Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/05220/2014

THE IMMIGRATION ACTS

Heard at Field House
On 14th January 2015

Decision & Reasons Promulgated
On 21st January 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MR ARIAZ ANAAZ ALI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER – TRINIDAD AND TOBAGO

Respondent

Representation:
For the Appellant: Mr R Molyneux (Solicitor)
For the Respondent: Ms J Isherwood (HOPO)

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Gurung-Thapa, promulgated on 4th September 2014, following a hearing at Stoke on 7th August 2014. The hearing before the judge was by way of a "paper hearing" in that no oral evidence or submissions were presented. In the determination, the judge dismissed the appeal of Mr Ariaz Anaaz Ali who, subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

© CROWN COPYRIGHT 2015

The Appellant

2. The Appellant is a male, a citizen of Trinidad and Tobago, who was born on 16th November 1983. He applied for entry clearance as a partner of Shana Baksh, who had indefinite leave to remain in the UK, and the couple of a child together by the name of Aiesha Ali, born on 3rd September 2009, who is a British citizen. The Respondent refused the application on 24th March 2014 on the basis that the Appellant could not meet the requirements of Appendix FM.

The Appellant's Claim

3. The Appellant's claim is that he married Shana Baksh on 13th June 2008 (and not on 28th June 2008). He was uncertain what documentary evidence he should provide to show that his marriage was genuine and subsisting (particularly in the light of the fact that there was a child of the marriage) but he had submitted some documentary evidence. He had also "attached the payslips for himself and his Sponsor for the past year to corroborate the letter submitted by the Sponsor's employer confirming her annual income" (paragraph 11).

The Judge's Findings

4. The judge held that,

> "While I accept that the Sponsor's annual gross salary as at the date of the decision was £18,720, I take note of the fact that there is a child of the marriage. This means the Appellant and the Sponsor would have to show an additional £3,800. This was at the date of the decision. I note subsequently a second child has been born to the Appellant and the Sponsor on 10th June 2014. This would mean that an additional £2,400 would be required for the second child. However, I have not taken the second child into consideration given the date when the Appellant was refused ..." (paragraph 16).

The appeal was dismissed.

Grounds of Application

5. The grounds of application state that the judge erred in law because paragraph E.ECP.3.1 defines a child and it is quite clear that, for a British citizen child, there was no need to show additional earned income, over and above the income of £18,600 for the Appellant and the Sponsor. In giving regard to this, and overlooking the fact that the Appellant was able to point to income of £18,720, the judge had erred in law.

6. On 24th November 2014, permission to appeal was granted on this basis.

7. On 10th December 2014, a Rule 24 response was entered to the effect that the Appellant was refused on the basis that there was insufficient evidence provided to the ECO as required by Appendix FM-SE. The ECO was the Sponsor had not demonstrated by the required evidence in FM-SE that the income level is that required to meet the Rules.

Submissions

8. At the hearing before me on 14th January 2015, Mr Molyneux, appearing on behalf of the Appellant, handed up a skeleton argument together with the Immigration Directorate Instructions which dealt with "exceptional circumstances or compassionate factors (entry clearance)". He made two submissions. First, that the judge had made a clear finding of fact that the Appellant met the financial requirement because there was evidence of earnings of £18,720. Given this, the appeal should have been allowed. It was not because a judge erroneously took the view that an extra child required an additional sum of £3,800 (see paragraph 3) and this was wrong. Second, if this was wrong, then there was automatically a breach of Article 8 and a breach of Section 55 BCIA (both of which the judge had considered at the end of her determination) because if the Rules were met, there cannot be a pursuit of legitimate aim argument that the Respondent could employ to defeat the application.

9. For her part, Ms Isherwood relied upon the Rule 24 response. She submitted that the initial refusal by the Entry Clearance Officer was on the basis that the Appellant had not provided the payslips and the bank statements. The evidence simply had not been provided. The judge himself could not point to what evidence was before her, and if the evidence was not set out, then the appeal could not have been allowed in accordance with the Rules. In that event, the challenge that the judge concluded earnings of £18,720, was immaterial.

10. In reply, Mr Molyneux submitted that this was a "paper hearing" and much of the evidence had been sent directly to the hearing centre at Kingston. The judge obviously had regard to this. For example, at paragraph 11, the judge refers to "attached payslips for himself and his Sponsor" provided by the Appellant himself. Also at paragraph 13 of the determination the judge observes that, "I have also noted the payslips of the Appellant and the Sponsor for various dates". If on that basis, the judge was satisfied that the Appellant was earning £18,720 then that was the end of the matter. It was not the end of the matter here because the judge again wrongly went on to consider there to be in existence a requirement for additional £3,800 for a child which was contrary to paragraph E-ECP.3.1.

Error of Law

11. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision and remake the decision. It is clear that the judge had regard to "attached payslips" (see paragraph 11) and to "the payslips for the Appellant and the Sponsor for various dates" (see paragraph 13). On that basis, the judge was satisfied that "the Sponsor's annual gross salary as at the date of decision was £18,720" (paragraph 16). The financial requirements of the Rules were at that stage satisfied. As for the genuineness of the marriage there was a child of the marriage and indeed a second child born and the judge was not of the view that this was a marriage of convenience or a marriage that was not otherwise genuine and subsisting.

12. I accept Mr Molyneux's submission that if the Rules were satisfied then a refusal violates, not just the Immigration Rules, but also Article 8 rights to family life, in that the decision is not in accordance with the law, is not legitimate, and is altogether disproportionate. It is on this basis also that I remake the decision under Section 12(2) of TCEA 2007. I remake the decision on the basis of the findings of the original judge, the evidence before her, and the submissions that I have heard today. For the reasons I have given above, I am allowing this appeal.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. I remake the decision as follows. This appeal is allowed.

No anonymity order is made.

Signed Date

Deputy Upper Tribunal Judge Juss 19th January 2015