



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

Appeal Numbers: OA/10645/2013
OA/10646/2013
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THE IMMIGRATION ACTS

**Heard at Field House
On 9 July 2014**

**Decision & Reasons Promulgated
On 16 January 2015**

Before

**MR JUSTICE HADDON-CAVE
UPPER TRIBUNAL JUDGE CLIVE LANE**

Between

ENTRY CLEARANCE OFFICER - UNITED STATES OF AMERICA

Appellant

and

**MICHAEL SHAWNON WHITBY
STORM FREE WHITBY
SHAWN MICHAEL WHITBY
THOR WESLEY WHITBY
(ANONYMITY DIRECTION NOT MADE)**

Respondents

Representation:

For the Appellant: Mr Saunders, a Senior Home Office Presenting Officer
For the Respondents: Ms Revill, instructed by Kings Court Chambers

DECISION AND REASONS

1. The respondents, Michael Shawnon Whitby (date of birth 20 August 1968), Storm Free Whitby (date of birth 27 February 2003), Shawn Michael Whitby (date of birth 17 March 2005) and Thor Wesley Whitby (date of birth 6 September 1999) are citizens of the United States of America. We shall hereafter refer to the respondents as the appellants and to the appellants as the respondents (as they appeared respectively before the First-tier Tribunal). Further, we shall refer to the first appellant as “the appellant”. The second, third and fourth appellants are dependants upon the first appellant’s application for entry clearance. The appellant applied for entry clearance for settlement in the United Kingdom as the spouse of a British citizen (Lisa Whitby Flack – hereafter referred to as “the sponsor”). The applications were refused by a decision of the Entry Clearance Officer (ECO). The refusal notice dated 9 April 2013, reads as follows:

You have sought entry clearance to the United Kingdom as a partner under Appendix FM. However, on 22 April 2005 you were convicted of an offence for which you were sentenced to a period of imprisonment of four years. Also on 19 May 2008 you were convicted of an offence for which you were sentenced to a period of imprisonment of sixteen months. Consideration has been given to whether there are compelling factors as to why you should nevertheless be allowed entry to the UK. However, the circumstances you have put forward are not considered to amount to exceptional circumstances. I have also considered your application under Article 8 of the Human Rights Act 1998 and I am satisfied that the decision is justified and proportionate it is such that the public interest in maintaining a refusal is outweighed. I am therefore refusing your application under paragraph S-EC.1.4(a and b) and S-EC1.5 of the Immigration Rules.

2. The appellant appealed to the First-tier Tribunal (Judge Lingam) which, in a determination promulgated on 4 March 2014, dismissed the appeal under the Immigration Rules but allowed it under Article 8 ECHR. The ECO now appeals, with permission, to the Upper Tribunal.

Late Application for Permission to Appeal

3. Mr John McGirr on behalf of the ECO submitted a First-tier Tribunal application for permission to appeal to the Upper Tribunal on 19 March 2014. The application contains the following statement:

This allowed appeal was, apparently, served on 4.3.14. However, it was not received in the Home Office until 12.3.14. It is not know why there was this delay. However, it is respectfully submitted that this therefore makes today the last day to lodge an application in-time.

4. Granting permission, Judge Heynes wrote:

The respondent seeks permission to appeal, in time, against the decision of First-tier Judge Lingam who, in a determination promulgated on 4 March 2014, allowed the appeal of the appellant against the refusal of his application for entry clearance as a spouse and thus of his children.

The grounds of appeal complain that the judge failed to approach Article 8 correctly.

Though *Gulshan (Article 8-new rules-correct approach) [2013] UKUT 640 (IAC)* was quoted in the determination the guidance contained in it does not appear to have been followed in the assessment of the human rights appeal.

An arguable error of law is thus disclosed by the application.

5. Ms Revill, for the appellant, submitted that a mere assertion by Mr McGirr that the First-tier Tribunal determination had been received late, was, without further evidence, insufficient.
6. Even assuming (which we do not) that we have any jurisdiction to review the judge's decision to grant permission, we find that it is clear from that decision and his use of the expression "in time" that he accepted Mr McGirr's assertion that the determination had not reached the Home Office until 12 March 2014 and that the application had, therefore, been made in time. It was clear that he was satisfied with Mr McGirr's statement as evidence of the date of service and we could find no reason to interfere with his decision.

Ground 1: failure to identify compelling circumstances

7. Ground 1 reads as follows:

The judge erred in law by failing to identify 'an arguable case that there may be good grounds for granting leave outside the Rules by reference to Article 8' or to 'consider whether there are compelling circumstances not sufficiently recognised under the Rules to require the grant of such leave' per *Nagre* [2013] EWHC 720 (Admin).

8. The appellant's application fell to be considered under S-EC1.4. This provision had been amended from 13 December 2012 by Statement of Changes (HC 760). It provides as follows:

S-EC.1.4. The exclusion of the applicant from the UK is conducive to the public good because they have:

(a) been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 4 years; or

(b) been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 12 months but less than 4 years, unless a period of 10 years has passed since the end of the sentence; or

(c) been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 12 months, unless a period of 5 years has passed since the end of the sentence.

Where this paragraph applies, unless refusal would be contrary to the Human Rights Convention or the Convention and Protocol Relating to the Status of Refugees, it will only be

in exceptional circumstances that the public interest in maintaining refusal will be outweighed by compelling factors.

9. As the refusal notice observed, the appellant fell firmly within that category of applicant who had been sentenced to a period of imprisonment of at least twelve months but less than four years; the Rule provided for him to be excluded from the United Kingdom for a period of ten years since the end of his sentence. The grounds go on to say:

The Rules therefore 'sufficiently recognise' those in the appellant's situation. Given that the Rules sufficiently recognise the appellant's situation, compelling circumstances are required. The judge did not identify such case-specific, compelling circumstances. The degree to which circumstances are compelling further need to be addressed in the context of the public interest in denying entry to those with a criminal past.

10. Judge Lingam refers to *Gulshan* and to *Nagre* in the determination [14-15]. Then, at [16], she states simply: "I go on to deal with their appeal (*sic*) under Article 8 of the ECHR."
11. At the hearing on 9 July 2014, we directed that both parties file at the Tribunal and serve upon each other written submissions addressing this ground of appeal. The Upper Tribunal has received written submissions from Ms Revill; no submissions have been received from the respondent.
12. The Court of Appeal in *MM* [2014] EWCA Civ 985 (a judgment delivered on 11 July 2014, two days after the Upper Tribunal in the instant appeal and before we received Ms Revill's submissions) contains a helpful summary of the relevant authorities, in particular at [130-135]:

130. The next case on this topic is *MF(Nigeria) v SSHD*.^[141] New paragraphs 398, 399, 399A and 399B of the IRs were introduced in July 2012 and set out criteria by reference to which the right to respect for a person's private and family life under *Article 8* was to be assessed in criminal deportation cases. In the Court of Appeal, Lord Dyson MR gave the judgment of the court. The court held that the new rules constituted a "comprehensive code" of criteria by which to determine whether or not a "foreign criminal" who would otherwise be liable to deportation under the terms of *section 32(4)* of the *UKBA 2009* and *section 3(5)* of the 1971 Act might be permitted to remain in the UK on *Article 8* grounds.^[142] The consequence of this conclusion is that any claim by a "foreign criminal" to remain in the UK on *Article 8* grounds has to be considered in accordance with the new rules 398, 399 and 399A. This involves a "two stage" test: does the "foreign criminal's" case come within rule 399 or 399A; if not, then does he fall within the circumstances as set out in rule 398, as construed by the Court of Appeal.^[143] The other point to note is that Lord Dyson MR specifically referred to the analysis of Lord Bingham at [17] of *Huang* and endorsed it.

131. We did not specifically hear argument on whether the new MIR together with the Guidance constituted a "comprehensive code". But whether or not they do makes no difference, on the analysis of the Master of the Rolls in *MF(Nigeria)*.

This is because, as he said at [45], in any event it would be necessary to apply a "proportionality test" with regard to the "exceptional circumstances" guidance in order to be compatible with the Convention and in compliance with *Huang* at [20].^[144]

132. The last case to consider under this heading is *SSHD v Shahzad*.^[145] It concerned a student who had made a renewed application for leave to remain in the UK as a Tier 4 (General) Student migrant under the Points Based System. As such the IRs required that he demonstrate that he had private financial support from a parent or legal guardian, which the applicant could not do. The FTT had, nonetheless, allowed his appeal from the refusal of the SSHD's decision not to grant leave to remain, doing so on *Article 8* grounds. The SSHD appealed to the UT and (effectively) her appeal was allowed.^[146] For present purposes the important conclusions of the UT are: (1) *MF(Nigeria)* did not rule that all other provisions of the new IRs constituted a "complete code" on how to consider *Article 8* rights of applicants in relation to the IR concerned in that particular case; (2) where an area of the Rules does contain an express provision requiring consideration in the *Article 8* context of "exceptional circumstances" and "other factors" it would constitute such a "complete code"; (3) where an area of the IRs does not have such an express mechanism, the approach in *Nagre*^[147] should be followed: "ie. after applying the requirements of the Rules, only if there may be arguably good grounds for granting leave to remain outside them is it necessary for *Article 8* purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under them".^[148]
133. What is the upshot of all these decisions? First, the Secretary of State plainly is under a common law duty not to promulgate an IR that is discriminatory, manifestly unjust, made in bad faith or involves "such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men". If she does promulgate such an IR, it can be struck down or the offending part can be severed. Secondly, I think that *Huang, Baijai, Quila* and *Bibi* all support the proposition that it is the duty of the Secretary of State to formulate an IR in a way that means that even if it does interfere with a relevant Convention right, it has to be capable of doing so in a manner which is not inherently disproportionate or inherently unfair. Otherwise it will not be "rational", or it could be stigmatised as being "arbitrary" or objectionable",^[149] or be characterised as being "arbitrary and unjust".^[150] Thirdly, the analysis of the Supreme Court in *Quila* and of this Court in *Bibi* make it clear that if the relevant IR is challenged as being contrary to a Convention right, then the *Huang* tests have to be applied. The only difference, when it is an IR that is being challenged in principle, as opposed to an individual *Article 8* decision, is that the "proportionality" questions have to be considered in principle. In that case, it seems to me the test must be whether, assuming the relevant IR constitutes an interference with a Convention right, the IR and its application to particular cases, would be inherently disproportionate or unfair. Another way of putting the test is whether the IR is incapable of being proportionate and so is inherently unjustified.
134. Where does that leave the statements made in the *AM(Ethiopia), Pankina* and *Nagre* line of cases, viz. that the Secretary of State's duty is to protect an

immigrant's Convention rights whether or not that is done through the medium of the IRs so that "it follows that the Rules are not of themselves required to guarantee compliance with the [relevant Article]".^[151] I think that the reconciliation must be along the following lines: first, Laws LJ was dealing with the principles of construction of IRs. IRs are not to be construed upon the presumption that they will guarantee compliance with the relevant Convention right. Secondly, therefore, a particular IR does not, in each case, have to result in a person's Convention rights being "guaranteed". In a particular case, an IR may result in a person's Convention rights being interfered with in a manner which is not proportionate or justifiable on the facts of that case. That will not make the IR unlawful. But if the particular IR is one which, being an interference with the relevant Convention right, is also incapable of being applied in a manner which is proportionate or justifiable or is disproportionate in all (or nearly all cases), then it is unlawful.

135. Where the relevant group of IRs, upon their proper construction, provide a "complete code" for dealing with a person's Convention rights in the context of a particular IR or statutory provision, such as in the case of "foreign criminals",^[152] then the balancing exercise and the way the various factors are to be taken into account in an individual case must be done in accordance with that code, although references to "exceptional circumstances" in the code will nonetheless entail a proportionality exercise.^[153] But if the relevant group of IRs is not such a "complete code" then the proportionality test will be more at large, albeit guided by the *Huang* tests and UK and Strasbourg case law.^[154]

13. Ms Revill submits that S-EC1.4 provides for a "comprehensive code" similar to that provision in the Immigration Rules for those who are liable to automatic deportation. Indeed, we observe that S-EC1.4 does not simply provide (as the deportation provisions of paragraph 398 and 399A provide) an "exceptional circumstances" provision but rather makes explicit the requirement for a decision maker to consider the ECHR. In this context, we also note that the Court of Appeal in *MF (Nigeria) [2013] EWCA Civ 1192* made clear that an analysis of "exceptional circumstances" should produce the same result as the application to the same facts of Article 8 ECHR jurisprudence.
14. We agree with Ms Revill's submission. The wording of the last part of S-EC1.4 could not be more clear. It provides that the specific provisions of the Rule be applied followed then by an assessment as to whether the Human Rights Convention or the Refugee Convention would be breached by excluding an applicant and then for a consideration of any "exceptional circumstances". Following the ratio of *MF*, the last stage of that process would appear to be nugatory given that a proper assessment of an applicant's human rights and "exceptional circumstances" should produce the same result.
15. In consequence, we find that ground 1 is without merit. The respondent is suggesting that the judge erred because she failed to identify "case-specific compelling circumstances" which would entitle her to consider the appeal on Article 8 ECHR grounds. First, such an approach would be contrary to the wording of the

Rule itself which makes specific reference to the Human Rights Convention. Secondly, the requirement to pass through a “compelling circumstances” threshold was considered unnecessary by the Court of Appeal in *MM* at [129]:

Sales J's decision therefore follows the logic of Laws LJ's statements in [38]-[39] of *AM(Ethiopia)*, analysed above. However, there is a difference in that in *Nagre* the new rules were themselves attempting to cover, generally, circumstances where an individual should be allowed to remain in the UK on *Article 8* grounds; whereas in *AM(Ethiopia)* and in the present appeals the rule challenged stipulates a particular requirement that has to be fulfilled before the applicant will be allowed to enter or remain. The argument in each case is that it is that specific requirement that offends *Article 8*. *Nagre* does not add anything to the debate, save for the statement that if a particular person is outside the rule then he has to demonstrate, as a preliminary to a consideration outside the rule, that he has an arguable case that there may be good grounds for granting leave to remain outside the rules. I cannot see much utility in imposing this further, intermediary, test. If the applicant cannot satisfy the rule, then there either is or there is not a further *Article 8* claim. That will have to be determined by the relevant decision-maker.

16. Accordingly, we find that Judge Lingam was required by the correct application of S-EC1.4 to consider the appeal on Article 8 grounds.

Ground 2: Failure to Consider the Appellant's Precarious Immigration Status in the Evaluation of Proportionality

17. The respondent relies on *Rodrigues Da Silva* [2007] 44 EHRR 34 at [39]:

The Court reiterates that in the context of both positive and negative obligations the State must strike a fair balance between the competing interests of the individual and of the community as a whole. However, in both contexts the State enjoys a certain margin of appreciation. Moreover, Article 8 does not entail a general obligation for a State to respect immigrants' choice of the country of their residence and to authorise family reunion in its territory. Nevertheless, in a case which concerns family life as well as immigration, the extent of a State's obligations to admit to its territory relatives of persons residing there will vary according to the particular circumstances of the persons involved and the general interest (see *Gül v. Switzerland*, judgment of 19 February 1996, *Reports* 1996-I, pp. 174-75, § 38). Factors to be taken into account in this context are the extent to which family life is effectively ruptured, the extent of the ties in the Contracting State, whether there are insurmountable obstacles in the way of the family living in the country of origin of one or more of them, whether there are factors of immigration control (e.g. a history of breaches of immigration law) or considerations of public order weighing in favour of exclusion (see *Solomon v. the Netherlands* (dec.), no. 44328/98, 5 September 2000). Another important consideration will also be whether family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host state would from the outset be precarious. The Court has previously held that where this is the case it is likely only to be in the most exceptional circumstances that the removal of the non-national family member will constitute a violation of Article 8 (*Mitchell v. the United Kingdom* (dec.), no. 40447/98, 24 November 1998, and *Ajayi and Others v. the United Kingdom* (dec.), no. 27663/95, 22 June 1999).

18. In the grounds of appeal, the respondent asserts that “the relationship between the sponsor and first appellant began when the sponsor was in the USA for a holiday. It continued by means of visits by the sponsor to the USA. It must therefore have been well-known to all parties that the relationship could be frustrated by a lawful immigration decision. Accordingly, the weight to be placed on the family life between sponsor and appellants is diminished. The judge failed to consider this relevant consideration.”
19. Mr Saunders, for the respondent, told us that the respondent did not accept that the appellants had formed a family life with the sponsor in the United Kingdom. That submission is at odds with Judge Lingam’s statement at [23] that “it is not contested that the appellant and the sponsor formed an Article 8 family life.” We note from the refusal notice that, for the purposes of EC-P.1.1(d) (Eligibility for entry clearance as a partner) the refusal notice records that the appellant “meets relationship requirements.” We note also that the application for permission to appeal contains no suggestion that the respondent took issue with the judge’s statement that both parties agreed that family life existed. We are satisfied that the judge’s statement is accurate.
20. The judge did not refer to the precise circumstances in which the relationship between the appellant and sponsor had developed. However, we are satisfied that the judge’s analysis of Article 8 ECHR represents a sufficient assessment of all the relevant circumstances. We are not persuaded that the judge’s failure to refer in the determination to a circumstance of which she was patently aware constitutes an error of law or one so serious that it would justify setting aside her determination. Except for the one respect referred to in ground 2, the respondent does not otherwise take issue in the grounds with the judge’s Article 8 analysis. In our opinion the judge was required by S-EC1.4 to consider Article 8 ECHR and she reached an outcome which was open to her on the evidence. We accept that a differently constituted Tribunal may have come to a different decision but that is not the point. In the circumstances, the respondent’s appeal is dismissed.

NOTICE OF DECISION

21. This appeal is dismissed.

No anonymity direction is made.

Signed

Date 15 January 2015

Upper Tribunal Judge Clive Lane