



**Upper Tribunal
(Immigration and Asylum Chamber)
OA/07668/2015**

Appeal Number:

THE IMMIGRATION ACTS

Heard at Field House

On 26 October 2017

**Decision & Reasons
Promulgated**

On 21 November 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE RAMSHAW

Between

ENTRY CLEARANCE OFFICER - ISLAMABAD

Appellant

and

MRS R U

(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr M Diwncyz, a Senior Home Office Presenting Officer.

For the Respondent: Ms A Basharat of Counsel.

DECISION AND REASONS

1. This is an appeal by the Entry Clearance Officer. I shall refer to the Entry Clearance Officer throughout as such and to Mrs R U as the claimant in order to avoid confusion.
2. The claimant is a citizen of Pakistan who was born on 3 October 1989. She applied for entry clearance to enter the UK as a partner under Appendix FM of the Immigration Rules. By way of a decision dated 25 March 2015 the Entry Clearance Officer refused the claimant's application.

The appeal to the First-tier Tribunal

3. The claimant appealed against that decision to the First-tier Tribunal. In a decision promulgated on 28 November 2016 First-tier Tribunal Judge Mill allowed the claimant's appeal. The First-tier Tribunal allowed the appeal on the basis of Article 24(3) of the EU Charter of Fundamental Rights. The appeal was also allowed on Article 8 grounds.
4. The Entry Clearance Officer applied for permission to appeal against the First-tier Tribunal's decision. On 1 August 2017 First-tier Tribunal Judge Frankish refused permission to appeal. The Entry Clearance Officer renewed the application for permission to appeal to the Upper Tribunal and on 31 August 2017 Deputy Upper Tribunal Judge McGeachy granted permission to appeal.

The hearing before the Upper Tribunal

Submissions

The grounds of appeal assert that the First-tier Tribunal erred by following the case of **Abdul (section 55 - Article 24(3) Charter) [2016] UKUT 106 (IAC)**. It is also asserted that, in this case, even if **Abdul** is correctly decided the appeal has no EU law aspect at all. The claimant seeks, as a non-EEA national, to join her British husband who has never exercised any free movement rights. It is asserted that this is plainly outside any scenario where the UK as a member state is implementing Union law.

5. Reference is made to Article 51 of the Charter, which reads as follows:

“Article 51

Scope

- (1) The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the member states only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers.
 - (2) This Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the treaties.”
6. Whether or not there is a freestanding right as found in **Abdul** simply does not arise in the context of this appeal. It is asserted that the judge has erred by accepting that the Charter extends Community law in a manner not permitted by Article 51(2).
 7. Ground 2 submits that the judge took into consideration matters that are not admissible. It is asserted that the Entry Clearance Officer's decision was on 25 March 2015. The appeal, brought under Section 82(1) against

refusal of entry clearance, was subject to Section 85A(2), constraining consideration to circumstances appertaining at the date of decision. It is asserted that the judge had regard to the claimant's passing of an English language test postdating the decision and to the delay in the appeal coming to hearing, which by definition postdated the decision. The judge took into account as a relevant factor that the Rules would now be met. This is flawed. Post-decision evidence going to matters concerning Article 8 is debarred by Section 85A(2) to the same extent as any other, see **AS (Somalia) & Anor v Secretary of State for the Home Department [2009] UKHL 32**. It is asserted that the judge has not conducted the proportionality exercise on the correct basis in that the child's supposed freestanding right under the Charter does not exist and postdecision irrelevant matters have been taken into consideration. The full analysis required by the law has not been properly carried out.

8. Mr Diwncyz relied on the grounds of appeal.
9. Ms Basharat submitted that the appeal was allowed under two grounds, the Charter and also Article 8. She submitted that the Charter reference was only part of the reason for the appeal being allowed, so if it was an error of law that was not material as the appeal was allowed under Article 8 in any event. Ms Basharat accepted that the claimant could not meet the Immigration Rules. In response to a question I asked regarding proportionality she submitted that at paragraph 19 of the First-tier Tribunal decision the judge has carried out an appropriate proportionality exercise. She submitted that the grounds of appeal do not raise criticism of the proportionality exercise.
10. With regard to the EU charter issue the First-tier Tribunal Judge set out:
 - 14...The appellant's son is an EU citizen. The EU Charter of Fundamental Rights and in particular Article 24(3) of the Charter which bears the title 'the rights of the child' stipulates:-

'Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.'
 15. The Honourable Mr Justice McCloskey, President of the Upper Tribunal, states in **Abdul** that he is of the opinion that Article 24(3) creates a freestanding right interconnecting with the concept of the 'best interests' right.
 16. Regardless of whether the foundation upon Article 24(3) of the Charter is a freestanding right which would justify the granting of the appeal or whether that would trigger justification for consideration of the appellant's Article 8 rights on a standalone basis, aside from the Immigration Rules, may make no odds. However on the basis of the appellant's child's best interests, having regard to the fact he is a British citizen, this does seem to me reasonable to trigger a consideration of the appellant's Article 8 rights at large.

17. Looking at all the relevant facts and circumstances in the round, there does not appear to me to be any persuasive public interest arguments against granting the appeal.
18. The preservation of the appellant's son's Charter rights require him to be admitted to the United Kingdom in my view. There is no evidence to suggest this would not be the correct thing to do to enable him to exercise his rights as a British citizen.

11. At paragraph 27 the Upper Tribunal in **Abdul** set out:

'...Having regard to the gateway provisions of Article 51, it is clear that, by virtue of the EU law context, Article 24 applied to both the underlying decision of the Secretary of State and that of the FtT on appeal....'

12. In this case there is no EU law context. Article 51 as set out by the Entry Clearance Officer provides that the provisions of the EU Charter are addressed to the member states only when they are implementing Union law. This case involved the UK's domestic Immigration Rules and Article 8 of the ECHR. Therefore the EU charter is not relevant. It was an error of law for the judge to allow the appeal on the basis of the EU Charter.

13. The judge also allowed the appeal under Article 8.

14. The respondent's representative did not suggest that the appellant would not meet the terms of the Immigration Rules now. A fresh application could, of course, be made but I note that the appeal has been outstanding for some considerable time through no fault of the appellant. Her appeal was received on 28 April 2015, a period over eighteen months ago. The case was not listed before it was heard before me. ...

...

19. I consider it would be disproportionate to require the appellant to apply afresh for entry clearance. I believe this would have an adverse effect upon the appellant and her son. Such a course of action would delay the opportunity of the appellant's son, who is a British citizen, to enter the United Kingdom with his mother who is his primary caregiver who it seems clear to me would meet the terms of the Immigration Rules should any fresh application be made now. Alternatively the appellant's son would travel alone and this would have the effect of significantly interfering with the relationship between himself and the appellant which would be unduly harsh.

20. Though the appellant could be criticised for having failed to investigate and ensure that the appropriate English test was taken and certified for the purposes of her application, the substantial delay caused thereafter has not been her fault and certainly not been the fault of her son."

14. It is clear that the judge did take post-decision factors into account. Further there was no proper proportionality exercise undertaken by the judge. The judge appears to have been influenced by the finding that the claimant's son's charter rights require him to be admitted to the UK and

simply states that there does not appear to be persuasive public law arguments against granting the appeal and it would be disproportionate for the claimant to apply afresh. In addition there are insufficient reasons given by the judge and no consideration has been given to section 117 of the Nationality, Immigration and Asylum Act 2002.

15. I find that there were material errors of law in the First-tier Tribunal decision. I set that decision aside pursuant to section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 ('TCEA').
16. After giving my decision at the hearing that there were material errors of law I invited submissions as to whether or not I could remake the appeal myself. Both parties submitted that I could remake the decision on the papers before me. I invited submissions in support of the re-making. I asked if there were any particular needs in respect of the child. Ms Basharat indicated there were none that she was aware of and that she has no submissions to make.

Re-making the decision

17. Ms Basharat accepted that the claimant did not meet the requirements of the Immigration Rules therefore the only issue is whether or not refusal of entry clearance would be contrary to the UK's obligations under Article 8 of the ECHR.
18. The first consideration is the best interests of the claimant's and sponsor's son. In **Mundeba (s.55 and para 297(i)(f)) [2013] UKUT 88(IAC)** the Tribunal held that although the statutory duty under s.55 UK Borders Act 2009 only applies to children within the UK the exercise of the duty by the Entry Clearance Officer to assess an application under the Immigration Rules as to whether there are family or other considerations making the child's exclusion undesirable inevitably involves an assessment of what the child's welfare and best interests require.
19. The child is now 5 years old and has lived in Pakistan with his mother all his life. He is still at a very young age when the focus of his life will be on his parents (in this case his mother who is his primary carer). Any integration he has will be into the life and culture in Pakistan. Therefore many of the factors ordinarily taken into account in assessing the best interests of a child who is in the UK do not apply in this case. The sponsor has had little direct day to day involvement but this is as a result of the claimant being refused entry to the UK. He has visited his wife and son in Pakistan. There is nothing to indicate that the sponsor and the claimant do not want to raise their son together as a family or that the sponsor is not involved, albeit at a distance, in his son's upbringing. There were no particular factors that should be taken into account with regard to the child or the claimant. He is a British Citizen as a result of his paternity. He is also a Pakistani citizen. The intrinsic importance of citizenship should not be played down -**ZH (Tanzania) (FC) (Appellant) v Secretary of State for the Home Department (Respondent) [2011] UKSC 4.**

20. The best interests of this child are to be brought up by both parents. That does not, however, lead to the conclusion that this must be in the United Kingdom. As held in **ZH Tanzania**:

‘The fact of British citizenship does not trump everything else. But it will hardly ever be less than a very significant and weighty factor against moving children who have that status to another country with a parent who has no right to remain here, especially if the effect of doing this is that they will inevitably lose those benefits and advantages for the rest of their childhood.’

21. In this case the child is entitled to reside in the UK as a British Citizen and to benefit from all the rights and benefits that flow from that. He also has the right to benefit from his Pakistani citizenship. This child will not be uprooted from a settled life in the UK. His British citizenship is not a trump card but I weigh it as a significant factor when considering whether or not refusal of entry clearance to his mother is disproportionate.
22. In **Razgar 2004 UKHL 27** the House of Lords set out five steps to follow when determining Article 8 outside of the Rules. It is not in dispute that the first 4 steps of the test are met and the issue is whether or not refusal of entry clearance is proportionate to the pursuit of the legitimate aim.
23. In **SS(Congo) and Others: [2015] EWCA Civ 387** the court held that in relation to an application for leave to enter the requirements upon the state under Article 8 are less stringent than in the leave to remain context. In **MM (Lebanon) [2017] UKSC 10** the Supreme Court considered that the issue is always whether the authorities have struck a fair balance between the individual and public interests
24. A state has the right to control entry as held in **ZH Tanzania**:

17...The starting point is, of course, that any state has the right, in international law, to control the entry of foreigners and how long they may remain after entry. Nevertheless, that right has to be exercised consistently with the obligations of the European Convention on Human Rights. In *Abdulaziz, Cabales and Balkandali v United Kingdom* (1985) 7 EHRR 471, the European Court of Human Rights held that refusing to admit the foreign spouses of British citizens or persons settled here was not a breach of the article 8 right to respect for family life; there was no general obligation to respect a married couple’s choice of country to live in; and there were no obstacles to establishing family life in their own or their husband’s home countries.

25. In **MM (Lebanon)** the court considered:

41. There is no general obligation to respect a married couple’s choice of country in which to reside or to authorise family reunification. It will depend upon the particular circumstances of the persons concerned and the general interest. Factors to be taken into account are the extent to which family life would effectively be ruptured; the extent of the ties in the host country; whether there are “insurmountable obstacles” (or, as it has sometimes been put in other cases, “major impediments...in the way of the family living in the alien’s home country; and whether there are factors of immigration

control (such a history of breaches of immigration law) or public order weighing in favour of exclusion... If family life was created at a time when the people involved knew that the immigration status of one of them was such that persistence of family life in the host state would from the outset be precarious, "it is likely only to be in exceptional circumstances that the removal of the non-national family member will constitute a violation of article 8"...

26. I am required to take the provisions of section 117B into account when considering whether a decision breaches a person's respect to family life under Article 8. 117B(1) requires that sufficient weight be given to the public interest in immigration control. The claimant speaks English to a sufficient standard (117B(2)) and it appears that the sponsor would be able to support the claimant financially (s117B(3)). Subsections (4-6) are not applicable because (4 and 6) refer to persons in the UK and (5) concerns private life.
27. In the instant case, the couple entered into their marriage at a time when they knew that the claimant had no right to reside in the UK. As identified in **MM (Lebanon)** in such circumstances it is likely only to be in exceptional circumstances that the refusal of entry clearance will constitute a violation of article 8. It has not been argued that there are major impediments to the couple continuing their relationship in Pakistan or that the sponsor would be unable to re-locate there. The sponsor has visited on a number of occasions and they married there. Essentially this was a choice made by the couple to marry in circumstances where the claimant had no right to reside in the UK. Sufficient weight must be afforded to the need to maintain firm and fair immigration control. The claimant did not meet the requirements of the Immigration Rules. Countervailing against this is the fact that the child is a British Citizen. This weighs heavily in favour of entry clearance but it is not a trump card. The result of the decision will not involve removal to another country that is alien to him. Taking all the factors into consideration that I set out above I do not consider that this is sufficient on the facts of this case to tip the balance in favour of the claimant.
28. The refusal of entry clearance in this case is proportionate to the need to maintain effective immigration control.

Notice of Decision

There was a material error of law in the First-tier Tribunal decision, I set that decision aside and re-make the decision dismissing the claimant's appeal against the decision of the Entry Clearance Officer. The decision of the Entry Clearance Officer stands.

Signed P M Ramshaw

Date 19 November 2017

Deputy Upper Tribunal Judge Ramshaw