



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/07444/2013

THE IMMIGRATION ACTS

Heard at Birmingham
On 20 June 2014
Prepared 20 June 2014

Determination Promulgated
On 27 June 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE DAVEY

Between

ENTRY CLEARANCE OFFICER - ISLAMABAD

and

MRS SAMINA RAZAQ
(ANONYMITY ORDER NOT MADE)

Appellant

Respondent

Representation:

For the Appellant: Mr D Mills, Senior Presenting Officer
For the Respondent: Mr Haroon Khan, Sponsor

DETERMINATION AND REASONS

1. In this appeal the Appellant is referred to as the ECO and the Respondent is referred to as the claimant.

2. The claimant, a national of Pakistan, date of birth 12 April 1993, appealed against the ECO's decision dated 27 February 2013 to refuse entry clearance as a partner under Appendix FM of the Immigration Rules, with particular reference to paragraphs EC-P.1.1 and EC-P.1.3 of Appendix FM of the Immigration Rules.
3. That appeal came before First-tier Tribunal Judge Sangha who, on 14 March 2014, allowed the appeal on Article 8 ECHR grounds, but dismissed the appeal under the Immigration Rules.
4. Permission to appeal that decision was given by Designated Judge of the First-tier Tribunal Dearden on 24 April 2014.
5. The ECO's criticisms can be put very shortly. It was not disputed that the claimant had not met the requirements of the Immigration Rules in failing to provide the documents and accordingly the application was properly refused under paragraph EC-P.1.1(b) of Appendix FM of the Rules.
6. Up to the conclusion, at paragraph 18 of the determination, the decision properly dealt with the issues faced on the evidence and the judge concluded that the application was properly refused by the ECO and that the claimant could make a fresh application providing all the specified documents as required under Appendix FM-SE.
7. Where the judge erred was that he went straight on to consider whether or not a case was made out under Article 8 of the ECHR because he did not perform the exercise identified in *MF Nigeria* [2013] EWCA Civ 1192 and *Nagre* [2013] EWHC 720 (Admin) and, in the light of *Gulshan* [2013] UKUT 640 (IAC) and other case law, and failed to consider whether there were circumstances which were not addressed within the Immigration Rules, or whether there were compelling circumstances not recognised under the Rules which militated in favour of an Article 8 ECHR assessment.

8. It is correct that that is what the judge, although ultimately it makes a significant difference, concluded that there was evidence, but failing to notice that it was post-decision and not in contemplation at the date of the ECO's decision. The Judge thought the later evidence showed the Sponsor had earnings of £19,415 which exceeded the financial threshold of £18,600 per annum. The judge evidently made an error about the actual earnings because the relevant tax return, which postdated the date of decision, even if he was entitled to take it into account, showed that the 'gross turnover' of the business at the time, was £19,415. However, after deductions and allowances, the net profit was £10,209. With further deductions, the profit from self-employment upon which tax was to be taken off was £9,450. Thus the net position was very different from that which the judge proceeded on and the judge made an error of fact amounting to an error of law when he concluded that the claimant's evidence did meet the financial threshold of the Rules. Plainly the relevant evidence at the time, bearing in mind the date of the ECO's decision, was not in being or contemplated. In the circumstances the claimant did not meet and could not meet the requirements.. Similarly that the judge had no basis for what was the core of the reasoning for allowing the appeal under Article 8, even if expressed in a limited fashion, on the basis that the ECO's decision was a disproportionate interference with family life rights under Article 8(2).
9. I find the Original Tribunal made an error of law and the Original Tribunal's decision cannot stand.
10. It is accepted that I should remake the case on the basis of the material before me. I explained to the Sponsor why it would be better for him and the claimant to make a fresh application, rather than pursue what was a lost cause and have any further delay in considering the present claim. There plainly was no evidential basis, not least in the light of the decision in AAO (Somalia) [2011] EWCA Civ 840 [37-39], to show that the appeal would succeed under Article 8, when the lawful operation of immigration controls, which was not substantively challenged, was not said to be

disproportionate to the legitimate end. Quite simply all that had occurred, somewhat unfortunately, was that the relevant material had not been provided by the Appellant's sponsor. The issue raised by the judge in the case of MM [2013] EWHC 1900 (Admin) really takes this matter no further, quite simply because there was no substituted figure given and, on the face of it, the figure of £18,600 financial threshold still stands: The judge made no findings in relation to any lesser amount in fact being appropriate.

11. Accordingly in remaking this decision I find that the position stood at the date of the ECO's decision that the claimant had not provided the relevant information as required which met the requirements of the Rule. It is not said that the necessary information could not be provided or that a fresh application could not be made which met the requirements of the rules. It followed that, on the face of it, there was not a basis of exceptional circumstances for consideration of the appeal under Article 8 of the ECHR.
12. The ECO's appeal succeeds. The following decision is substituted. The appeal of the Mrs Razaq against the ECO's decision of 27 February 2013 is dismissed.

ANONYMITY ORDER

13. No anonymity was requested and no anonymity order is appropriate or necessary.

FEE AWARD

14. In these circumstances therefore the judge's decision in making a fee award against the ECO was driven by the outcome which cannot stand. Since the claimant's appeal has been dismissed, no costs order may be made.

Signed

Date 24 June 2014

Deputy Upper Tribunal Judge Davey