Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/10002/2012

THE IMMIGRATION ACTS

Heard at Glasgow	**Determination promulgated**
on 3rd June 2013	**on 6th June 2013**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

SHARIQ MAHMOOD

Appellant

and

ENTRY CLEARANCE OFFICER, PAKISTAN

Respondent

For the Appellant: Mr A Caskie, Advocate, instructed by Latta & Co, Solicitors
For the Respondent: Mr M Matthews, Senior Presenting Officer

DETERMINATION AND REASONS

1. The Appellant is a citizen of Pakistan who gives his date of birth as 1st January 1970. He sought entry clearance with a view to settlement as the spouse of a person present and settled in the UK.

2. By notice dated 4th May 2012 the Respondent refused the application for the following reasons. The Appellant said that he married the Sponsor on 23rd April 2000, but he did not produce the original marriage certificate, and the Sponsor had four children by another father. The ECO did not

accept the Appellant's statement that the Sponsor had not been married or in a previous similar relationship. The ECO was not satisfied that the Appellant had any significant contact with the Sponsor and that he intended to live permanently with her in a subsisting relationship. The Sponsor was dependent on public funds and the Appellant had failed to show that he would be adequately maintained and accommodated in the UK without additional recourse to public funds.

3. The refusal makes no mention of Article 8 of the ECHR.

4. The Respondent appealed to the First-tier Tribunal, on generic grounds which did not raise any specific issues. The grounds included the statement, "The decision is unlawful because it is incompatible with [the Appellant's] rights under the ECHR", without elaboration.

5. First-tier Tribunal Judge Dennis dismissed the Appellant's appeal by determination promulgated on 1st February 2013. The judge found the Sponsor a wholly unreliable witness (paragraph 24). He found it more than likely that the Appellant if granted entry clearance would also avail himself of State benefits. "On this basis, alone, the appeal would fail" (paragraph 23). However, the judge went on at paragraph 25 to accept that the Appellant and Sponsor were married in 2000, and that the Appellant was, more likely than not, the father of her oldest child.

6. At paragraph 26 the judge considered Article 8, although observing that the matter had not been well developed either in the grounds of appeal or in submissions. The child had seen the Appellant once since he was 3 months old and the Sponsor had seen the Appellant only twice, and that recently, in nine years. The judge was not satisfied that family life existed:

> This is not to challenge the biological relationship, but merely to conclude that they do not share that particular intimacy born of mutual interdependence which characterises a functioning family unit such as is protected under Article 8. A smattering of greeting cards and letters in the last few months do not create the reality of a family life… There is simply no factual basis to conclude there is a family life experience between the Sponsor, the boy and the Appellant… I fully recognise that in the usual circumstance the best interests of a child would require regular involvement with both parents, but here it must be recognised it was nine years before he ever met his father or had anything whatever to do with him. There is no bar to him developing some contact in future.

7. The Grounds of Appeal, both as presented to the First-tier Tribunal and to the Upper Tribunal, are rather prolix and do not disclose much more than disagreement. Assertions are made that the judge speculated and made perverse or irrational findings, and that he applied too high a standard of proof, none of which are even properly arguable. Mr Caskie (who was not, I think, the author of the grounds) did not pursue those assertions.

8. The grant of permission to appeal to the UT, dated 11th April 2013, says:

> The FtT Judge… drew attention to irreconcilable differences in the Sponsor's evidence. His findings as regards the subsistence of the marriage and the parties' intention to live together and the Appellant's future employment prospects were

> sustainable… Insofar as Article 8 is concerned the judge finds… that there was no effective family life. It is, just about, arguable that the judge has not properly considered the proportionality of the decision given that he has accepted that the child is probably the Appellant's child and that there has been some contact. Permission to appeal is therefore granted on the limited grounds of Article 8 only.

9. The grant of permission simply opens the door to the Upper Tribunal, and should not be scrutinised as if it were a crucial passage of a judgment; but it might be better read as pointing to the question whether the judge was entitled to hold that family life did not exist.

10. In a reply to the grant of permission, dated 29th April 2013, the Respondent said:

> …It is difficult to see on the facts, which are that the marriage is not subsisting, the lack of support or contact since 2008, that an Article 8 case can be made out.
>
> …As at the date of decision… the circumstances do not reveal a situation, outside the biological relationship, that Article 8 of the ECHR could be engaged.

11. Mr Caskie referred at the outset to the Immigration Rules Schedule B Section R-LTRPT 1.1 on the requirements for limited leave to remain "as a partner" and "as a parent or partner". He accepted that these Rules apply to those seeking leave to remain in the UK, not to those seeking entry clearance, but he said that was irrelevant. In an Article 8 case it made no difference if the person concerned was overseas or in the UK. The Secretary of State set out her view of proportionality for the purposes of these two Rules, and the balance must be the same in or out of country. Apart from the in-country requirement, the Appellant could "tick all the boxes" of the Rules for leave to remain, and it was not open to the Secretary of State to argue that refusal of entry clearance was a proportionate step.

12. Mr Matthews submitted that this was an argument very different from anything to be found in either set of grounds. The grounds, so far as relevant, attack the judge's finding that there was no family life. If so, that was the end of any case on Article 8. Whether family life existed was essentially a question of fact for the judge to resolve, under the broad principles summarised in *Macdonald's Immigration Law and Practice* 8th ed. at paragraph 8.81. The Appellant might be the natural father of the child, but he had been found to have no relationship as claimed with the Sponsor, and the level of contact with the child since the Sponsor left Pakistan in 2002-2003, when the child was only months old, was minimal. At best, the child had seen his father for six weeks in 2011. The findings on the existence of family life were properly open to the judge and did not disclose error of law. The Rules both for entry clearance and for leave to remain required a subsisting relationship, and that had not been established. The Appellant had failed to show that he could meet the requirements of the entry clearance Rules as to maintenance. Mr Matthews did not accept that the Rules had to be overwritten by a requirement that there was no difference between an in-country and an out-of-country application. It was valid to include different requirements in

the respective Rules. The argument to the contrary would make large parts of the entry clearance Rules redundant.

13. Mr Caskie argued further that Article 8 had to pertain in the same way to in-country and out-of-country cases, irrespective of any difference the Rules might seek to impose. As to the judge's decision that family life did not exist, he applied the incorrect test. He should have held that a natural relationship existed, and then asked whether the circumstances were so exceptional as to break that. From the Appellant's point of view, there had been a lengthy and enforced separation during which he could not exercise contact with his child. The question of whether leave to enter should be granted went to the best interests of the child. Even if the judge was entitled to conclude that family life did not exist, this then collapsed into private life issues. The Presenting Officer had referred to the poor credibility of the Sponsor and of another witness, but that did not have any part to play in the Article 8 assessment. It should have been found that there was family life, that there were no exceptional circumstances to break the link, and the case should then have succeeded under Article 8, taking account of the best interests of the child. So far as the child is concerned this is a "domestic case", with a threshold significantly lower than in a "foreign case". This was another element with which the judge failed to deal.

14. I queried whether the matters now canvassed had effectively been raised before the First-tier Tribunal. Mr Caskie submitted that the grant of permission was sufficiently wide to enable any argument to be run, so long as it was related to the interests of the child, which was part of the Article 8 issue. In short, Mr Caskie finally submitted, "Article 8 is Article 8; the Appellant 'ticks all the boxes'; focussing on the interests of the child and not of anyone else, proportionality requires the Appellant to be admitted, even if the maintenance requirements of the Rules could not be met".

15. I reserved my determination.

16. The submissions to the Upper Tribunal are far removed from any case put to the FtT, or even in the grounds of appeal to the UT.

17. The FtT Judge's decision under the Immigration Rules, the main issue to which he was directed, is impeccable.

18. The Respondent's reply to the grant of permission overstates that side of the case, as there was at least some evidence beyond biological relationship.

19. There is a presumption in favour of the existence of family life between parent and child. However, the continuing existence of family life depends upon the level of contact and the quality of the relationship between them. There is no error of law in the judge's approach to this issue at paragraph 26, and no imposition of an incorrect legal test. The question was primarily one of fact for the judge to determine on the evidence. He was

entitled to conclude as he did. The reasons given are more than adequate. As the Presenting Officer submitted, if that conclusion is sustained that is decisive of this further appeal.

20. I would not have upheld the submission that there can be no distinction for Article 8 purposes between in-country and out-of-country cases, and that any differential requirements such as the maintenance and accommodation provisions of the Rules must be excised from the proportionality balance. In most cases, an in-country appeal will involve potential disruption of an existing relationship. In many cases, an out-of-country appeal will raise the question whether the State should stand in the way of further development of a family relationship. While the State has positive duties to help development of family life, there are general differences between the two situations. The State is entitled to consider the economic impact of decisions. However, these considerations are not decisive for present purposes.

21. It has not been shown that the determination of the First-tier Tribunal erred on any point of law, such as to require it to be set aside. That determination shall stand.

22. No anonymity order has been requested or made.

5 June 2013
Upper Tribunal Judge Macleman