R (on the application of SA) v Secretary of State for the Home Department (human rights challenges: correct approach) IJR [2015] UKUT 00536 (IAC)

Upper Tribunal
Immigration and Asylum Chamber

Judicial Review Decision Notice

The Queen on the application of SA

Applicant

v

Secretary of State for the Home Department

Respondent

Before Mr Justice McCloskey, President of the Upper Tribunal

Application for judicial review: substantive decision

Having considered all documents lodged and having heard Ms I Thomas, of Counsel, instructed by Lloyds Solicitors, on behalf of the Applicant and Mr Z Malik, of Counsel, on behalf of the Respondent, instructed by the Government Legal Department, at a hearing at Manchester Civil Justice Centre on 31 July 2015

Decision: the application for judicial review is refused

(i) *Tribunals should be alert to distinguish between human rights grounds and public law grounds.*

(ii) *In judicial review challenges which include Article 8 ECHR grounds, the question is not whether the impugned decision is vitiated by one or more of the established public law misdemeanours. Rather, the question is whether a breach of Article 8 has been demonstrated.*

(iii) Provided that the above distinction is appreciated, judicial adjudication of issues of proportionality may legitimately be informed by public law principles.

(iv) The tribunal's approach to proportionality in immigration judicial reviews and immigration appeals differs. In judicial review, the role of the Tribunal is limited by the principle of the discretionary area of judgment, albeit the intensity of review will invariably depend upon the context. This inhibition does not apply in statutory appeals: Huang v SSHD.

(v) In human rights cases, the focus of the court or tribunal is always on the product of the decision making process under scrutiny, rather than the process itself, except where Convention rights which have a procedural content are engaged.

Anonymity

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI2008/269) an Anonymity Order is made. Unless the Upper Tribunal or Court orders otherwise, no report of any proceedings or any form of publication thereof shall directly or indirectly identify the original Applicant. This prohibition applies to, amongst others, all parties.

Introduction

(1) This substantive application for judicial review features some of the most frequently encountered misconceptions in cases which have combined elements of public law and human rights challenges.

Factual Framework

(2) The factual matrix is uncontentious, comprising the following salient elements. The Applicant, a national of Pakistan, aged 25 years, entered the United Kingdom lawfully in accordance with a visitor's visa in 2006. His lawful sojourn ended in 2008. In January 2014 he applied for indefinite leave to remain under Appendix FM of the Immigration Rules and Article 8 ECHR. His application was refused by the Respondent (the "*Secretary of State*") in the same year. His challenge to this decision secured the grant of permission to apply for judicial review by order dated 10 February 2015.

(3) The centrepiece of the Applicant's case is the relationship which he has formed with a British citizen. The lady in question (whom I shall describe as his "*partner*") is now aged 23 years. The relationship is of approximately five years duration. It is described in the evidence as "*akin to marriage*". The upbringing, background and personal circumstances of the Applicant's partner combine to form the cornerstone of the case advanced. These emerge from the following passages in her witness statement:

> "*I have been in care since a young age because my parents were seen to be neglecting me and my siblings. Whilst in care I was sexually abused ….*
>
> *Then I was placed back with my mother …. She drank a lot and her partner was*

very violent towards her …. I never went to school …. I fell in with the wrong crowd and turned to drink and drugs. I put myself back into care after my mother beat me up ….

I was raped when I was 15. I used to drink every day …."

One of the highlighted features of the rape is that the perpetrator was a Pakistani national who was prosecuted and convicted and, later, deported to Pakistan. The Applicant is credited by his partner with having fundamentally transformed her life. She asserts that she no longer indulges in substance abuse; she has completed a child care course; she was able to secure employment; she has professional ambitions for the future; and she is in a deeply committed, loving relationship with the Applicant.

Legal Framework

(4) The applicable provisions of the Immigration Rules are paragraphs 276ADE, 276BE and 276CE, in tandem with certain provisions of Appendix FM, namely paragraphs E – LTRP and EX1. In the context of this case, there are two salient provisions. The first is paragraph 276ADE(1)(vi) which is concerned with the private life dimension of Article 8 ECHR and makes provision for the grant of leave to remain on this ground where the applicant –

> "*…. is aged 18 years or above, has lived continuously in the UK for less than 20 years (discounting any period of imprisonment) but there would be very significant obstacles to the applicant's integration into the country to which he would have to go if required to leave the UK.*"

By paragraph 276BE, if the Secretary of State is satisfied that this requirement is fulfilled, leave to remain in the United Kingdom for a period not exceeding 30 months may be granted. If not thus satisfied, per paragraph 276CE, leave to remain "*is to be refused*".

(5) The second main provision of the Rules of moment in the present context relates to the Applicant's quest to secure leave to remain as a partner of the British citizen concerned. This engages paragraph EX1 of Appendix FM, which provides, insofar as material, as follows:

> "*…… (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.*"

The "insurmountable obstacles" criterion enshrined in this discrete provision of the Rules lies at the heart of the impugned decision of the Secretary of State and the Applicant's ensuing challenge.

(6) The governing legal framework has two further elements. The first is Article 8 ECHR which, pursuant to MF (Nigeria) v SSHD [2013] EWCA Civ 1192, continues to operate independently of and in addition to the Article 8 provisions of the Rules, albeit in a specific residual mode. In the context of deportation of foreign criminals, this is captured in the following passage in the judgment of

Dyson MR, at [46]:

> "*If the claimant succeeds on an application of the new rules at the first hurdle … 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 paragraph 399 or 399A applies***."
>
> [Emphasis added.]

This concept is explained with particular clarity by the further decision of the Court of Appeal in SS (Congo) and Others v SSHD [2015] EWCA Civ 387. Having emphasised that the relevant provisions of the Immigration Rules are not unlawful simply because they do not comprehensively fulfil the requirements of Convention rights with respect to immigration decisions, Richards LJ continues, [13]:

> "*That is because any Convention right of an individual which goes beyond the entitlements set out in the Rules can be satisfied by the Secretary of State outside the Rules by exercise of her residual discretion in accordance with such Convention right requirements as may apply in that individual's case ….*"

Thus the MF principle is not confined to the context of the deportation of foreign criminals, but extends to other Article 8 provisions of the Rules.

(7) Finally, sections 117A and 117B of the Nationality, Immigration and Asylum Act 2002 (the "*2002 Act*") must also be given effect in a case of this *genre*. These new statutory provisions are reproduced fully in the recently reported decision of the Upper Tribunal in Bossade (ss 117A-D – interrelationship with Rules) [2015] UKUT 415 (IAC), at [9]. Within these provisions there is a series of factors, the so-called "*public interest considerations*", to which the court or tribunal must have regard in every case involving a determination of whether a decision made under the Immigration Acts breaches a person's right to respect for private and/or family life under Article 8 ECHR, contrary to section 6 of the Human Rights Act 1998.

The Impugned Decision

(8) The Secretary of State's decision is distributed between a formal notice dated 18 September 2014 and a supplementary letter dated 31 March 2015. The latter was evidently stimulated by the grant of permission to apply for judicial review. The first of these focused particularly on the "*insurmountable obstacles*" provision of the Rules, in the following passage:

> "*In determining whether there are 'insurmountable obstacles', we have considered the seriousness of the difficulties which you and your partner would face in continuing your family life outside the UK and whether they entail something that you could not (or could not reasonably be expected to) overcome, even with a degree of hardship for one or more of the individuals concerned. While it is acknowledged that your partner has lived in the UK all her life, this does not mean that you are unable to live together in Pakistan. It is noted that*

your partner claimed to have been raped in 2005 by an illegal immigrant from Pakistan who was eventually deported and you give this as a reason why she cannot live in Pakistan. Your partner was aware of your nationality when entering into a relationship with you. Furthermore, you have not provided any evidence to support this claim and show that she is unable to relocate to Pakistan with you and continue your family life together. Although relocating there may cause a degree of hardship for your British partner, the Secretary of State has not seen any evidence to suggest that there are any insurmountable obstacles …. preventing you from continuing your relationship in Bangladesh [sic]."

The next section of the decision addresses the requirements of paragraph 276ADE of the Rules. Within the analysis which follows, there is an assessment that the Applicant has failed to demonstrate very significant obstacles to his reintegration to his country of origin: paragraph 276ADE(1)(vi) of the Rules refers. The final element of the Notice of Decision is contained under the rubric "Decision on Exceptional Circumstances". It is couched in the following terms:

"*It has also been considered whether your application raises any exceptional circumstances which, consistent with the right to respect for private and family life contained in Article 8 ……. might warrant a grant of leave to remain in the United Kingdom outside the requirements of the Immigration Rules. You have not raised any such exceptional circumstances, so it has been decided that your application does not fall for a grant of leave to remain outside the Rules.*"

Judges and practitioners alike will be familiar with this formulaic passage.

(9) As noted above, the supplementary text of the impugned decision is contained in a later letter, addressed to the Applicant's solicitors. This gives further consideration to the Applicant's application under the heading "Insurmountable Obstacles and Article 8 of the ECHR". The main ingredients of this further essay are the following:

(i) The initiation and development of the Applicant's relationship with his partner unfolded in full knowledge that he was unlawfully present in the United Kingdom and of precarious immigration status.

(ii) There is no evidence that the couple cannot enter and live lawfully in Pakistan.

(iii) Cultural and language barriers do not equate to insurmountable obstacles.

(iv) The partner's difficult upbringing, sexual abuse and history of rape have all been carefully considered. (In terms) the prospects of her re-encountering the rapist in Pakistan are infinitesimal.

(v) While the medical evidence, which indicates that the partner suffers from "PTSD", has been considered, there is no suggestion that there will be no medical facilities for her in Pakistan, even if of a standard inferior to that available in the United Kingdom.

The letter contains the following omnibus conclusions:

> "*The Secretary of State is not satisfied that refusal of leave to remain, taking full account of all considerations and evidence, prejudices your client's private and family life, and that of his partner, in a manner sufficiently serious to amount to a breach of Article 8 …..*
>
> *The Secretary of State maintains that your client's removal is considered to be proportionate to the legitimate aim of maintaining effective immigration control and the economic wellbeing of the UK ….*
>
> *It is not considered that there are any exceptional or compassionate circumstances which would have unduly harsh consequences for your client or his partner such as would render removal from the UK disproportionate. Leave to remain outside the Immigration Rules is therefore not appropriate in this case.*"

The Essence of Judicial Review in Immigration Cases

(10) The common misconceptions to which I have referred in [1] above find expression in the grant of permission to apply for judicial review. The opening passage in the permission order is couched in these terms:

> "*It is arguable that the Claimant* [a misnomer for Applicant] *has a genuine and subsisting relationship in the UK with a UK citizen and thus that removal is a disproportionate interference with the Article 8 rights of the Claimant and his partner. It is at least arguable that there are insurmountable difficulties in that relationship continuing outside the UK both because it amounts to a requirement that a British citizen leaves the UK and because of the particular personal circumstances of the Claimant's partner.*"

The first error committed is to focus on the arguability of something which has at no time been contested by the Secretary of State, namely the genuine and subsisting relationship between the Applicant and his UK citizen partner. Pausing at this juncture, it is tolerably clear that, in this passage, the Judge had in mind certain of the Article 8 provisions of the Rules: see [5] *supra*. The grant of permission continues:

> "*… Removal constitutes an interference not merely with the Article 8 rights of the Claimant but also of his partner …. Although the decision letter purports to decide the application under the exceptional circumstances head in the alternative in my judgment that element of the decision is flawed on irrationality or lack of reasoning grounds …. To dismiss this element simply on the basis that no exceptional circumstances have been raised is wrong in law or is irrational in the public law sense and fails to give proper reasons for the decision.*".

Within this passage there is a conflation of a human rights and public law considerations, in the same notional breath. I shall revisit this *infra*.

(11) One of the arguments advanced on behalf of the Secretary of State, based on the second passage quoted above, was that the permission Judge had, in substance, treated the application as if it were a challenge to the merits of the impugned

decision. It is timely to emphasise that a challenge by judicial review is of an altogether different species from an appeal on the merits. This is one of the core dogmata of judicial review. This is expressed in the venerable principle that the jurisdiction of the court, or tribunal, is supervisory in nature. In De Smith's Judicial Review (7th Edition), paragraph 11 – 056, it is expressed in these terms:

> "*In general it is right that courts do leave the assessment of fact to public authorities which are primarily suited to gathering and assessing the evidence. Review must not become appeal.*"

This dogma is also captured in the celebrated words of Lord Brightman:

> "*Where the existence or non-existence of a fact is left to the judgment and discretion of a public body and that fact involves a broad spectrum ranging from the obvious to the debatable to the just conceivable, it is the duty of the court to leave the decision of that fact to the public body to whom Parliament has entrusted the decision making power save in a case where it is obvious that the public body, consciously or unconsciously, are acting perversely.*"

(R v Hillingdon LBC, ex parte Puhlhofer [1986] AC 484, at 518.)

This formulation of principle, I suggest, applies also to the frequently recurring exercises of evaluative judgment and predictive assessment in the realm of factual issues carried out by decision makers. These are ingrained characteristics of decision making in the fields of immigration and asylum law.

(12) It is essential for decision makers and judges alike to distinguish between cases which involve a human rights challenge, whether in whole or in part, and those which do not. In cases where an application is made to secure a status or benefit under the Immigration Rules having no human rights elements, the ensuing decision is similarly made under the Rules. The central question, one of mixed law and fact, is whether the applicant satisfies the relevant requirements of the Rules. This prompts some reflection on the applicable juridical framework. The starting point, sometimes overlooked, is section 3(1) of the Immigration Act 1971, which provides:

> "*Except as otherwise provided by or under this Act, where a person is not a British citizen –*
>
> *(a) he shall not enter the United Kingdom unless given leave to do so in accordance with the provisions of, or made under, this Act;*
>
> *(b) he may be given leave to enter the United Kingdom (or, when already there, leave to remain in the United Kingdom) either for a limited or for an indefinite period ….*"

By section 3(2) the Secretary of State is obliged to lay before Parliament rules governing "*the practice to be followed in the administration of this Act for regulating the entry and stay in the United Kingdom of persons required by this Act to have leave to enter*". Section 4(1) regulates entry and leave to remain decisions in general terms. There is, of course, a host of other statutory provisions resulting from the intense Parliamentary activity of the past two decades. The common thread

throughout the legislative labyrinth is that of decision making in the exercise of powers conferred by statute or rules made thereunder. Thus the territory is quintessentially that of public law.

(13) This analysis is clearly identifiable in the speech of Lord Bridge in Bugdacay v SSHD [1987] AC 514, at 522-523 :

> "… *The discretionary decision whether to grant or withhold leave to enter or remain depends must necessarily be determined by the immigration officer or the Secretary of State in the exercise of the discretion which is exclusively conferred upon them by section 4(1) of the Act. The question whether an applicant for leave to enter or remain is or is not a refugee is only one, even if a particularly important one required by paragraph 73 of HC 169 [i.e. the relevant paragraph of the Rules] to be referred to the Home Office, of a multiplicity of questions which immigration officers and officials of the Home Office acting for the Secretary of State must daily determine in dealing with applications for leave to enter or remain in accordance with the rules, as, for example, whether an applicant is a bona fide visitor, student, businessman, dependant etc. Determination of such questions is only open to challenge in the courts on well known Wednesbury principles ….*

While the formula "*Wednesbury principles*" may appear somewhat restrictive, it seems uncontroversial to suggest, some two decades later, that it extends to and embraces all recognised public law errors.

(14) This subject has been considered in a notable recent decision of the Court of Appeal. In R (Giri) v SSHD [2015] EWCA Civ 784 the Court rejected the argument that the precedent (or jurisdictional) fact principles of Khawaja are applicable to a decision that an immigrant engaged in deception in an entry clearance application by the provision of false documents (see R v SSHD, ex parte Khawaja [1984] AC 74). The following is the key passage in the judgment of Richards LJ, at [19]:

> "*The decision here under challenge is a decision made in the exercise of the power conferred on the Secretary of State by section 3 of the 1971 Act to grant leave to remain in the United Kingdom. The Rules contain detailed provisions as to how the power is to be exercised (though there is a residual power to grant leave even where it falls to be refused under the Rules). Paragraph 322(1A) is one of those provisions. Its application involves findings of fact, but that is true of a multiplicity of provisions in the Rules. If the conditions in it are found to be satisfied, leave must be refused under the Rules, but that, too, is true of many other provisions under the Rules. A finding that the conditions are satisfied has potentially serious consequences (see, in particular, the effect of paragraph 320(7B) as summarised above), but paragraph 322(1A) is again far from unique in that respect. The key point is that the statute confers the power on the Secretary of State, or the immigration officers acting on her behalf, to make the decision whether to grant or refuse leave to remain. It is for the Secretary of State or her officials, in the exercise of that power and in reaching their decision, to determine which provisions of the Rules apply and whether relevant conditions are satisfied, including the determination of relevant questions of fact. On the reasoning in Khawaja and Bugdaycay, their findings on such matters are open to challenge in judicial review proceedings only on Wednesbury principles; it is not a situation in which their powers depend on some precedent fact the existence of*

which falls for determination by the court itself."

Notably, the Court contrasted decisions made under section 3 of the 1971 Act with those made under section 10 of the Immigration and Asylum Act 1999, which empowers an immigration officer to direct the removal of a person who is not a British citizen from the United Kingdom if "*… he uses deception in seeking (whether successfully or not) leave to remain*". Richards LJ observed, at [20]:

> "*In that event, as a matter of statutory construction, the very existence of the power to remove would depend on deception having been used; and in judicial review proceedings challenging the decision to remove, the question whether deception had been used would be a precedent fact for determination by the court in accordance with Khawaja. Miss Giovannetti QC, on behalf of the Secretary of State, accepted as much. In practice, however, the issue will rarely arise in that form, because decisions under section 10 are immigration decisions carrying a right of appeal to the tribunal, which can review for itself the facts on which the decision under appeal was based and the existence of that alternative remedy means that judicial review is not available in the absence of special or exceptional factors: see, most recently, the decision of this court in R (Mehmood and Ali) v Secretary of State for the Home Department [2015] EWCA Civ 744.*"

(15) Where an immigration decision having no human rights element is appealable, the First–tier Tribunal ("*FtT*") will examine the question of whether the relevant provisions of the Rules have been correctly applied by the Secretary of State, in considering whether the decision under challenge is in accordance with the law. This will frequently involve examining, and determining, disputed factual issues. The fundamental enquiry will relate to whether the applicant's case satisfies the applicable requirements of the Rules. The legality of the Secretary of State's decision may be challenged on (*inter alia*) conventional public law grounds: conveniently summarised under the familiar headings of illegality, procedural impropriety and Wednesbury unreasonableness, the latter incorporating also both a failure to take into account all material factors and/or permitting immaterial considerations to intrude. It is, of course, the tribunal which is the ultimate arbiter of whether a person's Convention rights have been infringed: Huang v SSHD [2007] 2 AC 167.

(16) Where no statutory appeal is provided, the appropriate method of challenge may be an application for judicial review to the Upper Tribunal. In such cases, again on the premise that there is no human rights element, the same public law grounds of challenge may be invoked. In the paradigm judicial review, the Upper Tribunal has no fact finding function and it exercises a more restricted jurisdiction, traditionally labelled supervisory, as, unlike the FtT, it does not conduct an appeal on the merits: see [12] supra. See also the discussion in R (Naziri and others) v SSHD [2015] UKUT 437, at [73]-[75].

Human Rights Challenges: The Correct Approach

(17) I refer to the second excerpt from the permission order reproduced in [11] above. The gravamen of the Applicant's case has at all material times been that to require him to return to his country of origin will breach the family life rights of him and his partner under Article 8 ECHR. I characterise this as a pure human rights claim. However, the passage in the permission order is replete with

references to public law misdemeanours. This gives rise to what I have described above as an impermissible conflation. The error thereby committed was a failure to recognise that the Applicant was advancing a pure human rights claim and to adjudicate on the application for permission to apply for judicial review accordingly.

(18) The contrast between adjudication in conventional judicial review and adjudication in human rights challenges under the Human Rights Act 1998 (the "1998 Act") was highlighted with particular clarity by Lord Hoffmann in R (SB) v Governors of Denbigh High School [2007] 1 AC 100, where a Muslim pupil asserted a right to depart from her school's uniform policy by wearing a jilbab, invoking Article 9 ECHR. Her challenge ultimately failed. Lord Hoffmann stated, at [68]:

> "*In domestic judicial review, the Court is usually concerned with whether the decision maker reached his decision in the right way rather than whether he got what the Court thinks might be the right answer. But Article 9 is concerned with substance, not procedure. It confers no right to have a decision made in any particular way.* ***What matters is the result*** *…."*
>
> [Emphasis added.]

The Court of Appeal's error was to find that the governors had, in adopting the school uniform policy, failed to observe what the Court considered to be a necessary decision making process. Lord Bingham formulated three main reasons for reversing their decision. He expressed the first in these terms, at [29]:

> "*First, the purpose of the 1998 Act was not to enlarge the rights or remedies of those in the United Kingdom whose Convention rights have been violated but to enable those rights and remedies to be asserted and enforced by the domestic courts of this country and not only by recourse to Strasbourg ….*
>
> *But the focus at Strasbourg is not and has never been on whether a challenged decision or action is the product of a defective decision making process, but on whether, in the case under consideration, the applicant's Convention rights have been violated.*"

I would add that the correct doctrinal approach is rooted in the language of section 6(1) of the 1998 Act. The unlawfulness which section 6(1) forbids is any action by a public authority which is incompatible with a person's Convention right. The process culminating in the impugned act or decision is legally irrelevant, unless the Convention right concerned has a procedural content, the paradigm example being Article 6.

(19) The distinction between judicial adjudication in a challenge based on public law grounds (on the one hand) and a human rights claim (on the other) is highlighted in another landmark decision of the House of Lords, Belfast City Council v Miss Behavin Limited [2007] UKHL 19 (a case which, in the words of Baroness Hale, "*… must take the prize for the most entertaining name of any that have come before us in recent years.*"). The impugned decision was the City Council's refusal to license a so-called sex shop in the exercise of its statutory power to

decline approval to such enterprises. The Court of Appeal reasoned that the Council's decision was contrary to section 6 of the Human Rights Act 1998 on the ground that it had not sufficiently taken into account the shop owner's right to freedom of expression under Article 10 ECHR and its right to the peaceful enjoyment of its possessions under Article 1 of The First Protocol. The Council's appeal to the House of Lords succeeded on the basis that this approach was erroneous in law. The fallacy in its reasoning was analysed by Lord Hoffmann in particular, at [12]:

> "*… the Court of Appeal did not say that the Respondent's human right to operate a sex shop .. had been infringed. Instead, it said that its Convention rights had been violated by the way the Council had arrived at its decision. In the reasons it gave, the Council had not shown that it was conscious of the Convention rights which were engaged ….*
>
> *[13] …. Either the refusal infringed the Respondent's Convention rights or it did not. If it did, no display of human rights learning by the Belfast City Council would have made the decision lawful. If it did not, it would not matter if the Councillors had never heard of Article 10 or The First Protocol.*"

Lord Rodger's formulation is equally uncompromising. He said at [23]:

> "*…. The Council's refusal was unlawful if it was incompatible with the Applicant's right to freedom of expression ….*
>
> *In that event it would still have been unlawful however much the Council had analysed and agonised over the Applicant's right to freedom of expression before refusing the license. Equally, if the refusal did not interfere disproportionately with the Applicant's right to freedom of expression, then it was lawful for purposes of section 6(1)* [of the Human Rights Act 1998] *- whether or not the Council had deliberated on that right before refusing.*"

Elaborating on the correct test, Lord Rodger emphasised, at [24], that what matters is impact (viz. the end product, or outcome), rather than the preceding quality of the debate. Baroness Hale expressed this concept in the following terms, at [31]:

> "*In human rights adjudication, the Court is concerned with whether the human rights of the claimant have in fact been infringed, not with whether the administrative decision maker properly took them into account.*"

See also, to like effect, Lord Neuberger at [88] and [90].

(20) At this juncture, it is appropriate to recall that many human rights decisions involve balancing exercises. These are evaluative processes which normally entail weighing the individual, personal interests of the person concerned with some competing public interest or interests. For immigration judges the dominant Convention right in this respect is Article 8. It is a truism that in a large majority of Article 8 challenges in the immigration sphere the question to be determined by the tribunal is that of proportionality, the last of the stages specified in R (Razgar) v SSHD [2004] 2AC 368. In such cases the question for

the Tribunal is not whether the impugned decision is irrational or is vitiated by the application of the Wednesbury principles or is procedurally unfair or contravenes some other public law standard. The correct question is, rather, whether the decision is a disproportionate means of pursuing the legitimate aim in play. If "yes", the conclusion is that the Convention right has been breached: not that the decision is unlawful on account of some public law misdemeanour. I explain in [27] below the manner in which public law errors can inform and illuminate this assessment.

(21) Having regard to the terms of the permission order in this case and the debate which this stimulated at the substantive hearing, I consider it timely to draw attention to the contours of the proportionality principle and the exercise which this requires of the court or tribunal. Lord Steyn's seminal exposition of the doctrine of proportionality in R v Secretary of State for the Home Department, ex parte Daly [2001] UKHL 26, while instructive *per se*, has the additional merit of illuminating the differing functions of the court, or tribunal, in conventional judicial review and human rights adjudication, at [27]:

> "*The starting point is that there is an overlap between the traditional grounds of review and the approach of proportionality. Most cases would be decided in the same way whichever approach is adopted. But the intensity of review is somewhat greater under the proportionality approach …..*
>
> *I would mention three concrete differences without suggesting that my statement is exhaustive. First, the doctrine of proportionality may require the reviewing Court to assess the balance which the decision maker has struck,* ***not merely whether it is within the range of rational or reasonable decisions.*** *Secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations. Thirdly, even the heightened scrutiny test developed in R v Ministry of Defence, ex parte Smith … is not necessarily appropriate to the protection of human rights.*"

In the developing jurisprudence of the Supreme Court, the doctrine of proportionality has been more recently formulated in the following way:

(i) Is the objective sufficiently important to justify limitation upon a fundamental right?

(ii) Is the measure rationally connected to the objective?

(iii) Could a less intrusive measure have been adopted?

(iv) Has a fair balance been struck between individual rights and the interests of the community?

See Bank Mellat v HM Treasury (No 2) [2013] UKSC 39, at [20]. I refer also to the most recent consideration of these principles by the Supreme Court in R (Tigere) v Secretary of State for Business, Innovation and Skills [2015] UKSC 57, at [23]-[33].

(22) The terms in which the public authority concerned has expressed the impugned

decision, or offending measure, are of inescapable importance. At one extreme of the notional spectrum, a public authority's decision challenged on Convention rights grounds may contain an admirable and elaborate dissertation analysing and debating all relevant aspects of the right under consideration in the particular factual context. At the other extreme, the documented incarnation of the impugned decision may fail to even mention the Convention right engaged. For courts and tribunals it is important to appreciate what this means in practice. This is succinctly explained by Lord Bingham in SB at [31]:

> "*If it appears that a body has conscientiously paid attention to all human rights considerations, no doubt a challenger's task will be the harder.*"

Why is this so? In Article 8 challenges where the crucial question is whether the impugned decision or measure is proportionate, in cases where the decision maker has scrupulously examined and weighed all, or most, of the facts and considerations bearing on the Convention right engaged it is more likely that a proper balancing exercise can be demonstrated resulting in a proportionate outcome. This is recognised, in substance, by Lord Bingham in the passage quoted above, by Lord Hoffmann in SB at [68] and, more fully, by Baroness Hale in Miss Behavin', at [37}:

> "*Had the Belfast City Council expressly set itself the task of balancing the rights of individuals to sell and buy pornographic literature and images against the interests of the wider community, a court would find it hard to upset the balance which the local authority had struck. But where there is no indication that this has been done, the court has no alternative but to strike the balance for itself, giving due weight to the judgments made by those who are in much closer touch with the people and the places involved than the court could ever be.*"

Notably, Baroness Hales revisited this issue in the recent decision of Tigere (*supra)* in the following terms, at [32]: *"… the court must treat the judgements of the Secretary of State, as primary decision maker, with appropriate respect. That respect is, of course, heightened where there is evidence that the decision maker has addressed his mind to the particular issue before us …".*

Notably, this is followed by the observation that this element is missing in circumstances where the measure under challenge is the product of the negative resolution procedure in Parliament.

(23) While the doctrinal distinction which I have sought to emphasise in the preceding paragraphs has been relatively dormant in recent years, it features in the recent decision of the Court of Appeal in Singh and Khalid v Secretary of State for the Home Department [2015] EWCA Civ 74, at [68] – [71], per Underhill LJ. Of further note is that, as these passages indicate, the Secretary of State's decision in the case of Ms Khalid belonged to the second of the two extremities of the notional spectrum considered above.

(24) Article 8 is, by some measure, the dominant Convention right in immigration appeals and judicial reviews. It being a qualified right which in many cases requires a judicial decision on proportionality, an alertness to the principle, or doctrine, of the discretionary area of judgment is essential. Article 8 is essential. This is, broadly, the United Kingdom domestic law equivalent of the margin of

appreciation principle embedded in the Strasbourg jurisprudence, habitually expressed in the following terms:

> "*By reason of their direct and continuous contact with the vital forces of their countries, the national authorities are in principle better placed than an international court to evaluate local needs and conditions.*"

(Buckley v United Kingdom [1996] 23 EHRR 101, at [75])

In domestic law, the effect of this principle is that while the court, or tribunal, is the ultimate arbiter of whether a Convention right has been violated it will, in certain cases, attribute appropriate – sometimes substantial – weight to the function, expertise and experience of the public authority concerned. Shortly before the advent of the 1998 Act, Lord Hope offered the following analysis:

> "*The questions which the courts will have to decide … will involve questions of balance between competing interests and issues of proportionality. In this area difficult choices may have to be made by the executive or the legislature between the rights of the individual and the needs of society. In some circumstances it will be appropriate for the courts to recognise that there is an area of judgment within which the judiciary will defer, on democratic grounds, to the considered opinion of the elected body or person whose act or decision is said to be incompatible with the Convention ……..*
>
> *It will be easier for such an area of judgment to be recognised where the Convention itself requires a balance to be struck, much less so where the right is stated in terms which are unqualified. It will be easier for it to be recognised where the issues involve questions of social or economic policy, much less so where the rights are of high constitutional importance or are of a kind where the courts are especially well placed to assess the need for protection.*"

Almost two decades later the prophesies in this illuminating commentary have fully materialised in all kinds of guises.

(25) The Appellate Committee of the House of Lords has considered this issue on several occasions in its human rights jurisprudence. For example, in A v Secretary of State for the Home Department [2005] 2 AC 68, Lord Bingham stated, at [29]

> "*The more purely political (in a broad or narrow sense) a question is, the more appropriate it will be for political resolution and the less likely it is to be an appropriate matter for judicial decision. The smaller, therefore, will be the potential role of the court. It is the function of political and not judicial bodies to resolve political questions. Conversely, the greater the legal content of any issue, the greater the potential role of the court, because under our constitution and subject to the sovereign power of Parliament, it is the function of the courts and not of political bodies to resolve legal questions.*"

In the field of immigration law one of the more striking developments in recent years has been the increasing prescription and expression of the public interest in primary legislation, one of the more notable instances being the introduction of the statutory provisions relating to the deportation of foreign criminals.

Where Parliament intervenes in this way, the public interest has special force: per Laws LJ in SS (Nigeria) v SSHD [2013] EWCA Civ 550, at [37]-[42] and [52]-[55].

(26) The operation of this doctrine is illustrated graphically in R (Animal Defenders International) v Secretary of State for Culture, Media and Sport [2008] 1 AC 1312, which involved a challenge to the statutory prohibition on political advertising. Lord Bingham stated at [33]:

> "*The weight to be accorded to the judgment of Parliament depends on the circumstances and the subject matter. In the present context it should in my opinion be given great weight ….*"

The main reason proffered for this analysis was that the subject matter lay particularly within the province of the democratically elected legislature rather than the judiciary. Thus, while there could of course be no abdication of the judicial duty of adjudication, the Parliamentary choice would weigh heavily in the judicial conduct of the balancing exercise in determining whether the interference with the Convention right engaged was proportionate. As the ensuing decision of the ECtHR emphasises – see [2013] 57 EHRR 21 – the balancing exercise pitted the right to impart information and ideas of general interest which the public was entitled to receive against the government's desire to protect the democratic debate and process from distortion by powerful financial groups with advantageous access to influential media. The Parliamentary nature of the measure under challenge, coupled with additional elements such as cross party support and no dissenting vote, proved decisive. The Grand Chamber concluded, in terms which have become familiar, that the reasons adduced to justify the prohibition were relevant and sufficient and the measure could not be considered a disproportionate interference with the right to freedom of expression.

(27) Provided that the court or tribunal appreciates, and gives effect to, the distinction between a public law challenge and a human rights challenge, some of the considerations which traditionally belonged exclusively to the realm of the former can permissibly feature in the sphere of the latter. Thus in deciding whether a decision constitutes a disproportionate interference with a person's Article 8 rights, it is permissible to consider questions such as whether the decision maker has taken into account all material facts and considerations or has permitted immaterial considerations to intrude. These are probably the clearest examples of the legitimate importation of public law principles to judicial human rights adjudication. The procedural fairness of the decision making process may also, in some contexts, illuminate the Tribunal's determination of whether the outcome viz the impugned decision is proportionate. While maintaining the underlying distinction will not always be easy, it is the crucial starting point in the judicial exercise. It is a truism that judges fall on the sword of what they write: judicial failure will be averted if judges take care to avoid the impermissible conflation which shines brightly in the second passage quoted in [10] above.

(28) The task of the court, or tribunal, is complicated by the recurring phenomenon of public law grounds of challenge combining and, sometimes imperceptibly, merging with a complaint of human rights infringements in one and the same

case. This is one of the driving forces underpinning the Upper Tribunal's emphasis on the importance of discipline and focus in pleadings in judicial review cases: see in particular R (SN) v SSHD (Striking Out Principles) [2015] UKUT 227 (IAC), at [28] – [32]. In such cases the judge must be particularly alert to apply the correct prism to the different kinds of challenge. The lens must be altered and adjusted at the appropriate stage of the judicial analysis. This is so not least because the application of the doctrine of proportionality in a given case can yield a result different from that which the application of public law principles might produce, as explained by Lord Steyn in Daly at [28].

(29) In Huang v SSHD [2007] 2AC 167, the House of Lords examined the decision making role of immigration appellate authorities when deciding appeals on human rights grounds. It decided that the task of the authority is to decide whether the impugned decision is unlawful, being incompatible with a Convention right. The House decided emphatically that the authority is not simply reviewing the primary decision maker's determination. Rather, it conducts a full merits appeal: see [13]. Thus the authority – now the FtT – is the arbiter of all aspects of the human rights claim, including proportionality. The effect of this decision is that in deciding issues of proportionality the FtT conducts a full merits appeal. This is the correct approach in statutory appeals. However, as explained below, the lens must be adjusted in judicial review cases.

(30) Implicit in the decisions in Daly and Huang is the proposition that where human rights issues fall to be decided in judicial review proceedings the function of the Upper Tribunal (and, for that matter, the Administrative Court) does not equate with that of the FtT in statutory appeals. Rather, in adjudicating on questions of proportionality, the function remains one of review. That said, it is appropriate to emphasise that the standard of review is not that of irrationality and, further, the latitude, or discretionary area of judgment, to be accorded to the Secretary of State will vary according to the context. Thus the scale of intensity of review is a sliding one. A case warranting high intensity review could, in the abstract, differ little in substance from an FtT merits appeal. The extent to which these two distinct methods of judicial superintendence merge will depend upon further developments in the law. One of the modest aims of this judgment is to highlight the distinction.

The Impugned Decision: Conclusions

(31) On behalf of the Applicant Ms Thomas acknowledged that the main challenge to the impugned decision is made under the Article 8 provisions of the Rules. The central focus of her submissions was the "*insurmountable obstacles*" provision in paragraph EX1 of Appendix FM. She criticised the weight attributed to certain considerations and the lack of weight accorded to others. The burden of her argument was that the Secretary of State had failed to give sufficient weight to the Applicant's partner's troubled upbringing, her rape when a teenager, the nationality of the rapist, her PTSD condition and treatment, her fertility treatment and her unfamiliarity with the culture and languages of Pakistan. In short, the burden of the Applicant's case is that the impugned decision is a disproportionate interference with the family life rights of the Applicant and his partner under Article 8 ECHR.

(32) As the most recent learning on the test of insurmountable obstacles, contained in the decision of the Court of Appeal in R (on the application of Agyarko and others) v Secretary of State for the Home Department [2015] EWCA Civ 440, makes clear, this phrase as used in the Rules is intended to have the same meaning as in the Strasbourg jurisprudence, illustrated in Jeunesse v The Netherlands [2015] 60 EHRR 17 at [117]. Giving the judgment of the Court, Sales LJ highlighted two particular features of the insurmountable obstacles criterion. First, while imposing a stringent test, it is to be interpreted "*in a sensible and practical rather than a purely literal way*": see [23]. Second, this criterion is not simply a factor to be taken into account. Rather, it is a condition which must be satisfied if a claim under the Rules is to succeed.

(33) I find no basis for interfering with the Secretary of State's decision. It is impressively and carefully reasoned. Its components are a series of evaluative assessments directed to the main features of the Applicant's case. No relevant fact or factor has been ignored, while nothing immaterial has been considered. Settling in Pakistan will undoubtedly involve hardship, disruption, anxiety and various challenges for the Applicant's partner, less so for the Applicant. However, collectively, I consider that these factors are insufficient to warrant condemnation of the Secretary of State's evaluative assessment as disproportionate. While the Applicant would in principle have found it easier to satisfy the less stringent, somewhat gentler predecessor test of whether it would be reasonable to expect the couple to continue their family life outside the United Kingdom, a decision by the Secretary of State to his detriment, on this hypothesis, would also have been difficult to upset. *A fortiori* the current decision which involved the application of a demonstrably and incontestably more exacting criterion to the Applicant's case.

(34) It was further argued, albeit somewhat faintly, on behalf of the Applicant that the Secretary of State's application of the "*no ties*" criterion enshrined in paragraph 276ADE(vi) of the Rules was unsustainable. The main features of the equation, in this respect, are the Applicant's age, his upbringing in Pakistan to the age of 15, his present age (25), the length of his sojourn in the United Kingdom, his family circumstances here and the evidence relating to his enduring connections, or the lack thereof, with Pakistan. I consider that on these issues the Applicant's case is evidentially barren and incurably frail. The Secretary of State's application of this criterion is in my view comfortably compliant with the proportionality principle.

(35) Finally, in challenging the Secretary of State's decision outwith the framework of the Rules, Ms Thomas's central argument was that the impugned decision does not demonstrate sufficient care, detail and reasoning on the part of the decision maker. I accept that this complaint, in principle, sounds on the proportionality issue. However, as my assessment in [33] above makes clear, I consider it devoid of merit. Having regard to the jurisprudence on this subject, the ultimate question for the Tribunal is whether there is something so compelling or exceptional about the Applicant's circumstances to warrant the condemnation of the Secretary of State's decision as disproportionate, thereby displacing the public interests engaged, which are the maintenance of firm immigration control and the economic wellbeing of the country.

(36) In my judgement, while acknowledging that proportionality is a more

penetrating and sophisticated tool of analysis than irrationality, this question must be answered in the negative, for essentially the same reasons which underpin the Tribunal's rejection of the Applicant's first and second grounds of challenge. The Applicant's case undoubtedly possesses some unusual, appealing and compassionate features. However, bearing in mind that this is not an appeal on the merits, I consider that these fall markedly short of outweighing the public interest in the balancing exercise.

(37) The frailty of the Applicant's case in this respect is sharply exposed by the application of sections 117A and 117B of the 2002 Act to this case. These provisions dictate that little weight is to be given to any private life established by the Applicant when his immigration status was precarious. I consider that his immigration status was of this kind from his arrival in the United Kingdom. In addition, little weight is to be attributed to private life established by him since the expiry of his status of lawful visitor around 2008. The relationship with his partner was formed during the period which followed. It has elements of both private and family life. I refer to the recent analysis of these new statutory provisions in Forman (ss 117A–C: considerations) [2015] UKUT (IAC) 412, at [17]. As a court of judicial review, I conclude that as regards all aspects of the Applicant's challenge the public interests in play, namely the maintenance of firm immigration control and the economic well being of the country, comfortably outweigh the competing personal Article 8 interests of the Applicant and his partner.

Decision

(38) Giving effect to the analysis and conclusions above:

(i) the application for judicial review is dismissed;

(ii) the Applicant will pay the Respondent's costs, to be assessed in default of agreement, subject to any submissions in writing to be made by 31 August 2015; and

(iii) this being, ultimately, a decision entailing the application of well established principles to a particular fact sensitive context, permission to appeal is refused, subject to any application in writing by the Applicant by 31 August 2015.

Signed :

The Honourable Mr Justice McCloskey
President of the Upper Tribunal, Immigration and Asylum Chamber

Dated: 08 August 2015

Applicant's solicitors:
Respondent's solicitors:
Home Office Ref:
Decision(s) sent to above parties on:

Notification of appeal rights

A decision by the Upper Tribunal on an application for judicial review is a decision that disposes of proceedings.

A party may appeal against such a decision to the Court of Appeal **on a question of law only**. Any party who wishes to appeal should apply to the Upper Tribunal for permission, at the hearing at which the decision is given. If no application is made, the Tribunal must nonetheless consider at the hearing whether to give or refuse permission to appeal (rule 44(4B) of the Tribunal Procedure (Upper Tribunal) Rules 2008).

If the Tribunal refuses permission, either in response to an application or by virtue of rule 44(4B), then the party wishing to appeal can apply for permission from the Court of Appeal itself. This must be done by filing an appellant's notice with the Civil Appeals Office of the Court of Appeal **within 28 days** of the date the Tribunal's decision on permission to appeal was given (Civil Procedure Rules Practice Direction 52D 3.3(2)).