



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/08095/2014

THE IMMIGRATION ACTS

Heard at: Manchester
On: 19th November 2015

Decision & Reasons Promulgated
On: 19th January 2016

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

Entry Clearance Officer, Islamabad

Appellant

and

Atif Lal

(no anonymity direction made)

Respondent

Representation:

For the Appellant: Mr A. McVeety, Senior Home Office Presenting Officer
For the Respondent: Ms S. Chaudhri, Sponsor

DETERMINATION AND REASONS

1. The Respondent is a national of Pakistan born 1st February 1988. On the 21st April 2015 the First-tier Tribunal (Judge Nicol) allowed his appeal against the decision to refuse him entry clearance as a 'partner' under Appendix FM of the Immigration Rules. The appeal was allowed on human rights grounds. The Entry Clearance Officer (ECO) now has permission to appeal that decision¹.

¹ Permission granted by First-tier Tribunal Judge Landes on the 12th June 2015.

2. The Respondent's application for entry clearance was made on the 23rd November 2013. It was based on his marriage to British national Saba Chaudhri. Together they submitted evidence of the Sponsor's employment including a letter from Highfield Taxis and wage slips.
3. There was some delay in the application being dealt with, apparently because the ECO was awaiting the outcome of the appeal in MM (Lebanon) [2014] EWCA Civ 985. An preliminary decision was notified in June 2014 but the final notice of decision is dated the 16th December 2014. The ECO was not satisfied that the documents relating to the Sponsor's employment were genuine. In addition the application had not been supported by the evidence specified in Appendix FM-SE, in particular bank statements showing the claimed salary being deposited. As to the relationship, the ECO was not satisfied that this was a genuine and subsisting marriage and that the parties intended to live together permanently.
4. When the matter came before the First-tier Tribunal the Judge heard oral evidence from the Sponsor and had regard to the bundles produced by both parties. Having done so he made the following findings of fact:
 - i) The marriage is genuine;
 - ii) The Sponsor is employed by AA Law Solicitors;
 - iii) The Sponsor has a second job with Highfield Taxis;
 - iv) Her combined income from those employments is higher than the required threshold of £18,600

Paragraph 22 notes that in closing submissions the HOPO on the day conceded that there was a subsisting relationship, and that the Sponsor was employed as claimed.

5. In respect of Appendix FM-SE the determination says the following:

"There is a technical argument that the Sponsor's wages paid in case by one of her employers was not paid into her bank account before being used on her living expenses but this does not seem to be a significant element in the refusal. The Sponsor now pays her wages into her bank account before using them. Based on the evidence presented, there is nothing to suggest that a fresh application would be rejected"

It would appear that the Tribunal accepted this "technical argument", made in respect of her employment with Highfield Taxis, to be fatal to the case under Appendix FM since the appeal is dismissed under the Immigration Rules.

6. The determination goes on to address Article 8 as follows:

"26. ... The Sponsor and Appellant are in a subsisting relationship and, to the extent that they are able, have a family and private life together. The decision of the respondent in this case prevents them developing this. With regard to delay, this was because the Respondent was waiting for the

outcome of another case concerning the financial requirements. It was reasonable for the Respondent to wait for this as it might, if decided differently, have resulted in the application being allowed. However, the delay has been aggravated by the failure of the Respondent to have proper regard to the information supplied by the Appellant and the allegations made concerning the quality of the information supplied.

27. Taking all of the factors into account I find that there are exceptional circumstances warranting the consideration of this matter under Article 8 outside the Rules.

28. I have found that there is a genuine family life between the Appellant and the Sponsor and that the decision does significantly interfere with this. I also find that the decision is in accordance with the law and for the purposes of maintaining immigration control. As a final matter consideration has to be given to whether or not the decision to refuse entry clearance was proportionately justified. Considering all the matters placed before me, I find in the circumstances that the decision is not proportionality justified. At most the decision taken only delays the inevitable and has wrongly resulted in accusations of falsehood. The benefit of enforcing immigration control is in this case outweighed by the harm that it does to the relationship between the Appellant and the Sponsor.

29. Accordingly, even if the Appellant did not meet the requirements of Appendix FM, the Appellant and the Sponsor's rights under Article 8 outside of the Rules would be breached by the decision to refuse him entry to the United Kingdom.

30. For the reasons set out above the appeal is to be allowed."

Error of Law - Submissions

7. The ECO submits that this reasoning is flawed in law on the following grounds:
 - i) The Tribunal failed to identify what compelling circumstances there were to justify consideration of Article 8 outside of the Rules: Gulshan [2013] UKUT 00640 (IAC)
 - ii) An appeal can only be allowed under Article 8 where there is an "unjustifiably harsh outcome": Nagre [2013] EWHC 720 (Admin)
 - iii) It is open to the applicant to make a new application now that he meets all of the requirements of the Rules.
8. In his submissions Mr McVeety adopted the grounds and amplified them with reference to SS (Congo) [2015] EWCA Civ 387: Article 8 is not to be treated as a general dispensing power.
9. Ms Chaudhry explained that she has had to wait a very long time for her husband to join her. She did not have the benefit of legal representation but she understood that she and her husband had always met the requirements of the Rules - she had earned over the required £18,600 before they made the

application, and continues to do so today. She had always had savings – in fact at the time of the original application she had over £30,000 saved up but had used this to buy a house for herself and her husband shortly before the decision. She had paid her cash wages into the bank but not all of it every week because she had not understood that this was a requirement. She really did not want to have to make another application because it would mean another delay and they had waited such a long time already.

10. Ms Chaudhry's reference to savings held prompted me to consider whether the Respondent could in fact show that he met the requirements of the Rules at the date of decision, rendering any error in respect of Article 8 immaterial. Mr McVeety very helpfully made the calculation that in order to do so Ms Chaudhry would need to have had £25,500 in the bank at the relevant time. This figure derived from paragraph E-ECP.3.1 (b) wherein it states that applicants should have specified savings of £16,000 plus "additional savings of an amount equivalent to 2.5 times the amount which is the difference between the gross annual income" and the total amount normally required. The salary normally required is £18,600. It being accepted that Ms Chaudhry had properly evidenced approximately £14,400 of her earnings (that from AA Law) there was a shortfall of £4,200 per annum when the earnings from Highfield were excluded. That figure multiplied by 2.5 equals £10,500. Ms Chaudhry would therefore need to show that at the date of her husband's application she had savings of £10,500 plus £16,000 = £26,500.
11. I agreed to a short adjournment to permit Ms Chaudhry to provide any evidence she had pertaining to the situation at the date of application. Ms Chaudhry submitted a letter dated 1st December 2015 in which she explained that she had been saving since she started work at 18 and that she had a number of savings accounts. She provided statements from two different RBS accounts bearing her name and covering the period immediately before the application was made. One relates to a 'Bonus 30 annual' savings account and this shows that on the 21st October 2013 she had £19,159.56 in savings. The second relates to a 'student current' account which on the same date held £8,175.54. Transfers out of the accounts indicate that there is at least one other account; in her letter Ms Chaudhry explains that this is a Halifax account connected to her mortgage.

My Findings

12. Insofar as the grounds of appeal suggest, with reference to Gulshan, that the First-tier Tribunal erred in failing to impose some intermediary test before going on to consider Article 8, this ground is without merit. There is no utility in imposing such a test: see MM (Lebanon) at paragraph 129.
13. The crux of the ECO's case is that this applicant could not meet the requirement of the Rules because his wife had not been paying her salary from her second job straight into the bank each week. He therefore failed to meet the

requirements set out in Appendix FM-SE. It is now accepted that the Tribunal was obliged to consider Article 8: see paragraph 47 SS (Congo). In doing so, the Tribunal could only allow the appeal on human rights grounds if the applicant could show some compelling circumstances that outweighed the public interest.

14. The matters identified by the Tribunal in its analysis of proportionality were as follows. There had been some delay in the application being dealt with because the ECO was waiting for the decision in MM. That was a reasonable course of action to take but the effect of the delay upon the parties was exacerbated by the fact that when the application was finally assessed, false accusations were made in respect of the veracity of the documents and the information given was not properly assessed. This being a genuine couple waiting to be together the decision was only delaying the inevitable and there was no public interest in refusing leave to enter.
15. I share the sympathy that the First-tier Tribunal evidently had for Ms Chaudhry and her husband. No-one now disputes that Ms Chaudhry has had at all relevant times two jobs, and that she did earn, and continues to earn, over the required threshold of £18,600. In those circumstances it was understandable that the First-tier Tribunal did not find it to be in the public interest that the Respondent continued to be denied leave to enter. The Tribunal made its decision on the 21st April 2015 and did not therefore have the benefit of the Court of Appeal's reasoning in SS (Congo), a judgement handed down two days later on the 23rd April 2015. The Court dealt directly with the question of appeals which fail under Appendix FM-SE. Two reasons are identified as to why "compelling circumstances" would have to be found before such a case could succeed under Article 8. The first is that the evidence rules have the same general objective as the substantive rules, namely to limit the risk that someone is admitted into the United Kingdom and then becomes a burden on public resources; it is for the Secretary of State to determine how best to do that [at 52]. The second is that the same Rules apply to all applicants. As noted in Huang it is generally desirable that the Rules apply in a workable, predictable, consistent and fair manner. If the Respondent was to be in effect excused his failure to comply with FM-SE he would have to show some good reason why he was entitled to preferential treatment with respect to the Rules of evidence over other applicants applying in the same category [SS at 51-53].
16. I am not satisfied that the matters here identified by the First-tier Tribunal amount to either compelling circumstances or a good reason why the Respondent should have preferential treatment over others. The fact that there was a delay was unfortunate, but as the First-tier Tribunal finds, there was good reason for it, since the appeal in MM was plainly material to the outcome of many applications under Appendix FM. That the application was turned down on a number of grounds, and that some of them were subsequently found to be without foundation, does not change the fact that the application was doomed to fail from the moment it was lodged, because there were no statements which could show that the wages from Highfield Taxis were being

deposited in a bank. Having heard from Ms Chaudhry I am quite satisfied, as the First-tier Tribunal was, that this is a genuine relationship and that the parties would very much like to be living together. It has now been some three years since they were married and they are no doubt frustrated by the delay and bureaucracy that they face. That does not constitute a “compelling circumstance”. The central ground of appeal is made out and the decision of the First-tier Tribunal must be set aside.

17. In respect of the re-made decision I have no reason to doubt that at the time the application was made Ms Chaudhry held savings of £27, 334. I accept that this is so because I have been provided with bank statements to that effect, and I have heard her credible oral evidence. That figure would, as Mr McVeety accepts, be enough for the Respondent to succeed under the alternative ‘savings’ route in Appendix FM. Unfortunately I do not have the evidence before me to allow the appeal on that ground. Appendix FM-SE specifies that this evidence must be provided in original form, and I have only been provided with scanned and emailed copies. Furthermore the money must be held for the six months prior to the application, and I only have bank statements showing the funds in place between September and October 2013. The appeal therefore fails, again, because of a ‘near miss’ of the Rules. The Sponsor may wish to forward her original bank statements (of both RBS accounts as well as the missing Halifax statements), covering the period six months prior to the application, to the ECO. Given the already lengthy delay the ECO may wish to review these and avoid the necessity of a fresh application.

Decisions

18. The decision of the First-tier Tribunal contains an error of law and it is set aside.
19. The decision in the appeal is re-made as follows:
“The appeal is dismissed on all grounds”.
20. I make no direction for anonymity because neither party has requested one and on the facts I do not consider such an order to be necessary.

Upper Tribunal Judge Bruce
20th December 2015