Upper Tribunal
(Immigration and Asylum Chamber)

MB (Article 8 – near miss) Pakistan [2010] UKUT 282 (IAC)

THE IMMIGRATION ACTS

Heard at Field House

On 16 July 2010

Before

LORD JUSTICE SEDLEY

SENIOR IMMIGRATION JUDGE ALLEN

SENIOR IMMIGRATION JUDGE KEKIC

Between

MB

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the Appellant: Ms B Asanovic, instructed by Middlesex Law Chambers

For the Respondent: Mr M Blundell, Senior Home Office Presenting Officer

In an Article 8 case, when balancing the demands of fair and firm immigration control against the disruption of the family or private life of a person if removed for non-compliance with the Immigration Rules, the nature and degree of the non-compliance may well be significant.

DETERMINATION AND REASONS

1. This appeal comes before the Tribunal by permission of Senior Immigration Judge Eshun on the following basis. Mr Bhatt, who was present here as a student, had failed to secure renewal or extension of his permission to remain here for that purpose because of two failures to comply with the Rules as to eligibility. Of the two Rules that had not been complied with there was an arguable case that the finding of non-compliance with one of them was erroneous with no such arguable case and indeed no challenge in relation to the other. This being so, there was an unassailable finding of breach of the Rules. But the grounds of appeal before the Senior Immigration Judge went further and

asserted that Immigration Judge Morris had wholly failed to consider the Article 8 appeal which it was said was also before her. On this issue alone permission to appeal to the Upper Tribunal was granted.

2. When one looks at the refusal letter dated 3 November 2009, one sees that the reasons given are entirely Rule related. When one looks at the appeal form which brought the case before the First-tier Tribunal, one sees that the box is struck through which reads “If the Home Office has stated that specific Articles of the European Convention on Human Rights do not apply to your case and you disagree please explain why in this box”. When one looks at the grounds of appeal annexed to the form, one sees that they relate entirely to the Rules and say not a syllable about the Convention. And when one looks at the pro forma letter from the UK Border Agency, one sees that Section C captioned “Right of appeal” spells out that an appeal must be on one or more of the following grounds and that these include incompatibility with Convention rights. There follows under this heading the one stop warning: “You must now inform us of any reasons why you think you should be allowed to stay in this country”. There was therefore every possible warning of the need to advance an Article 8 claim by the time the matter reached the Immigration Judge and equally clearly no endeavour to do so. It follows in our judgment that no criticism can be levelled at Immigration Judge Morris for not dealing with an Article 8 claim that was never advanced.

3. Today appearing for Mr Bhatt, Ms Asanovic accepts that this is the situation but she has quoted to us a note made by those then representing Mr Bhatt to the effect that Article 8 was engaged by reason of the harshness of the Rule. Significantly it does not appear that even then personal circumstances were being invoked.

4. There is before this Tribunal a witness statement containing a paragraph referring to the appellant’s personal circumstances. It was not before the Immigration Judge and there was therefore no evidential basis upon which to proceed with any Article 8 claim. The passage before us might or might not found an Article 8 case but that does not arise unless and until it is established that there was an error of law in the way the Immigration Judge at first instance handled the matter.

5. We have considered whether, notwithstanding that it was not on her written agenda, the Immigration Judge ought to have dealt with this as what one could call a Robinson obvious point. It is the case, as Mr Blundell very properly for the Home Office has pointed out to us, that this is a door which at least is arguably opened by what has recently been said by the Court of Appeal in the case of Pankina and Others [2010] EWCA Civ 719 from paragraphs 41 to 47. Because we are not required to determine this question, we do no more than note that it is at least respectably arguable that if an Article 8 case is properly before a fact finding Tribunal or Tribunal of law in this field, one of the matters which may go to proportionality is what is described by Ms Asanovic as a near miss argument. That is to say, if one is considering on the one hand the demands of a firm and fair immigration control policy and on the other the situation of somebody whose family or private life is going to be disrupted in a material way by removal for non-compliance with the Rules. It may well matter what the nature and degree of non-compliance was. We go no further down that road at present because it does not arise materially in this case. This case, in our judgment, goes off on the fact that there was no Article 8 claim adumbrated before the Immigration Judge, nor was any such claim also obviously present as to require to be dealt with whether or not it had been put in the grounds of appeal.

6. There was, in our judgment, no error of law in the first instance decision and for that reason this appeal fails.

Signed

Lord Justice Sedley

(sitting as a Judge of the Upper Tribunal)