Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/13357/2013

THE IMMIGRATION ACTS

Heard at Bradford	**Determination Promulgated**
On 10th July 2014	**On 27th August 2014**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
Appellant

and

MA
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Ms R Pettersen, Senior Presenting Officer
For the Respondent: Mrs A Javid, Solicitor on behalf of Reiss Solicitors

DETERMINATION AND REASONS

1. This is an appeal by the Secretary of State against the decision of the First-tier Tribunal allowing MA's appeal against the decision of the Entry Clearance Officer to

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refuse his application for leave to enter the United Kingdom to join his spouse and Sponsor, NS, a British citizen. For the purposes of this decision, I shall refer to the Secretary of State as the Respondent and MA as the Appellant, reflecting their positions as they were in the appeal before the First-tier Tribunal.

2. Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings. I have made such a direction as the evidence before the Tribunal refers to medical evidence in respect of a minor and also a party.

3. The Appellant is a citizen of the People's Republic of China. On 25th February 2013 he applied for leave to enter the United Kingdom to join his spouse and Sponsor, NS, who is a British citizen. That application was refused by the Respondent on 22nd May 2013.

4. The reasons for refusing that application were two-fold; namely that the Entry Clearance Officer was not satisfied that the Appellant met the relationship and the financial requirement of Appendix FM of the Immigration Rules and, in particular, paragraphs E-EC-P.1.1(d) and E-ECP.3.1 thereof. The reasons were also given in the refusal letter of the same date. In respect of their relationship, it was stated that the Appellant had not indicated when the relationship first began and there was no evidence to substantiate the claim that the couple last saw one another on 22nd June 2012. It was asserted there was little evidence of contact which amounted to a single remittance slip and a number of photographs dating back to 2010. Thus the first issue was that the Entry Clearance Officer was not satisfied that the relationship was genuine and subsisting or, that the couple intended to live together permanently.

5. The second reason for refusing the application was in respect of the financial requirements. It was asserted that the documents provided did not clearly confirm the Sponsor's gross income for the last six months. The evidence of employment was considered and it was noted that there was no evidence indicating salary payments into the Sponsor's account. Thus the application was refused.

6. The Appellant exercised his right to appeal that decision and on 25th September 2013 the Entry Clearance Officer reviewed the further evidence but maintained her decision.

7. The Appellant's appeal was heard before the First-tier Tribunal (Judge Bagral) on 2nd April 2014 at Bradford. The judge had the advantage of hearing oral evidence from the Sponsor and also a witness in the form of her employer, Mr T. It is plain from reading the determination at [11] that the judge found their evidence to be frank, truthful and credible and was in accordance with the documentary evidence that had been placed before the judge.

8. First of all, the judge dealt with the issue of whether the couple were in a genuine and subsisting relationship. As set out above it is plain that the judge formed a more

than favourable view of the Sponsor's evidence and whilst the relationship had been challenged by the Entry Clearance Officer in the refusal letter and that had formed part of basis the refusal, it is further plain from reading the determination at [12] that the Presenting Officer at the hearing did not challenge the evidence provided in support of the relationship. The judge found the Sponsor's evidence as to the relationship "entirely genuine" (at [12]) and found on the evidence before her that they had maintained contact via various methods such as telephone, Facebook, Skype and texts and that there were photographs of the couple and a single post-marriage visit.

9. The judge also placed weight and importance upon the fact that a child was born of the parties on 5th March 2013. The decision in this case was 22nd May 2013, two months after the birth of the child. The Appellant provided evidence before the Entry Clearance Officer which was referred to in the ECM review on 29th September 2013 in the form of a birth certificate. However the Entry Clearance Manager considered that this was not evidence of a subsisting relationship between the father and mother. However this was not maintained before the First-tier Tribunal and the judge found at [12] and [13] that this was a genuine and subsisting relationship and therefore had met the relationship requirements under Appendix FM.

10. Dealing with the financial requirements, the reasons given by the Entry Clearance Officer for refusing the application was set out by the judge at [2]. The judge dealt with the issues at [14]-[18] of the determination. Despite the matters set out in the refusal letter there appeared to be little in dispute between the parties at the hearing itself. It was accepted by the Presenting Officer that the Appellant was in employment at the time of the date of decision and that the gross pay was £18,600 and the judge recorded at [18] that the Presenting Officer accepted that. It was further accepted that the relevant documents to support the financial requirements (in the form of bank statements for the six month period demonstrating salary payments) had been provided (at [17]). The judge refused, in my view properly, the Presenting Officer's submission relating to the date of the Appellant's employment at [17]. Thus the only issue outstanding and identified by the parties was whether the Appellant had complied with the requirement to produce an employer's letter. The Appellant's representative did not dispute the letter from the employer had not been provided and the judge did not accept the argument that the accountant's letter was sufficient to satisfy the requirement for a specified document. Thus she found that the Appellant could not meet the Immigration Rules for that reason. In this context it is important to note that the judge had the opportunity to hear the oral evidence of a witness, Mr T, who is the Sponsor's employer. At [11] the judge made a finding that his evidence was truthful, frank and credible and that he was her employer and that instead of the letter being produced, the judge had the advantage of hearing the oral evidence of the employer which the judge accepted and it was this that formed the findings in due course at [21].

11. The judge then moved on to Article 8 applying the guidance in **Gulshan [2013] UKUT 640 (IAC)** and at paragraphs [20]-[21] the judge reached the conclusion that there were good grounds for granting leave to remain outside the Immigration Rules

placing weight upon medical evidence in respect of the newborn British child and that of the mother, that the income threshold was met and that the legitimate purpose behind the Rules to ensure that the applicant did not have recourse to public funds had been met in this case (in the light of the evidence from the witness). The judge considered that "notwithstanding the very weighty interest of the Respondent", the judge found on the issue of proportionality that the decision of the Respondent was not justified on the particular facts of the case. Thus she allowed the appeal on human rights grounds (Article 8).

12. The Respondent sought permission to appeal that decision to the Upper Tribunal. The grounds are set out in the application. Those grounds submit that the judge failed to identify the compelling circumstances that were not recognised by the Immigration Rules and had failed to follow the approach of **Gulshan** (as cited) and **R (Nagre) v SSHD [2013] EWHC 720 (Admin)**. It was further asserted that the judge did not give adequate reasons for allowing the appeal under Article 8 and that it had not been considered that the Appellant could make a further application and that the judge failed to demonstrate how the refusal would lead to an unjustifiably harsh outcome.

13. Permission to appeal was granted on 21st May 2014. Thus the appeal came before the Upper Tribunal. Ms Pettersen appeared on behalf of the Secretary of State and Mrs Javid, who appeared at the court below on behalf of the Appellant. Ms Pettersen relied upon the grounds set out in the papers noting that the judge had dismissed the appeal under the Immigration Rules because the Appellant had not produced an employer's letter. That was a specified document. She submitted in those circumstances it was not open to the judge to allow the appeal under Article 8 as the judge had not provided adequate reasons for finding that there would be unjustifiably harsh circumstances on the facts of the case. She submitted that in terms of Article 8, the decision would have no affect on the child and it would maintain the status quo. The judge failed also to deal with the remedy of making a further application and was swayed by postdecision evidence concerning the birth. Thus it was submitted the judge made an error of law.

14. Mrs Javid submitted that the grounds did not demonstrate any legal error on the part of the judge and that she had correctly directed herself on the law and the findings of facts made were open to her on the evidence. In particular, there was medical evidence relating to the child's birth which was not post-decision but which was before the date of decision. Any discussion of that evidence was relevant to the issues. Furthermore the Sponsor described her own medical problems at the time of the birth of the child. The judge took all of that evidence into account and having heard the oral evidence of the Sponsor and also the witness allowed the appeal on Article 8 grounds. There was no error of law in her approach and it was submitted on behalf of the Appellant that the judge had identified compelling circumstances in the case. Thus she invited me to uphold the decision.

Conclusions:

15. I have had the opportunity of hearing the submissions of the parties and also reading the determination in the light of the evidence that was before the First-tier Tribunal. Having done so, I have reached the conclusion that the Secretary of State has not made out her grounds that the decision of the judge demonstrated that she erred in law. I shall set out my reasons for reaching that view.

16. The grounds submit that the judge, having found that the Appellant did not meet the Immigration Rules wrongly went on to consider Article 8 outside of the Rules and failed to properly apply the decision of **Gulshan** (as cited) and that the appeal should only be allowed if exceptional circumstances were found that would lead to an unjustifiably harsh outcome (see Grounds 1-10 relied upon by Ms Pettersen). In this case it is also asserted that no adequate reasons were given for reaching the view that it would be unjustifiably harsh to refuse the application (see Ground 12). It is further contended on behalf of the Respondent that the Secretary of State had set a minimum income threshold for those who chose to establish their family life in the UK (see grounds at [8]).

17. When reading the determination as a whole it is plain that the judge properly applied the law. The judge at [19] set out the decision of **Gulshan [2013] UKUT 64 (IAC)** and had express regard to paragraph 24(b) of that decision in which it is said:-

> "(b) After applying the requirements of the Rules, only if there may arguably be 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: **Nagre**."

18. The relevant case law makes it clear that the Immigration Rules should be the starting point in any consideration of the issue of the rights of the Appellant under Article 8 of the ECHR. Thus the judge was required to consider whether there were any "arguably good grounds". It is plain to me that the judge did carry out that consideration at [20] and did so in the context of the evidence before her. The judge identified two relevant considerations that were capable on the evidence of constituting "arguably good grounds" to consider the claim outside the Rules by conducting a second stage Article 8 assessment addressing the well-established **Razgar** matters. Whilst the judge made reference to the judge not identifying the "arguably good grounds" the judge, in fact did so at [20]. At the date of the decision the Appellant had a newborn British son with medical difficulties. The judge relied upon this at [20]. There was no challenge to the evidence in this regard and that was a finding wholly open to the judge to make on the evidence before her.

19. The child of the parties had been born on 5th March 2013, two months prior to the decision. The Respondent was plainly aware of the birth of the child as the birth certificate had been sent as evidence of the genuineness and subsistence of the relationship. The Entry Clearance Manager, notwithstanding this important piece of evidence, did not consider that it demonstrated a genuine or subsisting relationship between the parties. The evidence confirming the child's birth was also before the

judge. It was plainly not post-decision evidence as submitted on behalf of the Secretary of State, in the light of the child's birth which took place prior to the decision. Any reference to the medical evidence post-decision was relevant and appertained to the facts at the date of the decision. The medical evidence was set out within the bundle. It is plain from reading the medical evidence the birth of the child was traumatic. The child was born by emergency caesarean section and the Sponsor suffered a haemorrhage which required further emergency surgery. The medical evidence sets out her circumstances which continued for a time after the birth; she gave birth on 5th March but was not discharged from hospital until 18th March 2013 (see page 33). The evidence of the Sponsor is set out in her witness statement at page 52 which was to the effect that this had been a very complicated pregnancy and birth. This is amply reflected in the documentary evidence at page 39, a letter from the hospital and at 47 a letter from her doctor. There is no doubt that this was an extremely traumatic experience for the Sponsor in the light of that evidence.

20. As to her son's birth, he was born with a significant renal abnormality. Following the birth he was transferred from Keighley, the local hospital, to Leeds for further treatment and assessment. He was diagnosed as having a bilateral grade 5 vesico-ureteric reflux with associated hydronephrosis and neurogenic bladder. He later returned to hospital in the local area and it was recorded that the medical requirements were such that he required careful review including blood checks on a fortnightly basis, repeated ultrasound scans and was further to be reviewed by a specialist consultant at the main hospital with direct access to the paediatric unit out of usual hours. At thirteen weeks the evidence was set out at page 47. The evidence, I find was relevant to the circumstances of the child and could not be properly described as post-decision evidence. That confirmed congenital hydronephrosis, neuropathic bladder and vesicoureteric reflux. It set out that he was attending hospital and tests on a weekly basis. It recorded the evidence in relation to the child that it would then be of benefit to both the mother and child to have her husband in the United Kingdom.

21. There is therefore no merit in the ground that the judge did not identify any arguably good grounds for going on to conduct a second stage Article 8 assessment. The judge plainly gave reasons which were supported by the evidence. In this respect the judge paid regard to the findings made in the earlier parts of the determination relating to the genuineness of the relationship and that this was a subsisting relationship. As I have set out it is of relevance that much of the refusal was based on the view that there was insufficient evidence of the relationship as one that was genuine and subsisting. The judge reached a contrary view after having the advantage of considering not only the documentary evidence but also hearing the oral evidence of the parties. The judge also considered it in the light of the birth of the child which the Entry Clearance Officer had plainly been aware of but still considered that that was insufficient to deal with this issue.

22. On the judge's consideration of the **Razgar** questions, it is plain that she resolved them in favour of the Appellant (see [20]). The judge then turned to the issue of proportionality. As to proportionality, the grounds do not make reference to this

issue in that sense. The grounds challenge the findings by way of inadequate reasoning as to why the judge found that it would be "unjustifiably harsh". The judge set out her consideration of the issues at [21] and [22]. They were required to be considered alongside the findings of fact made in the earlier part of the determination. Contrary to the grounds, the judge gave adequate and sustainable reasons for reaching the view that the proportionality balance lay in favour of granting entry clearance and that it would be in those circumstances "unjustifiably harsh" not to allow the appeal outside of the Rules.

23. In this context she took into account the reasons for refusal under the Immigration Rules. Whilst the judge referred to it as a "technical failure", I am satisfied that this was not seen in the sense of a "near miss". Indeed the Respondent has not sought to argue any such point. Instead the Respondent argues that the Secretary of State is entitled to set a minimum income threshold with the aim of ensuring that those who chose to establish their family life in the UK should have the financial ability to support themselves such that the migrant partner does not become a burden on the taxpayer and is better able to integrate into society (see paragraph 8 of the grounds). This was the very point the judge made and placed weight and reliance upon. The judge recorded that the Presenting Officer at the hearing accepted that she was employed as claimed and that she met the minimum income requirement of £18,600 gross as set out in the Rules and that the oral evidence of her employer was accepted as to her employment. Thus, contrary to the grounds, it was open to the judge to find that the Sponsor had demonstrated the requisite level of income which was met at the date of decision. In this context the judge went on to state that in view of this, the legitimate purpose of the Rules to ensure that the applicant does not have recourse to public funds had been met. This echoes the submission made on behalf of the Respondent at paragraph 8 of the grounds that that is the legitimate aim of the minimum income threshold requirements. The judge went on to state:

> "Notwithstanding the very weighty interests of the Respondent in maintaining immigration control and the Appellant's failure to meet the requirements of the Rules, the significance of which I fully take into account, I cannot accept the Respondent's decision is justified in these circumstances."

This was a finding that was open to the judge on the particular and individual circumstances of this applicant and the judge was entitled to make that finding and place weight upon it when considering the issue of proportionality. However it cannot be said that this was the only factor which was placed in the balance in favour of the Appellant. It is plain from reading the determination as a whole that the judge placed weight upon the medical evidence relating to the Appellant's child at [22] as set out earlier in this determination. The consideration of the child's medical problems and how it impacted on the mother and the Appellant was not postdecision evidence as it was evidence appertaining to the factual circumstances at the date of decision. The judge was entitled to weigh in the balance the effect of the separation between the Appellant and the Sponsor and against the circumstances of coping with a child with medical problems as set out in the evidence and her account that she had been finding it difficult to cope.

It is further plain from reading the determination the judge had formed a favourable impression of the Sponsor and the evidence before her, both oral and documentary and the judge was entitled to place weight upon that when reaching a decision on proportionality.

Whilst the decision may be characterised as a generous one, the relevant issue to decide is whether or not the judge erred in law in making her decision or whether the grounds in fact amount simply to a disagreement with those generous findings. I have reached the conclusion after reading the determination as a whole, considering the evidence that was before the judge and the submissions of the parties, that this was a case where the judge did carefully set out the relevant case law and the principles of the leading cases and identified and followed the approach set out in the decision of the Upper Tribunal in **Shahzad** at paragraph 31 of that decision. In line with that approach, the judge found at [20] that there were arguably good grounds for considering the facts of the case outside the Rules and that there were compelling circumstances which were properly identified by the judge. The judge did give adequate reasons for finding that there were arguably good grounds and therefore that compelling circumstances did exist on the particular facts of this case. Whilst the judge did not specifically direct herself to the issue of making a fresh application, it is plain from the issues under discussion that she formed the view that further separation between the parties was not warranted for the reasons that she gave.

24. For those reasons, I have reached the conclusion that the Secretary of State has not demonstrated that there was an error of law in the judge's approach and thus the decision shall stand.

Decision:

The decision of the First-tier Tribunal does not disclose an error on a point of law. The decision stands; the appeal is allowed.

Direction Regarding Anonymity – Rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date

Upper Tribunal Judge Reeds