The Red line: Assessing "proportionality" in Article 8 ECHR family rights

This was the case in Catherine Lal: ***Lal v SSHD [2019] EWCA Civ 1925*** on appeal from the Upper Tribunal.

The test in relation to "Insurmountable Obstacles" maintaining a family life is not whether the couple would be able to live together in the Applicants country of origin "without serious hardship". Albeit, it is a relevant criterion in deciding whether there are "insurmountable obstacles" to continuing family life outside the UK. In considering, however, whether there are "exceptional circumstances", the applicable test is whether refusing leave to remain would result in "unjustifiably harsh consequences" for the applicant or their partner, such that refusal would not be proportionate considering all the circumstances and a full factual enquiry of the case [68].

The substantive and relevant law to the tribunal's decision-making is Part 5A (sections 117A-117D) of the Nationality, Immigration and Asylum Act 2002 (inserted by the Immigration Act 2014). As provided by section 117A(1), Part 5A applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts breaches article 8 and as a result would be unlawful under section 6 of the Human Rights Act 1998. Section 117A(2) requires the court or tribunal, in considering whether an interference with a person's right to respect for private and family life is justified under article 8(2), to have regard in all cases to the considerations listed in section 117B.

Section 117B states as follows (again with the most pertinent provisions highlighted):

"**Article 8: public interest considerations applicable in all cases**

(1) The maintenance of effective immigration controls is in the public interest.

(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—

(a) are less of a burden on taxpayers, and

(b) are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—

(a) are not a burden on taxpayers, and

(b) are better able to integrate into society.

(4) Little weight should be given to—

(a) a private life, or

(b) a relationship formed with a qualifying partner, that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—

(a) the person has a genuine and subsisting parental relationship with a qualifying child, and

(b) it would not be reasonable to expect the child to leave the United Kingdom."

Against the substantive law, the Court Appeal comprehensively examined the cases of *Jeunesse v The Netherlands* (2014) 60 EHRR 17; *GM (Sri Lanka) v Secretary of State for the Home Department* [2019] EWCA Civ 1630; *Rhuppiah v Secretary of State for the Home Department* [2018] UKSC 58; *R (Agyarko) v Secretary of State for the Home Department* [2017] UKSC 11; *R (Ali) v Secretary of State for the Home Department* [2016] UKSC 60; *TZ (Pakistan) v Secretary of State for the Home Department* [2018] EWCA Civ 1109; *Rajendran (s117B - family life)* [2016] UKUT 138 (IAC);

The Court of Appeal, held that:

1. This means that "insurmountable obstacles" can take two forms, namely "first, a very significant difficulty which would be literally impossible to overcome, so it would be impossible for family life with the applicant's partner to continue overseas (for example, because they would not be able to gain entry to the proposed country of return); or second, a very significant difficulty which would be faced by the applicant or their partner in continuing their family life together outside the UK and which could be overcome but to do so would entail very serious hardship for one or both of them": [35].

2. In applying this [insurmountable obstacles] test, a logical approach is first of all to decide whether the alleged obstacle to continuing family life outside the UK amounts to a very significant difficulty. If it meets this threshold requirement, the next question is whether the difficulty is one which would make it impossible for the applicant and their partner to continue family life together outside the UK. If not, the decision-maker needs finally to consider whether, taking account of any steps which could reasonably be taken to avoid or mitigate the difficulty, it would nevertheless entail very serious hardship for the applicant or their partner (or both)": [36]. This is donoe by looking at all the circumstances and factual enquiry of the issues.

3. There ought to be evidence and specific reliance on material when judges give sweeping statement or their own intentional experiences when considering unjustifiably harsh consequences [41].

4. Sufficient and adequate evidence should be produced to rely on to meet the test set out in paragraphs EX.1.(b) and EX.2. of Appendix FM to the Immigration Rules [42 -43].

5. It was wrong of a judge in his approach by considering the matters relied on separately from each other without also assessing their cumulative impact. What the judge ought to have done was to identify all the significant difficulties one would face if required to move to the country of origin and to ask whether, taken together, they would entail very serious hardship for the sponsor [45].

6. It is clear that in section 117(B)(5) of the 2002 Act Parliament has deliberately distinguished between an applicant's private life, to which little weight should be given in so far as it was established at a time when a person's immigration status is precarious, and his or her family life, which is not the subject of such a requirement. That leaves it open to courts and tribunals in cases where a relationship with a qualifying partner is established at a time when a person is lawfully present in the UK but does not have indefinite leave to remain to give such weight to the relationship as is appropriate in the circumstances of the particular case. [59].

7. There was, therefore, never any issue whether, as a matter of law, little weight (117B) should be given to a substantial family relationship with a qualifying person established at a time when the person was here lawfully but their immigration status was precarious. The observations in paras 25-27 of the judgment of the Senior President of Tribunals should not be read as commenting at all on that situation; if they were intended to address it, they are not binding as a precedent because they were not necessary to the court's decision. [63]

8. The point in the ***Rajendra*** case is that what weight it is appropriate to give to such a relationship in the proportionality assessment depends on the particular circumstances. The relevant circumstances include the duration of the relationship and the details of the applicant's immigration history and particular immigration status when the relationship was formed (and when the application was made) [64].

9. Counsel for the Home Office sought to distinguish this decision on the grounds that in *GM (Sri Lanka)* the appellant's partner was not a British citizen or other qualifying partner but another foreign national with discretionary leave to remain and that the family life relied on also included the couple's relationships with their two children. But these are plainly not relevant differences. There is no rational basis for requiring family life established with a partner who is a British citizen by a person whose immigration status is precarious to be given little weight when, as *GM (Sri Lanka)* shows, there is no such requirement where the partner is not a British citizen (nor settled in the UK). If anything, there would

be more justification for such a requirement in the latter case. Nor can the fact that the couple in *GM (Sri Lanka)* had children (who were not British citizens and did not have settled status at the relevant time) logically affect the question whether the couple's relationship with each other should be given little weight. The Court of Appeal clearly held that the weight attached to all the family rights relied on had been wrongly discounted. In the same way we are satisfied that the Upper Tribunal judge in this case erred in law in so far as he treated the fact that Ms Lal's immigration status was precarious when her relationship with her husband was formed as requiring him to attach little weight to their right to respect for their family life [67].

Conclusions

Each case turns on its own facts. Before any submissions of an application to the SSHD it is advised that all evidence is submitted adequately with proper independent and or objective evidence with a full factual background so as to fully justify any Insurmountable Obstacles or exceptional circumstances.

Islam Khan

Church Court Chambers

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