



IAC-HW-MP-V1

**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/42468/2013

THE IMMIGRATION ACTS

**Heard at Newport
On 28th July 2015**

**Decision & Reasons Promulgated
On 26th August 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE RIMINGTON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MR SIRAJUDDIN MOHAMMED
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Ms Robinson, instructed by Juris Solicitors
For the Respondent: Mr P Richards, Home Office Presenting Officer

DECISION AND REASONS

The Appellant

1. The application for permission to appeal was made by the Secretary of State but nonetheless for the purposes of this decision I shall refer to the parties as they were described before the First-Tier Tribunal, that is Mr Mohammad as the appellant and the Secretary of State as the respondent.

2. The appellant is a citizen of India, born on 5th June 1987 and he appeals against the decision of the respondent dated 2nd October 2013 to refuse his application for leave to remain as the partner of a British citizen under Appendix FM and paragraph 276ADE.
3. In that decision the Secretary of State was not satisfied that the appellant could meet EX.1.
4. The appellant had entered the UK as a Tier 4 Student on 22nd January 2009 and completed a Masters Degree. He married Nadine Williams on 19th September 2012 and he made an application for leave to remain on 25th October 2012. The appellant had conceded that he did not meet the current income threshold of £18,600 but he was working and earning between £1,000 and £1,200 a month and they paid rent of £240 a month.
5. The appeal against the respondent's refusal was heard by First-tier Tribunal Judge Woolley on 13th May 2014 and in a decision promulgated on 19th May 2014 the judge allowed the appeal.
6. An application for permission to appeal was made by the respondent. The judge accepted at paragraph 22 that the appellant could not meet the requirements of Appendix FM but he found there were compelling circumstances not sufficiently recognised under the Rules as per **Nagre v Secretary of State for the Home Department [2013] EWHC 720 (Admin)**. It was asserted that the judge considered the appellant's unborn child and placed excessive weight on this in the determination on Article 8. The judge found, on the basis of the unborn child, that **Ogundimu (Article 8 - new Rules) Nigeria [2013]** applied and that the appellant's partner could not be expected to relocate to India. As such the judge had erred in law.
7. At paragraph 29 the judge had noted the reasonable foreseeability of the birth of the child who would be a British citizen but the judge did not acknowledge that even though there must be some consideration given to the unborn child, the child is not regarded in law as a separate entity from the mother.
8. It was argued further to **Gulshan (Article 8 - new Rules - correct approach) [2013] UKUT 00640 (IAC)** an appeal should only be allowed where there are exceptional circumstances.
9. The Secretary of State had applied the immigration law and there was no prejudice to the appellant in this approach. The appellant and sponsor could continue their family life together in India. Whilst the unborn child merited some consideration, having found that in law the unborn child was not regarded as a separate entity, that consideration and impact on the overall balancing exercise had to be limited.
10. There was no analysis by the judge as to why the appellant could not submit a further application or any reasoning why it would be unjustifiably harsh to require him to do so. There is a minimum entitlement threshold with the aim of ensuring

those who choose to establish their family life in the UK should have the financial ability to support themselves. The judge failed to consider and make findings on this issue.

The Hearing

11. At the hearing Mr Richards submitted that there was a very narrow point on a single issue and in effect the judge had essentially found that the appellant's appeal under the Rules could not succeed but had gone on to consider the matter on the basis of the appellant's partner being pregnant. The judge should have assessed family life as it stood at the date of the hearing and it was not open to the judge to take into account an unborn child.
12. Ms Robinson submitted her skeleton argument and relied essentially on that. She submitted there were compelling circumstances aside from the existence of the child and the removal would have forced a pregnant woman to continue her pregnancy either without her husband or to relocate in a country where she would have very little support. It was reasonable for the judge to consider this.
13. At paragraph 5 it was recorded that the Secretary of State conceded that an unborn child may be considered a compelling circumstance not recognised by the Rules. Although **Ogundimu (Article 8)** was considered it was not the deciding factor and indeed at paragraph 29 Judge Woolley stated "the reasonable foreseeability of the birth of the child who will be a British citizen must necessitate some consideration in the overall balancing exercise". The judge explicitly stated that the child was not to be regarded as a separate entity and therefore could not have said to have fallen into error.
14. With regards to the failure to consider **MM (Lebanon) [2014] EWCA Civ 985** and the weight to the respondent's concerns, Judge Woolley clearly took into account the need to maintain effective immigration control at paragraph 28 in the event that his decision was found to be in error the respondent argued he cannot now be forced to leave the UK in the light of **Zambrano [2011] EUECJ C-34/09**. His child is a British citizen and should not be deprived of the rights by being forced to live without her father.
15. Ms Robinson submitted it was disproportionate to expect the child to live without her father.
16. Mr Richards submitted that the balancing exercise was such that there must be full account taken of the economic wellbeing of the country. He did accept that with regards to the Immigration Rules that the appellant could fulfil all of the other Immigration Rules and the question was whether EX.1 was fulfilled. It was accepted there was now a genuine and subsisting parental relationship with a British citizen child and the question was whether it would be reasonable for the child to leave the UK.

17. I am not persuaded that the judge erred in allowing the appeal outside the Rules. He was clear that there were compelling circumstances not sufficiently recognised under the Rules, that is that the mother was pregnant with a child due in the very short timeframe and I do not accept that the judge erred in failing to follow the guidance in Gulshan (Article 8 - new Rules - correct approach) [2013] UKUT 640 (IAC). Although the Immigration Rules set out the position of the Secretary of State, with regards to the appellant's human rights claim under Article 8, and to which the Judge gave weight, they do not necessarily displace the need for assessment under Strasbourg jurisprudence, MM Lebanon [2014] EWCA Civ 985, Singh v SSHD [2015] EWCA Civ 74.
18. R (Nagre) v Secretary of State for the Home Department [2013] EWHC 720 (Admin) has been cited and specifically at paragraph 29 to the effect that
- “... the new Rules do provide better explicit coverage of the factors identified in case law as relevant to analysis of claims under Article 8 than was formerly the position, so in many cases the main points for consideration in relation to Article 8 would be addressed by decision makers applying the new Rules. It is only after doing that there remains an arguable case that there may be good grounds for granting leave to remain outside the Rules by reference to Article 8 that it will be necessary for Article 8 purposes to go on and consider whether there are compelling circumstances not sufficiently recognised under the new Rules to require the grant of such leave.”
19. This case law has been reviewed in a number of authorities and it is right to say that MF (Nigeria) v Secretary of State for the Home Department [2013] EWCA Civ 1192, confirms that the test of exceptionality is no longer to be applied. Singh at paragraph 64 states as follows:
- “In my view that is a mis-reading of Aikens LJ's observation. He was not questioning the substantial point made by Sales J. He was simply saying that it was unnecessary for the decision-maker, in approaching the "second stage", to have to decide first whether it was arguable that there was a good article 8 claim outside the Rules - that being what he calls "the intermediary test" - and then, if he decided that it was arguable, to go on to assess that claim: he should simply decide whether there was a good claim outside the Rules or not. I am not sure that I would myself have read Sales J as intending to impose any such intermediary requirement, though I agree with Aikens LJ that if he was it represents an unnecessary refinement. But what matters is that there is nothing in Aikens LJ's comment which casts doubt on Sales J's basic point that there is no need to conduct a full separate examination of article 8 outside the Rules where, in the circumstances of a particular case, all the issues have been addressed in the consideration under the Rules.”
20. Oludoyi v SSHD (Article 8 - MM (Lebanon) and Nagre) IJR [2014] UKUT 539 (IAC) confirms that there is nothing in Nagre, Gulshan or Shahzad that suggests a threshold test was being suggested as making it clear that there was a need to look at the evidence to see if there was anything that had not already been adequately considered in the context of the Immigration Rules and which could lead to a successful Article 8 claim. This is consistent with RMM and Others v SSHD [2014] EWCA. There is no prior threshold which dictates the exercise of discretion should be considered.

21. Indeed the judge referred to **R (Razgar) v SSHD [2004] UKHL 27** which sets out the five stage test to be adopted in this instance and **Huang v SSHD [2007] UKHL** specifically rejected the test of exceptional circumstances and confirmed at 20

“... 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 to a manner sufficiently serious to amount to a breach of the fundamental right protected by Article 8”.
22. As such I reject this challenge to the decision by Judge Woolley. Even if that were not the case he has indeed set out why he considered there to be compelling reasons and he identified that the removal of the appellant would either mean forcing a pregnant woman, and a British citizen, to continue her pregnancy without her husband or that she should relocate to a country where she would have very little support. As Ms Robinson pointed out at paragraph 5 of the application for permission to appeal the respondent conceded that an unborn child may be considered a compelling circumstance not sufficiently recognised by the Rules.
23. That said, unfortunately the judge set out the ruling in **Sanade and Others (British children - Zambrano - Dereci) India [2012] UKUT 48** which has been qualified by **Ogundimu (Article 8 - new Rules) Nigeria [2013] UKUT 60** to the effect that this principle only extends to British citizen spouse or partner where there is in addition a British child. At this point the judge engaged the “reasonable foreseeability of the birth of a child who will be a British citizen” which he found “must necessitate some consideration in the overall balancing exercise, even though the unborn child is not regarded in law as a separate entity from the mother”.
24. I find it difficult to accept that the judge having found that the child is not regarded in law as a separate entity from the mother that the judge was in effect able to factor in a real time consideration of a break-up by the “mother and children remaining in the UK and the father returning to India by himself” at a stage when the child was not born.
25. I therefore find an error of law.
26. That said the findings of fact are essentially preserved insofar as they relate to the circumstances of the appellant and his sponsor but there is the additional consideration on my re-making that the child is now born and was born in October 2014.
27. The appellant cannot comply with paragraph 276ADE as he has not remained in the UK for 20 years. With regards the significant obstacles it may be that he himself does not have significant barrier if he were to return alone. The issue here is the wife and child. Turning to Appendix FM, the starting point for my consideration in regards the re-making of the decision is the Immigration Rules as per **SS Congo v SSHD [2015] EWCA Civ 387**. At the hearing before me Mr Richards confirmed that the

appellant had complied with the Immigration Rules (although he noted that he could not comply with the financial requirements) and the remaining factor to be considered was EX.1. It is clear that the appellant has a genuine and subsisting parental relationship with his child who is a British citizen and the question is whether it will be reasonable for the child to leave the UK.

28. The decision of **Sanade** can now legitimately be engaged and it cannot be suggested that it would be reasonable for the child to leave the UK. As such that would necessitate the mother remaining in the UK to care for the child. Any decision must engage a consideration of Section 55 of the Borders, Citizenship and Immigration Act 2009 and this would entail the consideration of the children's best interests as a primary consideration. I stress not *the* primary consideration but a primary consideration and that does not necessarily trump all other considerations.
29. It was submitted that there was a choice for the parents to live separately but clearly this would not be in the best interests of the child who needs the financial support of the father who is currently working and it is in the best interests of the child to remain with both parents.
30. The appellant is not barred through the suitability requirements but it was considered reasonable that his partner could relocate with him. He would not be able to be considered under the parent route as he does not have sole responsibility and his wife is his partner. I also take into account Section 117B of the Nationality Immigration and Asylum Act 2002 as reflective of the Secretary of State's position in relation to proportionality. The father can speak English is earning an income and supporting his family and he himself would not be a burden on the tax payer although he does not appear to have enough income to support the whole family under Appendix FM. Those requirements have been the subject of extensive judicial scrutiny and been upheld in **MM Lebanon** [2014] EWCA Civ 985. That said the factor of EX.1 (which does not require the financial requirements to be met) and reasonability of the child leaving the UK is one of the issues here.
31. The question is whether it is reasonable, in effect, to expect the father to live separately from the mother and I note that Section 117B, section 6 states -

'117B - (6) public	In the case of a person who is not liable to deportation, the 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.'
32. The further question is whether the separation of the parents would in effect force the child to leave the UK. It was found that the appellant can succeed under the remaining Immigration Rules and I do not find that it would be reasonable to expect the child to leave the UK which is what in effect is being requested should the family wish and desire to stay together.

33. Lord Brown in **EB Kosovo** [2008] UKHL 41 reasoned as follows:

“[48] Thus the appellate immigration authority must make its own judgment and that judgment will be strongly influenced by the particular facts and circumstances of the particular case. The authority will, of course, take note of factors which have, or have not, weighed with the Strasbourg court. It will, for example, recognise that it will rarely be proportionate to uphold an order for removal of a spouse if there is a close and genuine bond with the other spouse and that spouse cannot reasonably be expected to follow the removed spouse to the country of removal, or if the effect of the order is to sever a genuine and subsisting relationship between parent and child. But cases will not ordinarily raise such stark choices, and there is in general no alternative to making a careful and informed evaluation of the facts of the particular case. The search for a hard-edged or bright-line rule to be applied to the generality of cases is incompatible with the difficult evaluative exercise which article 8 requires.”

34. **R (on the application of Chen) v SSHD (Appendix FM - Chikwamba - temporary separation - proportionality)** IJR [2015] UKUT 00189 (IAC) asserted that

“Lord Brown was not laying down a legal test when he suggested in Chikwamba that requiring a claimant to make an application for entry clearance would only “comparatively rarely” be proportionate in a case involving children (per Burnett J, as he then was, in R (Kotecha and Das v SSHD) [2011] EWHC 2070 (Admin)).”

35. And the court in **Chen** added at [37]

“In my judgement, if it is shown by an individual (the burden being upon him or her) that an application for entry clearance from abroad would be granted and that there would be significant interference with family life by temporary removal, the weight to be accorded to the formal requirement of obtaining entry clearance is reduced. In cases involving children, where removal would interfere with the child's enjoyment of family life with one or other of his or her parents whilst entry clearance is obtained, it will be easier to show that the balance on proportionality falls in favour of the claimant than in cases which do not involve children but where removal interferes with family life between parties who knowingly entered into the relationship in the knowledge that family life was being established whilst the immigration status of one party was “precarious”. In other words, in the former case, it would be easier to show that the individual's circumstances fall within the minority envisaged by the House of Lords in Huang or the exceptions referred to in judgments of the ECtHR than in the latter case. However, it all depends on the facts.”

36. In these circumstances there is a British citizen mother with a newly born British citizen child although this is not necessarily a trump card it is a factor to be borne in mind. Additionally, should the appellant return to Pakistan his employment will end and it is the fact that the mother will have to look after the child without an income. This cannot be in the child's interests and contributes to the issue of whether he should return to make an application from abroad. Following the birth of her first child and the need for medical attention I do not consider that it would be reasonable for her to remove herself from the UK even for a short period. This is not a case where the genuineness of the relationship is under scrutiny and I note the

couple have been together since 2012 and the appellant entered the UK lawfully and has remained in the UK lawfully.

37. To avoid long term separation of this family the child would in fact be expected to leave the UK. I also take into account the disruption to the family, that the wife does not speak a native language which she would need to do in India, and the child would effectively be deprived of its ability to be raised in the UK as a British citizen. The family would lose their livelihood and in the short term medical care.
38. Taking full account of all considerations, I considered that the family life of the claimant and his wife and child would be prejudiced in a manner sufficiently serious to amount to a breach of the fundamental right protected by Article 8 **Huang v Secretary of State for the Home Department [2007] UKHL 11.**
39. I therefore find that the appellant has succeeded under the Immigration Rules themselves and I therefore re-make the decision and allow the appeal.

No anonymity direction is made.

Notice of Decision

The Judge erred materially for the reasons identified. I set aside the decision pursuant to Section 12(2)(a) of the Tribunals Courts and Enforcement Act 2007 (TCE 2007) and remake the decision under section 12(2) (b) (ii) of the TCE 2007.

The appeal is allowed on Human Rights grounds.

Signed

Date 24th August 2015

Deputy Upper Tribunal Judge Rimington

TO THE RESPONDENT **FEE AWARD**

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make no fee award because at the time of the decision the child was not born and issues have become more complex than at the date of the application.

Signed

Date 24th August 2015

Deputy Upper Tribunal Judge Rimington