Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/38907/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 22 August 2014	**On 27 August 2014**

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

MRS ANIJA ANAND

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Chohan, Counsel instructed by Genesis Law Associates Ltd
For the Respondent: Mr T Melvin, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is an Indian citizen. She appeals with permission against the determination of First-tier Tribunal Judge Parker on 9 April 2014 who dismissed her appeal against the Secretary of State's decision to refuse to vary her leave to remain in the United Kingdom on private and family life grounds under Article 8 ECHR, and to remove her by way of directions under Section 47 of the Immigration, Asylum and Nationality Act 2006.

2. At the date of application the appellant still had valid student leave in the United Kingdom which is extended by operation of Section 3C.

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3. The appellant has a spouse in India and two children now aged 13 and 6; no divorce proceedings are underway. She has, however, also entered into a relationship while in the United Kingdom with a Ukrainian citizen who has indefinite leave to remain here. At the date of the First-tier Tribunal hearing she had borne him a child, who was then 4 months old.

First-tier Tribunal determination

4. The appeal in the First-tier Tribunal turned on Article 8 outwith the Immigration Rules only, it being accepted that the Immigration Rules could not be met. At paragraph 29 of the determination the First-tier Tribunal Judge directed himself as follows:

> "I note the guidance uses the word exceptional. This means circumstances in which refusal would result in unjustifiably harsh consequences for the individual or their family such that refusal of the application would not be proportionate. That is likely to be the case only very rarely. The appellant's partner has indefinite leave and the child is a British citizen. The stated intention of the appellant and [her partner] is that they wish to remain in this country. Therefore, [if she is returned to India] they will only be separated for a short period of time. If she wishes to use that time in India to file for divorce and make a contact application [for her Indian children] that is her choice. In law those issues may be regarded as mere hardship and not unduly harsh consequences, given the fact that the appellant's father is in well-paid employment. There is no suggestion that she will be abandoned by her partner and she will be supported by him whilst she returns to India to make the application. If the child remains behind with the father then childcare arrangements will have to be made. I therefore do not find that the appellant has satisfied the test set out in *Gulshan*."

Basis of appeal

5. The appellant challenged the determination on the basis that the First-tier Tribunal had failed properly to apply *Zoumbas v Secretary of State for the Home Department* [2013] UKSC 74, *Sanade and others (British children – Zambrano – Dereci) India* [2012] UKUT 48 (IAC) and *Azimi-Moayed and others (decisions affecting children; onward appeals) Iran* [2013] UKUT 197 (IAC) or to give proper weight to the status of her child as a British citizen.

6. She also contended that the First-tier Tribunal erred in its interpretation of the weight to be given to *R ota Zhang v Secretary of State for the Home Department* [2013] EWHC 891 in the light of *Gulshan (Article 8 – new Rules – correct approach)* [2012] UKUT 640 (IAC) and that at paragraph 30 of the determination, the First-tier Tribunal erred in stating that Article 8 did not need to be considered in the determination, that being the only issue which was live before the First-tier Tribunal.

7. Permission to appeal was granted by First-tier Tribunal Judge Hemingway on all grounds.

Rule 24 Reply on behalf of respondent

8. The respondent in her Reply contended that the First-tier Tribunal judge had directed himself appropriately and that, in particular:

> "3. The Judge was aware that he was dealing with a British citizen child and took the view that it was not be disproportionate in the circumstances to expect the appellant to return to India with or without the child to obtain the necessary entry clearance to return. He applies [sic] the case of Gulshan, and takes the view that there are no compelling or exceptional circumstances. He was entitled to arrive at this conclusion."

9. The respondent opposed the appeal and requested an oral hearing.

Appellant's Rule 24 Response

10. On 14 August 2014, the appellant's representatives filed a response to the respondent's Reply. That response was not filed in time but I have treated it as a skeleton argument for the appellant.

11. In addition to the matters already pleaded, the appellant now relied upon *R ota MM (Lebanon) and others v Secretary of State for the Home Department* [2014] EWCA Civ 985, published on 11 July 2014, arguing that the effect of paragraphs 128-129 thereof was to overturn the 'two-stage' *Gulshan* test and substitute a consideration as to whether in any particular case the Rules were a complete code, failing which a full *Razgar* proportionality assessment was required.

12. The appellant argued that the respondent's Reply was no more than a mere disagreement with the grant of permission and, by implication, that it should be disregarded. The appellant relied on the case of *Nixon (permission to appeal – grounds)* [2014] UKUT 000368 which deals with inadequately particularised permission applications. The relevance of *Nixon* is unclear in relation to the respondent's Reply and, although brief, I do not find that the Reply lacks clarity as to the reasons for sustaining the decision under challenge.

13. Finally, at paragraph 9, the Response states that:

> "9. In accordance with the Procedure Rules he also applies to rely on further evidence why she cannot return home to India."

For the appellant, Mr Chohan accepted that no such evidence had been provided and that paragraph 9 did not amount to a proper Rule 15 request to adduce further evidence.

14. That was the basis on which the appeal came before me.

Upper Tribunal hearing

15. For the appellant, Mr Chohan relied on his grounds and his Response. He argued, as set out in the Response, that after *MM* there was no two-stage *Gulshan* test and that

the Upper Tribunal should proceed simply to deal with Article 8 outwith the Rules. He relied on *Azimi-Moayed.* He asked me to set aside the First-tier Tribunal determination and to allow the appeal.

16. For the respondent, Mr Melvin argued that the First-tier Tribunal determination was not erroneous. In particular, he sought to persuade me that there was no error of law in considering that the appellant had a choice between taking her 4-month old child back to India with her, or leaving the child in the United Kingdom with the father. He did not consider that any particular weight should be placed on the very young age of the baby at the date of hearing.

Legal framework

17. I begin by reminding myself of the guidance available from the decided cases relied upon by the appellant. The cases relied upon deal with two points, the proper approach to the best interests of children pursuant to s.55 Borders, Citizenship and Immigration Act 2009 (whether citizen or non-citizen children); and the correct approach to Article 8 overall, applying either the *Nagre/Gulshan* approach or, as the appellant argued, considering Article 8 in the round, following *MM (Lebanon)* and *Zhang.*

The best interests of children

18. The first case on which the appellant relies concerning the best interests of children is *Zoumbas,* in which Lord Hodge, giving the judgment of the court, at paragraph [10] set out the principles applicable to the removal of children from the United Kingdom with (or without) their parents:

> "(1) The best interests of a child are an integral part of the proportionality assessment under article 8 ECHR;
> (2) In making that assessment, the best interests of a child must be a primary consideration, although not always the only primary consideration; and the child's best interests do not of themselves have the status of the paramount consideration;
> (3) Although the best interests of a child can be outweighed by the cumulative effect of other considerations, no other consideration can be treated as inherently more significant;
> (4) While different judges might approach the question of the best interests of a child in different ways, it is important to ask oneself the right questions in an orderly manner in order to avoid the risk that the best interests of a child might be undervalued when other important considerations were in play;
> (5) It is important to have a clear idea of a child's circumstances and of what is in a child's best interests before one asks oneself whether those interests are outweighed by the force of other considerations;
> (6) To that end there is no substitute for a careful examination of all relevant factors when the interests of a child are involved in an article 8 assessment; and
> (7) A child must not be blamed for matters for which he or she is not responsible, such as the conduct of a parent."

19. The *Zoumbas* case did not concern citizen children: the parents and children were all citizens of the Republic of Congo and were to be removed together as a family unit. At paragraphs [24]-[25] of *Zoumbas,* Lord Hodge said this:

> "24. There is no irrationality in the conclusion that it was in the children's best interests to go with their parents to the Republic of Congo. No doubt it would have been possible to have stated that, other things being equal, it was in the best interests of the children that they and their parents stayed in the United Kingdom so that they could obtain such benefits as health care and education which the decision-maker recognised might be of a higher standard than would be available in the Congo. But other things were not equal. They were not British citizens. They had no right to future education and health care in this country. They were part of a close-knit family with highly educated parents and were of an age when their emotional needs could only be fully met within the immediate family unit. Such integration as had occurred into United Kingdom society would have been predominantly in the context of that family unit. Most significantly, the decision-maker concluded that they could be removed to the Republic of Congo in the care of their parents without serious detriment to their well-being. We agree with Lady Dorrian's succinct summary of the position in para 18 of the Inner House's opinion.
>
> 25. … It was legitimate for the decision-maker to ask herself first whether it would have been proportionate to remove the parents if they had no children and then, in considering the best interests of the children in the proportionality exercise, ask whether their well-being altered that provisional balance. When one has regard to the age of the children, the nature and extent of their integration into United Kingdom society, the close family unit in which they lived and their Congolese citizenship, the matters on which Mr Lindsay relied did not create such a strong case for the children that their interest in remaining in the United Kingdom could have outweighed the considerations on which the decision-maker relied in striking the balance in the proportionality exercise (paras 17 and 18 above). The assessment of the children's best interests must be read in the context of the decision letter as a whole."

20. In the Supreme Court judgment in *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4, at [32]-[33] in the opinion of Lady Hale, the Supreme Court emphasised the importance for citizen children of growing up in the country of their citizenship:

> "32. Nor should the intrinsic importance of citizenship be played down. As citizens these children have rights which they will not be able to exercise if they move to another country. They will lose the advantages of growing up and being educated in their own country, their own culture and their own language. They will have lost all this when they come back as adults. As Jacqueline Bhaba (in 'The "Mere Fortuity of Birth"? Children, Mothers, Borders and the Meaning of Citizenship', in *Migrations and Mobilities: Citizenship, Borders and Gender* (2009), edited by Seyla Benhabib and Judith Resnik, at p 193) has put it:
>
> > 'In short, the fact of belonging to a country fundamentally affects the manner of exercise of a child's family and private life, during childhood and well beyond. Yet children, particularly young children, are often considered parcels that are easily movable across borders with their parents and without particular cost to the children.'

> 33. We now have a much greater understanding of the importance of these issues in assessing the overall well-being of the child. In making the proportionality assessment under article 8, the best interests of the child must be a primary consideration. This means that they must be considered first. They can, of course, be outweighed by the cumulative effect of other considerations. In this case, the countervailing considerations were the need to maintain firm and fair immigration control, coupled with the mother's appalling immigration history and the precariousness of her position when family life was created. But, as the Tribunal rightly pointed out, the children were not to be blamed for that. And the inevitable result of removing their primary carer would be that they had to leave with her. On the facts, it is as least as strong a case as *Edore v Secretary of State for the Home Department* [2003] 1 WLR 2979, where Simon Brown LJ held that "there really is only room for one view" (para 26). In those circumstances, the Secretary of State was clearly right to concede that there could be only one answer."

21. The decision of the Upper Tribunal in *Sanade* in February 2012 predates the introduction of Appendix FM and paragraph 276ADE into the Immigration Rules. There was then no codification of Article 8 in United Kingdom law. The guidance given in *Sanade,* so far as it relates to the factual matrix here, is at paragraph 6 of the judicial headnote:

> *" 6. Where in the context of Article 8 one parent ("the remaining parent") of a British citizen child is also a British citizen (or cannot be removed as a family member or in their own right), the removal of the other parent does not mean that either the child or the remaining parent will be required to leave, thereby infringing the Zambrano principle, see C-256/11 Murat Dereci. The critical question is whether the child is dependent on the parent being removed for the exercise of his Union right of residence and whether removal of that parent will deprive the child of the effective exercise of residence in the United Kingdom or elsewhere in the Union."*

22. In *Azimi-Moayed* in 2013, the Upper Tribunal gave further guidance on the position of children, summarised in the judicial headnote thus:

> "***Decisions affecting children***
>
> *(1) The case law of the Upper Tribunal has identified the following principles to assist in the determination of appeals where children are affected by the appealed decisions:*
>
> *i) As a starting point it is in the best interests of children to be with both their parents and if both parents are being removed from the United Kingdom then the starting point suggests that so should dependent children who form part of their household unless there are reasons to the contrary.*
>
> *ii) It is generally in the interests of children to have both stability and continuity of social and educational provision and the benefit of growing up in the cultural norms of the society to which they belong.*
>
> *iii) Lengthy residence in a country other than the state of origin can lead to development of social cultural and educational ties that it would be inappropriate to disrupt, in the absence of compelling reason to the contrary. What amounts to lengthy residence is not clear cut but past and present policies have identified seven years as a relevant period.*
>
> *iv) Apart from the terms of published policies and rules, the Tribunal notes that seven years from age four is likely to be more significant to a child that the first seven years of life. Very young children are focussed on their parents rather than their peers and are adaptable.*

> *v) Short periods of residence, particularly ones without leave or the reasonable expectation of leave to enter or remain, while claims are promptly considered, are unlikely to give rise to private life deserving of respect in the absence of exceptional factors. In any event, protection of the economic well-being of society amply justifies removal in such cases."*

23. The remaining three cases on which the appellant relied concern the proper approach to Article 8 after July 2012. The conclusion of Mr Justice Sales (as he then was) in *Nagre* was that in relation to deportation, the post-July 2012 Rules constituted a complete code such that only in exceptional or compassionate circumstances would the respondent be required to grant leave to remain outside the Rules.

24. That approach was followed by the Upper Tribunal in *Gulshan,* which summarised the state of the authorities as at December 2013. The judicial headnote says this:

> *"On the current state of the authorities:*
>
> > *(a) the maintenance requirements of E-LTRP.3.1-3.2 stand, although Blake J in R (on the application of MM) v Secretary of State for the Home Department [2013] EWHC 1900 (Admin) said that they could constitute an unjustified and disproportionate interference with the ability of spouses to live together; he suggested that an appropriate figure may be around £13,400, and highlighted the position of young people and low wage earners caught by the higher figure in the rules;*
> > *(b) after applying the requirements of the Rules, only if there may be arguably good grounds for granting leave to remain outside them is it necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under them: R (on the application of) Nagre v Secretary of State for the Home Department [2013] EWHC 720 (Admin);*
> > *(c) the term "insurmountable obstacles" in provisions such as Section EX.1 are not obstacles which are impossible to surmount: MF (Article 8 – new rules) Nigeria [2012] UKUT 393 (IAC); Izuazu (Article 8 – new rules) [2013] UKUT 45 (IAC); they concern the practical possibilities of relocation. In the absence of such insurmountable obstacles, it is necessary to show other non-standard and particular features demonstrating that removal will be unjustifiably harsh: Nagre.*
>
> *The Secretary of State addressed the Article 8 family aspects of the respondent's position through the Rules, in particular EX1, and the private life aspects through paragraph 276ADE. The judge should have done likewise, also paying attention to the Guidance. Thus the judge should have considered the Secretary of State's conclusion under EX.1 that there were no insurmountable obstacles preventing the continuation of the family life outside the UK. Only if there were arguably good grounds for granting leave to remain outside the rules was it necessary for him for Article 8 purposes to go on to consider whether there were compelling circumstances not sufficiently recognised under the Rules."*

25. In *Zhang,* Mr Justice Turner sitting in the Administrative Court decided that the rule that a person with limited leave to remain in the UK had to leave and re-apply to return and remain as a spouse was likely to be a disproportionate interference with the Article 8 rights of the vast majority of ordinary cases. Turner J said that this could not be cured by an applicant asking the SSHD to exercise a discretion outside the Rules. He declined to strike down rule 319C(h)(i) but disapplied it to the applicant before him.

26. Finally, in *MM (Lebanon),* published on 11 July 2014, the Court of Appeal considered the position of three settled husbands (two British citizens and a refugee with indefinite leave to remain) whose non-citizen spouses were not settled in the United Kingdom. None of the couples could meet the new £18600 income requirement. The

Court of Appeal considered *Gulshan, Nagre,* and *Zhang* in analysing the legality of that requirement.

27. The paragraphs in the judgment of Lord Justice Aikens which are relied upon by the appellant in this case, [128] and [129], do not form part of the *ratio decidendi* of *MM (Lebanon).* At paragraphs [132]-[134], Aikens LJ summarises the legal position thus:

> "132. What is the upshot of all these decisions? First, the Secretary of State plainly is under a common law duty not to promulgate an IR that is discriminatory, manifestly unjust, made in bad faith or involves "such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men". If she does promulgate such an IR, it can be struck down or the offending part can be severed. Secondly, I think that *Huang, Baiai, Quila* and *Bibi* all support the proposition that it is the duty of the Secretary of State to formulate an IR in a way that means that even if it does interfere with a relevant Convention right, it has to be capable of doing so in a manner which is not inherently disproportionate or inherently unfair. Otherwise it will not be "rational", or it could be stigmatised as being "arbitrary" or objectionable", or be characterised as being "arbitrary and unjust". Thirdly, the analysis of the Supreme Court in *Quila* and of this Court in *Bibi* make it clear that if the relevant IR is challenged as being contrary to a Convention right, then the ***Huang*** tests have to be applied. The only difference, when it is an IR that is being challenged in principle, as opposed to an individual *Article 8* decision, is that the "proportionality" questions have to be considered in principle. In that case, it seems to me the test must be whether, assuming the relevant IR constitutes an interference with a Convention right, the IR and its application to particular cases, would be inherently disproportionate or unfair. Another way of putting the test is whether the IR is incapable of being proportionate and so is inherently unjustified.
>
> 133. Where does that leave the statements made in the *AM (Ethiopia), Pankina* and *Nagre* line of cases, viz. that the Secretary of State's duty is to protect an immigrant's Convention rights whether or not that is done through the medium of the IRs so that "it follows that the Rules are not of themselves required to guarantee compliance with the [relevant Article]".[I think that the reconciliation must be along the following lines: first, Laws LJ was dealing with the principles of construction of IRs. IRs are not to be construed upon the presumption that they will guarantee compliance with the relevant Convention right. Secondly, therefore, a particular IR does not, in each case, have to result in a person's Convention rights being "guaranteed". In a particular case, an IR may result in a person's Convention rights being interfered with in a manner which is not proportionate or justifiable on the facts of that case. That will not make the IR unlawful. But if the particular IR is one which, being an interference with the relevant Convention right, is also incapable of being applied in a manner which is proportionate or justifiable or is disproportionate in all (or nearly all cases), then it is unlawful.
>
> 134. Where the relevant group of IRs, upon their proper construction, provide a "complete code" for dealing with a person's Convention rights in the context of a particular IR or statutory provision, such as in the case of "foreign criminals", then the balancing exercise and the way the various factors are to be taken into account in an individual case must be done in accordance with that code, although references to "exceptional circumstances" in the code will nonetheless entail a proportionality exercise. But if the relevant group of IRs is not such a "complete code" then the

proportionality test will be more at large, albeit guided by the *Huang* tests and UK and Strasbourg case law."

Discussion

28. The judge in the present appeal did not have the benefit of *MM (Lebanon)* when preparing his decision. He did consider the guidance in *Azimi-Moayed* and apply the *Nagre/Gulshan* approach. He addressed himself briefly to *Zhang* and *Gulshan* at paragraphs [24]-[25], albeit without reaching a conclusion as to whether they are compatible. He failed, however, to place any weight at all on the British citizen status of the child, save to note it at paragraph 23. Crucially, he failed to address the approach of Lady Hale in *ZH (Tanzania).* He did not make any finding as to whether, in the context of a marriage where one spouse is settled and the other not, Appendix FM and paragraph 276ADE constitute a complete code such that the exceptional or compassionate circumstances approach in *Nagre* and *Gulshan* might be ousted and Article 8 applied as it was before July 2012.

29. The judge found as a fact that settlement applications from India take sixty days to process. He considered that the appellant could either take her child with her, or make alternative arrangements, for that short period, while she applied to rejoin her United Kingdom partner from India. In reality, the appellant could not be expected to leave a four month old child in the United Kingdom with her husband. At that age, the mother is the child's principal carer and it follows that at the date of hearing before the First-tier Tribunal, in order for the appellant to be removed to India it would have been necessary for her citizen child to be deprived of the benefit of growing up in the United Kingdom, for however long it might take her to get entry clearance to return and rejoin her partner in the United Kingdom.

30. It is unclear on what basis such a settlement application would be made: the appellant is still married to her Indian husband and has three children with him. She is not free to marry her United Kingdom partner and therefore cannot apply to enter as his spouse or fiancée. It might well take significantly longer for her to sort out her marital affairs and be in a position to make an application within the Rules to rejoin her partner here, particularly since the accepted evidence is that she does not know where in India her husband and three children from her marriage are living.

31. The failure to give weight to the young age and British citizenship of the baby does amount to a material error of law. This determination must be set aside and remade and at the hearing I indicated that it would be necessary for there to be a further oral hearing, since the child is now approximately one year old. I considered that to be necessary principally because of the insertion of Part 5A into the Nationality Immigration and Asylum Act 2002 on 28 July 2014 by s.19 of the Immigration Act 2014. The determination will therefore be remade in the First-tier Tribunal at the Birmingham hearing centre on 8 October 2014.

Directions

32. The appellant has leave to file amended grounds of appeal dealing with part 5A (limited to four A4 pages), within 7 days of receiving this decision.

33. The respondent may serve and file a Reply to any such amended grounds (limited to four A4 pages), if so advised, within 21 days thereafter.

34. Any other relevant directions for the remaking of the determination will be made by the Birmingham Hearing Centre.

Conclusions

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law. I set aside the decision. The decision will be remade in the First-tier Tribunal.

Signed Date: 26 August 2014

Upper Tribunal Judge Gleeson