Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/01209/2013

THE IMMIGRATION ACTS

Heard at Manchester	**Determination Promulgated**
On 11th September 2014	**On 17th September 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE LEVER

Between

MR RAJA TARIQ MEHMOOD KHAN
(ANONYMITY NOT RETAINED)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Thornhill
For the Respondent: Mr Harrison

DETERMINATION AND REASONS

Introduction

1. The Appellant born on 6th December 1980 is a citizen of Pakistan. The Appellant was represented by Mr Thornhill. The Respondent was represented by Mr Harrison a Home Office Presenting Officer. The Sponsor in this case Mrs Asma was present.

Substantive Issues under Appeal

2. The Appellant had made application on 29th June 2012 for entry clearance as a spouse under paragraph 281 of the Immigration Rules (in existence at that stage). The application had been refused by the Entry Clearance Officer on 11th December 2012. The application had been refused under the terms of paragraph 320(18) of the Immigration Rules. The Appellant had appealed that decision and the appeal was heard by Judge of the First-tier Tribunal Smith sitting at Manchester on 25th October 2013. The judge had dismissed the Appellant's appeal under both the Immigration Rules and Article 8 of the ECHR. Application for permission to appeal had been made and granted by First-tier Tribunal Judge Astle on 12th May 2014. Permission was granted on the basis that it was arguable the judge had misinterpreted the case of **F USA [2013] UKUT 00309**. The Respondent had opposed that application by letter dated 10th June 2014. Directions had been issued firstly for the Upper Tribunal to decide if an error of law had been made by the First-tier Tribunal and the matter comes before me in accordance with those directions. Further directions were issued to the parties that the Tribunal did not have any of the documentary evidence that was before the Immigration Judge.

Submissions on Behalf of the Appellant

3. Mr Thornhill referred me to the case of **F** contained within the bundle presented by him to the Upper Tribunal dated 9th September 2014. I am grateful for the compilation of that bundle given the absence of documents that were before the First-tier Tribunal Judge. It was submitted that it was necessary for the judge, in accordance with the case of **F**, to have considered, using his own discretion, the facts of this case even if it was found that there were strong compassionate reasons for allowing the appeal.

Submissions on Behalf of the Respondent

4. It was said by Mr Harrison that the judge had looked at the case of **F** and was aware of that case and I was referred to paragraphs 14 and 15 in particular within the determination that indicated the judge had found no discretionary basis for allowing the appeal.

5. Given the absence of documents that may or may not have been before the First-tier Tribunal I, with the assistance of the representatives, obtained some basic facts concerning the background to the Appellant's position. Those facts suggested that the Appellant had first come to the UK as a visitor in 2004 and had thereafter remained unlawfully. He had been caught attempting to leave the United Kingdom using a false travel document to go to Pakistan in 2008. As a result of the use of that fraudulent document he had been sentenced to twelve months' imprisonment on 8th May 2008. The Appellant had then been removed under the Voluntary Removal Scheme on 29th August 2008 and thereafter had remained in Pakistan. He had married the Sponsor in Pakistan in

2012. The Sponsor is a British citizen of Pakistan origin. She has three children from a previous marriage. The marriage between herself and the Appellant was an arranged marriage as she had described they were former friends. Her previous marriage had taken place in 2007 and she had been divorced in 2012.

6. At the conclusion of the submissions I reserved my decision to consider this case and now provide that decision with my reasons.

Decision and Reasons

7. The application in this case had been made before the changes to the Immigration Rules on 9th July 2012 and the original application had therefore been made under paragraph 281 of the Immigration Rules. It would appear to be the case that the Entry Clearance Officer had not considered the merits or otherwise of the application under paragraph 281 of the Immigration Rules being satisfied that the Appellant failed to meet the Immigration Rules as a result of paragraph 320(18) of those Rules. That was because the Appellant had been convicted of an offence in the United Kingdom punishable with imprisonment for a term of twelve months or any greater punishment. In this case the Appellant had been convicted to a sentence of twelve months for an offence which carried a maximum sentence of two years' imprisonment. That was in relation to the conviction in 2008 relating to his use of a fraudulent travel document. It was further agreed that that conviction was not a spent conviction.

8. Paragraph 320 subparagraph (18) is one of the subparagraphs that comes within the general heading "Grounds on which entry clearance or leave to enter the United Kingdom should normally be refused". The use of the phrase "should normally be refused" suggests an element of discretion when applying that Rule. The terms of paragraph 320(18) has built in to it the concept of discretion where it states "save where the Immigration Officer is satisfied that admission would be justified for strong compassionate reasons".

9. It was submitted by Mr Thornhill that paragraph 320(18) requires essentially a two stage discretionary approach. The first stage is to decide if there are strong compassionate reasons. If there are such reasons then there is no need to move to the second stage. However if there are not strong compassionate reasons to allow admission it is said that the general discretionary heading referred to above allows for a second stage analysis of whether there are factors that would allow discretion to be favoured one way or the other.

10. The only guidance that has been referred to me in this respect is guidance valid from 31st August 2011 at pages 52 and 53 of what where then guidance based on the Immigration Rules issued by the Home Office. The only relevant parts of that guidance state that if an Immigration Officer decides to refuse an applicant based on his conviction then that Immigration Officer must take into account any human rights reasons and

make sure the refusal is both proportionate and reasonable. Secondly the guidance in mandatory terms states "You must not refuse an applicant under paragraph 320(18) if their conviction is spent under the Rehabilitation of Offenders Act 1974. It was agreed that in this case that did not apply to the Appellant. The reference to taking into account human rights reasons and making sure the refusal is both proportionate and reasonable is not directly linked to the phrase within paragraph 320(18) that "Admission would be justified for strong compassionate reasons". It would seem by inference however that it does relate to that phrase and thereby providing guidance to Immigration Officers that if their decision would, by application of the correct test at that time, infringe an individual's family or private life under Article 8 of the ECHR then that in turn would be a strong compassionate reason for allowing admission.

11. The judge in this case had before him evidence as to the circumstances relating to the marriage and family life existing between the Appellant and the Sponsor and her children. Insofar as that evidence is referred to within the determination it is consistent with those facts referred to above and obtained at this hearing, given the absence of original documentation.

12. The judge at paragraph 14 referred to the authority of **F [2013] UKUT 00309** and he had clearly noted that case and referred to the headnote that made reference to taking a two stage approach. The judge had reminded himself of the general heading that related to paragraphs 320(8) through to 320(22) that being that entry should normally be refused. He had then in paragraph 14 considered whether there were strong compassionate reasons in this case why the normal effect of the law to refuse entry should not follow. He had noted, and it must be correctly, that the fact that the parties are married cannot in itself be the strong compassionate reasons otherwise every matrimonial application would have to be allowed which would defeat the purpose of the provision. He had therefore asked himself whether the particular circumstances of this case gave rise to strong compassionate reasons. He had noted that the parties had married in the full knowledge of the Appellant's immigration history and that marriage had taken place as recently as 2012 in Pakistan. He noted that the children of the Sponsor had only met the Appellant once at the wedding and he further noted that from the evidence available there was no medical issues affecting any of the parties. He concluded paragraph 14 by stating:

> "There is nothing in this case that appears to me to amount to anything approaching strong compassionate reasons as to why the normal effect of the law should not take place. It is my view that the application has been properly refused pursuant to paragraph 320(18)".

13. He had then noted in paragraph 15 the argument placed before him that notwithstanding finding there were no strong compassionate reasons it was said that the ECO had failed to exercise his discretion. The judge noted that that decision by the Entry Clearance Officer had been reviewed

by an Entry Clearance Manager who had exercised discretion but not in favour of the applicant. He had noted that neither party had placed before him any guidance with regard to how and when the discretion is to be exercised but concluded that on the evidence before him it certainly appeared that the ECM was aware of the consideration of applying discretion but had applied it against the applicant. He concluded that he was satisfied the discretion had been applied and that the decision was therefore not an unlawful decision.

14. It could be argued that whilst the judge had recognised the existence of that residual discretion, and had recognised that the ECM had applied it but against the applicant it was nevertheless incumbent upon the judge separately and independently to have undertaken that residual discretion exercise himself. If in paragraph 15 he had done no more than simply say that he agreed with the decision of the ECM after reviewing the evidence then there could be no argument in this case.

15. The judge did not do that. It was submitted however that the final sentence of the previous paragraph "It is my view that the application has been properly refused pursuant to paragraph 320(18)" is tantamount to the judge having so exercised that residual discretion. Whilst that is one interpretation of the final sentence of paragraph 14 the context of the final sentence of paragraph 14 is in respect of the first stage test namely whether there were strong compassionate reasons or not. It would be difficult to read down the final sentence of paragraph 14 to incorporate the judge independently exercising the residual discretion. Indeed paragraph 15 suggests that the judge was responding to a specific submission that the failure of the Entry Clearance Officer to exercise residual discretion rendered the Respondent's decision unlawful.

16. In conclusion it may well be the judge made an error of law in not independently exercising his own discretion in terms of that second stage approach i.e. the residual discretion that still existed even though strong compassionate circumstances had not been found. The question is whether that error of law, which in some respects is somewhat semantic led to a material error of law being made in that had he exercised such residual discretion could it have altered his decision.

17. This was not a material error of law. Firstly as the judge noted the general heading to this section of paragraph 320 indicated that the application should normally be refused. Secondly the judge thereafter had himself found that there were no strong compassionate reasons in this case to overturn the normal effect of the law. Indeed he went further where he said that there was nothing that amounted to anything approaching strong compassionate reasons. Further and with some significance the judge had at paragraphs 16 to 18 independently considered whether the decision to refuse entry clearance would be a breach of the Appellant's right to a family and private life pursuant to Article 8. In this respect he had looked at the facts presented before him with the case of **Razgar [2004]** in mind. The judge had provided clear and proper reasons why he found a

refusal would not be disproportionate in the circumstances of this case. In reaching that conclusion the judge had properly considered the interests of the children referred to above.

18. Given the factual background of this case and even bearing in mind that this application predated the change to the Immigration Rules, it is extremely difficult to see how the judge could have arrived at any other conclusion when properly applying the appropriate test under Article 8 of the ECHR. As noted above there was nothing before the judge or indeed before me in terms of issued guidance on factors that may or may not be considered in the exercise of this "residual discretion". Having concluded that there were no strong compassionate circumstances; having further concluded that the facts did not even amount to anything approaching strong compassionate reasons and finally having properly concluded that the facts did not demonstrate a refusal would be a disproportionate breach of Article 8 of the ECHR when looking at the circumstances both of the Appellant, the Sponsor and her children it is extremely difficult if not close to impossible to think of any other facts or other test other than proportionality that could have been applied if the judge had looked at the concept of "residual discretion". Accordingly whilst it could be said that one reading of paragraphs 14 and 15 indicated an error of law, it is clear that it was not a material error of law and that had the judge exercised that residual discretion, independent of the conclusion reached by the Entry Clearance Manager, the judge would have reached no other conclusion than the one that he did reach in dismissing the appeal both under the Immigration Rules and under Article 8 of the ECHR.

Decision

19. There was no error of law made by the judge in this case and I uphold the decision of the First-tier Tribunal.

No anonymity order is made.

Signed Date

Deputy Upper Tribunal Judge Lever