Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/15416/2013

THE IMMIGRATION ACTS

Heard at Glasgow	**Determination Promulgated**
On 25 February 2014	**On 22 April 2014**

Before

UPPER TRIBUNAL JUDGE DEANS

Between

MR NAUMAN BABAR

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr C Ndubuisi, Drummond Miller LLP
For the Respondent: Mr M Matthews, Home Office Presenting Officer

DETERMINATION AND REASONS

1) This is an appeal with permission against a decision by Judge of the First-tier Tribunal J C Grant-Hutchison dismissing the appeal under the Immigration Rules and under Article 8. In a decision dated 23 April 2013 the respondent refused the appellant leave to remain as a partner of Coralle Walker McDonald. The judge found that the appellant and sponsor had a joint income below the £18,600 threshold under Appendix FM and therefore could not meet the maintenance requirement. The appellant did not meet the requirements of paragraph 276ADE of the Immigration Rules. Accordingly the judge went on to consider the appeal under Article 8 and found the refusal decision was not disproportionate.

2) The judge found that a removal decision under section 47 of the Immigration, Asylum and Nationality Act 2006 was unlawful but this did not affect the substantive decision.

3) Permission to appeal was granted on several grounds. The application giving rise to the refusal decision was made in January 2012 and there was a question as to whether the rules introduced in July 2012 should have been applied. There was also a question as to the judge's reasoning under Article 8.

4) The first question which arose at the hearing before me was whether the application should have been considered under the pre-July 2012 Rules or the new Rules. Mr Ndubuisi explained that the application was submitted in January 2012 under the rule then in force, which was paragraph 295D. For the respondent, however, Mr Matthews indicated that the appellant could not have succeeded under the old paragraph 295D because this required that an applicant already had leave under the Immigration Rules whereas the only leave the appellant had at time of his application was discretionary leave outwith the Rules. The appellant had obtained discretionary leave at a time when he was pursuing contact proceedings in the Sheriff Court but he had not been awarded contact so it would not have been appropriate for his discretionary leave to have been extended. It was therefore proper to have considered the application under Appendix FM.

5) Mr Ndubuisi pointed out that the respondent had requested documents from the appellant in October 2012 in order to see whether the appellant met the financial requirements of Appendix FM. The appellant provided this documentation for a 12 month period but the respondent then excluded part of this period in making the calculation of the couple's income. Mr Ndubuisi said that the relevant requirement of the rules was to be found at Appendix FM-SE, paragraph 2(c)(ii), which stated that wage slips must be provided covering any period of salaried employment in the period of 12 months prior to the date of the application if the applicant has been employed by their current employer for less than 6 months.

6) Mr Ndubuisi continued that this still left a question over the date of the application. This was in January 2012 and Appendix FM was not retrospective. If, however, Appendix FM was applied, then the relevant time for consideration was the date when the respondent requested the documents.

7) In addition, Mr Ndubuisi submitted that it was not reasonable under Article 8 to expect the appellant to leave the UK to apply for entry clearance and the judge took the wrong approach on this issue. Whether or not the parties had an intention to marry was not a relevant factor, although the judge appeared to have taken this into account. Reference was made to the cases of Chikwamba [2008] UKHL 40 and Zhang [2013] EWHC 891 (Admin).

8) For the respondent Mr Matthew submitted that if was the rules enforced at the date of decision which had to be applied, in accordance with Odelola [2009] UKHL 25, subject to any transitional provisions. The cases of Zhang and Chikwamba did not assist the appellant. The outcome of the appeal depended upon the application of Appendix FM. If the appellant failed under the financial requirements on the basis of the evidence

then he would fail on the financial requirements if he applied for entry clearance from Pakistan. The rule required an annual income of £18,600. The judge found that the couple had an income of about £15,000. The appellant was self-employed at the time. His earnings over a period of 3 months were enough to raise the couple's income over £18,600 but this was not an annual income. Their annual income was still £15,000. The relevant provisions to be followed were paragraphs 18 and 19 of Appendix FM-SE. On the application of MM [2013] EWHC 1900 (Admin), Mr Matthews relied on Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 640.

9) Mr Matthews continued that the Judge of the First-tier Tribunal was entitled to assess the strength and quality of the relationship when considering proportionality under Article 8. The judge considered whether it was reasonable to expect the couple to relocate to Pakistan. That might have been an error but the error was in favour of the appellant. There was no error of law such that the decision should be set aside and remade.

10) For the appellant, Mr Ndubuisi submitted that the respondent had no issue with the relationship between the couple although the judge questioned the relationship in her determination. The couple had been cohabiting from 2010 until 2014. The judge appeared to have been looking for the couple's intention to marry but she should have been looking at the period of cohabitation. The question of marriage should not have been an issue at all. The decision should be re-made in favour of the appellant. The question of whether a further hearing was required depended on the application of Appendix FM. If the evidence of the appellant's self-employed income was taken into account then the financial requirements were met.

11) In relation to the determination by the Judge of the First-tier Tribunal I have two concerns about what is otherwise a thorough and carefully written determination. The first concern relates to the period of time in respect of which the couple's earnings should have been assessed. The second relates to the judge's approach to the couple's relationship when considering the application of Article 8.

12) In relation to the question of dates, the background to the application is important. The application was made in January 2012, before the new Rules, which include Appendix FM, came into force on 9 July 2012. In theory, therefore, the application fell to be considered under the old rules and, in particular, paragraph 295D. As Mr Matthews pointed out, however, the appellant could not succeed under paragraph 295D because he did not have leave under the Immigration Rules at the time he made his application. He had discretionary leave outwith the Rules for the purpose of pursuing contact proceedings in respect of his child of his previous marriage. The appellant therefore could not succeed under the old Rules.

13) By the time the respondent came to consider the application the new Rules were in force. The application could not succeed as originally made but only under Article 8 in respect of the appellant's right to respect for his private or family life. When considering an application under Article 8 the respondent will apply Appendix FM

and paragraph 276ADE because these are intended to provide for consideration of issues relating to private and family life. Accordingly the respondent was entitled to proceed under Appendix FM, not on the basis that the application as originally made fell under Appendix FM, but on the basis that the appellant was claiming a right to remain in the UK on the basis of private and family life.

14) Nevertheless, the financial assessment required under Appendix FM contains a provision which causes some considerable difficulty. As Mr Ndubuisi pointed out, paragraph 2 of Appendix FM-SE, which sets out the evidence of financial requirements which must be provided, refers to wage slips being provided for periods prior to the date of the application. In respect of this particular application, however, it was made in January 2012, before Appendix FM came into force. Similarly, paragraph 12A, which appears to be directly applicable to this application were it made under Appendix FM, again refers to wage slips for a period of 6 months prior to the date of application.

15) In considering the application under Appendix FM the respondent appears to have taken a pragmatic approach in writing to the appellant on 26 September 2012 (pages 193-194 of the appellant's first Inventory) requesting financial documents from the appellant and his partner. The appellant's position, which the judge set out at paragraph 17 of her determination, was that between September 2011 and September 2012 the appellant's partner earned approximately £15,100 per annum. In the period from February to April 2012 the appellant himself earned £4,500. These two sums together made a joint income of approximately £19,600 for the period September 2011 to September 2012.

16) In making a financial assessment under Appendix FM, however, the respondent took the P60s for the appellant and his partner for the year ending 5 April 2012 and found a combined annual income of £18, 441.14. This included the appellant's earnings for the month of February and March but not for the month of April, hence the shortfall.

17) To summarise, at the hearing before the First-tier Tribunal the respective positions of the parties in respect of the financial requirements were as follows. The appellant sought to rely on his partner's earning for the year up to September 2012 and his own earnings for the 3 months from February to April 2012. If the year up to September 2012 was taken as the period over which earnings were calculated then the appellant and his partner satisfied the minimum income threshold of £18,600. The respondent sought to take the couple's earnings for the tax year ending 5 April 2012, which excluded the appellant's earnings for April 2012, and therefore produced a combined income of just below the threshold of £18,600. The Judge of the First-tier Tribunal pointed out, however, at paragraph 18 of the determination, that Appendix FM-SE generally requires that financial information is taken into account from a period of 6 months prior to the date of the application. In other words, neither the appellant's approach nor the respondent's approach complied with the evidential requirements of Appendix FM-SE.

18) Having pointed out this anomaly, the Judge of the First-tier Tribunal did not pursue it. Instead she had regard to the couple's earnings up to the date of the hearing, including the appellant's evidence about his anticipated earnings from self employment. The judge found that the couple's income was below the £18,600 threshold apart from during a 3 month period from February to April 2012.

19) In making this finding the judge fell into error. There was no more justification for the judge to consider the couple's income up to the date of the hearing than there was for the Secretary of State to consider the income for the tax year up to 5 April 2012. Both periods were outwith the scope of Appendix FM-SE.

20) It might be argued that the alternative period would have been the 6 months prior to the application in January 2012. However, the difficulty with this proposal, as Mr Ndubuisi pointed out, is that Appendix FM is not retrospective. The application of January 2012 preceded the introduction of Appendix FM. There is no basis in Appendix FM or its transitional provisions which would permit an application made in January 2012 to be considered as if it were made on or after 9 July 2012. There the matter appears to rest.

21) Accordingly, as far as the application under the Immigration Rules is concerned, the application falls between two stools. It cannot succeed under paragraph 295D for the reasons already set out above. It cannot succeed under Appendix FM because the financial requirements in Appendix FM do not provide a mechanism for calculating the income of a couple whose application was made prior to 9 July 2012. Accordingly it would seem the application cannot succeed under the Immigration Rules.

22) Quite rightly the Judge of the First-tier Tribunal went on consider the appeal under Article 8 outwith the Rules. Once again, her consideration is thorough but, as I have already indicated, her reasoning includes an irrelevant consideration. The judge records at paragraph 35 that the couple met four years ago and have been in a relationship since then. The judge then comments that the couple are not married or engaged. She states they have what she regards as vague plans for the future of marrying and settling down and having their own family. The judge then records that she had only their own evidence that they met some four years ago and have been in a relationship since, although this was never questioned up until this point.

23) Mr Matthews submitted that the judge was entitled to assess the quality of the relationship in her consideration of Article 8. As a general proposition this is correct but I have two difficulties with the judge's approach. The first is that she has questioned the relationship for the first time in her determination and the couple had no notice that it was to be questioned. The second issue is that when assessing the relationship of an unmarried couple there is no requirement that they should intend to marry or have plans to marry in the future. I am satisfied that the judge's reasoning in respect of Article 8 contains errors of law and for this reason her decision must be set aside.

24) Mr Matthew submitted that the principle of Chikwamba would not assist the appellant as if he returned to Pakistan he would still be unable to meet the relevant financial requirements in Appendix FM. I consider, however, that this submission requires to be qualified in two ways. The first arises from what the Judge of the First-tier Tribunal stated at paragraph 39 of her determination where she pointed out that the sponsor had increased her income previously and could do so again to raise her above the £18,600 threshold. In other words, the sponsor's income is not fixed were an application be made in the future. The second qualification relates to the past. The application was not made under Appendix FM but was made under the old Immigration Rules before Appendix FM came into force. As already pointed out, the provisions of Appendix FM-SE do not provide a clear mechanism for calculating income where an application was made before 9th July 2012. Furthermore, in the circumstances of this appeal the question of the adequacy of income depends to a large extent on the period taken for assessment.

25) As is clear from Zhang, the Chikwamba principle still applies, in particular, in respect of applications made before 9 July 2012. The basic question, as put succinctly in Hayat [2012] EWCA Civ 1054, is whether there is a sensible reason to require the appellant to return to Pakistan to apply for entry clearance. If there is not then it will be a disproportionate interference with family life to require him to do this. Mr Matthews' answer to this question would be that the reason is for the appellant to demonstrate that the requirements of Appendix FM are met, particularly the financial requirements. To this the appellant might respond that these financial requirements were not in force at the time the application was made. More significantly in my view, the financial requirements in Appendix FM provide no mechanism for assessing evidence of financial requirements where an application was made prior to 9 July 2012 and, on one assessment, the requirements were indeed met. In other words, why should the appellant be expected to return to Pakistan to provide evidence of financial requirements which was not necessary at the time he originally made his application and which, depending on the period of assessment, was satisfied anyway?

26) There is, of course, a public interest in maintaining effective immigration control and this must be balanced against the appellant's right to private and family life. The chief stumbling block preventing the appellant from succeeding under Appendix FM was the £18,600 income threshold. Depending on the period taken for calculating income, however, the appellant either satisfied or did not satisfy this requirement. If the period taken by the respondent up to 5 April 2012 was used, then the appellant fell slightly short but if the period preferred by the appellant, for the year up to September 2012 was taken, then he met the requirement. Neither of these periods is contemplated by the terms of Appendix FM-SE because neither of them falls prior to the date of the application. There is no good reason for choosing one of these periods rather than the other. Both are outwith the terms of Appendix FM but one favours the appellant and the other does not. In these circumstances it is difficult to see how the public interest in maintaining immigration control is to be served when by a calculation under one period the appellant meets the threshold and by calculation under another period he does not, but neither period is contemplated by the Rules.

27) In these circumstances I am satisfied that to require the appellant to return to Pakistan to make an application for entry clearance would be a disproportionate interference with his right to respect for private and family life. Accordingly, the appeal will succeed under Article 8.

28) The comments by the Judge of the First-tier Tribunal in respect of section 47 are correct in law but as the appeal falls to be allowed under Article 8 the removal decision will fall away.

29) The Judge of the First-tier Tribunal made no fee award because the appeal was dismissed. In allowing the appeal I have to consider whether a fee award should be made. In the circumstances of this appeal it cannot be said that there was clear evidence available prior to the respondent's decision on which the application ought to have been granted. Accordingly I make no fee award.

Conclusions

30) The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

31) I set aside the decision.

32) I re-make the decision in the appeal by allowing it under Article 8.

Anonymity

33) The First-tier Tribunal did not make a direction for anonymity and I consider that no order requires to be made.

Fee Award Note: This is not part of the determination

In the light of my decision to re-make the decision in the appeal by allowing it, I have considered whether to make a fee award and for the reasons set out above I make no fee award.

Signed Date

Judge of the Upper Tribunal