Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/04661/2015

THE IMMIGRATION ACTS

Heard at Bennett House, Stoke	**Decision Promulgated**
On 4th July 2016	**On 22nd July 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE GARRATT

Between

MUHAMMAD RIZWAN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J Howard, Solicitor of Fountains Solicitors
For the Respondent: Mr A McVeety, Senior Home Office Presenting Officer

DECISION AND DIRECTIONS

1. In this appeal the Secretary of State becomes the appellant. However, for the avoidance of confusion and for the sake of consistency, I shall refer to the parties as they were before the First-tier Tribunal.

Background

2. On 9th May 2016 Judge of the First-tier Tribunal E B Grant gave permission to the respondent to appeal against the decision of Judge of the First-tier Tribunal McDade in which he allowed the appeal against the decision of the respondent Entry Clearance Officer to refuse entry clearance as a partner in accordance with the provisions of Appendix FM of the Immigration Rules. The appellant is a male citizen of Pakistan born on 1st July 1990.

3. Judge Grant noted that the grounds argued that the judge had misdirected himself with regard to the application of Article 8. This was because it was contended that the judge failed to consider whether or not the circumstances of the claim were exceptional and the outcome unjustifiably harsh, it being open to the appellant to take another English language test and make a further entry clearance application. The judge had also allegedly failed to acknowledge that,whilst the best interests of a child were a primary consideration, they were not the only interests to consider in the proportionality assessment. The judge should not have found that there were exceptional circumstances enabling him to allow the appeal. Judge Grant thought all these matters were arguable.

Submissions

4. Mr McVeety confirmed that the respondent relied upon the terms of the grounds of application and the grant. He pointed out that a grant of leave under Article 8 would not, in any event, have been as valuable to the appellant as a grant of settlement under the Rules. The appellant could have come within the Rules if a fresh application had been made and a valid English language certificate submitted.

5. In relation to the issue of finance also raised in the refusal, Mr McVeety acknowledged that it had been accepted, before the judge, that the sponsor was earning the required gross annual salary at the time of the decision.

6. Mr McVeety also contended that it could not be a breach of Article 8 if, as the judge had decided, the appellant could easily meet the requisite English language standard. The appellant was living outside the United Kingdom so nothing would be lost by making a further application. He added that a 'near miss' did not strengthen the human rights claim. He thought that the judge had not identified any compelling circumstances justifying a grant of leave outside the Immigration Rules.

7. My attention was drawn to paragraphs 51 and 53 of the Court of Appeal decision in *SS (Congo)* [2015] EWCA Civ 387 specifying that good reason should be put forward to justify giving preferential treatment to an applicant in relation to the supporting documentary evidence required under the Rules. Further, as paragraph 58 of the same decision makes clear, an applicant is not entitled to apply for leave to enter at a time when the requirements of the Rules are not satisfied, in the hope that by the time the appellate process has been exhausted, those requirements will be satisfied as that would be an illegitimate way of trying to jump the queue for consideration. Mr McVeety concluded by indicating that he believed the appeal should be withdrawn by the appellant.

8. Mr Howard relied upon the reply submitted under Rule 24 in which he also refers to the decision of the Court of Appeal in *SS (Congo)* but on the basis that the judge had carried out the correct test and assessment. He drew my attention to paragraph 56 of that decision pointing out that a "near miss" may be a relevant consideration which tips the balance under Article 8. The response also argues that the judge had given clear and cogent reasoning for finding there were exceptional circumstances and so had directed himself properly.

9. Mr Howard contended that it was in paragraph 3 of the First-tier Judge's decision that the compelling circumstances were identified, particularly the need to require the appellant to sit another English language test, for the third time, when, had a second certificate been with the Entry Clearance Officer at the time of his decision, a further application would not have been required. These circumstances therefore affected the reunification of the appellant's family, the best interests of his child and the length of separation. All these were factors considered by the judge.

10. Mr Howard indicated that, if an error was, however, found then the best interests of the appellant's child would need up-to-date consideration with the provision of fresh evidence. On that basis he suggested that the matter should be remitted to the First-tier Tribunal.

Conclusions

11. After I had considered the matter for a few moments, I indicated that I was satisfied that the decision of the First-tier Judge showed material errors on points of law such that it should be set aside and the appeal remitted to the First-tier Tribunal for hearing afresh. My reasons for that conclusion now follow.

12. Although the main issue before the First-tier Judge was the appellant's failure to provide the appropriate English language test certificate (it having been found that the appellant could meet the financial requirements of the Rules), the judge's approach to consideration of human rights issues outside the Immigration Rules is flawed. The judge thought that a relevant circumstance justifying consideration of the Article 8 claim outside the Rules was because the appellant had sent to the Entry Clearance Officer a valid English language test certificate even if that did not arrive before the refusal decision was made. However, I note that the appellant claimed he had passed an acceptable English language examination but applied for entry clearance before the certificate confirming his success was available. That situation is dealt with by the Court of Appeal in *SS (Congo)* in paragraph 58, the relevant part of which I have already summarised, above. An applicant should not apply for leave to enter at a time when it was known that the requirements of the Rules (particularly documentary) were not satisfied. Neither that circumstance nor the fact that the appellant was already separated from his family and, on the basis that he could comply with the Rules, was in a position to make a further, successful, application were factors considered by the judge before concluding that there were compelling circumstances.

13. Additionally, the decision does not show that the judge gave appropriate or any consideration to the public interest in immigration control before reaching his decision. There is no reference to Sections 117A and 117B of the Nationality, Immigration and Asylum Act 2014 and it is not clear that the judge applied the

principles relating to the public interest even if he did not specifically refer to the Sections. The decision therefore shows a material error on a point of law in this respect also.

14. As the re-making of the decision will require consideration of evidence to the date of hearing about the best interests of the appellant's child in the United Kingdom in addition to the basis for considering human rights outside the Rules, it is appropriate that this matter should be remitted to the First-tier Tribunal for hearing afresh. This accords with the Practice Statements by the Senior President of Tribunals of 25th September 2012 at paragraph 7.2.

Decision

The decision of the First-tier Tribunal shows an error on a point of law such that if should be set aside and re-made by remittal to the First-tier Tribunal.

Anonymity

The First-tier Tribunal did not make an anonymity direction nor do I consider one appropriate in this case.

DIRECTIONS

15. The appeal is remitted to the First-tier Tribunal for hearing afresh on all issues.

16. The hearing will take place at the Stoke Hearing Centre on a date to be specified by the Resident Judge.

17. No interpreter will be provided for the hearing unless the parties indicate to the contrary.

18. The time estimate for the remitted hearing is two hours.

Signed Date **22nd July 2016**

Deputy Upper Tribunal Judge Garratt