Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/05937/2012

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 24 February 2014 and 26 March 2014	**On 2nd May 2014**

Before

UPPER TRIBUNAL JUDGE LATTER
UPPER TRIBUNAL JUDGE GOLDSTEIN

Between

FATEH BOUZIDI

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr C Jacobs, instructed by Procol & Candor, solicitors
For the Respondent: Mr E Tufan, Home Office Presenting Officer (24 February 2014)
Mr G Saunders, Home Office Presenting Officer (26 March 2014)

DETERMINATION AND REASONS

1. This is an appeal against a decision of the First-tier Tribunal issued on 21 May 2012 against the respondent's decision of 1 February 2012 refusing his application made

on 7 November 2011 for a permanent residence card under the provisions of the Immigration (European Economic Area) Regulations 2006 (the 2006 Regulations). The appellant had also sought to rely on article 8 but the Tribunal held that there was no jurisdiction to determine that issue at the appeal hearing.

Procedural History

2. Permission to appeal was subsequently granted by the First-tier Tribunal to appeal against this decision. The appeal was heard by the Upper Tribunal on 14 September 2012 when it was held that the First-tier Tribunal Judge had erred in law in saying that she had no jurisdiction to deal with the article 8 claim but it was held that the scope of the article 8 appeal had to be related to the subject matter of the decision and in the context of this appeal to the consequences of the refusal of a residence card to which he was not entitled and that article 8 in its full effect could not be argued in the absence of a decision to remove him.

3. Permission to appeal to the Court of Appeal was refused by the Upper Tribunal but granted by the Court of Appeal for the following reasons:

> "Given JM Liberia [2006] EWCA Civ 1402 which the UT does not seem to have considered, I think there is a viable question whether article 8 should have been considered more broadly than the UT allowed, and that this should be looked at on a second appeal. But there are plain differences from the JM case and the appellant may have an uphill struggle."

4. The appeal was allowed by consent in an order dated 27 January 2014. The decision of the Upper Tribunal was set aside and the matter remitted to the Tribunal for rehearing. The relevant parts of the Statement of Reasons are as follows:

> "5. The appellant appealed to the Upper Tribunal. In his grounds of appeal he relied on the case of JM (Liberia) v Secretary of State for the Home Department [2006] EWCA Civ 1402, [2007] Imm AR 293. Permission to appeal was granted by FTTJ Zucker on 18 June 2012. The appeal was heard by UTJ Jordan. He decided, in an undated determination, that FTTJ Lingard had erred in law in finding that he had no jurisdiction to determine the appeal; that he did have such jurisdiction; but that jurisdiction was limited to considering the human rights implications of a decision to refuse to issue a residence card to which he was not entitled. The appeal was dismissed.
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> 6. UTJ Jordan also refused permission to appeal to the Court of Appeal on 11 February 2013. Permission to appeal was granted by Laws LJ on 23 May 2013, who noted that UTJ Jordan did not appear to have considered the case of JM (Liberia), which had been cited to him.
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> 7. The Secretary of State has given careful consideration to the appellant's arguments. She accepts that the case of JM (Liberia) is an important authority in this particular area of immigration law. It was highly relevant to the arguments that were being advanced by the appellant at his appeal. The appellant relied on

> it at the hearing before UTJ Jordan. It was an important authority which the learned upper tribunal judge was required to consider. On the face of UTJ Jordan's determination there is no indication that he did so consider it. That is a clear error of law. For these reasons the Secretary of State accepts that UTJ Jordan's determination is vitiated by an error of law and the matter should be remitted to the Upper Tribunal for reconsideration."

5. The matter was accordingly listed for us on 24 February 2014 and, having heard submissions on the error of law, was adjourned part-heard to hear further evidence about the appellant's family life, in particular relating to his son.

The Factual Background

6. The appellant is a citizen of Algeria born on 30 November 1974. He claims that he first entered the UK with a work permit on 14 April 2000. On 22 November 2003 he married an EEA national and after initially being refused a residence card on 10 October 2006, he was issued with a residence permit on the basis of his marriage. That marriage ended in divorce on 3 July 2008. Meanwhile, the appellant had met a British citizen in 2004 and they started living together in early 2006. They have a son, Z, born on 19 June 2006. They underwent an Islamic marriage ceremony on 1 January 2009 and have continued to live together as a family.

7. On 7 November 2011 the appellant applied for a residence card relying on reg. 10(5) of the 2006 Regulations. This was refused for the reasons set out in the decision of 1 February 2012: he had not completed five years' residence in the UK in accordance with the Regulations and therefore did not have a basis of stay under their provisions. The decision then went on to say:

> "As you appear to have no alternative basis of stay in the United Kingdom you should now make arrangements to leave. If you fail to make a voluntary departure a separate decision may be made at a later date to enforce your removal from the United Kingdom. Any such decision and associated appeal rights would be notified separately."

8. The appellant appealed against that decision. The grounds attached to the notice of appeal are formulaic. At the hearing before the First-tier Tribunal judge, it was conceded that the appellant could not succeed against the refusal of a permanent residence card under the 2006 Regulations but he sought to pursue his appeal on the basis of his private life in the UK since 2000 and on family life in the light of his relationship with his British citizen partner since 2006 and with their child born on 19 June 2006. The judge held that she had no jurisdiction to consider matters raised outside the focus of attention in the appeal. She said that there had been no removal directions and the respondent's decision did not include a notice under s.120 of the Nationality, Immigration and Asylum Act 2002. She referred to the judgment of the Court of Appeal in Lamichhane v Secretary of State for the Home Department [2012] EWCA Civ 260 where the Court held that an appellant on whom no s.120 notice had been served could not raise before the Tribunal any ground for the grant of leave to

remain different from the subject of the decision appealed against. She pointed out that the decision letter had concluded by saying:

> "If you consider that you have a right to reside in the United Kingdom as a matter of European law, and are in a position to submit the necessary information to support your application for permanent residence as a recognition of that right, you may alternatively wish to submit a further application."

The judge commented that it was open to the appellant if he so wished to make a formal application to the respondent to remain in the UK on some basis connected with his relationship to a British citizen and their son who was also a British citizen.

Submissions

9. Mr Jacobs submitted that the First-tier Tribunal had erred in law by failing to consider the article 8 appeal. He argued that there was no basis for limiting article 8 to issues arising from the refusal of a residence permit. He referred to and relied on JM (Liberia) where it was held that an applicant who had been refused a variation of leave with the consequence that he became an overstayer was entitled to raise article 8 grounds on appeal and that such an approach was consistent with the aim of the legislation to decide all relevant issues at one hearing even though a s.120 notice had not been served in this case. He submitted that the comments of Sullivan LJ at [17] of FK (Kenya) v Secretary of State [2010] EWCA Civ 1302 on whether the article 8 appeal was premature should be read in the context of JM (Liberia). This was not a case where it would be premature for the Tribunal to consider article 8 as the decision notice had made it clear that the appellant no longer had any basis for stay in the UK.

10. In any event the appellant, so Mr Jacobs submitted, had been entitled to argue before the Tribunal that the decision was contrary to the duty imposed on the respondent under s.55 of the Borders, Citizenship and Immigration Act 2009. The position could properly be distinguished from the position in the Mirza line of cases (in the Court of Appeal at [2011] EWCA Civ 159) which concerned whether it was permissible for the respondent to delay making a decision on removal when an immigration decision was being made. The position could also properly be distinguished from Lamichhane. The fact that no s.120 notice had been served could not operate to prevent the Tribunal from considering human rights arguments properly raised. He submitted that the judgment of the Supreme Court in Patel & Others v Secretary of State [2013] 3 WLR 1517 supported his submission that a broad approach should be taken to the issues to be determined.

11. Mr Tufan submitted that a proper distinction could be drawn between cases under the EEA Regulations and under the Immigration Rules. JM (Liberia) and Patel had not been concerned with EEA cases. The appeal had been on EEA grounds and this was a case where consideration under article 8 was premature in the light of the indication in the decision letter that the appellant could make further

representations. No decision had been made to remove and in those circumstances article 8 did not come into play.

Consideration of whether there is an Error of Law

12. The issue for us at this stage of the appeal is whether the First-tier Tribunal erred in law such that its decision should be set aside. The issue is whether the judge had jurisdiction to consider article 8 and if so, whether there was any restriction limiting it to the consequences arising from the decision under appeal.

13. In JM (Liberia) the Court of Appeal considered a contention that in cases where no removal directions had been set and an appellant was in no danger of imminent removal, as in a case where the appeal was against a refusal simply to vary leave which of itself did not entail any removal, the appellant did not then face any violation of his Convention rights and an article 8 claim could not and should not be determined. The Court commented that in a case where an unsuccessful application for variation of leave had been made, the unsuccessful appellant, if he had a potential article 8 claim which would be arguable on his removal, would face a very unsatisfactory choice: either he should leave the United Kingdom as the criminal law said he must without his human rights being determined or remain until removal directions were given anticipating that at that stage he would be able to ventilate his human rights claim before the Tribunal.

14. Laws LJ said at [18]:

> "It seems to me to be wrong in principle that the price of getting before an independent tribunal, for a judicial decision on a human rights claim should be the commission of a criminal offence and other associated legal prohibitions. But that seems to me the effect of the AIT's conclusion. However, the position may be even starker than this. Given what I have said so far, it might be thought that an appellant who after an unsuccessful variation appeal waits until removal directions are set, will at that stage, at any rate, have a clear right of appeal exercisable from within the United Kingdom in which he could deploy his human rights claim. The appeal would lie under section 82(2)(g), which I have read. But that is not necessarily the position. By force of section 92 of the 2002 Act, a section 82 appeal against an immigration decision of the kind specified in section 82(2)(g) can only be maintained from abroad, unless a human rights claim has been made within the meaning of section 113; that is, it must have been made in the place designated by the Secretary of State."

15. And at [28] and [29]:

> "The short, but important, position is that once a human rights point is properly before the AIT, they are obliged to deal with it. That is consonant with the general jurisprudence relating to the obligations of public bodies under the Human Rights Act and seems to me to be the proper result of the construction of the relevant provisions. I should add that the AIT referred to Strasbourg authority, they said at para 33:

> 'We are aware that it has sometimes been said that, in dealing with a refusal to vary leave to enter or remain, the appellate authorities should deal also with human rights on removal in the sense that removal is imminent: but it is not imminent in any legal sense because of the need for a further decision. So much is clear from the European Court of Human Rights decision in Vijayanathan and Pusparajar v France [1992] 15 EHRR 62.'
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> With deference to the AIT, the reasoning of the Strasbourg court in that case takes the matter no further. The most that can be said is that the construction of section 84(1)(g), which I prefer for the reasons I have given, may yield a broader accommodation of human rights than might be insisted upon by the court at Strasbourg; manifestly, that would involve no interference with or violation of anyone's Convention rights."

16. The judgment in FK (Kenya) does not take the position any further so far as the jurisdiction to hear an article 8 appeal is concerned save to provide an illustration of a case where article 8 was considered together with an appeal under the EEA Regulations. Following a finding that the appellant did not have a right of permanent residence under regulation 15, Sullivan LJ commented that the consideration of article 8 might have been premature but no issue had been taken before the immigration judge on whether there was jurisdiction to consider article 8.

17. The judgment in Lamichhane was dealing with the very specific submission of whether a Tier 4 argument could be made in a case where no s.120 notice had been served. We are not satisfied that that principle can be extended to exclude an argument based on human rights grounds. We are also satisfied that the approach in Patel in the Supreme Court is consistent with the judgment in JM (Liberia). In the present case it is correct that no removal decision has been made, but the decision makes it clear that as the appellant "appear(s) to have no alternative basis of stay" he "should make arrangements to leave" and that "if he fails to make a voluntary departure a separate decision may be made to enforce his removal". Therefore, absent a right to reside as a matter of European Union law, the appellant had no right to remain and was therefore required to leave.

18. In these circumstances we are satisfied that he had the right to raise article 8 grounds and to have them resolved by the First-tier Tribunal.

19. Further, we are satisfied in an appeal dealing with an issue of European Union law that the appellant would in any event be entitled to rely on human rights grounds. Fundamental human rights form part of the general principles of Community Law and the importance of their protection is confirmed by the Charter of Fundamental Rights of the European Union which has become part of EU law and has the same value as the European treaties by virtue of the coming into force of the Lisbon Treaty on 1 December 2009.

20. In Dereci and others (European Citizenship) [2011] EUECJ C-256/11 at [70] – [72] in respect of the right to respect for private and family life the Court of Justice observed that:

> "…in so far as article 7 of the Charter contained rights corresponding to rights guaranteed by article 8 of the ECHR, the meaning and scope of article 7 were the same as in article 8 as interpreted by the case law of the European Court of Human Rights [70]…if the referring court considers…that the situation of the applicants in the main proceedings is covered by European Union law, it must examine whether the refusal of their right of residence undermines the right to respect for private and family life provided for in article 7 of the Charter…on the other hand if it takes the view that the situation is not covered by European Union law it must undertake that examination in the light of article 8(1) of the ECHR [72]…."

21. For this reason we are satisfied that an appeal raising EEA grounds necessarily brings with it a consideration of article 7 of the Charter but if there are no EEA grounds, it is article 8 of the ECHR which is in play. The principle set out in JM (Liberia) is equally applicable to cases involving EEA law as to domestic cases and we do not accept the submission that any distinction can be drawn in its application between EEA and domestic law. It is clear that there will be cases where a consideration of article 8 will be premature, but where that is not the case article 8 must be considered without being limited to its impact and effect on the particular decision under appeal.

22. This leads to the question of how the article 8 assessment (or article 7 under the Charter in EEA cases) should be carried out. The proper approach in domestic cases following the amendments to the Immigration Rules on 9 July 2012 is set out in MF (Nigeria) [2013] EWCA Civ, the judgment of the Administrative Court in Nagre v Secretary of State [2013] EWHC 720 (Admin) and the Upper Tribunal in Gulshan (article 8 – new rules – correct approach) Pakistan [2013] UKUT 640. The application should first be considered under the Immigration Rules and if the appellant is unable to meet the Rules, the issue is then whether there are compelling or exceptional circumstances sufficient to justify further consideration under article 8. We note that on 2 April 2014 the Court of Appeal gave judgment in Edgehill and others v Secretary of State [2014] EWCA Civ 402 on the approach to article 8 in respect of applications made before 9 July 2012 but we have not relisted this appeal for further submissions as we are satisfied that the judgment has no material bearing on the outcome of this appeal.

23. In EEA cases a similar approach should be adopted. The first consideration is whether an appellant is able to meet the requirements of the EEA Regulations and if not, the issue is whether there are compelling or exceptional circumstances justifying further consideration under article 7 of the Charter. As in domestic law cases (see [27] of Gulshan) it is not appropriate to embark on a free-wheeling article 7 exercise unencumbered by the relevant regulations.

Further Evidence

24. At the adjourned hearing we heard further evidence from the appellant who adopted his witness statement at 1A1-2. He confirmed that he had met his wife in 2004 and

they went through an Islamic ceremony of marriage in January 2009 having lived together since early 2006. Their son was born on 19 June 2006. The appellant had been employed at a restaurant but was now working as a chef in a bakery; he supported his family and his wife did not work. He confirmed his supplementary statement of 19 February 2014. He agreed with the contents of the letter from his son's school. He said that if he had to return to Algeria, it would be a very hard life for his wife and she would not be able to support herself financially. He explained in cross-examination that he worked for sixteen hours a week getting about £70-£80. His family were in receipt of benefits. His wife was British and she looked after their son when he was working. He did not know what difficulties he might face if he had to apply for entry clearance. He did have a family in Algeria and his mother had made a visit to this country.

25. The appellant's wife adopted her witness statement of 8 May 2012 at 1A3-4, her letter at 1A23 and her further statement at 2A6. The information was correct. She was not working but was receiving various benefits. If her husband had to return to Algeria, she would find it very hard. Their son would be distraught as they both interacted very well together. She thought it would affect his health. She was not sure how much her husband earned saying that it was cash in hand. She said if she needed something, she simply asked him. He worked three days a week just opposite their home. She thought it would take him a long time to apply for entry clearance and said that they had already been waiting four years for this hearing.

26. Documentary evidence has been submitted about Z's circumstances. It is best summarised in the letter dated 14 March 2014 from his primary school. This confirms that Z has been attending the school since September 2010 and is a Year 3 pupil. He has additional support both in and out of the classroom to support his learning needs and a range of specialists have been involved to further assess and support him. He has astigmatism and a squint which is being monitored by Moorfields Eye Hospital. He has low muscle tone, visual perception, manual dexterity, visual motor integration and sensory needs and a home and school occupational therapy programme has been provided. He has speech production difficulties and a speech programme has been provided by a speech and language therapist. He has specific learning difficulties and an assessment shows that he fits the role of a dyslexic learner with significant difficulties in understanding numbers. He has been referred to the school psychotherapist for individual therapy. Since he came to the school, the letter records that his mother has worked closely with the school to support his learning and in the last year his father has become more involved. The letter says that it is essential that both parents work together to provide a loving and stable family home for Z and without this nurturing environment, his progress will be compromised.

Submissions

27. Mr Saunders submitted that when and if removal directions were made, the appellant at that stage would be able to exercise his right of appeal. However, if

there was a full article 8 appeal, he submitted that it would now only be open to the Tribunal to go outside the Rules if there were compelling circumstances. He submitted that it was clear that the appellant could not meet the maintenance requirements of the Rules. This was not a case where there were sufficiently compelling circumstances for a grant of leave outside the Rules. He accepted that Z had various difficulties but, sadly, there were many cases where children had such difficulties. He accepted in answer to a question from the Tribunal that this would be a case where the requirements of para EX.1 should to be considered if the matter came within the Rules.

28. Mr Jacobs endorsed the argument that para EX.1 was engaged. He submitted that this was a case where there were clearly insurmountable obstacles to the family returning to Algeria. The best interests of Z should be taken into account in accordance with the jurisprudence of the House of Lords in ZH (Tanzania) [2011] UKSC 4 and those interests should be a primary consideration. Even if the applicants could not bring themselves within the Rules, the circumstances were sufficiently compelling to require an assessment of proportionality under the general article 8 principles set out in cases such as Razgar [2004] UKHL 27 and Huang [2007] UKHL 11.

Assessment of the Issues

29. We are satisfied, and there is no real dispute, that there is family life between the appellant, his wife and child. They have been in a genuine and subsisting relationship since at least early 2006 and their son was born on 19 June 2006. We pause here to note, that this means he would be able to fulfil the requirements of para 276ADE(iv) in that he is under the age of 18 years and has lived continuously in the UK for at least seven years. In any event, he is a British citizen and neither he nor his mother is under any obligation to leave the United Kingdom. It is accepted that the appellant is unable to meet the requirements of Appendix FM for leave to remain as a partner unless he can rely on para EX.1.

30. Paragraph EX.1 provides as follows:

> "EX.1 This paragraph applies if
>
> (a) (i) the applicant has a genuine and subsisting parental relationship with a child who –
> (aa) is under the age of 18 years;
> (bb) is in the UK;
> (cc) is a British citizen or has lived in the UK continuously for at least the seven years immediately preceding the date of application; and
>
> (ii) it would not be reasonable to expect the child to leave the UK; or

(b) the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen, settled in the UK or in the UK with refugee leave or humanitarian protection, and there are insurmountable obstacles to family life with that partner continuing outside the UK."

31. We heard submissions on whether the test of insurmountable obstacles was met, how that should be construed and whether or not that part of the Rules is ultra vires. However, we need not resolve those issues because we are satisfied that the provisions of para EX.1(a) are fulfilled. Z is under the age of 18, he is in the UK and is a British citizen. As to the nature and extent of the appellant's relationship with his son, we see no reason to doubt his or his wife's evidence on this issue.

32. The evidence of the appellant's involvement with his son is supported by the evidence from the school which describes him as becoming more involved in the past year. We are therefore satisfied that his relationship with his son is genuine and subsisting. In the light of the evidence about Z's medical and developmental conditions, we are satisfied that he cannot reasonably be expected to return with his parents to Algeria even if his mother was willing to return there with his father. In these circumstances we are satisfied that the provisions of para EX.1 are met.

33. Even if we needed to look at the matter outside the Rules, we would be satisfied that this was a case where the best interests of Z require that he remain in this country with his parents. Whilst we attach considerable weight to the importance of immigration control as an aspect of the legitimate aim of maintaining the economic well being of the country or the prevention of disorder or crime (see Shahzad (article 8: legitimate aim) [2014] UKUT 00085), in the light of Z's circumstances and his length of residence in the UK, we are satisfied in the particular circumstances of this case that his best interests outweigh the public interest in his father being removed. When the family circumstances are looked at as a whole, the appellant's removal would be disproportionate to a legitimate aim.

Decision

34. The First-tier Tribunal erred in law. We set aside that decision and substitute a decision allowing the appeal on article 8 grounds.

Signed Date: 2 May 2014

Upper Tribunal Judge Latter