



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

Appeal Number: IA/07311/2014

THE IMMIGRATION ACTS

Heard at Centre City Tower, Birmingham

**Decision & Reasons
Promulgated**

On 15th September 2015

On 29th September 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE FRENCH

Between

**ARSALAN PERVAIZ BUTT
(ANONYMITY ORDER NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Pipe instructed by D & A Solicitors

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

DECISION AND REASONS

1. The background of this appeal is that the Appellant's application for leave to remain on the basis of his marriage to the Sponsor Ramsah Ahmed, who is a British citizen, made whilst he had extant leave was refused on 21st January 2014 and a decision made to remove him. His appeal against that decision was dismissed following a hearing before First-tier Tribunal Judge Birk, in a determination promulgated on 18th September 2014. The Judge's primary finding was that the Appellant had failed to meet the requirements of paragraph EX.1 to Appendix FM to the Immigration Rules

as there were no insurmountable obstacles to the couple continuing family life outside the United Kingdom. The appeal was dismissed both under the Immigration Rules and under Article 8 ECHR.

2. The Appellant applied for permission to appeal. The grounds are fourfold. It was said that the judge had erred in failing properly to assess the Appellant's Article 8 claim. The consideration under EX.1 had not exhausted the claim and there should have been a full assessment under Article 8 but the findings in that regard were inadequate. Secondly it was said that the judge had failed to give any adequate consideration to the rights of the spouse as a British national. It was then said that the judge had misdirected herself in her consideration of insurmountable obstacles and the problems that the Appellant and his wife might suffer from the Appellant's father-in-law. In referring to there being no physical threat or danger to the Appellant or his wife she had applied too high a test as insurmountable obstacles did not require such a level of ill-treatment, reference being made to **MF (Nigeria) v SSHD [2013] EWCA Civ 1192** and **Izuazu (Article 8 - new Rules) Nigeria [2013] UKUT 45 (IAC)**. Finally it was said that the judge had failed to consider material matters namely the problems which the spouse had faced in the past. The letter of application set out that she had had to obtain consular support as she believed she was going to be forced into a marriage by her father and these difficulties had led the couple to marry early to obviate that risk.
3. Permission was granted on all grounds on 30th October 2014. In a response under Upper Tribunal Rule 24 the Secretary of State argued that the judge had directed herself appropriately and there was no material error of law.
4. At the commencement of the hearing it was clarified that there was no issue as to the relationship between the Appellant and Sponsor. Mr Pipe said that the issues arose under EX.1 to Appendix FM to the Rules and then under Article 8. Both representatives agreed that the relevant version of EX.1 was the version which did not include the explanatory statement at EX.2, which was only introduced with effect from 28th July 2014, well after the date of decision under appeal. The grant of permission had included a reference to **MM (Lebanon) and Others v SSHD [2014] EWCA Civ 985** having overturned the decisions in **Gulshan (Article 8 - new Rules - correct approach) [2013] UKUT 640 (IAC)** and **R (Nagre) v SSHD [2013] EWHC (Admin) 720**. Mr Pipe accepted that **MM** had simply clarified what the other cases had meant. Mr Smart for his part relied on the judgment of the Court of Appeal in **Singh v SSHD [2015] EWCA Civ 74**, a copy of which he supplied, and Mr Pipe supplied a copy of the reported Tribunal decision in **Forman (ss117A-C considerations) [2015] UKUT 412 (IAC)**, concerning the application of Section 117B of the Nationality, Immigration and Asylum Act 2002.
5. Mr Pipe then addressed me on the substantive issues. He said that looking at the determination the Appellant had been in receipt of extant leave when the application was made and was not here unlawfully. The

evidence had been recited at paragraphs 5 and 6 of the decision. The Appellant had been employed developing automotive design and the Sponsor had hoped to go on to an apprenticeship or to university. The judge found that the Appellant did not meet the requirements of paragraph EX.1. The judge referred to the Sponsor's expressed fear of her father on her return to Pakistan but Mr Pipe submitted that the judge had not properly assessed the insurmountable obstacles but had regarded the test as in the nature of Article 3 ECHR. In the past there had been threats to the Appellant's wife, who was British, to marry her against her wishes and she had returned to the United Kingdom and married the Appellant in October of 2013 as a protective mechanism. That was set out in the statements, although he had to accept that there was not very much detail about the reference to consular support being requested. The proper test was not of risks but of obstacles or difficulties. He submitted that the judge's consideration of EX.1 was flawed. She had not considered the correct approach to insurmountable obstacles but had focused on risk, shutting out other considerations.

6. He continued that in any event the judge should have gone to consider Article 8 substantively. It appeared at paragraph 16 of the determination that she had regarded her findings under the Rules as a gateway but she then went on to consider the **Razgar** questions. In considering proportionality he said that she had erred. The Appellant had been in the United Kingdom for some time with leave. The whole time he had been lawful and he had been working. She should have considered all of the elements of Section 117 of the 2002 Act. Family life would carry weight because he had not been here unlawfully. The application of EX.1 of the Rules had not carried out the whole assessment. He said it was an odd determination as at paragraph 16 it appeared that the judge was shutting the door on any further consideration but then she went on to make such an assessment.
7. In response Mr Smart said that the Court of Appeal judgment in **Singh** touched on the first and last Grounds of Appeal. It was apparent from paragraph 63 and 64 of that judgment that there was no need for a full examination beyond the Rules if all issues had been considered under the Rules. He submitted that the Appellant's assertion that a full Article 8 assessment was required was not right. There were no compelling considerations and therefore the judge was right to apply that test.
8. With regard to the second ground he said that the judge had considered all of the evidence and had made proper findings. There had been more consideration than there had in the case of **Agyarko and Others, R, v SSHD [2015] EWCA Civ 440**. As to the third ground the judge had made findings upon the opposition of the father to the marriage. The issue of consular assistance had not been covered in the statement of either of the parties to the marriage and there was no evidence-in-chief or cross-examination on the point. There had been a reference in the letter accompanying the application but it was unclear as to who had sought consular support and the assertion was distant hearsay.

9. In response Mr Pipe, who was aware of the judgment in **Agyarko**, said that it was a stringent test but in reaching her findings the judge had equated the test with physical risk. He accepted that the evidence of consular support was not strong but the couple had taken steps to get away from the father to marry early to avoid the risk of forced marriage. He submitted that the judge had not taken account of all these matters. Factors to be considered under the Rules formed part of an Article 8 assessment but there had to be a finding on matters in totality. Asked by me as to what issues in Section 117B the judge had failed to consider he said it was financial independence, the Appellant's ability in English and his family life. There were also the rights of the wife under Article 8. It had been a bold move to defy her father, leave Leeds and join the Appellant. There was no evidence the judge had had regard to both sides of the argument.
10. Having heard those submissions I reserved my decision which I now give. I find that the judge did not err in her approach to paragraph EX.1 of Appendix FM to the Rules in any material way. It is correct, as Mr Pipe indicated that in the final sentence at paragraph 13 of her decision she referred to the father's disapproval as not amounting to or being the same as a physical threat or danger to the Appellant or his wife. However that must be read in the context of the paragraph as a whole and the following paragraph, in which the judge addresses the obstacles which might be faced. I will set out those two paragraphs in full:

"13. The Appellant and his wife state that they fear her father upon return due to his opposition to their marriage. He states at paragraph 7 of his statement that the country is not the problem but that the family are a problem and what they could do to them. Neither witness was able to expand upon or elaborate upon how the wife's father has such great power and influence and what is the source of his great power. Without any such details I cannot find that his influence is so prevalent and so strong in Pakistan that the Appellant and his wife could not settle elsewhere in Pakistan than where the wife's father lives. I find that there is no evidence as to what in reality he could do or would be capable of doing. They both gave an impression of concern and foreboding but were unable to provide anything more substantial than that. Both have referred to threatening calls by him but no details were given as to what he said that he would do and to whom. I do not find that this amounts to anything more than a parent who is very unhappy with the marriage and disapproves strongly but this does not amount to or is the same as there being a physical threat or danger to the Appellant or his wife.

14. I find that the Appellant works and is a fit, able educated male who would be able to find work in Pakistan. He resided there until about six years ago and so would be familiar with the language and culture of Pakistan. His wife has also lived in Pakistan until recently and she would not be returning to live

with her father but her husband. The Appellant accepts that if his wife remains in the UK she will have the support of his father and uncle so that she is not left alone in the UK.”

11. Those two paragraphs do not indicate to me that the judge was in fact applying an Article 3 test as was submitted. She found that there was no substance in the alleged threats but she also found that the couple were familiar with Pakistan, could return to a cultural climate with which they were familiar and to an area other than where the Appellant’s father lived and that the Appellant would be able to find work in order to support them both. That the test of “insurmountable obstacles” is a stringent one is made clear in **Agyarko**. In my judgment the judge adequately assessed the evidence of this element of the appeal, made reasoned findings and applied the correct test.
12. There remains the question of the judge’s approach to Article 8 outwith the Rules. As Mr Pipe commented the determination of Judge Birk is somewhat odd in that paragraphs 16 and 17 might be perceived as indicating that a decision had been made that there was no need to go on to consider Article 8 beyond the Rules. In this case I would not have agreed with that approach. The definitive guidance on the issue is now set out by Lord Justice Underhill in **Singh**. At paragraph 66(2) he stated “If the decision-maker’s view is straightforwardly that all the Article 8 issues raised have been addressed in determining the claim under the Rules all that is necessary is, as Sales J says, to say so.” In the current case the judge found that there were not insurmountable obstacles to the couple continuing family life in Pakistan. As is pointed in **Agyarko** that is by the application of a stringent test, arguably not consistent with a simple Article 8 assessment.
13. The judge did, notwithstanding what she said at paragraphs 16 and 17, then refer to **R (Razgar) v SSHD [2004] UKHL 27** and went on to consider proportionality. In doing so she stated that she had regard to Sections 117A and 117B of the 2002 Act. Her final assessment on proportionality is succinct. She said at paragraph 20,

“I find that the Appellant does speak English, he works and he made this application during the duration of his legitimate leave. I take into account the findings that I have made in paragraphs 12 to 17 above and having balanced all of the various factors I find that the decision to refuse the Appellant’s application is a proportionate one and there is no breach of Article 8.”

Although that proportionality assessment is notably brief the judge clearly took account of the fact that some of the factors in Section 117B of the 2002 Act were met, namely sub-paragraphs (2) and (3). She was aware that the Appellant had been in this country lawfully and had been working. She was aware that the wife’s father disapproved strongly of her marriage but found that the couple could go to live in Pakistan together, where the husband was likely to find work. Alternatively she found that the wife could remain in this country, where she would have support from other family

members, and the Appellant return to Pakistan from where he could seek entry clearance. That approach is consistent with the guidance of the European Court of Human Rights in **Jeunesse v Netherlands (2015) 60 EHRR 17**. There are no children in this case and there are no exceptional circumstances which might have rendered that approach inappropriate. Although there is much to be said in favour of this young couple in that they are in a legitimate relationship, built up whilst the Appellant was in this country lawfully, that the Appellant has been working in a significant occupation and that they married notwithstanding parental opposition the judge was aware of all of these factors in reaching her decision on proportionality. The fact that the Appellant met several of the elements of Section 117B of the 2002 Act does not in itself render the proportionality assessment unsafe - see, amongst other cases, **Forman and AM (Section 117B) Malawi [2015] UKUT 00260 (IAC)**. In the circumstances, although the judge's assessment of proportionality might, with advantage, have been expressed more fully, she did refer back to her earlier findings which were not concerned solely with issues under EX.1. The judge accepted that the relationship was genuine and had been formed when the Appellant was in the country lawfully but the first premise of Section 117B of the 2002 Act is that effective immigration control is in the public interest. By statute that element is implicit in any proportionality assessment. Something substantial was required to outweigh that consideration and the judge clearly did not find that established. In the circumstances the decision is adequately, if economically, reasoned and not materially flawed in law. The appeal is therefore dismissed.

Notice of Decision

There was no material error of law in the decision of the First-tier Tribunal and the appeal therefore stands dismissed.

There was no application for an order for anonymity and none is made.

Signed
Deputy Upper Tribunal Judge French

Date 29 September 2015