



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

Appeal Number: IA/48437/2013
IA/48442/2013
IA/48448/2013

THE IMMIGRATION ACTS

Heard at Field House

**Decision & Reasons
Promulgated**

On 13 January 2016

On 18 March 2016

Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

**SYED AUSAF HAIDER
HAFSA AKTER
(AND ONE CHILD DEPENDENT)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms S. Haji, Counsel instructed by Marks & Marks Solicitors
For the Respondent: Mr C. Avery, Home Office Presenting Officer

DECISION AND REASONS

Background

1. The first appellant is a citizen of Pakistan. He says that he was born in Saudi Arabia, where his parents lived and worked for most of his early life. Although he visited Pakistan with his family for holidays in the past he says that he has little experience of life there, having grown up in Saudi Arabia. He entered the UK in January 2007 with entry clearance as a student. He began by studying accountancy but then moved on to study towards a BA (Hons) degree in Business and Management. The appellant accepts that he did not complete those courses, and in actual fact, has little to show in the way of formal academic achievement from his time spent studying in the UK. The appellant's exact immigration history is a little unclear from the evidence but it seems that he may have overstayed for a period of time from 2009, when his visa expired, and when he left the UK in October 2010.
2. The second appellant is a citizen of Bangladesh. She entered the UK in September 2006 with entry clearance as a student, which was valid until 30 November 2009. She met the first appellant in 2008 while they were both studying at the London School of Commerce. She completed an MBA in Finance. Their friendship developed into a relationship and they decided to marry. An Islamic ceremony took place in London on 29 July 2010. The second appellant was granted further leave to remain as a Tier 1 (Post-Study Work) Migrant, which was valid until 16 September 2012.
3. In October 2010 the appellants travelled to Pakistan in order to register the marriage. The second appellant stayed for three weeks while the marriage was registered and then returned to the UK. The first appellant applied for entry clearance as the dependent of a PBS migrant. He re-entered the UK on 13 January 2011 with entry clearance as a PBS partner that was valid until 16 September 2012. Their first child was born on 11 June 2012 (3 years old). Their second child was born on 18 December 2015 (newborn).
4. On 13 September 2012 the appellants applied to vary and extend their leave to remain on human rights grounds. The application was refused in a decision dated 01 November 2013. The respondent was satisfied that they did not meet the private or family life requirements contained in the immigration rules and that there were no exceptional circumstances to justify granting leave to remain outside the rules. The respondent took into account the fact that they came from different countries but noted that they established a family life in the UK at a time when they knew that their immigration status was temporary and there was no expectation that they would be able to remain in the UK on a permanent basis. They would be able to apply for entry into one or other country. Their child was young enough to adapt to life in Pakistan or Bangladesh with the help of his parents. If they feared that they would be at risk on return they should make a separate claim at the Asylum Screening Unit.

5. The appellants appealed to the First-tier Tribunal. First-tier Tribunal Judge Callender Smith allowed the appeal in a decision promulgated on 02 September 2014. In a decision dated 06 March 2015 Deputy Upper Tribunal Judge Murray concluded that the First-tier Tribunal decision involved the making of an error on a point of law. The Upper Tribunal found that the First-tier Tribunal erred in failing to have sufficient regard to the public interest considerations weighing in favour of refusal of leave to remain.
6. The appeal was listed for further hearing on 19 May 2015 in order to remake the decision. The appellants did not appear. An adjournment request was made on the ground that the second appellant was pregnant and had suffered a fall. She had been advised to rest and would not be able to attend the hearing. The judge refused to adjourn and proceeded to hear the resumed appeal. She dismissed the appeal in a decision promulgated on 18 June 2015.
7. On 31 July 2015 Upper Tribunal Judge Reeds set aside the decision on the ground that it was in the interests of justice to do so. She was satisfied that the conditions specified in rule 43(2)(c) of The Tribunal Procedure (Upper Tribunal) Rules 2008 were met. It clearly had been envisaged that the second appellant would give evidence at the resumed hearing.
8. The appeal came before me to remake the decision. An error of law has already been found in the earlier decision dated 06 March 2015. I heard evidence from both appellants and submissions from both parties. I have also considered the background and other documentary evidence relied on by the parties.

Decision and reasons

9. It is accepted that the appellants do not meet the strict requirements of the immigration rules for leave to remain on human rights grounds. The appeal falls to be considered under Article 8 outside the rules. The immigration rules are said to reflect the respondent's view of where a fair balance should be struck between the right to respect for private and family life and public interest considerations relating to the maintenance of an effective system of immigration control (paragraph GEN.1.1 Appendix FM). The rules should be read in a way that reflects a proper interpretation of Article 8 of the European Convention. However, there may be some cases where the rules do not address relevant Article 8 issues. In such cases it may be necessary to consider whether there are compelling circumstances to justify granting leave to remain outside the immigration rules: *Huang v SSHD* [2007] 2 AC 167 & *SSHD v SS (Congo)* [2015] EWCA Civ 387. This should be assessed by reference to the five stage test outlined by the House of Lords in *R v SSHD ex parte Razgar* [2004] 3 WLR 58.

Article 8(1) - Private and family life

10. It is not disputed that the appellants are in a genuine and subsisting relationship. There is evidence to show that they have a child from their marriage. At the date of the hearing they had another newborn child, born in December 2015. The appellants explained that they had not had time to register the birth. Both children attended the hearing. The respondent's representative didn't express any doubt about the fact that there might be another child. Although the second child is not an appellant in this appeal I take him into account in so far as he forms part of the family unit. Any future action taken in relation to the family should include the second child once a valid birth certificate has been produced.
11. The first appellant has lived in the UK for a period of nine years. During that time he had leave to remain as a student and as a PBS dependent. It seems likely that there was a period of overstaying for a number of months before he travelled to Pakistan with his wife to register their marriage. It was not a bar to him being granted entry clearance as a PBS dependent. He has remained in the UK on a lawful basis since 2011. The second appellant has lived in the UK for just over nine years. It appears that during that time she has resided in the UK on a lawful basis.
12. The First-tier Tribunal did not make any clear findings regarding private and family life in the UK. The appellants are likely to be removed as a family unit. On the face of it the decision is unlikely to interfere with the appellants' right to continue their family life together. However, it is argued that their ability to conduct their private and family lives in the respective countries would be infringed by the difficulties that they would face as a result of the mixed religious/nationality nature of their marriage. The children are not yet old enough to have established private lives of their own. Their lives still revolve around their parents. The appellants have lived in the UK for a fairly lengthy period of time. In that time they have studied and worked and established themselves to some extent. As such I find that removal in consequence of the decision is likely to interfere with their right to private life in a sufficiently grave way to engage the operation of Article 8(1) (questions (i) & (ii) of Lord Bingham's five stage approach in *Razgar*).

Article 8(2) - proportionality

13. Article 8 of the European Convention protects the right to family and private life. However, it is not an absolute right and can be interfered with by the state in certain circumstances. It is trite law that the state has a right to control immigration and that rules governing the entry and residence of people into the country are "in accordance with the law" for the purpose of Article 8. Any interference with the right to private or family life must be for a legitimate reason and should be reasonable and proportionate.

14. In assessing whether removal in consequence of the decision would be a proportionate response I am required to take into account the public interest considerations set out in section 117B of the Nationality, Immigration and Asylum Act 2002 (NIAA 2002). I take into account the fact that significant weight should be given to the public interest in maintaining an effective system of immigration control (s.117B(1)). The appellants do not meet the requirements of the immigration rules and in such circumstances they would normally be expected to leave the UK.
15. The appellants have studied at degree level and gave evidence in English. They have both worked during their time in the UK and there is no evidence to suggest that they would become an unnecessary financial burden on the public purse if they remain in the UK. However, the considerations outlined in sections 117B(2)-(3) are neutral factors in the balancing exercise: see *AM (Section 117B) Malawi* [2015] UKUT 260. The fact that they can speak English, and are in a position to support the family, simply doesn't lend additional weight to the existing public interest considerations.
16. The considerations outlined in section 117B(4) do not appear to be applicable on the facts of this particular case. Save for a fairly brief period of time in the case of the first appellant they have lived in the UK on a lawful basis. However, section 117B(5) instructs that little weight should be given to a private life established by a person at a time when their immigration status is precarious. I take into account the fact that their leave to remain was in temporary categories. There was no expectation that either appellant would be able to reside in the UK on a longer term basis. That is the context in which they began their relationship in 2008 and the context in which they decided to start a family. As such I give little weight to the private life that the two adult appellants have established as part of my overall assessment.
17. Section 117B(6) is not applicable in this case because the appellants' children are not British citizens and are too young to be 'qualifying children' for the purpose of that provision. The children have not lived in the UK for a continuous period of seven years. The fact that the appellants have a genuine and subsisting parental relationship with children who are not yet well established in the UK is a matter that cannot be given weight in the balancing exercise.
18. The considerations set out in section 117B are not exhaustive but I can see no other relevant public interest considerations that would have any bearing on the proportionality assessment.
19. I turn to consider the factors that might weigh in favour of the appellants. They argue that their circumstances are compelling on the very particular facts of their case. The marriage is unusual both in terms of their mixed nationalities but also their mixed religious backgrounds. The first appellant is a Shia Muslim and the second appellant is Sunni. They say that as a

result of the mixed nature of their marriage both families have shunned them. In both countries there would be difficulties in being able to establish themselves without family support. In addition, the first appellant relies on the fact that he grew up in Saudi Arabia and has no experience of earning a living as an independent adult in Pakistan.

20. The First-tier Tribunal set out the factual circumstances in full and provided a summary of the expert evidence of Professor Dr Livia Holden, who is a Dean of the Faculty of Humanities and Social Sciences at Karakoram International University in Gilgit, Pakistan. Professor Holden's qualifications and experience indicate that she is qualified to comment as an expert on the conditions that the appellants might face. On the face of it she lives and works in Pakistan and is likely to have greater expertise to comment on the situation there but she provides an explanation as to why she also has knowledge and experience to comment on other countries in south Asia. The report is lengthy and refers in detail to the sources relied upon to support her opinion. I am satisfied that I can give weight to the expert opinions expressed in the report.
21. In summary, her opinion is that there would be a number of legal obstacles to the first appellant being able to enter and reside in Bangladesh with his wife. In both countries they are likely to face ostracism from their families as a result of the mixed nationality/religious nature of their marriage. She discusses the risk of 'honour' related crimes that could arise. She considers that Pakistan would be the more realistic option for the family but goes into some detail about the increasing level of religious intolerance towards religious minorities, including Shia Muslims. She concluded that in both countries there would be inadequate protection against the risk of 'honour' killing or targeted violence against religious minorities.
22. In this case the best interests of the children are tied to the evidence relating to the conditions they might face if returned to one or other country with their parents. In assessing the best interests of the children I have taken into account the statutory guidance "UKBA Every Child Matters: Change for Children" (November 2009), which gives further detail about the duties owed to children under section 55. In that guidance the UKBA acknowledges the importance of a number of international instruments relating to human rights including the UN Convention on the Rights of the Child (UNCRC). The guidance goes on to confirm: "*The UK Border Agency must fulfil the requirements of these instruments in relation to children whilst exercising its functions as expressed in UK domestic legislation and policies.*" I take into account the fact that the UNCRC sets out rights including a child's right to survival and development, the right to know and be cared for by his or her parents, the right not to be separated from parents and the enjoyment of the highest attainable standards of living, health and education without discrimination. The UNCRC also recognises the common responsibility of both parents for the upbringing and development of a child.

23. I have also taken into account the decisions in *ZH (Tanzania) v SSHD* [2011] UKSC 4, *Zoumbas v SSHD* [2013] UKSC 74 and *EV (Philippines) and others v SSHD* [2014] EWCA Civ 874. The best interests of the child are a primary consideration in this case but may be outweighed by the cumulative effect of other matters that weigh in favour of the public interest. I take into account that the younger the child the more important the involvement of a parent is likely to be: see *Berrehab v Netherlands* (1988) 11 EHRR 322. It is in the best interests of a child to be brought up by both parents unless it is contrary to his best interests to see one or other of his parents: see also *E-A (Article 8 - best interests of child) Nigeria* [2011] UKUT 00315.
24. The children are very young and their lives still revolve around their parents. It is clearly in the best interests of the children to remain in a family unit with their parents. In the UK their parents are able to work and provide the care and support that they need. In terms of the best interests of the children the main consideration is what conditions the family would face if returned to either Pakistan or Bangladesh.
25. I bear in mind that this is not a protection claim and that the conditions in Pakistan and Bangladesh form part of my assessment of the proportionality of removal under Article 8. I find that none of the individual factors outlined in the report are likely to be sufficient to show a real risk of serious harm. While the appellants say that they have been ostracised by their respective families there is little evidence to suggest that there is a real risk of serious harm solely as a result of their mixed marriage. However, a holistic assessment requires me to consider the cumulative nature of the difficulties faced by the appellants if they seek to live in one or other country.
26. Professor Holden explains the legal obstacles to the first appellant being given entry to remain in Bangladesh with his wife. If he cannot enter and remain in Bangladesh it is clearly not in the best interests of the children to be separated from their father. Professor Holden considers Pakistan to be the only realistic option for the family but they would face a number of difficulties in establishing themselves in order to provide the children with a reasonable level of support.
27. The first appellant has been ostracised from his family as a result of the marriage. Although they have travelled to Pakistan in order to register their marriage in 2010 they only stayed for a brief period of time. The appellant received some minor assistance from a cousin but the rest of his family appear to want to have nothing to do with him. The first appellant will have cultural connections with Pakistan but did not grow up there and does not have any experience of living independently and earning a living there. In a society where family support and connections are of great importance it would be particularly difficult for the first appellant to establish himself. In addition to this they would also face societal

discrimination and some risk of harm as a result of the mixed nationality/religious marriage. While none of these factors would be sufficient if taken alone, I find that the combination of difficulties that they would face if they tried to relocate to Pakistan is likely to be such that they would struggle to provide adequate safety and support for the family. In such circumstances I conclude that it would not be in the best interests of the children to live with their parents in Pakistan.

28. I have given careful consideration and due weight to the public interest considerations in this case but I am satisfied that the combination of factors outlined above are sufficient to show that there are compelling features. The best interests of the children point quite strongly to them remaining in the UK with their parents. While the fact that they don't meet the strict requirements of the immigration rules is a matter to be given significant weight there are few other public interest considerations to outweigh the best interests of the children. For example, there is no evidence of abuse of the immigration system at the more serious end of the scale such as use of false documents or fraud. The evidence suggests that both parents are educated and they would be able to support the family without becoming a burden on the public purse. For these reasons I find that removal in consequence of the decision would amount to a disproportionate interference with the appellants' rights under Article 8 of the European Convention (points (iv) & (v) of Lord Bingham's five stage approach in *Razgar*).

DECISION

The First-tier Tribunal decision involved the making of an error on a point of law and was set aside at an earlier hearing

I re-make the decision and ALLOW the appeals

Signed  Date 10 March 2016

Upper Tribunal Judge Canavan