Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/33679/2014

THE IMMIGRATION ACTS

Heard at Newport	**Decision & Reasons Promulgated**
On 5 January 2016	**On 15 January 2016**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

BAHADAR LAL

Respondent

Representation:
For the Appellant: Mr I Richards, Home Office Presenting Officer
For the Respondent: Mr M Read instructed by Adamson Law Solicitors

DETERMINATION AND REASONS

1. The Secretary of State appeals against a decision of the First-tier Tribunal (Judge L Murray) allowing Bahadar Lal's (hereafter "the claimant") appeal against a decision refusing him leave as the partner of a British Citizen. The Judge found that although the claimant could not meet the requirements of the Immigration Rules, namely Appendix FM and para 276 ADE nevertheless the claimant's removal was a disproportionate interference with her family life and consequently a breach of Article 8.

2. On 22 September 2015, the First-tier Tribunal (Judge Hodgkinson) granted the Secretary of State permission to appeal on the three grounds relied on:

   (1) that the Judge had failed to apply s.117B of the Nationality, Immigration and Asylum Act 2002 (the "NIA Act 2002") on the basis that it did not apply as the claimant's family life was established whilst he was here lawfully;

   (2) that having found that there were "no insurmountable obstacles" to the claimant's family life continuing in Pakistan, the Judge was wrong to find that the claimant's circumstances were such as to outweigh the public interest and

   (3) that the Judge was wrong to find that it would be disproportionate to require the claimant to return to Pakistan to seek entry clearance.

Introduction

3. The claimant is a Pakistani national who was born on 9 March 1988. He first came to the UK on 24 May 2010 with a student visa valid until 30 December 2012.

4. On 26 April 2012, the Secretary of State purported to curtail that leave to 26 June 2012. I will return to this shortly but Judge Murray found that that curtailment was ineffective as the Secretary of State could not prove that the notice had been communicated to the claimant as required by Syed (Curtailment of Leave – Notice) [2013] UKUT 0144 (IAC). That finding is not challenged.

5. On 5 July 2012, the claimant submitted an application for leave to remain as the spouse of a person settled in the UK. The basis of that claim was that he had married a British citizen who had come to the UK in September 2002 aged 12 from Pakistan. Both her parents and four brothers lived in the UK. The claimant married his wife in May 2012 in an Islamic ceremony and registered that marriage on 11 June 2012. The Judge accepted that at the time of his application, the claimant had no knowledge that the Secretary of State had purported to curtail his leave.

6. In a decision dated 11 February 2013, the Secretary of State refused the claimant's application for leave as the spouse of a British citizen under para 284 of the Immigration Rules (HC 395 as amended) on the sole ground that the claimant's leave had been curtailed to 26 June 2012 and consequently he did not have the required limited leave to enter under para 284(i). As the Secretary of State took the view that the claimant, at the time of his application, did not have leave to remain the decision letter states that the claimant had "no right of appeal against this refusal".

7. I interpolate that, in the light of Judge Murray's finding that the curtailment notice was not validly served, the Secretary of State's decision was wrong in that the claimant did in fact meet the requirement in para 284(i) and as he had leave at the time of the application and, by virtue of s.3C of the Immigration Act 1971, he continued to have leave and had a right of appeal against that decision under s.82(2)(d) of the NIA Act 2002.

8. Perhaps, because of the misleading statement by the Secretary of State in the decision notice of 11 February 2013 that the claimant had no right of appeal, the claimant did not appeal.

9. Instead, the claimant sought a reconsideration of his previous application on 13 March 2013. On 11 June 2014, he was served with an IS 151 notice of liability to removal as an overstayer. Then, on 30 June 2014, the claimant made a fresh application for leave under Article 8. That application was refused in a letter dated 11 August 2014 and on that date also the Secretary of State made a decision to remove the claimant as an overstayer.

10. It is against that latter decision that the claimant appealed to the First-tier Tribunal in this case.

The Judge's Decision

11. Judge Murray heard evidence from the claimant, his wife and the claimant's father-in-law. Judge Murray made a number of findings.

12. First, in relation to the Immigration Rules, Judge Murray concluded that although there was a certain degree of hardship in the claimant or his partner living in Pakistan that did not amount to "insurmountable obstacles" for the purposes of Appendix FM, EX1 or that there were very significant obstacles to his integration into Pakistan under para 276 ADE. Consequently, Judge Murray dismissed the claimant's appeal under the Immigration Rules.

13. Secondly, however, Judge Murray went onto consider the claimant's case under Article 8. As I have already indicated, she concluded that the claimant's leave had never been lawfully curtailed. At para 34 of her determination Judge Murray said this:

> "34. Clearly, the question of whether the Appellant was here lawfully when he made his application as a spouse is relevant to my assessment of proportionality. If the Respondent failed to validly serve the notice of curtailment of 27 April 2012 then the Appellant had extant leave when he applied for further leave as a spouse and the Respondent was wrong to reject that application with no right of appeal. Further, that application should be considered as still outstanding before the Respondent."

14. At para 36, having cited Syed, Judge Murray continued:

> "36. The notice was served on the Appellant's former college. Ms Quon confirmed when I asked that she was unable to prove postal service. She had no supporting evidence of service. Further, I find the Appellant's account that he did not receive notice of curtailment to be credible. He was clearly in a relationship and I accept that when he made an application on 5 July 2012 he thought he was making an in time application. The Respondent's failure to consider his application for further leave as a spouse was unlawful."

15. At paragraph 37, Judge Murray set out the claimant's financial circumstances, in particular that the claimant's wife earned over £35,000 per year. Judge Murray accepted that their relationship was genuine and that any application for entry clearance was likely to succeed. She said this:

> "37. The appellant has submitted his wife's payslips, bank statements and her HMRC annual tax summary for the year 2013-2014. This shows that her total income from employment for that year was £35,741.55. Although the evidence submitted cannot be construed as strictly complying with Appendix FM-SE there can be no real doubt that she would meet the financial provisions of the Immigration Rules. I therefore consider that her evidence that she expected his further leave application to be granted and not to have to return with him to Pakistan is credible. Further and in view of the fact that the Respondent has accepted that the Appellant was in a genuine relationship with his wife it is likely that the application would have been granted."

16. Then at paragraph 38 Judge Murray concluded that s.117B was not applicable for the following reasons:

> "38. Further, having found that the Appellant was here lawfully, section 117B does not apply because he has established his family life here whilst here lawfully."

17. Finally, Judge Murray reached her ultimate conclusion at paragraph 40 that the claimant's removal would be disproportionate as follows:

> "40. I have found, in the context of the Immigration Rules, that there are no insurmountable obstacles to the Appellant and his wife returning to Pakistan. However, in view of the fact that the Appellant should have had his spousal application determined in country, his wife has employment here and I accept on the basis of the doctor's letter would suffer a deterioration I her mental state if he were to return, I accept in this case that a temporary separation in order for the Appellant to apply for entry clearance would be disproportionate."

18. Consequently, the Judge allowed the appeal under Art 8.

Discussion

19. On behalf of the Secretary of State, Mr Richards relied upon the grounds upon which permission to appeal had been granted.

20. As regards s.117B Mr Richards submitted that what the Judge had said in paragraph 38 was clearly not right unless the Judge meant that sub-section (4) had no application, namely that "little weight" should be given to a relationship with a partner if it was established at the time when the person was in the UK unlawfully.

21. Mr Richards submitted that the key finding of the Judge was in paragraph 34 where she found that the curtailment notice had not been properly served and in effect the claimant's 2012 application as a spouse which had been refused on 11 February 2013

had not been correctly determined. Mr Richards acknowledged that the Judge's finding, which was unchallenged, meant that the claimant met the requirement in para 284(i) which was the sole basis upon which his application had been refused in February 2013 under the Immigration Rules. Mr Richards did not identify any other requirement in para 284 which the claimant could not meet. In particular, he accepted the financial evidence that the claimant's partner earned in the tax year 2013-2014 over £35,000. He did not suggest that the Judge's finding that the claimant's relationship with his wife was a genuine one was not properly open to the Judge.

22. In the course of his submissions, I raised with Mr Richards what was the public interest that outweighed the claimant's circumstances given that his application as a spouse in 2012 had been wrongly refused and he had been led to believe that he had no right of appeal against that decision.

23. In response, Mr Richards indicated that the first ground of appeal, namely that the Judge had failed to give effect to the public interest factors in s.117B of the NIA Act 2002 appeared to have been drafted without consideration of the Judge's finding in paras 34 and 36 that the appellant's leave had not been lawfully curtailed. In the light of that, Mr Richards accepted that the Judge had had two options in the light of that finding. First, she could have set aside the Secretary of State's decision as not being in accordance with the law or alternatively could have allowed the appeal under Article 8. He acknowledged that the fact that the Judge had allowed the appeal under Article 8 was probably the tidiest way of disposing of the appeal given her findings.

24. Having considered the submissions made on behalf of the Secretary of State, I am satisfied that her appeal cannot succeed.

25. In reaching her finding that the respondent's decision was disproportionate, the Judge correctly directed herself that, given the claimant could not meet the requirements of the Immigration Rules it had to be established that there were "compelling circumstances" to outweigh the public interest (see para 31 of her determination). The claimant's wife had been in the UK since she was 12 years old. There was medical evidence before the Judge that the claimant's wife suffered from depression and anxiety and was in receipt of anti-depressant medicine and that her mental state would deteriorate if the claimant returned to Pakistan. Whilst it is also the case that the Judge found that there were not insuperable obstacles to the claimant continuing his family life in Pakistan, there were nevertheless powerful factors which spoke in favour of the claimant's case. As Mr Richards acknowledged, a key finding was that the claimant had, in effect, met the requirements of the Immigration Rules in his spouse application made in 2012. That, together with the evidence of the employment of the claimant's wife and medical evidence concerning her mental health was taken into account by the Judge in para 40 of the determination which I have set out above.

26. I do not accept that in para 38 the Judge was saying that the entirety of s.117B of the NIA Act 2002 was not applicable to the claimant. It seems to me on a proper and careful reading that she was simply stating that s.117B(4) was not applicable as the claimant had established his family life with his wife whilst he was lawfully here. The Judge clearly had in mind that there was a public interest which had to be balanced, by virtue of s.117B(1) of the NIA Act 2002, against the claimant's circumstances and only if there were "compelling circumstances" would that public interest be outweighed (see paras 31 and 32 of the determination). However, as Mr Richards acknowledged in his submissions in response to a question from me, given that the claimant had wrongly been refused leave to remain as a spouse because he had, in fact, met the requirements of para 284 the public interest in this case was not strong. That was a factor, indeed a significant factor, which the Judge was entitled to take into account as she did in para 40 in reaching her conclusion that the claimant's removal was disproportionate.

27. In the circumstances, I am satisfied that the Judge was entitled to reach her finding that Article 8 would be breached if the claimant were required to return to Pakistan to live or, indeed, temporarily in order to seek entry clearance. In the latter instance, given that he had already met the requirements of the relevant rule in 2012, and it was not disputed that he would meet the requirements of the relevant rule if he made an entry clearance application now, there was "no sensible reason" to require the claimant to jump through the procedural hoop of leaving the country in order to seek entry clearance (see, SSHD v Hayat and Treebhowan [2012] EWCA Civ 1054 at [30(d)]). The Judge was entitled to find that was, in all the circumstances, disproportionate.

28. In truth, this is a case in which the claimant should have been better served by the immigration process. It is now accepted that he should have been granted leave under para 284 in 2012/2013 as a spouse. I see no sound basis upon which it can be said that given all the circumstances Judge Murray's finding that the refusal to grant him leave as a spouse now would be a disproportionate interference with his family life with his wife is irrational or otherwise unsustainable in law.

Decision

29. For these reasons, the decision of the First-tier Tribunal to allow the claimant's appeal under Article 8 stands.

30. Accordingly, the appeal of the Secretary of State to the Upper Tribunal is dismissed.

Signed

A Grubb
Judge of the Upper Tribunal

Date:

FEE AWARD

Judge Murray made a fee award of £140. I see no basis to reach a different conclusion and I affirm that decision.

Signed

A Grubb
Judge of the Upper Tribunal

Date: