Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/24870/2013

THE IMMIGRATION ACTS

Heard at Newport	**Determination Promulgated**
On 6 May 2014	**On 20 May 2014**
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Before

UPPER TRIBUNAL JUDGE GRUBB

Between

PRAVEZ AHMED

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Ahmed instructed by Eurasia Legal Services
For the Respondent: Mr K Hibbs, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Bangladesh born on 7 October 1985. He entered the UK illegally in October 2006. On 28 October 2008, he was encountered working at a restaurant in Gloucester and was served with notice that he was liable to be detained and removed as an illegal entrant. He was granted temporary admission subject to reporting conditions.

2. On 25 August 2011, the appellant married a British citizen, Sayra Ahmed. On 18 February 2013, he was detained when reporting. On 22 February

2013 he made an application for leave to remain in the UK under Article 8 of the ECHR based principally on his relationship with his wife. On 7 June 2013, the Secretary of State refused the appellant's application for leave under para 276ADE and Appendix FM of the Immigration Rules (HC 395 as amended). The Secretary of State also considered that there were no "exceptional circumstances" such as to make the appellant's removal no longer appropriate under para 353B of the Rules.

3. The appellant appealed to the First-tier Tribunal. In a determination promulgated on 28 January 2014, Judge Page dismissed the appellant's appeal under para 276ADE, Appendix FM and Article 8 of the ECHR.

4. On 19 February 2014, the First-tier Tribunal (Judge Keane) granted the appellant permission to appeal to the Upper Tribunal on the following ground;

> "3. The Upper Tribunal at paragraphs 27 and 28 of its determination in **The Secretary of State for the Home Department v Gulshan [2013] UKUT 00640 (IAC)** carried out an Article 8 analysis, although paying attention to the applicable guidance and the respondent's conclusion in that appeal under paragraph EX.1 of HC 395 (as amended) that there were no insurmountable obstacles preventing the continuation of family life outside the United Kingdom. The judge made an arguable error of law in not carrying out a **Razgar** style enquiry and in failing to consider the proportionality of the decision under appeal. The application for permission is granted."

5. Thus, the appeal came before me.

The Submissions

6. In his oral submissions and written skeleton argument, Mr Ahmed who represented the appellant submitted that the Judge had erred in law in three respects.

7. First, in paragraph 23 of his determination the Judge had made a factual error by stating that the appellant's wife was a national of Bangladesh when she was in fact a British citizen. This, Mr Ahmed submitted tainted the Judge's finding that there was no reason why the appellant's wife could not return with the appellant to live (or to seek entry clearance) in Bangladesh.

8. Secondly, and more fundamentally, Mr Ahmed submitted that the Judge had failed to carry out the two stage process set out by the Court of Appeal in MF (Nigeria) v SSHD [2013] EWCA Civ 1192 by first considering the application of the Immigration Rules and then carrying out an assessment of Article 8 outside the Rules applying the five stage process in Razgar v SSHD [2004] UKHL 27.

9. Thirdly, Mr Ahmed submitted that the Judge's reasoning was inadequate, in particular in finding that there were no "insurmountable obstacles" to the appellant and his wife living (or returning to seek entry clearance) in

Bangladesh given the appellant's wife worked in the UK and her ties were here.

10. On behalf of the respondent, Mr Hibbs accepted that the Judge had made a mistake in paragraph 23 but that error was not material to his decision as the Judge had fully considered the circumstances of the appellant and his wife and, applying Gulshan (Article 8 – New Rules – Correct Approach) [2013] UKUT 00640 (IAC), the Judge was entitled to find that there were "no exceptional circumstances" such as to require consideration of Article 8 outside the Rules.

Discussion

11. I deal first with Mr Ahmed's second submission on the fundamental point of whether the Judge erred in law because he did not carry out a "full" assessment under Article 8 outside the Rules.

12. Mr Ahmed principally relied upon the case of MF (Nigeria). That case concerned deportation and the relationship between the relevant Immigration Rule in paras 398-399A and Article 8 of the ECHR. The Court of Appeal held that the Immigration Rules in relation to the deportation of a foreign national criminal were a "complete code" (see [44]). The Court of Appeal noted ([40]-[46]) that under para 398 the rule stated that:

> "It will only be in exceptional circumstances that the public interest in deportation will be outweighed by other factors."

13. The Court of Appeal recognised (at [44]) that:

> "The exceptional circumstances to be considered in the balancing exercise involved the application of a proportionality test as required by the Strasbourg jurisprudence."

14. At [46], the Court of Appeal considered whether there was a one or two stage process involving consideration of the new Art 8 Rules followed by a consideration of Article 8 of the ECHR:

> "There has been debate as to whether there is a one stage or two stage test. If the claimant succeeds on an application of the new rules at the first hurdle ie he shows that para 399 or 399A applies, then it can be said that he has succeeded on a one stage test. But if he does not, it is necessary to consider whether there are circumstances which are sufficiently compelling (and therefore exceptional) to outweigh the public interest in deportation. That is an exercise which is separate from a consideration of whether para 399 and 399A applies. It is the second part of a two stage approach which, for the reasons we have given, is required by the new rules. The UT concluded (para 41) that it is required because the new rules do not fully reflect Strasbourg jurisprudence. But either way, it is necessary to carry out a two stage process.

15. Mr Ahmed placed reliance upon the Court of Appeal's reasoning and approach in MF (Nigeria). He submitted that the Judge, therefore, erred in law by failing to carry out the second stage, namely assessing the appellant's claim under the five stage approach in Razgar.

16. In my judgment, Mr Ahmed's submissions misstate the effect of MF (Nigeria). What the Court of Appeal required was not that a "full" application of Razgar was necessitated in every case where a person relied upon a claimed interference with his private or family life for the purposes of Article 8. As the Court of Appeal makes plain, in determining whether there are "exceptional circumstances" in the sense that they are circumstances which are "sufficiently compelling (and therefore exceptional) to outweigh the public interest " (see para [46]), the balancing exercise inherent in proportionality is, thereby, engaged. The point with which the cases are grappling is the extent to which there is any issue left to be determined in a private and family life case once it has been determined that an individual cannot meet the requirements of the Immigration Rules set out, for example, in para 276ADE and Appendix FM. Only if there are compelling (or exceptional) circumstances will that be so because the public interest otherwise reflected in the new Rules will prevail. If there are such circumstances, then the appellant will succeed under Art 8 "outside the Rules".

17. In MF (Nigeria), the Court of Appeal cited with approval the decision of Sales J in R (Nagre) v SSHD [2013] EWHC 720 (Admin). In that case, at [29] Sales J recognised that it would be only necessary to consider an individual's claim outside the Rules by reference to Article 8 if there were "compelling circumstances" not sufficiently dealt with under the Rules. At [29], Sales J said this:

> "Nonetheless, the new rules do provide better explicit coverage of the factors identified in case-law as relevant to analysis of claims under Article 8 than was formerly the position, so in many cases the main points for consideration in relation to Article 8 will be addressed by decision-makers applying the new rules. It is only if, after doing that, there remains an arguable case that there may be good grounds for granting leave to remain outside the Rules by reference to Article 8 that it will be necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under the new rules to require the grant of such leave."

18. Having then cited from the Upper Tribunal's decision in Izuazu (Article 8 – New Rules) [2013] UKUT 0045 (IAC), Sales J at [30] added this:

> "The only slight modification I would make, for the purposes of clarity, is to say that 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."

19. That approach was, in my judgement, approved and applied by the Upper Tribunal in Gulshan (Article 8 – New Rules – Correct Approach) [2013] UKUT 00640 (IAC). There, the Upper Tribunal having cited Nagre and MF (Nigeria) said this at [24(b)] that:

> "(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:"

20. Before leaving the case law and turning to Judge Page's determination, there are three matters which arise from the case law; one of which I have already alluded to.

21. The first concerns the issue of "insurmountable obstacles" found in section EX.1 of Appendix FM. In MF (Nigeria), the Court of Appeal rejected at [49] a literal meaning that only obstacles which were impossible to surmount for the parties to carry on their family life abroad would suffice. The proper approach is to consider the practical possibilities of relocation (see Izuazu at [53]-[59] and Gulshan at [24(c)]).

22. The second is that to succeed in a claim based upon private or family life outside the Immigration Rules, it is necessary to show that there are "compelling circumstances (MF (Nigeria) at [46]) such that removal will be "unjustifiably harsh" (Gulshan at [24(c)]).

23. The third is that in Nagre Sales J, having cited the Strasbourg case law, pointed out that in the absence of insurmountable obstacles to relocation abroad, it was likely that removal would be proportionate for the purposes of Article 8. Sales J continued:

> "In order to show that, despite the practical possibility of relocation (i.e. the absence of insurmountable obstacles to it), removal in such a case will nonetheless be disproportionate, one would need to identify other non-standard and particular features of the case of a compelling nature to show that removal would be unjustifiably harsh."

24. I turn now to consider Judge Page's determination.

25. Judge Page concluded that the appellant did not fall within paragraph 276ADE of the Rules based upon his private life. That finding is not challenged in the grounds or by Mr Ahmed in his oral submissions or skeleton argument.

26. Further, Judge Page concluded that the appellant could not meet the requirement of Appendix FM. In order to do so, it was common ground that the appellant had to show he met the requirements of Section EX.1 of Appendix FM based upon his relationship with his wife. That requires, so far as relevant:

> "(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 … and there are insurmountable obstacles to family life with that partner continuing outside the UK."

27. At para 15, Judge Page accepted that the appellant and his wife's relationship was "genuine and subsisting". Further, at [25], Judge Page concluded that there were:

> "…no insurmountable obstacles to family life continuing in Bangladesh should the appellant's wife return with him while he obtains the necessary entry clearance, alternatively, they could both return to Bangladesh to live there and pursue family life there."

28. At paras 16-17, Judge Page set out the correct approach in Gulshan that "insurmountable obstacles" did not mean obstacles that were impossible to surmount" but concerned "the practical possibilities of relocation" and the relevant IDI setting out factors that might be considered in determining whether there were "insurmountable obstacles" because of the degree of difficulty and hardship for the individuals of relocating abroad. At para 23, Judge Page said this:

> "I am not satisfied that the appellant's wife could not return to Bangladesh with him to pursue family life there with a view to obtaining the correct visa for him to return with her. She is a national of Bangladesh also. It is not the case that she would have to adapt to a country that she has never lived in before."

29. Whilst it is accepted that Judge Page miss-stated in paragraph 23 that the appellant's wife was a national of Bangladesh, he clearly set out at paragraph 3 correctly that she was a "British citizen". That error was not material to his decision.

30. I reject Mr Ahmad's first submission challenging Judge Page's decision.

31. Mr Ahmed told me, on instructions, that the sponsor had come to the UK to live in 2005. The sponsor's passport says that she was born on 8 June 1990 and, therefore, was 15 years old when she came to the UK from Bangladesh. Part of the appellant's case to which I shall return shortly, was that the appellant and his wife could not return to Bangladesh because they were at risk because the appellant's wife's family was angry because she had married the appellant rather than someone whom her family wished her to marry. The Judge rejected that evidence (a finding which is now not challenged) and so the position was that the sponsor had spent the first 15 years of her life in Bangladesh even though she was a British citizen by descent. The Judge noted at para 12 that the sponsor had a full time job in the UK. The appellant was, himself, a Bangladesh national who had lived in Bangladesh until 2006 (he was then 21 years old) before coming to the UK illegally. On these facts, having correctly directed himself to the meaning of "insurmountable obstacles", Judge Page was entitled to conclude that the appellant had failed to establish that there were "insurmountable obstacles" (properly understood) to the continuation of his family life with his wife in Bangladesh.

32. For those reasons, I reject Mr Ahmad's third submission challenging Judge Page's decision.

33. Having made that finding on 'insurmountable obstacles', Judge Page went on to consider whether the appellant could succeed "outside the Rules" on the basis of "exceptional circumstances". Again, Judge Page correctly directed himself, consistently with the case law, that exceptional

circumstances meant circumstances that would result in "unjustifiably harsh consequences". At para 20, Judge Page pointed out that:

> "The exceptional circumstances claimed in the extant case amount to a claim that the appellant and his wife could relocate to Bangladesh because both their lives would be at risk by reason of the appellant's wife's family being angry that they married."

34. Judge Page concluded that the appellant's circumstances were not exceptional so as to justify a grant of leave outside the Rules under Article 8. I set out in full his reasons at paras 21-25 which are as follows:

> "21. I have to be circumspect about the appellant's evidence for two reasons. Firstly he entered the United Kingdom unlawfully and was found working illegally and had made no attempt to regularise his status in the United Kingdom until he was detained when found working illegally at the Taste of India Restaurant in Gloucester. It is curious that he married his wife in Manchester before moving back to Gloucester which suggests they lived apart at some point. In any event it is plain that the appellant and his wife married in the full knowledge that he was in the United Kingdom unlawfully. Now the appellant relies upon his marriage as part of his claimed exceptional circumstances entitling him to remain in the United Kingdom outside the Immigration Rules under Article 8. The appellant knew of the procedure set down by law for him to seek settlement in the United Kingdom but chose not to return to Bangladesh to make the necessary entry clearance application.
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> 22. He has sought to circumvent the Rules on settlement by claiming a right to remain under Article 8. The deliberate flouting of the Rules is one of those circumstances that falls into the exception contemplated by the House of Lords in **Chikwamba**. The appellant and his wife might be inconvenienced for a few months should he return to Bangladesh to obtain entry clearance but the damage to his family life goes no further than that. There would be no grave and unjustifiably interference with his right to family life should he be required to do that.
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> 23. I am not satisfied that the appellant's wife could not return to Bangladesh with him to pursue family life there with a view to obtaining the correct visa for him to return with her. She is a national of Bangladesh also. It is not the case that she would have to adapt to a country she had never lived in before. I now turn to the issue of risk to both the appellant and her from her family.
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> 24. I could not consider there were exceptional circumstances unless I was satisfied that this risk from her family were genuine. Both the appellant and his wife have evry incentive to claim such a risk. I am not satisfied that her family in Bangladesh wanted her to marry someone there. She has been settled in the United Kingdom for some years. The evidence of both the appellant and his wife was only that she feared that her life and the appellant's life would not be safe in Bangladesh because she married the appellant against her family's consent. I find it difficult to understand why she would marry someone against her family's will if that person faced removal to Bangladesh. She would be marrying in circumstances where her marriage was precarious and where she was placing herself at risk. I am not satisfied upon the balance of probabilities that this claimed risk is genuine. There has been no evidence of threats or other problems, just a bare assertion that this threat

> exists. I did not find either the appellant or his wife credible on this issue.
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> 25. Therefore I determine the appeal on the basis that the appellant married in the United Kingdom in circumstances where he had no leave to remain after entering illegally. He cannot meet the requirements of the Immigration Rules and having taken into account the guidance in **Gulshan** above, I find there are no exceptional circumstances and no insurmountable obstacles to family life continuing in Bangladesh should the appellant's wife return with him while he obtains the necessary entry clearance. Alternatively, they could both return to Bangladesh to live there and pursue family life there. For these reasons the appeal is dismissed. "

35. Judge Page's rejection of the appellant's account that he and his wife were at risk from her family on return to Bangladesh has not been challenged. As a consequence, the appellant's circumstances were "standard" and there were no particular features demonstrating that his removal (whether temporarily to obtain entry clearance or permanently to live in Bangladesh) was unjustifiably harsh. The appellant had had no lawful basis for being in the UK since his arrival in October 2006 and he and his wife had married in August 2011 when it was clear that he had no basis to remain in the UK. Theirs was an example of "precarious family life". Whilst it is said by Mr Ahmed that the appellant's wife would suffer hardship if she had to relocate (whether temporarily or permanently) to Bangladesh, those consequences (put in relation to her job) were an inevitable consequence of their decision to marry at a time when the appellant had no right or expectation of being in the UK. Ms Ahmed placed reliance upon the House of Lords' decision in Chikwamba v SSHD [2008] UKHL 40 which, he submitted, told against imposing a procedural requirement (such as leaving the UK to seek entry clearance) where that was the only matter weighing on the public interest when assessing Article 8. The difficulty in this submission is that the appellant is an illegal entrant and has been so since October 2006. For that reason, the appellant's reliance upon Chikwamba cannot assist his argument that Judge Page was not entitled to conclude that the appellant failed in his claim outside the Rules.

36. For those reasons, I reject Mr Ahmad's second submission challenging Judge Page's decision.

37. In my judgment, Judge Page was entitled to conclude that the appellant could not succeed under the Immigration Rules (para 276ADE and Appendix FM) and further that his circumstances were not exceptional in that there would be unjustifiably harsh consequences if he were removed to Bangladesh and that there were no insurmountable obstacles to the appellant continuing his family life in Bangladesh either on a temporary basis whilst entry clearance was sought or permanently if the appellant and his wife could only live in Bangladesh. The Judge did not fall into legal error in dismissing the appellant's appeal.

Decision

38. For these reasons, the First-tier Tribunal's decision to dismiss the appellant's appeal did not involve the making of an error of law. The decision stands.

39. The appellant's appeal to the Upper Tribunal is dismissed.

Signed

A Grubb
Judge of the Upper Tribunal

Date: