Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: OA/14438/2013
OA/14440/2013

THE IMMIGRATION ACTS

Heard at Glasgow	**Determination Promulgated**
on 17th February 2015	**on 23rd February 2015**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

ENTRY CLEARANCE OFFICER, ISLAMABAD

Appellant

and

MUHAMMED SIBTAIN &
MUHAMMAD HASNAIN

Respondents

Representation:
For the Appellant: Mrs M O'Brien, Senior Presenting Officer
For the Respondents: Mr D Byrne, Advocate, instructed by Drummond Miller, Solicitors

DETERMINATION AND REASONS

1. This determination remakes the decisions in the appeals brought to the First-tier Tribunal by Muhammed Sibtain and Muhammad Hasnain ("the claimants") against decisions of the Entry Clearance Officer at Islamabad ("the ECO") dated 5th and 6th June 2013.

2. The decision by Upper Tribunal Judge Dawson dated 5th and issued on 11th September 2014 should be treated as an appendix to this determination. It explains why the determinations of First-tier Tribunal Judge Lea have been set aside for error of law. For avoidance of delay, a transfer order was made for the hearing of the appeals in the Upper Tribunal to be completed by a judge other than Judge Dawson.

3. The facts are set out in the determinations of Judge Lea and the decision of Judge Dawson. In short, the claimants are two brothers, citizens of Pakistan. On 23 April 2009 they married two sisters (the sponsors), also of Pakistani origin, who came to the UK in 2005 and gained citizenship in 2006. The first claimant and his wife have two children, born on 30th December 2009 and on 14th May 2011. The second claimant and his wife have one child, born on 1st July 2011. The sponsors have visited their husbands in Pakistan but have remained generally resident in the UK. The sponsors depend on public funds. The claimants cannot satisfy the financial requirements of Appendix FM of the Immigration Rules for entry to the UK. They invoke Article 8 of the ECHR, outwith the Immigration Rules.

4. The claimants submitted a notice under Rule 15(2A) with updating statements by the sponsors. Mrs O'Brien opposed admission of further evidence, on the basis that entry clearance cases fall to be resolved as at the date of the decisions by the ECO not only as to the Rules but also as to Article 8. Mr Byrne accepted that the relevant date is that of the decisions by the ECO but contended that the supplementary statements could cast light on the circumstances as then existing. Mrs O'Brien indicated that she would not wish to cross-examine either of the sponsors. I admitted their statements into evidence. Neither party in submissions relied on anything in the supplementary statements. The important facts underlying the plain question whether the claimants have a right to enter the UK under Article 8 of the ECHR have not changed.

Submissions for Claimants

5. A decision which separates parents from children is unusually stark and rarely proportionate: *EB (Kosovo)* [2009] 1 AC 1159 at paragraph 12.

6. The ECO and the Tribunal cannot proceed on the footing that UK spouses and children should leave the territory of the European Union to maintain their family life: *Sanade* [2012] UKUT 48 (IAC).

7. Paragraph EX1 of the Immigration Rules is a relevant factor when assessing proportionality outside the Rules: *MS* [2013] CSIH 52 at paragraph 30.

8. Appendix FM and EX1 would ask, if the claimants were in the UK, whether it was reasonable to expect the UK citizen children to leave the UK.

9. Section 117B(6) of the 2002 Act provides that the public interest does not require removal of a person who is not liable to deportation where that person has a genuine and subsisting parental relationship with a UK citizen child and it would not be reasonable to expect the child to leave the UK.

10. The distinction between entry and removal cases for Article 8 purposes is not material, and both require the same proportionality assessment: *Quila* [2012] 1 AC 621 at paragraph 43.

11. The Rules for entry clearance do not have a "safety valve" equivalent to paragraph EX1, nor is there a provision to look outside the Rules. As the Rules in this respect are not a "complete code" the proportionality test is "more at large": *MM* [2014] EWCA Civ 985 at 130 – 135.

12. The minimum income requirement in the Rules is not unlawful or in breach of section 55 from the 2009 Act (the need to safeguard and promote the welfare of children in the UK) but that does not resolve the need to conduct an assessment: *MM* at paragraph 162.

13. Based on that legal framework, Mr Byrne argued that the decisions give rise to a colossal interference with family life. There could be no premise that the sponsors and children might leave the EU to live in Pakistan. The interference was contrary to the best interests of the children to live within their family unit. There was no feature to justify such a separation and to make this one of those rare cases which both severs a genuine bond between spouses and a genuine bond between parents and children. There was no practical distinction between separations arising through expulsion and through refusal of entry, the consequences being of equal gravity. It would be artificial to exclude reference to paragraph EX1 of the Rules and section 117B of the 2002 Act as setting out the Government's position on what constitutes proportionality. It was not reasonable for the children to be required to leave the UK. Materially lower living conditions in Pakistan and discrimination against women, matters shown by background evidence and within the knowledge of the Tribunal, were significant further factors. Although the public interest prescribes a minimum level of income within the Rules, the Tribunal was entitled to have regard to the underlying reality in this particular case. The claimants had expressed a credible and realistic intention to work in the UK and not to constitute a public burden. In the circumstances of the case the decisions to refuse entry clearance were disproportionate.

Submissions for ECO

14. In accordance with the now settled authorities on the interaction of the Immigration Rules and Article 8 of the ECHR, the first question for the Tribunal was whether there was any good reason to look outside the Immigration Rules at all. This case disclosed no particular facts such as to constitute an unjustifiably harsh outcome. Similar instances would be numerous. The circumstances were not exceptional or compelling but representative of what the Rules are designed to govern. UK spouses who choose to marry and found a family with persons who are not EU residents are not entitled to assume that their future family life may be carried on in the UK without meeting the minimum income thresholds provided in the Rules for recognised public purposes.

15. The Rules in this area do not include a provision for exceptional circumstances such as paragraph EX1, but it was accepted that an ECO must always consider whether there are circumstances requiring separate

consideration under Article 8. At this point in submissions reference was made to the original decisions. Neither of them contains any reference to Article 8. Mrs O'Brien said that was a flaw in the decision making but an immaterial one because the obvious answer is that this case is not exceptional but typical. There was nothing to require the ECO or the Tribunal to proceed to an Article 8 assessment outside the Rules.

16. Paragraph EX1 was not to be extended into these cases. In *SM* [2014] CSIH 98 at paragraph 19 the opinion of Lady Clark of Calton, refusing an application for leave to appeal, was emphatically against such an argument:

> No sound legal basis was put before me to explain why there was or should be some read across from Rules relating to 'in-country' applications to Rules relating to 'out of country' applications ... the assertion was not based on any legal principle and defied common sense.

17. The family units in the present case have only ever existed in their present form and not in the UK. Refusal of entry clearance simply maintained the status quo. The situation was the choice of the parties, not interference by state decision, and so did not engage Article 8.

18. Even if the cases were to be looked at outside the Rules non-compliance with the minimum income requirements was a very weighty factor in the public interest. The aspirations of the claimants to become financially self-sustaining were irrelevant, and in any event insubstantial. The evidence pointed to an additional burden on the taxpayer.

19. It was not always unreasonable to anticipate that UK citizens including children might relocate elsewhere, but that was a matter for family choice not a requirement of the respondent.

20. Section 117B(6) of the 2002 Act was not a complete statement of where the public interest might lie in a case not involving deportation; there would still be a wider balancing exercise. In any event that was not relevant to this case because it does not apply in a refusal of entry case. Although section 55 of the 2009 Act required promotion of the welfare of children in the UK that was not a trump card to overturn the minimum income requirements, on the authority of *MM*.

Reply for Claimants

21. Mr Byrne said that the case for the ECO fundamentally rested on drawing a distinction between expulsion and entry cases, and while that existed in the Rules, it could not properly arise in a proportionality exercise outside the Rules, on the authority in particular of *Quila* (although he accepted that that case was decided prior to the major amendment of the Rules in 2012). There being no such distinction to be observed, the proportionality balance clearly fell in favour of the claimants.

Discussion and Conclusions

22. I tend to doubt whether section 117B(6) is subject to public interest considerations outside its own terms, as Mrs O'Brien contended. That does not seem to be its plain reading. The point may remain to be resolved, but it does not bear on this case.

23. There is no good basis for reading “in country” provisions across into “out of country” cases. That would be a far-reaching attack on the whole scheme of the Rules. In *SM* Lady Clark was emphatically against it. While Mr Byrne suggested that might have been because the legal foundation had not been laid, I do not think that he succeeded in laying any such foundation either. The proposition is not supported by *MS* or by any other cases relating to the Rules as from July 2012. The distinction is built into the statute. Section 117B(6) is about cases not requiring removal and by clear implication it is not about cases requiring entry.

24. *Quila* was decided before the amendments of the Rules in July 2012. Its effect is not as far-reaching as Mr Byrne contended. If there was no major distinction between entry and removal cases previously (which may be doubtful, but on which I need not express any view) such a distinction is now drawn in statute, in the Rules, and in case law.

25. *MM* deals with the issue:

> **XIV Issue Seven: Is there a separate ground of objection to the new MIR based on *section 55* of the 2009 Act?**
>
> 162. Mr Drabble was correct to identify the two stages at which the duty imposed by ***section 55*** on the Secretary of State arises; first, when the new rules are being formulated and, secondly, when individual decisions are being made. The present cases are only concerned with the first stage. Mr Drabble submitted that the Secretary of State was under a duty to ensure that the new rules established a framework whereby the best interests of a child in the UK would be capable of being considered when necessary in two particular classes of case. As noted above these are cases where a child is in the UK as a citizen or has leave to remain and a non-EEA partner is attempting to obtain leave to enter or remain and cases where a child is in the UK whose parent is a refugee or has been granted HP and the non-EEA partner wishes to join them in the UK.
>
> 163. I accept that Mr Drabble's general proposition must be correct, but in my view Mr Drabble's argument that the Secretary of State has not fulfilled her duty is not sustainable. First, paragraph GEN.1.1 of Appendix FM states that the provision of the family route "takes into account the need to safeguard and promote the welfare of children in the UK", which indicates that the Secretary of State has had regard to the statutory duty. Secondly, there is no legal requirement that the IRs should provide that the best interests of the child should be determinative. ***Section 55*** is not a "trump card" to be played whenever the interests of a child arise. Thus, thirdly, the new MIR are only a part of requirements set out in Appendix FM, but an important part. If a child in the UK is to be joined by a non-EEA partner under the "partner rules" (as compared with those under E-LTRPT.2.3) then it is reasonable to require, for the child's best interests, that there be adequate financial provision for the unit of which the child will be a part if the non-EEA partner joins it. If the financial requirements are otherwise judged to be lawful, then, on the financial front, that must mean the ***section 55*** duty has been discharged in framing the relevant IR. Fourthly, the amended IRs specifically stipulate that where the applicant has sole parental responsibility the welfare of children in the UK or fulfils the other requirements of E-LTRPT.2.3 of Appendix FM, the new MIR are not applicable, because the applicant need only provide evidence that they will be able adequately to maintain and accommodate themselves and any dependants in the UK without recourse to public funds. As Blake J pointed out at [116] these different provisions reflect a policy that a minimum income requirement is inappropriate when it is in the best interests of a child that a parent or carer should be admitted to look after a child in the UK and there are adequate funds and accommodation for that purpose (and any dependants joining the carer).

> 164. These appeals are not dealing with individual cases where the new MIR might produce a harsh result in relation to a child in the UK. The way that the "Exceptional circumstances" provision and ***Article 8*** will work in those individual cases is not for decision now.

26. The present cases are not at the rule formulation but at the individual decision stage. *MM* held that the financial requirements governing entry of non-EEA citizen spouses to the UK were not a disproportionate interference with Article 8 rights. The Court recognised that the financial requirements did constitute a significant interference with Article 8 rights, but found that the Rules struck a fair balance with which the Court was not entitled to interfere. That analysis applies also to cases involving children.

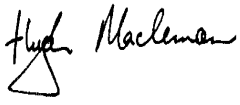
27. Mr Byrne in his clearly constructed argument was careful not to pose a challenge to the Rules themselves, but at bottom the appeals by the claimants could not succeed without setting the Rules aside in a way which would apply to all such cases. I find the submissions for the respondent preferable.

28. The sponsors and their children depend entirely on state benefits. The Rules for entry of spouses contemplate cases which also involve children, to which they apply additional financial requirements. The present cases are not rare but typical of situations which the Rules seek to govern. There is nothing significant or exceptional to distinguish them from thousands of others where claimants wish to join wives and children in the UK and where the minimum income requirements of the Rules cannot be met. The claimants have made no good arguable case that they have the right to enter the UK outside the requirements of the Rules.

29. If the cases were to pass that intermediate test then, for the like reasons, the ECO's decisions have not been shown to have an unjustifiably harsh or disproportionate outcome.

30. The two determinations of the First-tier Tribunal have been **set aside**, for the reasons given by UT Judge Dawson. The decisions substituted are that both appeals, as brought by the claimants to the First-tier Tribunal, are **dismissed**.

31. No anonymity directions have been requested or made.



Upper Tribunal Judge Macleman
20 February 2015