Upper Tribunal
(Immigration and Asylum Chamber)
IA/00616/2014

THE IMMIGRATION ACTS

Heard at Manchester	**Determination Promulgated**
On August 21, 2014	**On August 22, 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR MUSTAFA BERK

Respondent

Representation:

For the Appellant: Mr McVeety (Home Office Presenting Officer)
For the Respondent: Mr Dhanji, Counsel, instructed by Braitch RB Solicitors

DETERMINATION AND REASONS

1. Whereas the respondent is the appealing party, I shall, in the interests of convenience and consistency, replicate the nomenclature of the decision at first instance.

2. The appellant, born November 26, 1979, is a citizen of Turkey. On July 12, 2013 the appellant applied for a residence card as the partner of Grazyna Barbara Wiacek.

3. The respondent refused his application on October 2, 2013 on the basis she was not satisfied the appellant and Ms Wiacek were in a durable relationship.

4. On October 17, 2013 the appellant appealed under Section 82(1) of the Nationality, Immigration and Asylum Act 2002. And Regulation 26 of the Immigration (European Economic Area) Regulations 2006.

5. The matter was listed before Judge of the First-tier Tribunal Williams (hereinafter referred to as "the FtTJ") on April 24, 2014 and in a determination promulgated on May 12, 2014 he allowed the appellant's appeal under article 8 ECHR. He did however find the appellant was not in a durable relationship.

6. The respondent appealed that decision on May 21, 2014. Permission to appeal was granted by Judge of the First-tier Tribunal Plumptre on June 24, 2014. She found the FtTJ may have erred because:

    a. He failed to consider the provisions of Appendix FM and paragraph 276ADE and failed to follow the approach set out in R (on the application of) Nagre v SSHD [2013] EWHC 720 (Admin).

    b. By not first considering the best interests of Adam as a primary consideration rather than considering his interests last at paragraph 29.

    c. He gave comparative lesser weight to the appellant's immigration history, which he termed as "appalling".

7. The appellant was in attendance but was not required to give any evidence.

SUBMISSIONS ON ERROR OF LAW

8. Mr McVeety relied on the grounds of appeal and submitted the FtTJ erred by dismissing the appeal under

the 2006 Regulations and then immediately proceeded to consider the appeal under article 8 ECHR without any regard to the approach set out in Gulshan [2013] UKUT 00640 (IAC) and Nagre. This was a material error. Additionally, the FtTJ treated Adam as a trump card that outweighed his "appalling" immigration history despite the adverse findings made on his contact claims. Whilst Adam was a primary consideration more weight should have been given to his "appalling" immigration history and the fact he had never had any lawful status.

9. Mr Dhanji agreed the determination was not perfect but there was no material error. The appellant never argued the Immigration Rules for private/family life were met and the failure by the FtTJ to mention it does not amount to an error because the FtTJ proceeded on the basis the Rules were not met. Having decided article 8 was engaged the FtTJ did consider the best interests of the Adam and at the end of the determination he concluded that this outweighed his immigration history.

ERROR OF LAW ASSESSMENT

10. The FtTJ had before him a bundle of documents, including witness statements from the appellant and his partner. He took oral evidence and having heard that evidence he rejected the appellant's claim to be in a durable relationship. His findings between paragraphs [17] and [21] are quite damning with him finding:

    a. The appellant's credibility was undermined by his poor immigration history and his propensity to act in a deceptive and evasive manner throughout his time in the United Kingdom.

    b. The claimed durability of the relationship was undermined by the inconsistencies in the evidence regarding the frequency of contact with Adam.

    c. The appellant's "partner" evidence was also full of errors, which she would not have made if she had regularly taken Adam to his house as she claimed.

    d. The witness Mr Celebi, claimed he drove from Shotton to Blackpool (160 mile trip) two to three times a week to take the appellant to his partner's lacked credibility bearing in mind the appellant only live three miles apart.

e. There was a lack of evidence that they were in a durable relationship.

11. Having dismissed the application under the Regulations the FtTJ should have then considered whether the appellant met the Immigration Rules and in particular Appendix FM and paragraphs 248A and 276ADE.

12. As this appeal was lodged after July 2012 it was incumbent on the FtTJ to follow the approach set out in Gulshan and Nagre. However, what he did was to immediately consider his article 8 claim.

13. The FtTJ was probably not assisted by the representatives who did not address him on either article 8 or the Immigration Rules. However, as the appellant raised article 8 in his grounds of appeal it was incumbent on the FtTJ to address the issue in his determination.

14. His approach is flawed because before considering an article 8 claim outside of the Rules (assuming the Rules cannot be met) he must find circumstances in which refusal would result in unjustifiably harsh consequences for the individual such that refusal of the application would not be proportionate.

15. In paragraph [30] of his determination he found Adam should have the opportunity to grow up knowing his father and that the only reasonable place that could happen was in the United Kingdom. The FtTJ effectively treated the child as a trump card, which the Courts have made clear is incorrect. He belatedly referred to the appellant's immigration history but despite finding it appalling he failed to properly consider the importance of maintaining proper immigration control especially in circumstances where the appellant had entered the country illegally and had remained here illegally since July 2007.

16. In all the circumstances I am satisfied there is a material error and I therefore set aside the article 8 decision.

17. Mr Dhanji agreed no further oral evidence was necessary and I invited the representatives to make final submissions firstly on the issue of whether article 8 should be considered outside of the Rules and secondly, if it should be, whether removal was proportionate.

SUBMISSIONS

18. Mr McVeety submitted that the appellant had applied to remain here as an EEA national based on a durable relationship. The FtTJ had rejected this claim and made adverse findings on the alleged relationship between the appellant and Ms Wiacek and Adam. Their relationship had no legal status in the United Kingdom for the reasons set out in the determination and whilst Adam is his son the level of contact was less than he had claimed. The FtTJ rejected all the evidence although he accepted there was some contact. The appellant did not meet the Regulations and he could not meet the Immigration Rules. The Rules were a complete code as they offered him a number of options to stay namely as a parent having contact (Paragraph 248A), as a parent of a child and based on his private life. He failed to meet any of these Rules and in light of the FtTJ's finding on the level of contact a refusal would not result in unjustifiably harsh consequences for the individual.

19. Mr Dhanji submitted that although the appellant could not satisfy the Immigration Rules there would be good grounds for considering this appeal outside of the Rules. There was a young child who was entitled to see both his parents and it was not the child's fault that his father had a poor immigration history. It was in the child's best interests to have direct contact with the appellant and this is why the appeal should be considered outside of the Rules. Whilst the Immigration Act 2014 applied to this appeal it should be noted that the appellant could speak some English and was able to work and not be a burden on the State. If he were removed then his child would be unable to see him because it seemed they were no longer in a durable relationship. Whilst his relationship took place when his immigration status was precarious this was only one factor to take account. The appellant's appeal should be allowed under article 8 ECHR.

CONSIDERATION OF SUBSTANTIVE APPEAL

20. The issues in this appeal were as follows:-

    a. Did the Appellant meet the Immigration Rules.
    b. If not, were there compelling reasons to consider it outside of the Immigration Rules that would result in unjustifiably harsh consequences for him.
    c. If the case was considered outside of the Rules was it proportionate to remove him.

21. The appellant was unable to meet the Immigration Rules despite being able to apply, in theory, under a variety of routes. If he met the Rules he could have applied to stay on the basis of contact with his son or under Appendix FM or paragraph 276ADE.

22. The Immigration Rules do offer a route to remain but the appellant was unable to meet them. Significantly, his unlawful status and the fact the child is not settled here meant he would never be able to meet the Rules.

23. I am invited to consider the appeal under article 8 ECHR. The Courts in MM (Lebanon) & Ors, R (on the application of) v Secretary of State for the Home Department & Anor [2014] EWCA Civ 985 considered the approaches in Gulshan [2013] UKUT 00640 (IAC) and Nagre [2013] EWHC 720 Admin and confirmed the approach to be taken.

24. The Court of Appeal in MM examined numerous authorities and stated:

> "128. … In Nagre the new rules were themselves attempting to cover, generally, circumstances where an individual should be allowed to remain in the UK on Article 8 grounds… Nagre does not add anything to the debate, save for the statement that if a particular person is outside the rule then he has to demonstrate, as a preliminary to a consideration outside the rule, that he has an arguable case that there may be good grounds for granting leave to remain outside the rules. I cannot see much utility in imposing this further, intermediary, test. If the applicant cannot satisfy the rule, then there either is or there is not a further Article 8 claim. That will have to be determined by the relevant decision-maker.
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> 134. Where the relevant group of Immigration Rules, upon their proper construction, provide a "complete code" for dealing with a person's Convention rights in the context of a particular IR or statutory provision, such as in the case of "foreign criminals", then the balancing exercise and the way the various factors are to be taken into account in an individual case must be done in accordance with that code, although references to "exceptional circumstances" in the code will nonetheless entail a proportionality exercise. But if the relevant group of Immigration Rules is not such a "complete code" then the

> proportionality test will be more at large, albeit guided by the Huang tests and UK and Strasbourg case law.
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> 159. … It seems clear from the statement of Lord Dyson MR in MF (Nigeria) and Sales J in Nagre that a court would have to consider first whether the new MIR and the "Exceptional circumstances" created a "complete code" and, if they did, precisely how the "proportionality test" would be applied by reference to that "code".
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> 162. … Firstly, paragraph GEN.1.1 of Appendix FM states that the provision of the family route "takes into account the need to safeguard and promote the welfare of children in the UK", which indicates that the Secretary of State has had regard to the statutory duty. Secondly, there is no legal requirement that the Immigration Rules should provide that the best interests of the child should be determinative. Section 55 is not a "trump card" to be played whenever the interests of a child arise…"

25. I have to consider whether a refusal would result in unjustifiably harsh consequences for the individual such that refusal of the application would not be proportionate.

26. The FtTJ found he was here illegally (since 2007) and subject to a removal that was served on him over three years ago. Despite this precarious position he then entered into a relationship that led to Adam being conceived. The FtTJ rejected his claim of regular access although found he had some contact. That finding is significant because the appellant is not a large figure in Adam's life and whilst he has a role to play that role appears to be minimal based on the FtTJ's findings.

27. If the appellant had been in a durable relationship he would have been granted a residence card to stay and he would have been able to see his son. He is unable to stay under the Immigration Rules because he is here illegally.

28. Whilst it is incumbent to consider Adam's interests I am satisfied that those interests are covered by the Rules and Regulations. The appellant's relationship with Adam was limited and such relationship could be maintained by other means.

29. Based on the evidence presented I am unable to find good arguable grounds or compelling circumstances not sufficiently recognised under Appendix FM, paragraphs 248A or 276ADE or the 2006 Regulations where refusal would result in unjustifiably harsh consequences for the appellant.

30. In these circumstances I find there is no basis to allow this appeal under article 8 ECHR.

31. Even if there had been good reason I am satisfied that I would have to have regard to Section 117B as inserted into the 2002 Act by Section 19 of the Immigration Act 2014. Relevant to any assessment on proportionality would have been Sections 117B(3), (4), (5) and (6). Section 117B(6) recognises genuine and subsisting relationships with a qualifying child but Adam is neither a British citizen nor has he lived here for seven years. The remaining sections of 117B do not assist the appellant. I am satisfied that even if article 8 had been engaged it would not have been disproportionate to remove the appellant.

DECISION

32. There is a material error of law and I set aside the original decision.

33. I have remade the article 8 decision and I dismiss the appeal under Article 8 ECHR.

34. Under Rule 14(1) The Tribunal Procedure (Upper Tribunal) Rules 2008 (as amended) the appellant can be granted anonymity throughout these proceedings, unless and until a tribunal or court directs otherwise. No order has been made and no request for an order was submitted to me.

Signed: Dated:

Deputy Upper Tribunal Judge Alis

TO THE RESPONDENT

I do not make a fee award, as the appeal did not succeed.

Signed: Dated:

Deputy Upper Tribunal Judge Alis