Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/42675/2014
IA/42748/2014
IA/42752/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons**
On 22nd June 2015	**Promulgated On 4th September 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE RIMINGTON
DEPUTY UPPER TRIBUNAL JUDGE O'RYAN

Between

JEHANGIR KHAN
Ms ESTELLA SUGUE VERGINISA
Miss PAULA SUGUE
(ANONYMITY ORDER NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr J. Wells of Maliks & Khan Solicitors
For the Respondent: Ms Pal, Home Office Presenting Officer

DECISION AND REASONS

1 This is an appeal brought by the Appellants against the determination of the First Tier Tribunal (Judge of the First tier Tribunal Manyarara) dated 26th January 2015.

2 The first appellant is a national of Pakistan, born on 21st March 1979. On 31st July 2014, he applied to the Respondent for a residence card under Regulation 17 of the Immigration (European Economic Area) Regulations 2006 ('the 2006 Regulations') on the basis that he claimed to be a family member of a qualified person under the 2006 Regulations, being married to A2, a Spanish national, who was said to be working in the UK.

3 On 4th November 2014, the Respondent conducted a marriage interview with the first and second appellants. The Respondent formed the view that the marriage was one of convenience, and on 10th November 2014 made a decision in respect of A1 refusing him a residence card, on the ground that as a party to a marriage of convenience, he was not to be treated as A2's 'spouse', as defined by Reg 2, 2006 Regulations.

4 Further, in Respect of A2 and the third appellant (A2's minor dependent daughter from a previous marriage, and also a Spanish national), the Respondent made decisions dated 4th November 2014 to remove them administratively to Spain under s.10 Immigration and Asylum Act 1999, pursuant to Regulations 19(3)(c) and 21B of the 2006 Regulations, ie on the basis that their removal was justified on the grounds of A2's 'abuse of rights', as defined by Reg 21B(1) of the 2006 Regulations. It is therefore to be noted that the decisions served on A1 on the one hand and A2 and A3 on the other are quite different.

5 The Appellants appealed, and their appeals were heard together by Judge of the First tier Tribunal Manyarara on 15th January 2015. In dismissing the appeals under the 2006 Regulations and on human rights grounds, the Judge held:

(i) that the marriage was one of convenience (paras 31 to 44);

(ii) that it would be in A3's best interests to remain with her mother, A2 (para 45-46); and

(iii) any interference with Article 8 ECHR in the case was proportionate (para 47).

6 The Appellants sought permission to appeal to the Upper Tribunal on grounds, in summary, as follows:

(i) that the FTT erred in law in reaching findings on the marriage of convenience point that were not supported by the evidence and that her reasons were inadequate; and

(ii) the FTT made wholly inadequate findings in respect of Article 8 for A2 and A3.

7 The application for permission was considered by Judge of the First tier Tribunal Foudy. In relation to those grounds, she expressed the following view:

> "3. The Judge dealt with the oral evidence and documents in detail. Her determination sets out the matters relied upon by the Appellant and makes findings in respect of them in a comprehensive and reasoned manner.
> 4. However it is arguable that the Judge did not make adequate findings respect of her Article 8 decision. This is an arguable error of law."

8 It is therefore clear that permission was granted only in respect of the second ground. No renewed application for permission to appeal, to the UT directly, under Reg 22 of the Tribunal Procedure (Upper Tribunal) Rule 2008 was made.

9 At the hearing before us on 22nd June 2015, Mr Wells, appearing for the Appellants, submitted a skeleton argument seeking to re-argue Ground 1.

10 We refused permission to the Appellants to re-open Ground 1, for a number of reasons:

(i) no application had been made in a timely manner and on the proper form seeking to renew an application on such grounds;

(ii) no adequate explanation as to why such a renewed application had not been made was provided;

(iii) the ground not only fails to disclose a material error of law, it is also wholly misleading, seeking to argue that out of an alleged 230 questions asked of the Appellants in interview (in fact is was 124 each) the Respondent took issue with only 6, representing a mere 2.5% of the answers, whereas our view is that a proper inspection of the FTT determination reveals that the Judge relied upon at least 13 issues, discussed at paras 35-43, in support of her finding that the marriage was one of convenience, none of which were properly challenged in the grounds of appeal, and the actual number of questions in the interview from which those issues arose (which was greater than 6 in any event) was irrelevant.

The Article 8 issue

11 The appeal proceeded with the parties making submissions in relation to the second ground, challenging the adequacy of the FtT's determination on Article 8 Grounds.

12 It is appropriate to set out the relevant part of the decision. The Judge's consideration as to whether the A1 and A2's marriage was one of convenience concluded at paragraph 44. She then proceeded:

> "45 In now turn to consider Article 8 in respect of the removal decisions concerning the second and third appellants. I also note the date of the previous determination and the subsequent legal developments which have illuminated the approach to be taken in respect of cases involving children and the need to consider the interests of the child. They are section 55 of the Borders, Citizenship and Immigration Ac 2009 and ZH Tanzania v Secretary of State for the Home Department [2012] UKSC 4 respectively.
>
> 46. I find that the best interests of the child (the third appellant) in this case are served by being with her mother (the second Appellant). By the second appellant's own evidence, the third appellant is a shy child who needs to get used to new people, and also that she had difficulty adjusting to the education system in the United Kingdom as a result of language barriers. The third appellant speaks Spanish, as confirmed by the second appellant, and would be returning to the country where she was born and where she spent her formative years. There was no evidence to support the claim that the third appellant had therapy needs. Even if it were the case that such needs existed, there was no evidence before me that they could not be catered for in her country of origin. There would be no separation from what the third appellant is familiar with. Indeed considering the submissions made on behalf of the appellants in this respect, the third appellant has not completely adjusted to life in the United Kingdom having only lived here since 2013.
>
> 47. Finally, I have considered the five steps propounded by Lord Bingham in Razgar v SSHD [2004] (which I do not reiterate) and am satisfied that any interference with Article 8 in this case is proportionate, in the light of my findings in respect of marriage in this case."

13 Before considering the parties' submissions as to the adequacy of those findings on the proportionality of A2 and A3's removal, we note two things.

14 Firstly, that there has been no successful challenge to the finding that the marriage between A1 and A2 was one of convenience. There is therefore no Article 8 family life as between A1 on the one hand and A2 and A3 on the other. Whatever shortcomings there are alleged to be in relation to the FtT's considerations of the lawfulness of the decision to remove A2 and A3, A1''s appeal, against the decision to refuse him a residence card, therefore stands to be dismissed. Whether the Respondent seeks to remove A1 at a later date is a matter for her.

15 It is also to be noted that the Judge's reference at paragraph 45 to an earlier determination appears to be a determination of a previous appeal brought unsuccessfully by A1 against an earlier refusal to grant him a residence permit, apparently on the grounds that he had not shown that A2 was a qualified person. However, the evidence before the FtT in the present appeal appears to suggest that A2 had since obtained a new job, and the IS151A dated 4th November 2014 in respect of her does not seek to rely upon Reg 19(3)(a) of the 2006 Regulations (power to remove where a person does not have or ceases to have a right to reside under these Regulations). A2 and A3 (being a family member of A2) therefore appear to be asserting that they have a right of residence under the Regulations.

16 The parties submissions on as to whether the Judge's findings on Article 8 were relatively brief, arguing respectively that the paragraphs above were not (Appellants) or were (Respondent) adequate in respect of the dismissal of the appeals.

17 We find that the Judge's consideration of the proportionality of the proposed removals was inadequate in law.

18 It is appropriate to set out the relevant law.

19 EEA Regs 2006; 19 and 21B:

> "19.— Exclusion and removal from the United Kingdom
>
> ...
> (3) Subject to paragraphs (4) and (5), **an EEA national** who has entered the United Kingdom **or the family member of such a national** who has entered the United Kingdom **may be removed if**–
>
> (a) that person does not have or ceases to have a right to reside under these Regulations;
> (b) the Secretary of State has decided that the person's removal is justified on grounds of public policy, public security or public health in accordance with regulation 21; or
> **(c) the Secretary of State has decided that the person's removal is justified on grounds of abuse of rights in accordance with regulation 21B(2).**
>
> ...
>
> 21B.— Abuse of rights or fraud
>
> (1) The abuse of a right to reside includes—
> (a) engaging in conduct which appears to be intended to circumvent the requirement to be a qualified person;

(b) attempting to enter the United Kingdom within 12 months of being removed pursuant to regulation 19(3)(a), where the person attempting to do so is unable to provide evidence that, upon re entry to the United Kingdom, the conditions for any right to reside, other than the initial right of residence under regulation 13, will be met;
(c) entering, attempting to enter or assisting another person to enter or attempt to enter, a marriage or civil partnership of convenience; or
(d) fraudulently obtaining or attempting to obtain, or assisting another to obtain or attempt to obtain, a right to reside.

(2) The Secretary of State may take an EEA decision on the grounds of abuse of rights where there are reasonable grounds to suspect the abuse of a right to reside and it is proportionate to do so.

(3) Where these Regulations provide that an EEA decision taken on the grounds of abuse in the preceding twelve months affects a person's right to reside, the person who is the subject of that decision may apply to the Secretary of State to have the effect of that decision set aside on grounds that there has been a material change in the circumstances which justified that decision.

(4) An application under paragraph (3) may only be made whilst the applicant is outside the United Kingdom.

(5) This regulation may not be invoked systematically.

(6) In this regulation, "a right to reside" means a right to reside under these Regulations." (Our emphasis)

20 These Regulations are of course intended (whether successfully or not) to incorporate into domestic law the relevant provisions of the Citizens Directive 2004/58/EC:

"Article 35
Abuse of rights
Member States may adopt the necessary measures to refuse, terminate or withdraw any right conferred by this Directive in the case of abuse of rights or fraud, such as marriages of convenience. Any such measure shall be proportionate and subject to the procedural safeguards provided for in Articles 30 and 31.

...
Article 30
Notification of decisions

1. The persons concerned shall be notified in writing of any decision taken under Article 27(1), in such a way that they are able to comprehend its content and the implications for them.
2. The persons concerned shall be informed, precisely and in full, of the public policy, public security or public health grounds on which the decision taken in their case is based, unless this is contrary to the interests of State security.
3. The notification shall specify the court or administrative authority with which the person concerned may lodge an appeal, the time limit for the appeal and, where applicable, the time allowed for the person to leave the territory of the Member State. Save in duly substantiated cases of urgency, the time allowed to leave the territory shall be not less than one month from the date of notification.

Article 31
Procedural safeguards
1. The persons concerned shall have access to judicial and, where appropriate, administrative redress procedures in the host Member State to appeal against or seek review of any decision taken against them on the grounds of public policy, public security or public health.
2. Where the application for appeal against or judicial review of the expulsion decision is accompanied by an application for an interim order to suspend enforcement of that decision, actual removal from the territory may not take place until such time as the decision on the interim order has been taken,
except:
— where the expulsion decision is based on a previous judicial decision; or
— where the persons concerned have had previous access to judicial review; or
— where the expulsion decision is based on imperative grounds of public security under Article 28(3).
3. The redress procedures shall allow for an examination of the legality of the decision, **as well as of the facts and circumstances on which the proposed measure is based.** They shall ensure that the decision is not disproportionate, particularly in view of the requirements laid down **in Article 28.**
4. Member States may exclude the individual concerned from their territory pending the redress procedure, but they may not prevent the individual from submitting his/her defence in person, except when his/her appearance may cause serious troubles to public policy or public security or when the appeal or judicial review concerns a denial of entry to the territory.

Article 28
Protection against expulsion

1. Before taking an expulsion decision on grounds of public policy or public security, the host Member State shall take account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his/her links with the country of origin.

2. The host Member State may not take an expulsion decision against Union citizens or their family members, irrespective of nationality, who have the right of permanent residence on its territory, except on serious grounds of public policy or public security.
3. An expulsion decision may not be taken against Union citizens, except if the decision is based on imperative grounds of public security, as defined by Member States, if they:

(a) have resided in the host Member State for the previous 10 years; or
(b) **are a minor, except if the expulsion is necessary for the best interests of the child, as provided for in the United Nations Convention on the Rights of the Child of 20 November 1989."**

20 **Relevant guidance**

Chapter 50 (EEA) – EEA Administrative Removal

Instructions for assessing whether to administratively remove an EEA national [or a family member of an EEA national]

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/424570/Chapter_50_EEA__v7_EXT_20150428.pdf

5.5.2 Personal circumstances
Personal circumstances **must** be taken into account when considering whether a decision under regulation 19(3)(c) is proportionate. This includes regard to the relevant person's:
* age
* state of health
* family ties to the United Kingdom
* length of residence in the United Kingdom
* social and cultural integration
* economic situation.

Contrast the two examples below:

1. an EEA national who has been in the UK for six months and has entered into a marriage of convenience in full knowledge that the marriage was not genuine. They are fit and healthy

> and although they are working they have no other ties to the UK.
> 2. an EEA national with a lawfully acquired right of permanent residence who has lived in the UK for the past seven years and who has recently entered into a marriage of convenience in full knowledge that the marriage was not genuine. They have three children with a previous partner, the children have lived their whole life in the UK. The EEA national continues to work in the UK and has integrated fully into UK life.
>
> Although in both examples the EEA national was complicit in the marriage of convenience, it would be less proportionate to remove in the second example because of their length of residence, ties with the UK and their integration."

21 In contrast to A1, who received a 5 page letter dated 10th November 2014 containing the reasons as to why he was being refused a residence permit, the only documents we have seen relating to the decisions taken in respect of A2 and A3 are notices IS151A (EEA) and IS151B (EEA) dated 4.11.14 in respect of both of them. The IS151A's provide that they are:

> "...by virtue of regulations 19(3) and 24(2) a person in respect of whom removal directions may be given in accordance with section 10 of the Immigration and Asylum Act 1999 as a person whose removal is justified on the grounds of abuse of rights in accordance with regulation 21B(2) of the Immigration (Economic Area) Regulations 2006."

Further, the 'Specific Statement of Reasons' on the forms provide:

> "You are specifically considered a person who is involved in abuse of free movement rights by entering into a marriage that has been deemed a sham. A removal decision has **therefore** been taken under regulation 19(3)(c) of the EA Regulations." (A2)

and

> "You are specifically considered the dependent of a person who is involved in abuse of free movement rights by entering into a marriage that has been deemed a sham. A removal decision has **therefore** been taken under regulation 19(3)(c) of the EEA Regulations." (A3) (Our emphasis)

23 We note that the Appellants raised, in their grounds of appeal to the FtT:

(i) breach of EEA Regs and/or directive
(ii) failure to apply relevant guidance from European Commission
(iii) breach of Art 8 (&4, which we presume is a typographical error).

24 We are of the view that the consideration of the proportionality of removal, on the grounds of 'abuse of rights', of persons who would otherwise appear to have a right of residence in the UK, requires something very much more than the treatment that it received at paragraph 47 of the present determination, which was, with respect to the Judge, somewhat perfunctory. A proper recitation of 5 step process in Razgar would have assisted her in her deliberations. The proportionality of the decision needs to be considered both as a result of EU law principles (Reg 21B(2) and under Article 8 ECHR. It is to be further noted that the consideration of the issue of proportionality under these two regimes in not in any event the same. see eg para 26, R (Lumsden and others) v Legal Services Board[2015] UKSC 41.

25 The was no adequate consideration of:

(i) the ties that A2 and A3 have to the United Kingdom;
(ii) the fact that A2 claimed to be in employment in the UK;
(iii) the presence of A2's 23 year old niece, who lives in the same household as A2 and A3, and indeed shares a room with A3 and looks after her (see Respondent's bundle page I16 q 68-69);
(iv) the seriousness of the wrongdoing on A2's part; see in particular Article 31(3) of the Directive, which requires an examination the facts and circumstances on which the proposed measure is based.

26 There having been no adequate consideration of these issues in the FtT below, , and lack of findings in relation to them, we cannot say what the outcome of the appeals for A2 and A3 would or ought to have been. The lack of adequate consideration, whether under the 2006 Regulations, or Article 8 ECHR of the proportionality of the proposed removal of A2 and A3 would have caused us to allow their appeals and to have remitted them to a different Judge of the Fist tier Tribunal, with the preserved finding that A2 had engaged in a marriage of convenience.

27 However, we find that there is in fact a flaw of a different nature, within the original Respondent's decisions for A2 and A3 dated 4th November 2014.

28 We find that the invocation of the power to remove under Reg 19(3)(c) and 21B(2) of the 2006 Regulations involves the exercise of a discretion. The provisions *permit* removal, but do not mandate it if abuse of rights is established. Further, Reg 21B(5) specifically provide that Regulation 21B 'may not be invoked systematically'.

29 There is no evidence before us to indicate that the Respondent appreciated that she had a discretion whether or not to proceed to make a s.10 1999 Act removal decision upon abuse of rights being established. There is no reference within the IS151B (EEA) for either A2 or A3 that the Respondent appreciated that she possessed such a discretion. Indeed,

the language used in the notices for both A2 and A3 ('A removal decision has **therefore** been taken under regulation 19(3)(c) of the EA Regulations') suggests that the Respondent considered it mandatory to proceed to make a s.10 removal decision upon abuse of rights being established. Nor is there any reference to the Respondent's own published policy as to whether the discretion should be exercised.

30 We therefore find that the decisions of the Respondent are unlawful by reason of:

(i) failure to exercise a discretion contained within the Directive and/or 2006 Regulations; and/or

(ii) failure to consider and apply a published policy.

31 The Respondent's decisions in respect of A2 and A3 are therefore not in accordance with the law (s.86(3)(a) Nationality, Immigration and Asylum Act 2002 refers). If any authority is required to support our course of action, we believe it may be found in head note paragraph 5 of AG and others (Policies; executive discretions; Tribunal's powers) Kosovo [2007] UKAIT 00082:

> "But where within the terms of the policy the benefit to the appellant depends on the exercise of a discretion outside the Immigration Rules, the Tribunal has no power to substitute its own decision for that of the decision-maker."

32 The appeals of A2 and A3 are therefore allowed to the extent that we find that the decisions are unlawful. Any further decision (should the Respondent chose to proceed to remake a decision in respect of A2 and A3, which is a matter for her) should be made in accordance with the guidance in this determination.

33 To the extent that the point we raise at paragraphs 27-32 above is one which was not raised by the Appellants in their grounds of appeal, we feel that it is closely related to the grounds actually advanced (adequacy of Article 8 consideration), or is an obvious point (R. v SSHD ex p Robinson [1998] QC 929). Further, when we raised the issue of the Respondent having failed to exercise her discretion at all under the 2006 Regulations, advocates for both parties agreed that the correct outcome would be for the appeals of A2 and A3 to be allowed and for the Respondent to consider making a fresh decision.

Decision:

34 The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law in respect of A1. The appeal of A1 is dismissed.

35 The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law in respect of A2 and A3.

36 The determination, as it applies to A2 and A3, is set aside.

37 We re-make the decision in the appeals of A2 and A3, by allowing the appeals, to the extent that we find that the Respondent's decisions in respect of A2 and A3 were not in accordance with the law. The matter awaits a lawful decision by the Secretary of State.

Signed: Date: 7th August 2015

Deputy Upper Tribunal Judge Rimington
Deputy Upper Tribunal Judge O'Ryan