



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/09509/2013

THE IMMIGRATION ACTS

Heard at Field House
On 21 November 2013

Determination Promulgated
On 6 December 2013

Before

**Lord Matthews
Sitting as a Judge of the Upper Tribunal
Upper Tribunal Judge Reeds**

Between

MUHAMMAD USMAN

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss C H Bexson, Counsel instructed by Ali Sinclair Solicitors
For the Respondent: Mr G Saunders, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a male citizen of Pakistan born on 11 September 1984. He is the husband of the sponsor, Ifara Ayub whom he married on 8 December 2011 at Ealing Town Hall Registry Office. There was subsequently an Islamic marriage ceremony

on 23 July 2012 when a Nikah certificate was issued by the Imam of the West London Islamic Centre.

2. He arrived in the United Kingdom on 27 March 2011 on a student visa whose expiry was 11 August 2012. While in the UK he built up a relationship with his now wife, who is a British citizen. An application for further leave to remain was sent to the UK Border Agency by his solicitors on 7 August 2012. The application was both in terms of paragraph 295D of the Immigration Rules and under reference to Article 8 of the European Convention on Human Rights and Fundamental Freedoms. His application was refused on 4 March 2013.
3. The refusal letter indicated that he failed to meet the requirements of the Immigration Rules in a number of respects. He had provided a speaking test certificate as evidence of meeting the English Language Test but had not provided any certification in respect of the listening test. Furthermore he was unable to meet the financial requirements of the Rules.
4. The Article 8 claim was considered in terms of Appendix FM of the Rules which it was said govern such matters from 9 July 2012. It was said that the appellant was unable to meet the requirements of the exceptions paragraph EX.1 of Appendix FM. At that time at least he did not have a genuine and subsisting parental relationship with a child under the age of 18 years who was in the UK and who was a British citizen or who had lived in the UK continuously for at least seven immediately preceding the date of application. It was not accepted that there were any insurmountable obstacles which would prevent him from continuing his family life outside the UK in Pakistan.
5. An appeal against that decision was dealt with in the First-tier Tribunal on 8 July 2013, the determination refusing the appeal being promulgated on 22 August 2013. In the interim a female child, who is a British citizen, was born to the sponsor and the appellant on 24 July 2013.
6. Evidence was led before the First-tier Tribunal. The sponsor was found to be a credible young woman and it was accepted that the couple married as previously indicated. It was found that she continued to live in her parents' home and that they were initially unaware of the marriage. The evidence disclosed that at the end of November 2012 she and the appellant told her parents of their marriage, showed them their marriage certificate and informed them that she was in the early stages of pregnancy. Her parents were understandably displeased and told her to leave. The following day, on 1 December 2012, the sponsor left her parental home and went to live with her husband at the home of a friend. Before this they had not lived together after their marriage as a family unit. The First-tier Tribunal found and indeed it was accepted by all parties that the appeal could not succeed under the Immigration Rules. There was something of a discrepancy in relation to the certification of the English language requirements but in any event the maintenance provisions could not be met. The only hope within the Rules was to rely upon exceptional

circumstances under paragraph EX.1(b) of Appendix FM on the basis that the sponsor was a UK citizen born and brought up in the UK but now rejected by her family and estranged from them because of her clandestine marriage and pregnancy.

7. The First-tier Tribunal found that there were no exceptional circumstances or any insurmountable obstacles to her continuing her life with the appellant in Pakistan if she chose to go there. It would not be unreasonable to expect her to live there with her husband and in-laws and where she had some family members by marriage. It was pointed out that she had already spent approximately 18 months in total in that country, spread over several visits lasting a few months at a time. It was indeed at one of these family gatherings that she first met her husband. It was found that the couple were both clearly well used to living in Pakistan and it was open to the sponsor either to go with her husband or to stay in the UK, which she was perfectly entitled to do.
8. The First-tier Tribunal went on to consider the claim under Article 8. The respondent did not accept that removal of the appellant would necessarily interfere with the family life he had established with his wife since the time she left her parents' home as they could relocate together if they chose to do so. Alternatively there was nothing to stop the sponsor from travelling from time to time to visit her husband in Pakistan. It is said in paragraph 72 of the determination that the removal decision as such causes no interference with the couple's family life. It is not entirely clear whether that is a finding made by the Tribunal or whether it merely records the submissions by the respondent but our view is that the comment falls into the former category. As such it is difficult to justify the comment. It may well be that all the First-tier Tribunal was saying was that the decision itself has not interfered with the family life. It would be the consequences of the decision which would do so should for example the parties require to be separated or should the sponsor decide to go with the appellant to Pakistan. Even if that was the thinking behind the comment it is, with respect, somewhat disingenuous.
9. However, the First-tier Tribunal went on to consider any interference with the appellant's private life. It was found that he had established private life in the UK and that his removal would constitute an interference with the respect due to that. However, the Tribunal found that the friends who attended on his behalf shared his ethnicity or were married to members of his family and it was likely they would either return to Pakistan themselves, depending on their immigration status, or at least go there for a prolonged period of visit. It would be possible for the appellant to keep in touch with them. His removal was found to be proportionate.
10. It was found, as was the case, that there were no children but the First-tier Tribunal purported to go on to consider the best interests of any future children. It was said that any such children would be able to visit the United Kingdom, funds permitting. It was well known that children move countries and continents with their parents all the time and no-one had suggested that such wider experience of life was harmful. If they were in Pakistan both their parents would be able to work lawfully so that

family life would be placed on a secure footing rather than their having to suffer the economic uncertainties which had beset them in the UK, where the appellant had limited entitlement to work while pursuing his studies and the sponsor was currently on unpaid maternity leave from her job as a cashier in the butcher's. The family would accordingly be better off, whether or not in absolute material terms. They would also be likely to have support from the appellant's parents, particularly if their son's child was born there.

11. It was found however that there could be no consideration of where the best interests of the children lay given that the appellant was not able to satisfy the Immigration Rules and the child was unborn. Reference was made to Miah and Ors v SSHD [2012] EWCA Civ 261 on the basis that being a near miss could not assist.
12. At paragraph 80 the First-tier Tribunal said the following:

“80. It seems to me, particularly bearing in mind the minimal level of interference evidenced as being caused in this case by the family unit choosing to relocate – as a whole, that the respondent can justify any such interference with the maintenance of an effective immigration policy, a legitimate objective”
13. The appellant now appeals against the decision of the First-tier Tribunal. The first ground is that the First-tier Tribunal were wrong in finding that there were no insurmountable obstacles to the appellant and his wife going to live in Pakistan, nor was it unreasonable for the sponsor so to do. It is said that the fact that she spent a total of 18 months in Pakistan spread over a number of visits was translated by the judge into a conclusion that the sponsor was clearly well used to living in Pakistan. There was no consideration of the fact that the sponsor was born in the United Kingdom in 1990 and had lived her entire life here, the total of her visits to Pakistan amounting to only a tiny fraction of her life. Visiting a country for a limited period was not comparable to living there permanently. The position of women in Pakistan was notoriously very much worse than in the United Kingdom.
14. Before us Miss Bexson re-iterated this ground but Mr Saunders for the respondent pointed out that the permission to appeal did not allow that matter to be argued.
15. We can deal with this point fairly briefly. Leaving aside any question of the construction of the permission to appeal, it appears to us that the question of “insurmountable obstacles” is one of fact and degree to be determined according to the particular circumstances of each case. In our opinion it cannot be said that the First-tier Tribunal was not entitled to reach the view it did and we find no substance in this ground.
16. The grounds go on to argue that the First-tier Tribunal had simply failed to engage with the interference with family life which was sufficient to undermine her conclusions on Article 8. It was pointed out, as we have indicated, that at paragraph 72 the First-tier Tribunal Judge held that the decision caused no interference with family life. Since the appellant and his spouse were presently living together in the

United Kingdom and the decision would lead to his departure from the country that conclusion was incomprehensible.

17. We did not hear any argument on this point but it seems to us that there is obvious merit in it. In the first place it is difficult to avoid the conclusion, as we have indicated previously, that there would be clear interference with the family life of the appellant and his sponsor. The First-tier Tribunal at one stage in the determination indicated that there was no such interference but at paragraph 80 went on to describe it as minimal. The consequences of the appellant's removal will be either that the sponsor, a British citizen born and raised in the United Kingdom, will either relocate to Pakistan with the appellant or else the genuine and subsisting relationship which they have will be broken up to all intents and purposes for an indeterminate period. We consider that it is an error of law to describe that as "minimal interference".
18. Another matter causes us concern. It is pointed out in the grounds that the First-tier Tribunal purported to consider the best interests of future children while at the same time finding that there were no children and thus no best interests to consider. It is said that she failed adequately to consider that the sponsor was expecting the couple's first child and was very shortly to give birth to a child who would be entitled to British citizenship. A failure to consider the best interests of an imminent child was wholly unrealistic. Dismissing the drawbacks for a British child of being raised in Pakistan was the alternative to separation from birth from its father on the basis that the child could visit his country of nationality, funds permitting, was an inadequate approach to its best interests.
19. Mr Saunders on the other hand pointed out that, while everyone hoped that there would be no difficulties with the birth of a child, there was good reason not to consider a child who was not yet born. It was open now to the sponsor to go to the Secretary of State on the basis that things had changed. The judge had properly looked at the circumstances as they were and had not fallen into error.
20. We find ourselves having a great deal of sympathy with the argument for the respondent. The judge had to make a decision as at the date of decision and there is authority that the child *in utero* is to be left out of consideration. The judge however purported to go on to consider the interests of a future child. In doing so she failed to address the point that such a child, whose birth was plainly imminent, would be a British citizen and there was no engagement at all with the principles set out in Zambrano. It might be said that everything said about future children was completely irrelevant to her decision on the merits of the case but in our opinion she should have adopted a more pragmatic approach to what was about to happen and in any event, having embarked upon the discussion, she should have done so having regard to the applicable principles. With some hesitation we find that in the particular circumstances of this case this amounted to an error of law also. We do not consider that the case of Miah is of any assistance in these circumstances as the case dealt with a "near miss" under the Immigration Rules.

21. We considered whether it would be appropriate for the Upper Tribunal to re-make the decision in the circumstances which have now arisen. Whilst it is not in the ordinary practice of the Tribunal to remit cases to the First-tier Tribunal, there are reasons why in this case such a course should be adopted, having given particular regard to the overriding objective of the efficient disposal of appeals and that there are issues of fact that are central to this appeal that require determination which have not been taken into account or assessed when the case was before the First-tier Tribunal. In that sense the case falls within the Practice Statement at paragraph 7.2(b) (as amended).
22. Therefore the decision of the First-tier Tribunal is set aside, none of the findings shall stand and the case is to be remitted to the First-tier Tribunal for a hearing in accordance with Section 12(2)(b) of the Tribunals, Courts and Enforcement Act at paragraph 7.2 of the Practice Statement of 10th February 2010 (as amended).

Decision

23. The decision of the First-tier Tribunal involved the making of an error on a point of law. The decision of the First-tier Tribunal is set aside and the appeal is remitted to the First-tier Tribunal as set out in the preceding paragraph.

LORD MATTHEWS
Sitting as an Upper Tribunal Judge
(Immigration and Asylum Chamber)
Date: 25 November 2013