graduated. She states that she has never been independent and is very dependent upon the appellant and her mother; she returns home most weekends; the family is all that she has and she will be forever dependent on her parents. I find that family life arguably continues with Iqua in these circumstances, but I if I proceed on the basis that it does not I find that the outcome of the appeal is no different.

36. The 5-step approach set out in Razgar poses the following questions:

> (1) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?
>
> (2) If so, will such interference have consequences of such gravity as potentially to engage the operation of Article 8?
>
> (3) If so, is such interference in accordance with the law?
>
> (4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the

prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?

(5) If so, is such interference proportionate to the legitimate public end sought to be achieved?

37. I find that the answer to the first four questions is in the affirmative. The legitimate end to be achieved is the public interest in maintaining effective immigration controls and the economic wellbeing of the country. The importance of the public interest is now enshrined in statute and I necessarily attach significant weight to that interest. In accordance with the case of ZH (Tanzania) [2011] UKSC 4, I now consider the best interests of the children as a primary consideration.

38. In accordance with the case of Azimi-Moayed and others (decisions affecting children; onward appeals) [2013] UKUT 197(IAC) it is, as a starting point, in the best interests of children to be with both their parents. The evidence is that the three younger children are all in education and T R's evidence is that he is distraught at the thought of the appellant having to leave for Canada to be with his mother for even a short period of time. He is very attached to the appellant and is not independent in any way; the appellant is a key figure in his life. T R states that he needs the appellant's guidance and "If he goes, mum has to go with him, which would affect my education. It would destroy our relationship". He states that there is no contact with his biological father who is in Pakistan.

39. The sponsor's evidence is that removal to Canada would disturb the children's lives. She states that the children are used to having the appellant with them. They are disturbed by the thought of him returning to Canada. His removal would disturb them emotionally. T R's clear evidence was that it is better for the family to remain in the UK where they are all settled. His preference is to remain here, but if his parents were to go to Canada he would join them, but reluctantly so. Moving to Canada would mean starting a new life and there would be delay in his education.

40. I take account of the circumstances of T R's arrival in the United Kingdom with his mother who sought and obtained refugee status. A departure from the United Kingdom would be in the wake of this earlier disruption to his young life. The three younger children are all British citizens meaning that they inevitably have community links here and enjoy all the intrinsic value that comes with their citizenship. They have an unqualified right of abode in the United Kingdom, a right to education, childcare facilities, health care, medical, social, and economic support. Their departure from the United Kingdom would deprive them of all such rights and benefits.

41. I take account of the fact that Canada is an English-speaking country but that does little to diminish the significant level of disruption which would be caused to the lives of all the children by re-locating there. I take account

of the fact that the family might be able to re-locate there together but this does not diminish the loss to the children of all their benefits of British citizenship. I find that in all the circumstances of this case it is not reasonable to expect the children to live in Canada. In reaching this conclusion I weigh in the balance the level of their integration in the United Kingdom and the length of their residence here which weighs heavily in their favour.

42. I find that the evidence shows the best interests of the children not to be served by the decision of the respondent. The consequence is either of separation from the appellant and possibly their mother, or alternatively relocation to Canada to preserve the family unit, all of which causes significant distress, trauma, deprivation of rights and detriment to the children. I remind myself that these interests can be outweighed by the cumulative effect of other countervailing considerations. For all the following reasons I find that in this case they are not.

43. Carrying forward the best interests of the children into the wider proportionality exercise I weigh in the balance the fact that their mother is a British citizen settled in the United Kingdom with refugee status. I assess the impact of her leaving the United Kingdom to live in Canada in order to maintain the family unit or to stay with her husband, for even a short period of time, in the context of her refugee status and the trauma which preceded her arrival here with her children in the first place.

44. The sponsor's evidence is that she is gaining work experience as a teaching assistant at an infant school in Newport and voluntary work at a local charity. As the children grow older, she hopes to engage in fulltime paid work. Her evidence is that circumstances do not allow for her to go to Canada. The level of interference caused by the respondent's decision to the sponsor's family life is in all the circumstances significant.

45. I take full account of the appellant's immigration history and his intention to circumvent the Immigration Rules which does him little credit. However, those sins should not be visited upon the children. In accordance with the case of Chikwamba v SSHD [2008] UKHL 40 it is not necessarily unlawful to require an appellant who relied on a human rights ground to return to their country of origin to make an application for entry clearance. The rationale behind the Home Office policy of routinely requiring appellants to apply from abroad was to deter others from entering without entry clearance. This could be a legitimate objective and in certain cases could be the right course of action, but only when relevant considerations in the particular case made it so.

46. In an Article 8 family case the prospective length and degree of family disruption involved in going abroad for an entry clearance certificate will always be a highly relevant factor in the assessment of proportionality. I

find that the evidence shows the degree of family disruption in this case would in these circumstances be very significant. Only comparatively rarely, certainly in family cases involving children, should an Article 8 appeal be dismissed on the basis that it would be proportionate and more appropriate for the appellant to apply for leave from abroad.

47. I return to the enshrinement of the importance of the public interest in statute. I attribute significant weight to that interest and I take full account of the provisions of sections 117A and 117B of the Nationality, Immigration and Asylum Act 2002. The maintenance of effective immigration controls is in the public interest and it is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English. The appellant is English-speaking.

48. I take account of the appellant's inability to meet the financial requirements of the Immigration Rules and the evidence does not show him to be financially independent. His evidence is, however, that he has been employed in Canada and has not relied on public funds. He gives evidence of job prospects in the United Kingdom and the sponsor expresses her intention to undertake full time work in due course. The appellant's relationship formed with the sponsor was not established at a time when he was in the United Kingdom unlawfully. He has a genuine and subsisting parental relationship with qualifying children and I have found that it is not reasonable to expect the children to leave the United Kingdom.

49. Taking all the relevant evidence and factors into account and weighing them in the balance I find that the interference to family life in this case is not proportionate to the legitimate public end sought. The appeal succeeds under article 8 of the ECHR.

Notice of Decisions

50. The First-tier Tribunal made a material error of law in the making of the decision.

51. That decision is set aside and is remade as follows.

52. The appeal is allowed under Article 8 of the ECHR.

53. The appeal in the Upper Tribunal succeeds.

Direction Regarding Anonymity – rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014

The direction made by the First-tier tribunal remains in terms that the children referred to in the determination are granted anonymity. No report of these

proceedings shall directly or indirectly identify them or any member of their family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed:

Janet Harries
Deputy Upper Tribunal Judge
Date 26th November 2014

Fee Award

In the light of my decision to remake the decision in the appeal by allowing it I make a whole fee award.

Signed:

Janet Harries
Deputy Upper Tribunal Judge
Date 26th November 2014