



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

Appeal Number: IA/27035/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 2nd March 2015**

**Decision & Reasons
Promulgated
On 10th March 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

**MR IMRAN SHABBIR
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Pipe (Counsel)

For the Respondent: Mr S Whitwell (HOPO)

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Doyle promulgated on 1st December 2014, following a hearing at Richmond on 19th November 2014. In the determination, the judge allowed the appeal under Article 8 of the Human Rights Act, of Imran Shabbir. The Respondent subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a male, a citizen of Pakistan, who was born on 17th July 1989. He appealed against the decision of the Respondent dated 16th June 2014, to refuse to vary his leave to remain in the UK. The Appellant's claim is that he is a party to a genuine marriage who has not fallen foul of paragraph E-LTRP2.2 of Appendix FM. He is married to a British citizen present in the UK. But more importantly, there is a 10 year old child of his partner, from a former marriage, who is also a British citizen, and this the Secretary of State has not properly taken into account.

The Judge's Findings

3. The judge observed how the Appellant had entered the UK on 5th May 2010, with entry clearance as a student, which leave expired after 2nd August 2011. The Appellant appealed. He was successful. Further leave was given. However, the college that the Appellant was studying at had its Sponsor licence revoked. The Appellant was on 30th April 2014 found working in a mortgage brokers' business in Ilford contrary to the conditions of his leave. The Appellant then married Duangjai Batten, who was born in Thailand, and was a Thai citizen, until she became naturalised as a British citizen on 13th June 2006.
4. The marriage endures and they live together. The Sponsor, Duangjai Batten, was previously married to a British citizen. That marriage ended in divorce on 20th May 2013. There is a 10 year old daughter from the earlier marriage. She is a British citizen. The Sponsor's daughter lives, however, with the Sponsor's ex-husband. The Sponsor has contact with her daughter. So does the Appellant himself.
5. The judge had no doubt that the Appellant had worked in the UK contrary to the conditions of his leave. The Appellant could not succeed under paragraph E-LTRP2.2. The Appellant was in the UK in breach of immigration laws (see paragraph 12(c)). However, the Respondent's refusal letter did not give any consideration to the position of the Sponsor's child. The judge observed that,

"The clear evidence in this case is that the Sponsor has a 10 year old daughter who lives with the Sponsor's ex-husband. It is not disputed that the Sponsor (and the Appellant) has residential contact with the Sponsor's 10 year old daughter each weekend" (paragraph 15(d)).

Thereafter, the judge gave consideration to a spate of leading Article 8 decisions. The judge then concluded that

"The welfare of the Sponsor and her child forms clear arguable grounds for consideration of this case outwith the Rules. The rights of the Appellant, the Sponsor, and her child in terms of Article 8 would be breached by the implementation of the Respondent's decision" (paragraph 15(j)).

The appeal was allowed.

Grounds of Application

6. The grounds of application state that the judge failed to explain what factors weighed in his mind when deciding that there were exceptional circumstances to allowing the appeal under Article 8.
7. Permission to appeal was granted on 23rd January 2015.

Submissions

8. At the hearing before me on 2nd March 2015, Mr Whitwell, appearing on behalf of the Respondent Secretary of State, relied upon the grounds of application. He submitted that the judge failed to make it clear where the exceptional circumstances lay in this case. The judge also did not consider EX.1. There was no reason why the Appellant could not live in Pakistan with his sponsoring wife. Furthermore, there was no reference to the Section 117B considerations in the 2014 Act. No consideration was given to such factors as linguistic ability and financial independence. Therefore, there was nothing exceptional in this case. The appeal ought not to have been allowed under Article 8.
9. For his part, Mr Pipe relied upon the case of **Oludoyi [2014] UKUT 539**, which makes it clear that there is no threshold test to be established before the application of Article 8. Furthermore, the case of **MF (Nigeria)** makes it clear that the phrase “exceptional circumstances” is to be applied in the context of deportation of foreign criminals in the context of the weighing of competing factors. Otherwise, if there are arguably good grounds for granting leave outside the Immigration Rules, then the question of the five step approach in **Razgar** has to be considered. The case of **Ganesabalan [2014] EWHC 2712** makes it clear that Appendix FM and Rule 276ADE are not a “complete code” so far as Article 8 compatibility is concerned.
10. There is a duty to consider exercising discretion and this was recognised by the authorities. That discretion variously refers to “exceptional circumstances” or “unjustifiable hardship”, and it involves the Secretary of State applying the proportionality test, and asking whether removal would be disproportionate by reference to Article 8. This is what the judge had done here. He had given consideration to the fact that the daughter of the Sponsor is a British citizen and that the Sponsor has residential contact with her. This was of direct relevance to Section 55 BCIA 2009. Therefore, the decision was a correct decision and one that was open to the judge.
11. In reply, Mr Whitwell submitted that the Appellant’s position was precarious and he was always amenable to removal.
12. I am satisfied that the making of the decision by the judge did not involve the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision.

13. The judge has applied an approach that is entirely consistent with **Ganesabalan** and **Oludoyi**, and I accept that the submissions made by Mr Pipe are dispositive of this appeal. The fact was that there was always a 10 year old child in this appeal. No consideration was given to the position of the 10 year old British citizen child in the refusal letter. The judge so held (see paragraph 15(b)).
14. Furthermore, no consideration was given in the refusal letter to the fact that both the Sponsor and the Appellant had residential contact with the Sponsor's 10 year old daughter (see paragraph 15(b)). The judge did so. The judge also then in that context applied the leading authorities on Article 8. He was entitled to conclude (at paragraph 15(j)) that the welfare of the Sponsor and her child "forms clear arguable grounds for consideration of this case outwith the Rules".
15. The case of **Ganesabalan** makes it clear that the use of the phrase "exceptional circumstances" has to be interpreted in the context of the Secretary of State applying the proportionality test and asking whether removal would be disproportionate by reference to Article 8 standards.
16. The judge held that this clearly could not be the case because the 10 year old citizen child was resident in the UK and the Sponsor and the Appellant had residential contact with that child. To ask either to leave would be to rupture the family relationship with the child. The conclusion reached by the judge was entirely open to him.

Notice of Decision

17. There is no material error of law in the original judge's decision. The determination shall stand.
18. No anonymity order is made.

Signed

Date

Deputy Upper Tribunal Judge Juss

10th March 2015