



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

Appeal Number: IA/40527/2013

THE IMMIGRATION ACTS

Heard at Sheldon Court Birmingham

Determination

Promulgated

On 22nd September 2014

On 6th October 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

**SARFARAZ NAWAZ
(ANONYMITY ORDER NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss E Rutherford of Counsel instructed by Wornham & Co Solicitors

For the Respondent: Mr N Smart, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

Introduction and Background

1. The Appellant appeals against a determination of Judge of the First-tier Tribunal Broe promulgated on 20th March 2014.

2. The Appellant is a male citizen of Pakistan born 1st January 1985 who arrived in the United Kingdom as a student in February 2009. His leave to remain expired on 20th June 2012 and he overstayed and married a British citizen.
3. In June 2013 the Appellant applied for leave to remain, relying upon Article 8 of the 1950 European Convention on Human Rights (the 1950 Convention) on the basis that he had established family and private life in the United Kingdom. This application was refused on 9th August 2013 with no right of appeal, as the Appellant did not have any leave to remain when he made the application. The Respondent thereafter issued a decision to remove the Appellant from the United Kingdom dated 16th September 2013, which carried a right of appeal, and the Appellant duly exercised that right of appeal.
4. The appeal was heard by Judge Broe (the judge) on 24th February 2014. The judge accepted that the Appellant was married to a British citizen, and that the relationship is genuine and subsisting. The judge dismissed the appeal with reference to EX.1.(b) of Appendix FM, and went on to consider Article 8 outside the Immigration Rules, and also dismissed the appeal on that basis.
5. The Appellant applied for permission to appeal to the Upper Tribunal, and permission to appeal was refused by Judge of the First-tier Tribunal Levin on 1st May 2014. The application for permission was renewed, relying on three grounds. In summary it was firstly contended that the judge had failed to consider material matters, by failing to have proper regard to the rights of the Appellant's spouse as a British citizen. Reliance was placed upon MM [2013] EWHC 1900 (Admin) and Mansoor [2011] EWHC 832 (Admin). It was contended that the judge had failed to pay proper regard to the rights of the Appellant's spouse, who is British, in employment, and has close family in this country.
6. Secondly it was contended that the judge had made a material misdirection of law and/or failed to consider material matters. It was submitted that the judge had failed to consider the principles set out in Chikwamba [2008] UKHL 40.
7. Thirdly it was contended that the judge had failed to make adequate findings under Article 8 on a freestanding basis. It was contended that the judge had not carried out a comprehensive proportionality consideration and had failed to conduct a proper balancing exercise.
8. Permission to appeal was granted by Upper Tribunal Judge Reeds in the following terms;
 - (1) It is arguable that in the judge's assessment of EX.1 of Appendix FM and Article 8 outside the Rules the judge failed to consider the nationality of the Appellant's wife as a British citizen in accordance with the decision of Sanade & Others (British children - Zambrano - Dereci) [2012] UKUT 00048

(IAC) or to consider EX.1 in the light of the principles of the decision of Chikwamba v Secretary of State [2008] UKHL 40.

(2) The grounds are arguable and I grant permission.

9. Following the grant of permission the Respondent lodged a response pursuant to rule 24 of The Tribunal Procedure (Upper Tribunal) Rules 2008 contending that the grounds amounted to a disagreement with findings made by the judge, and there was no error of law.
10. Directions were then issued making provision for there to be a hearing before the Upper Tribunal to decide whether the First-tier Tribunal determination should be set aside.

The Appellant's Submissions

11. Miss Rutherford relied and expanded upon the grounds contained within the application for permission to appeal. It was accepted that since the grounds had been prepared, the decision in MM had been the subject of a successful appeal to the Court of Appeal, but nevertheless Miss Rutherford argued that the judge had erred by not properly taking into account the fact that the Appellant's spouse is a British citizen, and Sanade indicated that it was not appropriate to expect a British citizen to relocate outside the United Kingdom.
12. In relation to the Chikwamba principle, Miss Rutherford accepted that this may not lead to a successful appeal without more, as it was accepted that were factors to be considered such as the Appellant's adverse immigration history, but the judge should have considered the principles.
13. In relation to the third ground, Miss Rutherford submitted that the judge had failed to make adequate findings and had not carried out a proper proportionality assessment.

The Respondent's Submissions

14. Mr Smart relied upon the rule 24 response and submitted that the judge had properly considered the status of the Appellant's spouse and referred to her being settled in this country in paragraphs 18 and 33 and which is why the judge had considered EX.1.(b). I was asked to note that Sanade had been decided prior to the introduction into the Immigration Rules on 9th July 2012, of Appendix FM and paragraph 276ADE. Mr Smart submitted that the decision in Sanade followed a concession made by a representative of the Secretary of State which was misunderstood, and the position of the Secretary of State was more accurately set out in Izuazu [2013] UKUT 00045 (IAC).
15. Mr Smart submitted that, in relation to the Chikwamba principle, the judge had found good reasons why the Appellant should leave the United Kingdom and make an application for entry clearance from abroad, and I was referred to paragraphs 30, 49, and 50 of Secretary of State for the Home Department v Hayat [2012] EWCA Civ 10. In that case it was found

that a First-tier Judge had properly focused on three matters which went to the substantive merits of an Article 8 claim, and which were also relevant to the question of whether it was in the event legitimate to require an applicant to leave the United Kingdom and make an application from Pakistan. In that case relevant matters were that both the applicant and his wife were temporarily in the United Kingdom and had no legitimate expectation of a right to remain, family life could continue in Pakistan even though the applicant's wife would not wish to return, and that any period of separation would be short if the Appellant's wife were studying in the United Kingdom, and the period of study was due to end in a relatively short period of time.

16. Mr Smart submitted that it was open, in this case, to the judge to find it reasonable for the Appellant's spouse to live with him in Pakistan, as although a British citizen, she originated from Pakistan and had been in the United Kingdom since 2003, or alternatively, to remain in the United Kingdom while the Appellant made a proper application for entry clearance from abroad, in order to satisfy the requirements of the Immigration Rules.

The Appellant's Response

17. Miss Rutherford reiterated that the proportionality assessment carried out under Article 8 outside the rules had not been carried out properly, and pointed that in paragraph 30(c) of Hayat one of the factors to be considered was the prospective length and degree of disruption of family life and whether other members of the family are settled in the United Kingdom, and it was not clear that the judge had this in mind when making his decision.
18. At the conclusion of oral submissions I reserved my decision.

My Conclusions and Reasons

19. I do not find that the judge failed to pay proper regard to the rights of the Appellant's spouse as a British citizen. It is clear that the judge was aware of the spouse's British citizenship, as this is made clear in the documents considered by the judge, and he specifically refers to this in paragraph 24 of the determination. Sanade was decided before the changes in the Immigration Rules in July 2012 which introduced Appendix FM, and was decided prior to Izuazu which is a decision referred to by the judge. I set out below paragraph 5 of the head note to Izuazu;
 5. The UKBA continues to accept that EU law prevents the State requiring an EU law citizen from leaving the United Kingdom, although contends with good reason, that this is to be distinguished from a case where an independent adult can choose between continued residence in the United Kingdom or continued cohabitation abroad.
20. In my view the judge had this principle in mind when considering both EX.1 and Article 8.

21. My reading of the determination is that the judge's view was that the fact that the Appellant's spouse is a British citizen does not mean without more, that the Appellant must be allowed to remain in the United Kingdom for that reason alone.
22. The judge took into account all the evidence before him, some of which assisted the Appellant, such as the judge's finding that he is in a genuine and subsisting relationship, and the judge found in paragraph 27, that the Appellant's spouse was credible and persuasive on that issue. The judge accepted that family life had been established, and the couple were expecting a child.
23. The judge took into account in assessing the appeal under EX.1 and Article 8 outside the rules, that the Appellant entered the United Kingdom as a student, and in paragraph 26 found that there was no satisfactory evidence of progression with studies after 5th July 2011, and that the Appellant had a poor immigration history, and that he had submitted a fraudulent application to remain in the United Kingdom, having fraudulently applied for a residence card. The judge also found in that paragraph, that the Appellant had overstayed in breach of the Immigration Rules, and had given some discrepant evidence.
24. In paragraph 28 the judge found that family life had been established when the couple were "acutely aware of the Appellant's precarious position in this country". That is relevant because the judge noted that they did not meet until December 2012 and the Appellant's leave had expired in June 2012. His fraudulent EEA application was submitted in April 2012 and refused in May 2012. The judge accepted that the couple had married, but was aware that they had done so when the Appellant had no leave to remain in the United Kingdom.
25. In relation to the Chikwamba principle the judge made findings in paragraph 29, that the appeal could not succeed under the Immigration Rules for a number of reasons. One of those reasons was that the financial requirements of the rules cannot be met. This is therefore not a case where it is suggested that the Appellant should leave the United Kingdom simply because it is policy to make an application for entry clearance from abroad. The judge has found there are reasons why the appeal could not succeed under the Immigration Rules, and did not err in finding that the Appellant should leave the United Kingdom, and make an application for entry clearance and submit evidence that the Immigration Rules can be satisfied.
26. In relation to the proportionality assessment outside the Immigration Rules, the findings made by the judge are contained in paragraphs 36-40 and may be described as somewhat brief. However the judge has taken into account all relevant factors, and has not omitted any factor that is relevant, and has not taken into account irrelevant factors. The matters taken into account by the judge perhaps should have been set out fully in

paragraphs 36-40, but are in fact to be found in paragraphs 25-40. I have referred to those factors above.

27. In my view, the findings made by the judge were open to him on the evidence, and adequate and sustainable reasons were given for those findings. The judge did not misdirect himself in law and was aware and took into account that the Appellant's spouse is a British citizen, but also was aware that there were other factors which did not assist the Appellant, to be taken into account.
28. The judge did not err in concluding that the appeal should not be allowed under EX.1, nor did he err in finding the Respondent's decision to be proportionate when Article 8 was considered outside the rules, that it was open to the Appellant's spouse to continue family life with the Appellant in Pakistan if she wished, or alternatively it was proportionate for the Appellant to leave and make an application for entry clearance through the proper channels, and to provide the specified evidence that the Immigration Rules could be satisfied.

Decision

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

I do not set aside the decision. The appeal is dismissed.

Anonymity

No order for anonymity was made by the First-tier Tribunal. There has been no request for anonymity and the Upper Tribunal makes no anonymity direction.

Signed

Date: 24th September 2014

Deputy Upper Tribunal Judge M A Hall

TO THE RESPONDENT **FEE AWARD**

The appeal is dismissed. There is no fee award.

Signed

Date: 24th September 2014

Deputy Upper Tribunal Judge M A Hall