



Upper Tribunal

(Immigration and Asylum Chamber)

Appeal Number: OA/11760/2014

THE IMMIGRATION ACTS

Heard at Manchester Piccadilly

On 23 March 2016

Decision and Reasons Promulgated

On 12 April 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE BIRRELL

Between

SHAUBO SDIQ IBRAHIM

(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr C Bloomer counsel instructed by Global House Solicitors.

For the Respondent: Ms Johnstone Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this

Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. The Appellant was born on 1 January 1992 and is a national of Iraq.
3. The Secretary of State for the Home Department brings this appeal but in order to avoid confusion the parties are referred to as they were in the First-tier Tribunal. This is an appeal by the Secretary of State against a decision of First-tier Tribunal Judge Morris promulgated on 23 June 2015 which dismissed the Appellant's appeal against the decision of the Respondent to refuse entry clearance to the UK as the spouse of the Sponsor Dara Tofeek Albarzinjc.
4. The refusal decision which is dated 5 August 2014 gave a number of reasons:
 - (a) The Sponsor claimed to be exempt from the financial requirements because he was in receipt of DLA but had failed to provide evidence that he could maintain and accommodate themselves without recourse to public funds by reference to evidence of housing benefits received.
 - (b) No recent evidence of accommodation was provided.

The Judge's Decision

5. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Morris ("the Judge") dismissed the appeal under the Immigration Rules but allowed the appeal against the Respondent's decision under Article 8. The Judge:
 - (a) Set out the factual basis of the Appellants claim and the reasons for refusing.
 - (b) Identified the issues in the case.
 - (c) Set out the documentary evidence before him.
 - (d) Found that the Appellant did not meet the requirements of Appendix FM at the time of application as he did not meet the evidential requirements of Appendix FM-SE in relation to the receipt of Disability Living Allowance.
 - (e) The Appellant had not established at the time of application that he would be able to maintain and accommodate himself and his dependents without recourse to public funds because the account into which his DLA was paid was regularly overdrawn.
 - (f) The Appellant did not provide at the time of application the evidence that there was adequate accommodation without recourse to public funds.

- (g) He found that there were compelling circumstances in the case to warrant a grant of leave outside the Rules by reference to case law cited in paragraph 27.
 - (h) He set out the guidance in Razgar and the five questions he needed to consider.
 - (i) He considered the best interests of the Appellants child as a primary consideration noting that she had seen her father regularly until her father became seriously ill and wheelchair bound.
 - (j) He determined that the issue was one of proportionality.
 - (k) He accepted that the Appellants child was a British citizen although living with her mother in Iraq. He accepted that although the Appellant did not meet the requirements of the Rules at the time of the application she met them at the time of the hearing given the documentary evidence that had been produced. She was entitled to live with her father.
 - (l) He found it disproportionate to expect the Appellant to have to reapply for entry clearance particularly given the Sponsors serious ill health.
6. Grounds of appeal were lodged which argued that the Judge had misdirected himself in allowing the appeal under Article 8 as the relevant date for consideration of the Rules and Article 8 was the date of the decision; the Article 8 findings were inadequate; there was no reference to paragraph 117B of the Nationality Immigration and Asylum Act 2002 and the public interest factors.
7. On 14 October 2015 First-tier Tribunal Judge Cox gave permission to appeal.
8. At the hearing I heard submissions from Ms Johnstone on behalf of the Respondent that :
- (a) If the Appellant was now able to meet the requirements of the Rules she should make a fresh application.
9. On behalf of the Appellant Mr Bloomer submitted that :
- (a) The approach of the Judge was clear and well reasoned.
 - (b) The Appellant had set out a good case under Article 8.

- (c) There was evidence that he received DLA because he suffered from a serious spinal tumour and was in receipt of housing benefit. It was therefore clear that he would be exempt from the financial requirements of Appendix FM.
- (d) The Judge directed himself as to all of the relevant case law including SS Congo.
- (e) The Judge heard submissions as to proportionality which was the issue in the case and accepted counsel's submissions.
- (f) The conclusion he reached was one that was open to him.

10. In reply Ms Johnstone on behalf of the Respondent submitted that the Judge failed to consider the proportionality of the Appellant making a fresh application.

Finding on Material Error

11. Having heard those submissions, I reached the conclusion that the Tribunal made no material errors of law in what was a thorough, well-structured and carefully reasoned decision.

12. The Appellant in this case made an application on 8 May 2014 for entry clearance as a spouse underpinned by a claim that her husband was in receipt of DLA at the time of the application and therefore exempt for the financial provisions of Appendix FM and in receipt of housing benefit and able to accommodate his wife and child without recourse to public funds. The Judge found that the Appellant did not meet the evidential requirements of the Rules which require evidence submitted with the application in accordance with Appendix FM-SE. While there was clearly some dispute before him as to what evidence was submitted, the Appellant claiming that in fact the documents she claimed had been submitted with the application, the Judge came to the conclusion that the required documents had not been submitted at the time of application.

13. The Judge, having concluded that the Appellant did not meet the requirements of the Rules went on to consider Article 8 outside the Rules as he had been urged to find that in this case there were compelling circumstances in relation to the Sponsors health supported by a number of letters from those treating him why he

should find that there were compelling circumstances why a grant of leave outside the Rules was warranted. The Judge had before him clear and persuasive evidence that the Sponsor having previously enjoyed good health and worked developed a spinal cord tumour and underwent radiotherapy, chemotherapy and major spinal cord surgery which had not been successful. There were letters in the bundle from The Christie NHS Trust going back to late 2012 cataloguing the very serious nature of his condition and the impact it had on his mobility essentially leaving him in a wheelchair. All this was unchallenged.

14. The Judge self directed himself appropriately as to the relevant case law citing SS Congo [2015] EWCA Civ 387 in relation to compelling circumstances and the guidance given in Razgar [2004] 2AC 367 at paragraphs 27 and 28. He also made clear that the Appellant and her husband had a child who was a British citizen living with her mother her rights were a primary consideration and who was entitled to enjoy family life with her father who could no longer travel to see her. He accepted that the Sponsor had been able to see his daughter regularly before the onset of his illness and that family life existed.
15. He recognised that the issue was one of proportionality and essentially two arguments were placed before him to suggest that in the circumstances of this case were sufficiently compelling that a grant of leave outside the Rules was warranted: the Sponsors health and the fact that while he may not have produced the mandatory evidence in relation to the Rules the facts were as he claimed them to be in relation to DLA and Housing Benefit and that he received both.
16. Thus he noted the argument of the Appellants representative that even if the Appellant could not meet the requirements of the Rules at the time of the application that on the basis of the documents before the Tribunal she did at the date of hearing. I am satisfied that as it was argued the Judge was in error to accept this argument because in an out of country appeal the date of the assessment was the date of decision AS (Somalia) & Anor v ECO, Addis Ababa & Anor v SSHD [2008] EWCA Civ 149. However I am satisfied that this made no material difference to the outcome of this case because the evidence produced at the hearing in fact considered of a number of letters dating back to 28 February 2013 and leading up to the date of the application and indeed decision from the

DWP that confirmed that the Sponsor received the highest rate of DLA and was also in receipt of Employment Support Allowance and Housing Benefit so it would have been open to the Judge to conclude on the basis of this evidence that while the Appellant may not have produced the necessary documents with his application such documents did exist to show that he met the requirements of the Rules at the date of application. As was said in Adjei (visit visas – Article 8) [2015] UKUT 0261 (IAC) the Tribunal may need to look at the extent to which the claimant is said to have failed to meet the requirements of the rule because that may inform the proportionality balancing exercise that must follow. If he could have met the Rules it was open to the Appellant to argue as she did that the public interest was not served by refusing entry clearance.

17. The Judge therefore took that into account in the assessment of proportionality as he was entitled to do. He also at paragraph 35 took into account the Sponsors 'self evident' serious and debilitating health problems which was evidenced by numerous letters from the hospital unchallenged by the Respondent which showed he had care needs that were having to be met by friends and would benefit greatly from the presence of his wife and child according to his consultant oncologist and Consultant Neurosurgeons in letter that the Judge had before him. I find that in the particular circumstances of this case it was therefore open to the Judge to find 'compelling circumstances'- individual interests at stake covered by Article 8 "of a particularly pressing nature" so as to give rise to a "strong claim that compelling circumstances may exist to justify the grant of LTE [Leave to Enter] outside the rules" (SS Congo)

18. In the particular circumstances of this case it was also open to him to find as he did at paragraph 34 that it was 'disproportionate to require the Appellant to commence the whole process again.' Given the finding about his financial circumstances and accommodation and the Sponsors pressing need for support I am satisfied that it was open to the Judge to conclude that temporary separation to enable an individual to make an application for entry clearance was disproportionate and while he did not cite caselaw to that effect his approach was entirely in accordance with R (on the application of Chen) v SSHD (Appendix FM

– Chikwamba – temporary separation – proportionality) IJR [2015] UKUT 00189 (IAC).

19. I remind myself of what was said in Shizad (sufficiency of reasons: set aside) Afghanistan [2013] UKUT 85 (IAC) about the requirement for sufficient reasons to be given in a decision in headnote (1): “*Although there is a legal duty to give a brief explanation of the conclusions on the central issue on which an appeal is determined, those reasons need not be extensive if the decision as a whole makes sense, having regard to the material accepted by the judge.*”

20. I was therefore satisfied that the Judge’s determination when read as a whole set out findings that were sustainable and sufficiently detailed and based on cogent reasoning.

CONCLUSION

21. I therefore found that no errors of law have been established and that the Judge’s determination should stand.

DECISION

22. The appeal is dismissed.

Signed

Date 7.4.2016

Deputy Upper Tribunal Judge Birrell