EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2015] CSIH 28
P594/13

Lord Eassie

Lord Brodie

Lady Clark of Calton

OPINION OF THE COURT

delivered by LORD EASSIE

in the reclaiming motion

by

MR GULSHAHABAZ AHMED MIRZA (AP)

Petitioner and Reclaimer;

against

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent:

Petitioner and Reclaimer: Lindsay, QC, Winter; Drummond Miller LLP (for Gray & Co, Glasgow)
Respondent: Webster, Maciver; Office of the Advocate General

17 April 2015

Introductory

[1] In this petition for judicial review the petitioner challenges a decision taken on behalf of the Secretary of State for the Home Department refusing the petitioner leave to remain in the United Kingdom as the husband of his wife, who is a British citizen. The notice of that decision was initially given on 22 January 2013 but during the dependency of the petition in the Outer House the Secretary of State issued a fresh decision, following an invitation to her to reconsider matters. That new decision also refused leave. It is contained in an undated letter received by the petitioner's solicitors on 19 November 2013. Parties were agreed that that letter – "the November letter" – superseded the notice of 22 January 2013. By interlocutor pronounced on 4 December 2013 the Lord Ordinary refused the petition[1]. The reclaiming motion is brought against the Lord Ordinary's refusal of the petition.

[2] The petitioner, who was born in 1976, is a citizen of the Republic of Pakistan. On 2 April 2004 he came to the United Kingdom on a workholder visa which expired on 17 March 2005. He did not apply for any extension of that permission but remained in the United Kingdom. In June 2004 he met Tracy Grant, the lady who is now his wife. They met by chance when he boarded a bus in Govanhill and sat next to her. The acquaintanceship made initially on that bus journey continued thereafter. The petitioner and Miss Grant discussed marriage and they became engaged to marry in 2009. They began to live together in February 2010 in a flat which they rented in Glasgow. On 10 May 2010 the petitioner applied to the Secretary of State for the Home Department for permission to marry Miss Grant. Some nine months later, on

20 February 2011, the Secretary of State granted that permission and the marriage duly took place in Hamilton 18 June 2011. There is no suggestion that the marriage – which continues – is other than entirely genuine. The petitioner and his wife are anxious to have a child. A pregnancy miscarried and the petitioner's wife is approaching an age at which female fertility normally diminishes.

[3] As already mentioned, the petitioner's wife is a British citizen. She has lived all her life if not in Scotland at least in the United Kingdom. Her family are British. She works as a support worker in a care home in the Glasgow area.

The Immigration Rules

[4] It is not in dispute that the petitioner is unable to bring himself within the requirements of the particular provisions of the Immigration Rules (HC395) published by the Secretary of State which apply where leave is sought to remain in, or enter, the United Kingdom as the spouse of a British citizen or a person settled in the United Kingdom.

[5] The reasons for that are set out relatively fully in the November letter. Put very briefly, the provisions which applied in February 2012 when the petitioner made his application for leave – paragraph 284 of HC395 – did not avail him because of subparagraph (iv) of paragraph 284 which required that the petitioner had not "remained in breach of any immigration laws, disregarding any period of overstay for a period of 28 days or less". With effect from 9 July 2012, HC395 was supplemented by the addition of appendix FM. The relevant section of that appendix was section R-LTRP. For various reasons – principally the petitioner's inability to meet E-LTRP 2.2 by virtue of his having previously overstayed – were he to be granted leave in accordance with the Immigration Rules, the petitioner required to satisfy the terms of paragraph EX1(b).

[6] Paragraph EX1(b) provides:

> "(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 Secretary of State decided that there were no such "insurmountable obstacles". The November letter states:

> "It is accepted that your client is in a genuine and subsisting relationship with a British Citizen however it is not accepted that there are insurmountable obstacles to the relationship continuing outside of the UK. Little, if any, evidence has been provided which establishes that there are insurmountable obstacles to their relationship continuing in Pakistan. The fact that your client's spouse is a British Citizen is not an insurmountable obstacle to the relationship continuing outside the UK. It is clear that there are expatriate British Citizens living in Pakistan.
>
> It is acknowledged that your client's spouse is in employment in the UK as a support worker and that if she chose to join her husband in Pakistan, that she would have to leave her employment. English is one of the principle languages in Pakistan and no reason has been put forward about why either your client or his spouse could not obtain employment there in order to support their household.
>
> It is also acknowledged that your client's spouse has a home in the UK that she rents with her husband. Accordingly, the selling of the family home, should they continue their family life in Pakistan, is not an issue. It seems clear that your client still has family in Pakistan who could no doubt provide accommodation to the couple in the short to medium term. There is no evidence that any of his family members are against their marriage given the attendance at the ceremony of his two brothers.

It is also acknowledged that your client's spouse, should she choose to continue her family life with her husband in Pakistan, would be required to leave family and friends in the UK behind. It is not considered that no matter how upsetting this might be for her that this amounts to an insurmountable obstacle. There would be no reason why such relationships (which are unlikely to amount to family life in the legal sense) could not be maintained through modern forms of communications and visits. There is, for example, no evidence of particular family circumstances which may present such an obstacle. There is also no evidence of health concerns on the part of your client's spouse which may establish same.

No evidence has been put forward particular to your client which suggests that there would be insurmountable obstacles to the relationship continuing in Pakistan."

Article 8 ECHR

[7] However the fact that the petitioner did not come within the provisions for granting leave in terms of HC395 is of course not the end of the matter since the Secretary of State is yet required to consider whether refusing the petitioner leave to remain would place the United Kingdom in breach of its obligations under article 8 of the European Convention on Human Rights – "ECHR"- (right to private and family life).

[8] The decision letter went on to give some consideration to that issue. First, the author of the letter considered whether the petitioner's application might succeed in meeting the requirements of paragraph 276ADE of HC395, which related to certain aspects of private and family life. He concluded that the petitioner did not meet those requirements for the reason that the petitioner neither met the requirement of having lived for more than 20 years in the United Kingdom or the requirement of having no ties (including social, cultural or family) in another country, namely Pakistan.

[9] Since the provisions of paragraph 276 ADE are also not the end of the matter in the consideration of article 8 ECHR, the author of the November decision letter then proceeds:

"Finally, consideration has been given to whether leave should be granted outside of the Immigration Rules. In doing so consideration has been given to the guidance given by the Inner House in *MS*.."

Having quoted in part paragraph [30] of *MS (India)* v *Secretary of State for the Home Department* [2013] CSIH 52, the letter continues:

"There is no evidence that your client has a good arguable case that refusal of leave to remain would lead to unjustifiably harsh consequences. It is clear that your client's relationship with his spouse was formed at a time when his status here was extremely precarious. Both your client and his spouse must have had an appreciation when they married that they may not be allowed to carry on their family life in the UK. Article 8 does not give couples an inalienable right to choose where they carry on their family life. Your client also overstayed for 5 years before bringing himself to the attention of the Home Office. It is also more likely than not that he worked illegally at times in order to support himself during that period. Illegal working causes harm in our society,

Whilst your client met his spouse in 2004 it appears to be the case that they did not begin dating until 3 years later. It wasn't until February 2010 that they began living together. Accordingly, whilst they may have been in a relationship of some kind since 2007 it arguably was not until 2010 that it could conceivably have been a relationship protected by Article 8. Family life, therefore, has arguably not existed between your client and his spouse until the last three years which is not so long that of itself removal would be an unjustifiably harsh outcome. However, the fact that the relationship appears to

be a genuine one, that it has lasted for 6 years in one form or another and that should it continue in Pakistan your client's wife will lose the society of her friends and family and will have to leave her employment has also been taken into account in this assessment. It is not considered that these factors outweigh the need to maintain effective immigration control or otherwise give rise to a good arguable case that an unjustifiably harsh outcome so as to amount to a breach of Article 8 if leave to remain is not granted to your client.

It also appears to be the case that your client may be unable to meet the full requirements of Appendix FM should he seek entry clearance standing the level of his wife's earnings. An inability to meet the full requirements of the Immigration Rules is not considered to be a factor in his favour when assessing his rights under Article 8.

It is therefore not considered that your client has demonstrated a good arguable case that his case should be allowed outside of the Immigration Rules."

The Lord Ordinary's decision

[10] The reasons given by the Lord Ordinary for refusing the petition span two paragraphs:

"[13] In my opinion the November 2013 letter sets out clearly and comprehensively that the respondent did indeed have regard to the nationality of the petitioner's spouse and to the question of whether the petitioner had advanced a good arguable case to the effect that refusal of leave to remain would lead to unjustifiably harsh consequences. It requires to be borne in mind when considering the November 2013 letter that the petitioner did not seek to challenge the finding of the decision maker therein that the petitioner could not meet the immigration rules contained in Appendix FM. That having been established, the decision maker proceeded to refer to the consideration which he had given as to whether leave should have been granted outside the rules, and did so in the light of guidance given by the Division in *MS, supra*. The context in which consideration of this matter was given is clearly set out earlier in the letter to the effect that there was an acceptance by the decision maker that the petitioner was in a genuine and subsisting relationship with a British citizen. In proceeding to express his reasons in the chapter of the letter dealing with leave being granted outside the rules, the decision maker addressed the matter under the criterion of a 'good arguable case' in assessing whether refusal of leave would result in unjustifiably harsh consequences. It is clear that in taking that approach, as a matter of expression and indeed of substance in the letter, the decision maker has followed the guidance set out by the Division in *MS*, *supra*, at para 28, and concluded that there is no evidence that the petitioner has a good arguable, case in those terms. There is in these circumstances no requirement incumbent upon him to embark on a full second stage separate assessment of article 8 rights, the assessment of proportionality having been made already in applying the criterion of 'good arguable case' to the antecedent question as to whether the petitioner's application should have been dealt with outside the rules.

[14] The decision maker has in my view considered all relevant circumstances and factors, including in particular those founded upon by counsel for the petitioner, in assessing the criterion of 'good arguable case'. In that event, the dictum of the Division in *MS* (at para 30) applies to the effect that if a good arguable case 'is not demonstrated, it can be assumed that the applicant's article 8 rights will be adequately dealt with by applying the new rules'. I conclude therefore that, on a fair reading of the November 2013 letter as a whole, the decision complained of by the petitioner contains no error of law".

The argument for the petitioner

[11] Counsel for the petitioner submitted that the issue in the case was whether at the stage of considering whether the petitioner's application for leave to remain as a spouse of a British citizen notwithstanding that the application did not come within the terms of the immigration rules, the respondent had erred in law when considering whether the refusal of the application would be a disproportionate interference with the petitioner's rights under article 8 ECHR.

[12] In brief summary and under reference to authorities in the joint list of authorities, to some of which we shall later refer, Counsel for petitioner submitted that, at the outset, it was evident that the decision taker had applied the wrong test. The test which he had applied was whether "refusal of leave to remain would lead to unjustifiably harsh consequences". That was not the appropriate test. The proper test was whether the decision to refuse leave was a proportionate one having regard to the nature and extent of the interference with the petitioner's private life and the legitimate aim which the refusal purported to meet.

[13] Further, an important circumstance which rendered the decision flawed was that the decision erroneously proceeded only on the basis of assuming that the petitioner's wife could and would be able and willing to go to live in Pakistan. No consideration had been given to the validity of that assumption or its reasonableness. The test of "insurmountable obstacles" in paragraph EX1 (b) of HC 395 was not appropriate in assessing proportionality in terms of article 8 ECHR. The petitioner's wife was a citizen of the United Kingdom and the European Union. She could not be obliged by the Secretary of State to live outside the United Kingdom or the European Union. No consideration had been given to her rights, as a United Kingdom citizen, to live in the territory of the United Kingdom. Nor had consideration been given to practical issues for a lady who had always lived in the United Kingdom and who spoke no Urdu in being constrained to live in Pakistan. The assessment of the proportionality of refusing leave to the petitioner to remain in the United Kingdom as the spouse of Mrs Mirza therefore required to take account of the wife's rights and her practical situation. It required to proceed upon the basis that refusal of leave would result in the separation of the married couple.

[14] The separation would evidently not be of relatively short duration pending the grant of an entry clearance certificate in Pakistan since, as was indicated by the author of the November letter, such entry clearance would be prevented by the fact that Mrs Mirza was employed in a lowly remunerated job as a support worker in a care home; and no account could be taken of her husband's assets or earning potential. The decision letter failed to attempt any assessment of how that enduring separation of the couple could be justified as proportionate in light of a particular aspect of immigration control related to the circumstances of the present case.

The argument for the respondent

[15] Again in brief summary, counsel for the respondent submitted that where an applicant failed to meet the provisions of the immigration rules, including those which would enable permission to be granted on considerations arising from family and private life, the Secretary of State was not required in every case to consider fully whether refusal might breach article 8 ECHR; all that was required was that she apply her mind to whether there might be a good arguable case. The November decision letter followed that approach. At the time when the marriage was concluded the petitioner's immigration status within the United Kingdom was precarious. In any case in which the immigration status of the applicant was precarious at the time of marriage the gap between what might be permitted by the immigration rules and a proportionate decision was small – cf paragraph [29] of *MS* (*India*) v *Secretary of State for the Home Department*. The fact of the wife having British nationality and EU citizenship was a diversion. The decisions of the Court of Justice of the European Union on the topic were concerned with the position of children – Joined Cases C-356/11 and C-357/11 *O and Another v Maahanmuuttovirasto* [2013] 2 WLR 1093.

Discussion

[16] In approaching the competing positions of the parties to this petition for judicial review we think it appropriate to observe at the outset that the right to marry and to found a family is in itself a fundamental right protected by article 12 ECHR. As was observed by Baroness Hale of Richmond at paragraph 67 of her judgment in *Regina (Aguilar Quila & another)*v *Secretary of State for the Home Department* [2011] UKSC 45; [2012] 1 AC 621:

> "67. Married couples also have the right to live together. This is inherent in the right to found a family, which is coupled with the right to marry in the universal declaration, the ICCPR and the Human Rights Convention".

Similarly, at paragraph 62 of its judgment in *Abdulaziz, Cabales & Balkandali* v *United Kingdom* (1985) 7 EHRR 471, the European Court of Human Rights stated:

> "The expression 'family life' in the case of a married couple, normally comprises cohabitation. The latter proposition is reinforced by the existence of article 12, for it is scarcely conceivable that the right to found a family should not encompass the right to live together".

[17] In what we think may be seen as almost a corollary of that fundamental human right, it follows that in an application for leave to remain in, or to enter, the United Kingdom as a spouse of someone settled in the United Kingdom consideration must be given to the rights, including of course the rights under article 8 ECHR, of that other spouse. What are in issue are the human rights of the married couple. As was put by Sedley LJ (with whom the other members of the Court of Appeal of England and Wales agreed) at paragraph 20 of his judgment in *AB (Jamaica)* v *Secretary of State for the Home Department* [2007] EWCA Civ 1302; [2008] 1 WLR 1893, a case which challenged the deportation of a Jamaican lady married to a British national husband:

> "20. In substance, albeit not in form, Mr Brown [the husband] was a party to the proceedings. It was as much his marriage as the claimant's which was in jeopardy, and it was the impact of removal on him rather than on her which, given the lapse of years since the marriage, was now critical. From Strasbourg's point of view, his Convention rights were as fully engaged as hers. He was entitled to something better than the cavalier treatment he received not only from the Home Office but, I regret to say, from the AIT. It cannot be permissible to give less than detailed and anxious consideration to the situation of a British citizen who has lived here all his life before it is held reasonable and proportionate to expect him to emigrate to a foreign country in order to keep his marriage intact. One finds no consideration given to any of these matters by the AIT at either stage".

[18] A further matter of principle to be borne in mind is that, as a British citizen, the petitioner's wife cannot be required to leave the United Kingdom. Both under ordinary principles of common law and international law she has the right to live within the United Kingdom. That right is reflected in the terms of section 1(1) of the Immigration Act 1971 which provides that a British citizen, such as the petitioner's wife, is "free to live in the United Kingdom without let or hindrance".

[19] Counsel for the petitioner did not submit that the fact that the petitioner's wife was a British citizen required in itself the automatic granting of the application. But it did mean that the right of residence in the United Kingdom, and all that went with such residence, including the benefits of citizenship of the European Union, weighed heavily in the assessment of the proportionality of the interference with the couple's human rights to cohabit together as spouses. The assessment had to be conducted on the basis of separation of the couple; it was not open to the Secretary of State to contend that any incompatible interference with the

couple's article 8 rights could simply be avoided by stating that the couple might move to another country. In that respect support for the petitioner's position may be found in the following passage from the judgment, delivered by Blake J, of the Upper Tribunal (Immigration and Asylum Chamber) in *Sanade and Others (British Children – Zambrano – Dereçi)* [2012] Imm.AR 3:

> "92 Cases where the remaining parent not facing removal is either a British citizen or a third-country national will be governed by Art 8. It is in that context that the nationality of the remaining parent as well as that of the child has relevance.
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> 93 Finally, we note that a further question on which we asked for the respondent's assistance was in these terms:
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> > 'Does the respondent [the Secretary of State for the Home Department] agree that in a case where a non-national parent is being removed and claims it is a violation of that person's human rights to be separated from a child with whom he presently enjoys family life as an engaged parent, that a consequence of the CJEU's judgment is that it is not open to the respondent to submit that an interference can be avoided because it is reasonable to expect the child (and presumably any other parent/carer who is not facing deportation/removal) to join the appellant in the country of origin? If not, why not?'
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> 94 To this Mr Devereux [counsel for the Secretary of State] replied on 24 November 2011:
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> > 'We do accept, however, that in a case where a third country national is unable to claim a right to reside on the basis set out above it will not logically be possible, when assessing the compatibility of their removal or deportation with the ECHR to argue that any interference with Art 8 rights could be avoided by the family unit moving to a country which is outside of the EU.'
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> 95 We shall take this helpful submission into account when we consider the application of Art 8 to each appellant's case. We agree with it. This means that where the child or indeed the remaining spouse is a British citizen and therefore a citizen of the EU, it is not possible to require them to relocate outside of the EU or to submit that it would be reasonable for them to do so. The case serves to emphasise the importance of nationality already identified in the decision of the Supreme Court in ZH (Tanzania) . If interference with the family life is to be justified, it can only be on the basis that the conduct of the person to be removed gives rise to considerations of such weight as to justify separation."

In so far as one is concerned with the right of the citizen to reside within the territory of his citizenship it is, we think, also helpful to bear in mind the observations which Sedley LJ made in the course of paragraph 19 of his judgment in *AB (Jamaica)* v *Secretary of State for the Home Department:*

> "DP3/96, it must be recalled, embraces a wide spectrum of status in the word 'settled'; it includes both British citizens living in the United Kingdom and nationals of other countries who have indefinite leave to enter or remain here. There can be a world of difference, depending on the particular case, between expecting the foreign national, albeit now settled here, to return with his family to his country of origin or move to another country, and expecting a British citizen who has lived here all his life and has an inalienable right of abode here to live and work and find accommodation in a foreign country or to forfeit his marriage".

[20] It is in our view clear that the author of the November letter proceeded entirely on the basis that the petitioner's wife should go with him to live in Pakistan. That approach ignores the fact of her native British citizenship; it fails to consider that the refusal of leave may result in the indefinite separation of the married couple and whether that indefinite separation can be justified as a proportionate interference with their fundamental right to cohabit as a married couple. We therefore consider that counsel for the petitioner is

well founded in his submission that by ignoring the rights flowing to Mrs Mirza by her citizenship of the United Kingdom and assuming that she must go to Pakistan to preserve the substance of her marriage the decision involved an error of law. The assumption proceeds upon the basis of the conclusion which the author of the November letter reached in his consideration of the terms of paragraph EX1 (b) of HC395 that there were no "insurmountable obstacles" to Mrs Mirza's going to live in Pakistan. But, in our view, when it comes to an assessment of proportionality, it is not appropriate to apply a test of whether there might be an "insurmountable obstacle" to the petitioner's wife being able to join him in Pakistan. We are of course conscious that the phrase "insurmountable obstacle" has been used by the ECtHR as indicating a factor which might be taken into account in judging whether a decision is disproportionate. But that was simply mentioned as a possible factor. A disproportionate decision or measure in this field is not to be equiparated with the existence of an "insurmountable obstacle". In that regard it may also be observed that the author of the letter appears to assume, on the basis only that "there are expatriate British citizens living in Pakistan", that the Republic of Pakistan must accord to its nationals a right which the Immigration Rules do not accord to British nationals, namely an unqualified right to be joined in Pakistan by a non-national spouse.

[21] We are also of the view that counsel for the petitioner is well founded in his submission that in so far as the decision taker considered the compatibility of the refusal of leave to remain in the United Kingdom with article 8 ECHR, the decision taker applied the wrong test. The decision taker proceeded upon the basis whether refusal of leave to remain would lead to "unjustifiably harsh consequences". But the issue is whether the interference with private and family life – substantial even on the erroneous basis of requiring the wife to live in Pakistan – could be justified by the Secretary of State as proportionate to some legitimate objective. The four stage nature of that exercise is summarised by Lord Reed in paragraph 74 in his judgment in *Bank Mellat* v *H M Treasury* [2014] 2 AC 700:

> " The judgment of Dickson CJ in *Oakes*[2] provides the clearest and most influential judicial analysis of proportionality within the common law tradition of legal reasoning. Its attraction as a heuristic tool is that, by breaking down an assessment of proportionality into distinct elements, it can clarify different aspects of such an assessment, and make value judgments more explicit. The approach adopted in *Oakes* can be summarised by saying that it is necessary to determine (1) whether the objective of the measure is sufficiently important to justify the limitation of a protected right, (2) whether the measure is rationally connected to the objective, (3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and (4) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter. The first three of these are the criteria listed by Lord Clyde in *De Freitas*[3], and the fourth reflects the additional observation made in *Huang*[4]. I have formulated the fourth criterion in greater detail than Lord Sumption, but there is no difference of substance. In essence, the question at step four is whether the impact of the rights infringement is disproportionate to the likely benefit of the impugned measure.

[22] In our view, the exercise thus described by Lord Reed involves a case specific identification of the objective and the degree and nature of the interference. In his response to the argument for the petitioner counsel for the respondent was at pains to stress that at the time of the marriage of the petitioner and his wife the petitioner's immigration status was "precarious". Counsel for the respondent then proceeded to the observations expressed generally and *obiter* by the court at paragraph 29 of its opinion in *MS (India)* in order to submit that by that fact alone there could be no arguable article 8 case. But those observations are, in our opinion, simply generalised observations and do not elide the need for a specific, individual assessment of the whole facts including the degree to which it may be said that the status of the relevant party was truly precarious. As counsel for the petitioner observed, there is nothing to suggest that had the petitioner sought to regularise his position by applying for further leave to remain it would have been refused. Secondly, in so far as observations about a party's precarious status are directed to the expectations of the parties to the marriage, the petitioner sought the prior approval of the Secretary of State for the Home Department to marrying his wife. That approval was granted without qualification or any question being raised as to the

petitioner's precarious immigration status; or, indeed, any need for the bride to hold employment which was not remunerated other than modestly.

[23] In these circumstances we consider that in the two particular important respects which we have just discussed, the decision contained in the November letter is vitiated by error of law. For completeness, it was also submitted on behalf of the petitioner, in what might be seen as a minor supplementary criticism, that the decision taker had erred in thinking that the private and family life of the petitioner in issue could only come into being when cohabitation began with his now wife. We agree that this is a further error on the part of the decision taker. Plainly the entirety of the relationship and its whole duration requires to be taken into account.

[24] For all these reasons we conclude that the Lord Ordinary was in error in refusing the petition. We therefore allow the reclaiming motion and quash the decision of the Secretary of State for the Home Department contained in the November letter.