



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/13640/2013

THE IMMIGRATION ACTS

Heard at Field House
On 17 June 2014

Determination Promulgated
On 27 June 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE G A BLACK

Between

MR MUSTAFA SIMSEK

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: No representative (Mrs Michelle Simsek attended as sponsor)
For the Respondent: Mr P Deller (Senior Home Office Presenting Officer)

DETERMINATION AND REASONS

1. The appellant in this matter is the Secretary of State for the Home Department. For ease of reference I shall refer to the parties as the claimant and the Secretary of State for the Home Department. This matter comes before me for consideration as to whether or not there is a material error of law in the determination of First-tier Tribunal Judge Davidge promulgated on 18 March 2014.

Background

2. The claimant is a Turkish national who appealed the respondent's decision dated 29 March 2013 in which his application for entry clearance as the spouse of a British citizen was refused.

3. The basis of the refusal was the appellant could not meet the requirements of the Immigration Rules because the sponsor's wages of £11,802 per annum fell short of the required amount of £18,600 per annum as set out in the new Rules. Her actual income was £16,562 plus child tax credit of £4,760 per year.
4. The matter was reviewed by an Entry Clearance Manager under Article 8 ECHR who concluded that family life was not engaged because there was no evidence of family life between the claimant and his British child other than a two week visit at the time of his birth in 2012. It was considered that contact could be continued using modern methods of communication and visits.
5. The appeal was heard in the First-tier Tribunal where the sponsor attended and gave oral evidence. The findings made in the determination at [16] are not challenged. The Tribunal concluded that the Immigration Rules were not met because of the financial requirements. The Judge went on to consider Article 8 ECHR having had regard to the principles of Gulshan in [21] to [23]. She found that there were arguable grounds for considering the appeal outside of the rules, primarily because in out-of-country cases there is no express provision in the new rules which allows for an assessment of Article 8-type rights as encompassed in EX1. In considering Article 8 ECHR the judge followed the approach of Razgar and also placed weight on the decision made by Blake J in MM v Secretary of State for the Home Department [2013] EWHC 1900. She concluded the decision was not proportionate having regard to the financial requirements.

Grounds of Appeal

6. The Secretary of State argued that the First-tier Tribunal erred in law by allowing the appeal under Article 8 ECHR and that the determination contained a material misdirection of law with regard to consideration of the guidance in Gulshan [2013] UKUT 00640 (IAC) and Nagre [2013] EWHC 720 (Admin). It was submitted that the outcome would not be considered to be "unjustifiably harsh".
7. The Secretary of State also argued that Blake J in MM usurped the role of the democratically accountable decision maker and that the Tribunal in relying on MM erred in law. Further the Tribunal was wrong to rely upon MM as to the proportionality assessment as the Tribunal relied on an unsafe authority whose conclusions cannot stand.

Permission to Appeal

8. First-tier Tribunal Judge Coates granted permission to appeal on 24 April 2014.

Error of Law Hearing

9. The sponsor attended the hearing in support of the claimant. The nature of the proceedings was explained to her and she was informed that she would be able to address the Tribunal having heard the submissions raised by the Secretary of State.

Submissions

10. Mr Deller relied on the detailed grounds of appeal with regard to the two issues namely that the judge erred by failing to apply Gulshan guidance and secondly, wrongly relied on MM currently awaiting a decision by the Court of Appeal. The judge failed to explain fully her application of MM and failed to have regard to recent jurisprudence on Article 8 ECHR.
11. Mrs Simsek responded by acknowledging that she did not earn the required income level but she had a small child and was working part-time. If allowed to enter the UK her husband would be working and they would not be claiming tax credits and be able to pay their way without recourse to public funds.
12. At the end of the hearing I reserved my decision.

Findings and Conclusions

13. I find no material error of law in the judge's decision. I am satisfied that she fully engaged with the relevant issues in her detailed and well-reasoned determination. She correctly applied the Immigration Rules and concluded that the claimant was unable to meet the financial requirements. As regards Article 8 ECHR at paragraph 21 she correctly considered the guidelines in Gulshan (Article 8 - new rules - correct approach) [2013] UKUT 00640 and clearly set out her reasons why Gulshan is applicable. She found that there were good arguable grounds for consideration of the appeal outside of the Rules. Specifically she highlighted the fact that Appendix FM EX1 was not applicable to out-of-country cases. There was no express provision which allowed for the assessment of Article 8 rights including the best interests of the child, the unreasonableness of the sponsoring wife and the baby (both British citizens) having to relocate to Turkey shorter or in longer term. As such these factors could not be taken into account. She also found that the availability of other financial options such as from the claimant and support of third parties (the mother of the sponsor), in reducing the financial requirements of the family could not be factored in. Accordingly I am satisfied that Judge Davidge has fully engaged with the guidance in Gulshan and find that the factors identified are capable of coming within criteria as exceptional or compelling to justify consideration outside of the rules. Whilst accepting that the Judge did not specifically refer to exceptional or compelling factors, I am satisfied that she engaged with those issues in her determination. The judge relied on the sponsor's evidence having found her to be entirely credible. Her findings with regard to relocation are set out in paragraph 16(4) of the determination. She found that the sponsor could not reasonably be expected to relocate to Turkey because she has a significant and well-established private life in the UK, she has determinedly obtained vocational qualifications, established a career which is socially useful in terms of care and support for the elderly. She has permanent employment and has the benefit of significant childcare and financial support allowing her to enjoy and enhance her career. I am satisfied that the judge has taken into account the circumstances in the event that the sponsor and her child were required to relocate to Turkey and having regard to all of those

circumstances together with the findings and conclusions and application of **MM**, the judge has in my view considered all of the principles to establish that she finds there to be unjustifiably harsh and/or compelling circumstances. Insurmountable obstacles concern practical possibilities of relocation (**MF (Nigeria)v. Secretary of State for the Home dept [2013] EWCA Civ 1192**, and in the absence of the same if removal is to be disproportionate it is necessary to show other nonstandard features that the removal will be unjustifiably harsh. (**Nagre**) The judge fully considered all of the evidence before her and I am satisfied that her conclusion correctly following the **Gulshan** principles was open to her.

14. Having regard to the application of **MM**, I am satisfied that the judge correctly and appropriately relied on this authority notwithstanding that a Court of Appeal judgment is imminently expected. Judge Davidge dismissed the appeal on immigration grounds with reference to the claimant's failure to meet the financial requirements. However, I am satisfied that in her assessment of proportionality under Article 8 ECHR she engaged in a balanced assessment of the interests of the individuals and of the public interest. The Tribunal Judge found proper reasons for finding that the interference was disproportionate. She considered the extent to which the claimant failed to meet the Rules, the omission of consideration of potential earnings for the claimant and the evidence as to available savings and from third parties. She found that having regard to all of those matters the potential annual income for the sponsor and the claimant would be some £21,500, a figure reaching well over the requirement in the rules. The judge placed weight on the fact that this is a longstanding relationship, the sponsor and child are British citizens and the claimant's endeavours to develop family life with his child. In relying on **MM** the judge is endorsing the paragraphs of that judgment under the heading justification of interference in [122 - 125] having regard to the fact that the rights of British citizens who are low wage earners may be frustrated by the Rules and having regard to the level set which is below the minimum adult wage. In such circumstances the removal could constitute an unjustifiable and disproportionate interference, as found by the Tribunal Judge in this instance.

Decision

15. I dismiss the appeal. The determination shall stand.

Signed

Date 27.6.2014

Deputy Judge of the Upper Tribunal G A Black

No anonymity order.

No fee award made.

Signed

Dated 27.6.2014

Deputy Judge of the Upper Tribunal G A Black