



Upper Tribunal

(Immigration and Asylum Chamber)

Appeal Number: IA/36922/2014

THE IMMIGRATION ACTS

Heard at Manchester Piccadilly

On 22 February 2016

Decision Promulgated

On 7 March 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE BIRRELL

Between

QAISER TIKKA

(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R Ahmed counsel instructed by Fawad Law Associates

For the Respondent: Mr G Harrison Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this

Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. In order to avoid confusion, the parties are referred to as they were in the First-tier Tribunal.
3. The Appellant is a citizen of Pakistan born on 29 August 1990. The Appellant is appealing against the decision of the Respondent made on 13 September 2014 to curtail the Appellant's leave to remain in the United Kingdom as a spouse under paragraph 322(5A) of the Immigration Rules and to remove him from the UK.
4. The Appellant appealed that decision and after a hearing on 19 February 2015 First-tier Tribunal Judge Law found that the decision under the Rules to curtail his leave was justified but allowed the appeal under Article 8. I set aside that decision after a hearing on 30 November 2015 in so far as it related to Article 8 as it contained errors of law and the matter comes back before me for rehearing.
5. The background to this appeal is that the Appellant entered the United Kingdom on 1 July 2010 as a Tier 4 Student with leave until 8 September 2011. On 22 November 2012 the Appellant was convicted of an offence of Causing Death while Driving uninsured. The Appellant was sentenced in respect of the offence on 17 April 2014 to a period of unpaid work in the community. On 11 September 2014 the Appellant was granted limited leave to remain in the United Kingdom until 10 September 2016 as the spouse of a British Citizen having initially been refused a variation of his leave on the basis that he had failed to provide the required English Language certificate and appealed that decision. The reasons given in the decision letter curtailing the Appellant's leave were that the Respondent was satisfied that the Appellant's leave should be curtailed because it was undesirable for him to remain in the United Kingdom in the light of his conviction as it was an offence that caused serious harm in accordance with paragraph 322(5A) of the Rules.

The Law

6. The burden of proof in this case is upon the Appellant and the standard of proof is upon the balance of probability.

7. As the Appellant is in the United Kingdom, I can take into account evidence that concerns a matter arising after the date of the decision in accordance with Section 85(4) Nationality, Immigration and Asylum Act 2002.
8. The Appellant's appeal is pursuant to Section 82 of the 2002 Act.
9. In relation to claims under Article 8 these are addressed by Appendix FM and paragraph 276ADE of the Rules and the Secretary of State's Guidance. If an applicant does not meet the criteria set out in the Rules then guidance issued by the Secretary of State in the form of instructions provides in effect, that leave to remain outside the rules could be granted in the exercise of residual discretion in 'exceptional circumstances' which are defined in the guidance and must be exercised on the basis of Article 8 considerations, in particular assessing all relevant factors in determining whether a decision is proportionate under Article 8.2.
10. It is now generally accepted that the new IRs do not provide in advance for every nuance in the application of Article 8 in individual cases. At para 30 of Nagre, Sales J said:

"30. ... if, after the process of applying the new rules and finding that the claim for leave to remain under them fails, the relevant official or tribunal judge considers it is clear that the consideration under the Rules has fully addressed any family life or private life issues arising under Article 8, it would be sufficient simply to say that; they would not have to go on, in addition, to consider the case separately from the Rules. If there is no arguable case that there may be good grounds for granting leave to remain outside the Rules by reference to Article 8, there would be no point in introducing full separate consideration of Article 8 again after having reached a decision on application of the Rules."
11. This was also endorsed by the Court of Appeal in Singh and Khalid where Underhill LJ said (at para 64):

"64. ... there is no need to conduct a full separate examination of article 8 outside the Rules where, in the circumstances of a particular case, all the issues have been addressed in the consideration under the Rules."

12. More recently the Court of Appeal in SS Congo [2015] EWCA Civ 387 stated in paragraph 33:

“In our judgment, even though a test of exceptionality does not apply in every case falling within the scope of Appendix FM, it is accurate to say that the general position outside the sorts of special contexts referred to above is that compelling circumstances would need to be identified to support a claim for grant of LTR outside the new Rules in Appendix FM. In our view, that is a formulation which is not as strict as a test of exceptionality or a requirement of “very compelling reasons” (as referred to in MF (Nigeria) in the context of the Rules applicable to foreign criminals), but which gives appropriate weight to the focused consideration of public interest factors as finds expression in the Secretary of State’s formulation of the new Rules in Appendix FM. It also reflects the formulation in Nagre at para. [29], which has been tested and has survived scrutiny in this court: see, e.g., Haleemudeen at [44], per Beatson LJ. “

13. Section 117A (2) of the 2002 Act provides that where a Tribunal is required to determine whether a decision made under the Immigration Acts would be unlawful under section 6 of the Human Rights Act 1998 it must, in considering ‘the public interest question’, have regard in all cases to the considerations listed in section 117B of the Nationality, Immigration and Asylum Act 2002 (as amended by the Immigration Act 2014). Section 117 (3) provides that the ‘public interest question’ means the question of whether an interference with a person’s right to respect for private and family life is justified under Article 8(2).

14. The S117B considerations are as follows:

“(1) The maintenance of effective immigration controls is in the public interest.

(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—

(a) are less of a burden on taxpayers, and

(b) are better able to integrate into society.

- (3) *It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—*
- (a) *are not a burden on taxpayers, and*
 - (b) *are better able to integrate into society.*
- (4) *Little weight should be given to—*
- (a) *a private life, or*
 - (b) *a relationship formed with a qualifying partner, that is established by a person at a time when the person is in the United Kingdom unlawfully.*
- (5) *Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.*
- (6) *In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—*
- (a) *the person has a genuine and subsisting parental relationship with a qualifying child, and*
 - (b) *it would not be reasonable to expect the child to leave the United Kingdom.”*

Evidence

15. On the file I had the Respondents bundle. I had a copy of the reason for refusal letter. The Appellant put in an appeal and a bundle of documents numbered 1-33 that was before the First-tier Tribunal was also available to me. In addition, the Appellant submitted two additional letters one from the Sponsors GP dated 17 February 2016 and one to confirm that the Appellant was a Muslim.

16. I heard evidence from the Appellant which can be summarised as follows:

17. He adopted the contents of his witness statement of 11 February 2015.

18. He said that his wife could not live in Pakistan because she was a Hindu. He confirmed that his family there were not happy with his marriage. Her family in the UK would not talk to them as he was a Muslim and they did not like him. He confirmed that his wife was a British citizen and had Type 2 diabetes.
19. In cross examination he confirmed that both he and his wife practised their religions by attending their places of worship and she had a shrine at home and he read the Koran.
20. Theirs was a love match after they met at an Asian social event. If they had children their religion would be a matter for them.
21. He had had completed the equivalent of A levels in Pakistan before coming to the UK to do an English course
22. His wife worked full time as a café manager and earned £10,000 a year.
23. The offence which led to his leave being curtailed was one of causing a death while driving without the necessary insurance: he had insurance but not business insurance.
24. They did not have many friends in the UK. His wife worked full time and on Saturdays so they were together in the evenings and Sundays, They walked together, ate out. While his wife was at work he slept or watched TV.
25. In response to a question by me he stated he could not return to Pakistan and apply for entry clearance as his wife would be left alone and depressed. She was not a well woman. His family would not support him if he returned and they would find out he had returned. Mr Ahmed interposed that the Appellant could not return to Pakistan and reapply for entry clearance as he was unlikely to succeed in that application given the offence he had committed. I suggested that was a matter for his final submissions.
26. I heard evidence from Josita Rajoria the Appellants wife.
27. She adopted the contents of her witness statement at page 10 of the bundle.
28. She affirmed that it was not possible for her to live in Pakistan because she was a practising Hindu and this would put her at risk. She also stated that she was a diabetic and was unsure what treatment was available in Pakistan and she worked full time.
29. She confirmed her husband's account of how they met and that theirs was a love match and their different religions had not impacted on their decision. She had never spoken to the Appellant's family in Pakistan although she got on fine with

his family in the UK although she had not seen them very often with working full time. She earned £10,000 a year .

30. She could not live in Pakistan nor could she live in India. She stated she had only been to India once with her mother and brother last November and she did not like it.
31. They did not socialise with her family members although he had met them a few times. She spoke to her mother on the phone.
32. If the decision went against her husband she would not go and live in Pakistan.

Final Submissions

33. Mr Harrison made the following submissions on behalf of the Respondent:
- (a) He relied on the reasons for refusal and the curtailment notice.
 - (b) He suggested that their family life appeared to be very 'stilted', limited.
 - (c) He suggested that it would be possible for the Appellants wife to return with him and live in Pakistan.
 - (d) He reminded me of the provisions of section 117B of the Nationality Immigration Act 2002.
34. Mr Ahmed on behalf of the Appellant made the following submissions:
- (a) The Appellant and his wife had given credible evidence.
 - (b) Their marriage had caused problems with their respective families.
 - (c) There was now objective evidence before the court that such an interfaith marriage would put the sponsor at risk in Pakistan. They had married in a civil ceremony and such a marriage would not even be recognised in Pakistan.
 - (d) The Appellant could not reapply for entry clearance from Pakistan because of his previous conviction.
 - (e) The compelling circumstances in this case were that the Appellant and his wife could not live together in Pakistan and therefore it was unreasonable and disproportionate to remove him

Findings

35. On balance and taking the evidence as a whole, I have reached the following findings
36. The Appellant is a 25 year old citizen of Pakistan whose leave to remain in the UK as the Josita Rajoria was curtailed under paragraph 322(5A) of the Immigration Rules which sets out grounds on which leave to remain and variation

of leave to enter or remain in the United Kingdom should normally be refused and includes at 5A:

“(5A) it is undesirable to permit the person concerned to enter or remain in the United Kingdom because, in the view of the Secretary of State:

(a) their offending has caused serious harm; or

(b) they are a persistent offender who shows a particular disregard for the law;”

37. The decision arose out of his conviction on 22 November 2012 of causing death while driving uninsured on 21 December 2011 on the basis that it had caused serious harm. The Judge in the First tier upheld that decision and therefore the only basis on which the Appellant can base his appeal is that the decision to remove him breaches his right to family and private life under Article 8.

38. I have determined the issue on the basis of the questions posed by Lord Bingham in Razgar [2004] UKHL 27

Will the proposed removal be an interference by a public authority with the exercise of the applicant’s right to respect for his private (or as the case may be) family life?

39. I am satisfied that the Appellant and his wife have a family life with each other in the United Kingdom. The Appellant originally entered the UK as a student with leave to remain until 8 September 2011. Shortly before that leave expired the Appellant married on 22 August 2011. I am satisfied that the relationship however was established at a time when the Appellants status was precarious, the marriage taking place just before his leave expired and always dependent on them meeting the requirements of the Rules for another grant of leave. I am satisfied that they were aware of this.

40. The family life enjoyed by the parties in this case appears to be limited to the relationship that they have with each other as neither sides family have apparently embraced their mixed faith relationship. There were certainly no statements in support of the Appellant from any of his family members in the UK or indeed from his wife’s family. The time that the Appellant and his wife have together is limited by the fact that the Appellants spouse works a six day week and works long hours each day while he stays at their home and sleeps and watches television. There was no evidence of any private life beyond their

relationship, no evidence of engagement with the community other than a confirmation that the Appellant attends a mosque.

If so, will such interference have consequences of such gravity as potentially to engage the operation of Article 8?

41. I am satisfied that removal of the Appellant would have consequences of such gravity as potentially to engage the operation of Article 8.

If so, is such interference in accordance with the law?

42. I am satisfied that there is in place the legislative framework for the decision giving rise to the interference with Article 8 rights which is precise and accessible enough for the Appellant to regulate his conduct by reference to it.

If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedom of others?

43. The interference does have legitimate aims since it is in pursuit of one of the legitimate aims set out in Article 8 (2) necessary in pursuit of the economic wellbeing of the country through the maintenance of the requirements of a policy of immigration control. The state has the right to control the entry of non-nationals into its territory and Article 8 does not mean that an individual can choose where she wishes to enjoy his private and family life.

If so, is such interference proportionate to the legitimate public end sought to be achieved?

44. Consideration of the issue of proportionality is 'consideration of "the public interest question" as defined by section 117A(3) of the 2002 Act. I am therefore required by section 117A(2)(a) to have regard to the considerations listed in section 117B. I must therefore take into account that the maintenance of immigration control is in the public interest. I am satisfied that the Immigration Rules underpin that control. I take into account that the Appellant has been in the UK at all times with the required leave but a decision was made to curtail the Appellant's leave because he was convicted of an offence which caused serious harm and that was a decision that was upheld on appeal.

45. I accept that the Appellant speaks English. I accept that his wife has a full time job albeit her income at £10,000 would not meet the minimum income requirements of Appendix FM. I am unable to make a finding that the Appellant and his wife are financially independent in so far as I have seen no evidence relating to their finances and therefore there is no information before me as to whether or not their income is supplemented by state benefits.
46. I am obliged to give little weight to a private life formed while the Appellants status was precarious. I am satisfied in any event that on the basis of the evidence before me that there was little evidence of a private life for the Appellant beyond his marital relationship and his religious observances.
47. I have reminded myself that Lord Bingham in *Razgar* stated that in a judgement on proportionality that the ultimate question is, "*whether the refusal of leave to enter or remain in circumstances where the life of the family cannot reasonably be expected to be enjoyed elsewhere, taking full account of all considerations weighing in favour of the refusal, prejudices the family life of the applicant in a manner sufficiently serious to amount to a breach of the fundamental right protected by Article 8. If the answer to this question is affirmative, the refusal is unlawful and the authority must so decide.*"
48. I have therefore assessed whether it would be reasonable for the Appellant and sponsor to continue their family life in Pakistan. I have been provided with the January 2016 COIS on Interfaith Marriage in Pakistan and I have considered section 7 which sets out the position for a Muslim man who marries a Hindu woman and at 7.1.1 confirms that Islamic law does not recognise Muslim marriages to Hindus or Sikhs. Given this view, couples in such unions may be deemed to be having sexual relations outside of marriage, which is considered an offence and is punishable by imprisonment for up to five years and a fine. In relation to societal treatment and attitudes there were allegations of kidnappings of Hindu women and girls, forcibly converted to Islam and married to Muslim men. I accept that the Appellant's family in Pakistan do not support his marriage. At this point I note that the sponsor raised the issue of her health in that she is a type 2 diabetic. I note that although she is a diabetic she appears to have her diabetes under control and it has not impacted on her ability to work full time. Therefore I would not have found that the sponsor's diabetes impacted on the

reasonableness of her relocating. Mr Harrison questioned the sponsor about the possibility of the parties living in India but I note that she is a British citizen who has only ever visited the country once. There was no evidence before me to suggest that being of Indian heritage would give her or her husband the right to live in India.

49. Taking all of those factors relating to interfaith marriage however into account I accept that it would be unreasonable to expect the Appellants wife to relocate with him to Pakistan.

50. I have considered whether it would be disproportionate to require the Appellant to return to Pakistan to re apply for entry clearance as a spouse and in the light of all of the factors I set out below I am satisfied that such a temporary separation would not be disproportionate. Requiring the Appellant to return to his home country resulting in a temporary separation is not of itself unreasonable: R (on the application of Chen) v SSHD (Appendix FM – Chikwamba – temporary separation – proportionality) IJR [2015] UKUT 00189 (IAC). Mr Ahmed argued that this would be unreasonable in this case as the Appellant would simply be refused on the basis of the conviction that led to his leave being curtailed.

51. I am not satisfied that the argument has merit. I note that in Sabir (appendix FM-EX 1 not fee standing) 2014 UKUT 00063 the tribunal said at paragraph 33

"... She does not meet the requirements of the rules and it was clear at the time of the marriage that she could not do so; she would be expected to leave the UK and return to Pakistan to make an application for entry clearance, absent circumstances such that such a course of action would be unreasonable or harsh, contrary to her right to respect for family and private life. The likelihood or otherwise of being able to meet the requirements of the rules for entry clearance is not a relevant consideration."

52. I also note that in Mumu (paragraph 320; Article 8; scope) [2012] UKUT 00143(IAC) an out of country case for spouse settlement, the Tribunal said that the weight to be given to the Respondents interests in conducting the proportionality balancing exercise under Article 8(2) of the ECHR is not to be automatically diminished by reference to the consideration – (a) that a person may be able to take advantage of an exception in paragraph 320(7C) in any

future application for entry clearance; or, conversely (b) that there is a danger the person may be refused under paragraph 320(11) by reference to conduct that has led to his or her current application being refused under paragraph 320(7A).

53. I also note that the test that applied under paragraph 322(5A), that the offending caused 'serious harm' is different to that which might be applicable under Appendix FM. I note that while there are provisions for mandatory refusal under S-EC.1.4 these require the applicant to have been sentenced to a period of imprisonment which this Appellant was not. Otherwise the relevant provision that arguably could apply to this Appellant would be S-EC.1.5 that reads

"S-EC.1.5. The exclusion of the applicant from the UK is conducive to the public good because, for example, the applicant's conduct (including convictions which do not fall within paragraph S-EC.1.4.), character, associations, or other reasons, make it undesirable to grant them entry clearance."

54. I am not able to speculate about what position the Respondent would take about the relevance of the Appellants conviction when applying a different test. It may well be that there are factors peculiar to this offence that might allow arguments to be advanced as to why in this case the conviction should not be held against the Appellant. Although no evidence was produced of the Judge's sentencing remarks there was clearly some mitigation: thus for example while I note that this was an offence which carries imprisonment on conviction the Appellants was not sentenced to a period of imprisonment but to a short period of community service; this was not a conviction that reflected on the *manner* of the Appellants driving; the Appellant claimed that he had insurance but not for driving in a business capacity. These are all relevant matters set out in the Sentencing Guidelines which if supported by the appropriate evidence could be relevant to a decision under S-EC.1.5.

55. In determining whether the removal would be proportionate to the legitimate aim of immigration control I find that none of the facts underpinning the Appellants life in the United Kingdom taken either singularly or cumulatively outweigh the legitimate purpose of the Appellants removal.

56. I have considered the issue of anonymity in the present instance. Neither party has sought a direction. The Appellant is an adult and not a vulnerable person. I see no reason to make any direction in this regard.

CONCLUSION

57. On the facts as established in this appeal, there are no substantial grounds for believing that the Appellant's removal would result in treatment in breach of ECHR.

DECISION

58. The appeal is dismissed under Article 8 ECHR.

Signed

Date 29 February 2016

Deputy Upper Tribunal Judge Birrell