Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/26080/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 29th May 2014	**On 6th June 2014**

Before

UPPER TRIBUNAL JUDGE RENTON

Between

SALMAN AHMED

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Hossain of London Law Associates
For the Respondent: Ms K Pal, Home Office Presenting Officer

DETERMINATION AND REASONS

Introduction

1. The Appellant is a male citizen of Bangladesh born on 8th March 1987. He first arrived in the UK on 9th December 2012 when he was given limited leave to enter as a visitor for the purpose of marriage until 26th May 2013. The Appellant applied for

leave to remain on the basis of his subsequent marriage. That application was refused for the reasons given in a Notice of Decision dated 12th June 2013. At the same time it was decided to remove the Appellant under the amended provisions of Section 47 Immigration, Asylum and Nationality Act 2006. The Appellant appealed, and his appeal was heard by Judge of the First-tier Tribunal Emerton (the Judge) sitting at Taylor House on 14th January 2014. He decided to allow the appeal under the Immigration Rules and on Article 8 ECHR grounds for the reasons given in his Determination dated 17th January 2014. The Respondent sought leave to appeal that decision, and on 4th April 2014 such permission was granted.

Error of Law

2. I must first decide if the decision of the Judge contained an error on a point of law so that it should be set aside.

3. According to the Notice of Decision, the Appellant's application for leave to remain was refused under the provisions of paragraph R-LTRP.1.1 of Appendix FM of HC 395 because the Appellant had failed to show that he satisfied the maintenance requirements set out in paragraph E-LTRP.3.1. This was because the specified evidence showed that the Sponsor had an income from employment of £15,414.56 per annum, and £1,635 from self-employment. This gave a total of £17,049.56 which was less than the required amount of £18,600. Further, the Notice of Decision stated that the Appellant did not meet the requirements of paragraph EX.1 of Appendix FM, nor of paragraph 276ADE of HC 395.

4. According to the Determination, the Judge allowed the appeal on the basis of a different calculation of the Sponsor's income. Those calculations are set out in paragraphs 19 to 21 inclusive of the Determination. Using a period of twelve months up to the date of decision, the Judge found that the Sponsor had an income of £12,874.92 from employment and £6,565 from self-employment, making a total of £19,439.92 which figure is in excess of the required figure of £18,600. Further, the Judge allowed the appeal on Article 8 grounds on the basis that the Appellant qualified for leave to remain.

5. At the hearing, Ms Pal argued that the Judge had erred in law in calculating the Sponsor's income as he had used an incorrect period of time. According to Appendix FM-SE of the Immigration Rules, the Appellant was required to submit specified documents showing income for the twelve month period up to the date of application. The Judge had therefore erred in law by making calculations according to a twelve month period up to the date of decision. If the correct period had been used, the self-employed income of the Sponsor, applying Appendix FM-SE of the Immigration Rules, would have produced an income of only £2,245. The Judge had calculated the Sponsor's earnings from employment to amount to £13,124.52, and taking these two figures together, the Sponsor's income fell well short of that required. The Judge should therefore have dismissed the appeal.

6. Finally, Ms Pal submitted that the Judge had erred in law in his assessment of the Appellant's Article 8 rights as he had done so on the basis that the Appellant met the requirements of the Immigration Rules.

7. In response, Mr Hossain conceded that in calculating the Sponsor's income the Judge had erred in law as explained by Ms Pal. However he argued that the Judge had not erred in law in allowing the appeal under Article 8. It was not disputed that the Appellant had a family life with his wife in the UK.

8. I find an error of law in the Judge's decision to allow the appeal under the Immigration Rules. It is now agreed between the parties that the Judge used a wrong period of time in order to calculate the Sponsor's earnings and I so find. This is a material error because had the correct period been used, the Sponsor's earnings would have been insufficient to cross the threshold required by paragraph E-LTRP.3.1 of Appendix FM.

9. Having allowed the appeal under the Immigration Rules, it is no surprise that the Judge also allowed the appeal on Article 8 ECHR grounds, but in so doing he again erred in law by finding it "uncontroversial that removal would be disproportionate" on the basis that the Appellant qualified for leave to remain.

10. I therefore set aside both the decisions of the Judge to allow the appeal under the Immigration Rules and also on Article 8 ECHR grounds. I proceeded to remake those decisions.

Remade Decision

11. I was asked to remake the decisions on the basis of the evidence contained in the file. I heard further submissions from both representatives. Ms Pal did not want to add to what she had already said concerning maintenance, but as regards Article 8, she referred me to the contents of the Refusal Letter dated 12th June 2013 and submitted that there were no arguably good grounds allowing me to consider if there were compelling circumstances not sufficiently recognised under the Immigration Rules to consider the Appellant's Article 8 rights.

12. In response, Mr Hossain argued that now it was known that the Appellant's wife was in the advanced stages of pregnancy, the Appellant could meet the requirements of paragraph EX.1 of Appendix FM and therefore the appeal should be allowed on human rights grounds.

13. It is now not in dispute that on a correct calculation of the Sponsor's available income, the Sponsor had insufficient income to meet the requirements of the Immigration Rules and therefore I dismiss the appeal made under those Rules accordingly.

14. As regards Article 8, the bare facts, which are not in dispute, are that the Appellant arrived in the UK on 9th December 2012 in order to marry his wife, the Sponsor. They marred on 28th January 2013 since when they have lived together at the home of

the Sponsor's mother. The Sponsor is a British citizen who was born in the UK on 13th April 1993. She is now pregnant and is expected to be delivered of her child on 21st July 2014.

15. On this evidence I must find that the Appellant cannot rely upon the exception contained in paragraph EX.1.(b) of Appendix FM, bearing in mind the decision in **Sabir (Appendix FM – EX.1 not free standing) [2014] UKUT 00063 (IAC)**. There was no evidence before me that there were any insurmountable obstacles to family life between the Appellant and the Sponsor continuing outside the UK. That being the case, I find that there are no compelling circumstances in this case which might persuade me that leave to remain should be granted outside the Immigration Rules under the provisions of Article 8 ECHR.

16. I therefore dismiss the appeal.

Decision

17. The making of the decision of the First-tier Tribunal under the Immigration Rules and on Article 8 ECHR grounds did involve the making of an error on a point of law.

18. I set aside both decisions.

19. I remake those decisions in the appeal by dismissing it.

Anonymity

20. The First-tier Tribunal did not make an order pursuant to Rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and I find no reason to make such an order.

Signed Date

Upper Tribunal Judge Renton