



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/11478/2015

THE IMMIGRATION ACTS

Heard at Birmingham
On 7th August 2017

Decision & Reasons Promulgated
On 22nd September 2017

Before

UPPER TRIBUNAL JUDGE KING TD

Between

MRS SONIA NASEER

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Woodhouse, of Counsel, instructed by SH & Co, Solicitors
For the Respondent: Mr Mills, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of Pakistan, who seeks to challenge the decision of the Secretary of State dated 26th October 2015, refusing her application for entry clearance as a partner under Appendix FM.
2. It was not in dispute that the appellant and sponsor were in a genuine relationship. The sponsor went to Pakistan in 2014 to get married and returned in February 2015. He submitted the application for settlement on 13th July 2015.

3. The application was refused because the requisite documentation to show income had not been provided, namely bank statements for a twelve month period. In this case bank statements from March 2015 to July 2015 were submitted. Given that the sponsor resided in Pakistan for some ten months it is understandable that he would have difficulty in obtaining the requisite documentation.
4. Essentially the decision of the Entry Clearance Officer was based upon the failure to meet the requirements of the Immigration Rules.
5. The appellant sought to appeal against that decision on the basis that the decision was one which infringed her basic human rights.
6. Thus the matter came before the First-tier Tribunal for hearing on 20th February 2017. First-tier Tribunal Judge Phull heard the appeal and dismissed it under human rights grounds and Article 8 of the ECHR.
7. The appellant seeks to challenge that decision and permission to do so was granted by First-tier Tribunal Judge Gibb by reason of paragraph D of Appendix FM (relating to evidential flexibility/documents missing in sequence and failing to consider the wider assessment of proportionality).
8. Thus the matter comes before me to determine whether there is indeed a material error.
9. As I have indicated the jurisdiction for the Tribunal to entertain the appeal at all lies, not in the challenge to the substantive decision under the Immigration Rules, but in a failure to give due regard to the appellant's best interests and her human rights.
10. In a very senses that proportionality assessment has been clouded by a concern whether or not the documents were sufficient to meet the Immigration Rules, or whether Appendix D or Appendix FM-SE should have been brought into effect by the respondent and/or Judge.
11. It is of course open to a Judge, in considering Article 8, to look at the broader aspect of matters outside of the strict interpretation of the Immigration Rules. It seems to me that the Judge has been somewhat reluctant to do so. Even in the assessment of Article 8, rather than the substantive merits of the Immigration Rules (paragraphs 24 and 26), the issue of failure to provide bank statements raises its head time and again.
12. The reality of the matter is that the sponsor is in receipt of a carer's allowance of £62.10 per week. That being so, the strict requirement of having income of £18,600 per annum did not apply to him. All he had to show is that, excluding accommodation, he has income that is equivalent to the income support for a husband and wife calculated at some £87.50 per week. Thus income at a very modest level.

13. The sponsor is self-employed in the United Kingdom as a taxi driver and it is not seriously disputed that he has earned the modest amount that is needed over and above the allowance to satisfy the Rules. As Mr Woodhouse indicated in his submissions to me, there was ample material apart from the bank statements to show the nature of the earnings that he had. The difficulty in practical terms was of course that he had been some ten months in Pakistan and had not been earning during that period. Generally it could be seen from the evidence submitted, that he had the modest amount that was required, namely a few thousand pounds a year over his allowance.
14. The Judge correctly identified the case of **MM v Secretary of State for the Home Department** [2014] EWCA Civ 985 (paragraph 20 of the determination). The Judge recognised that the Rules were not a complete code and as such did not fully address the private and family life issues. It was necessary to conduct a full proportionality exercise before coming to a conclusion. Thus it would have been open to the Judge, having looked at all the material, to have been satisfied that, notwithstanding the technicalities of the Immigration Rules, that the financial requirements were met. That would be an important matter in favour of the appellant calling perhaps for some consideration as to why it was proportionate therefore under human rights to exclude her from the jurisdiction.
15. However, that having been said, it is by no means an easy exercise to be undertaken because clearly the jurisprudence requires that, if human rights are raised outside of the Rules, there has to be some compelling and compassionate circumstances that arise to require entry clearance to be given. In this case Mr Woodhouse submits that the sponsor was the carer of his nephew and that this element should have been considered by the Judge. It seems to me that the matter was considered fairly in paragraph 26 of the determination. The reality was that it could not be said that the child was totally dependent upon the sponsor and there was no evidence to that effect in any event. Clearly the child had been looked after by his own family and mother and extended family while the sponsor was ten months in Pakistan. It was also difficult to perhaps understand what was the urgency of the application given that the appellant lived in Pakistan, was married there and that family life for nine months shortly before the application was conducted in Pakistan and not in the United Kingdom. It would be difficult to argue on that basis that there were insurmountable obstacles or very significant obstacles to family life being conducted in Pakistan. It is perhaps difficult to argue that there were compelling circumstances that required entry clearance when most of the family life had been conducted in Pakistan. Mr Mills, accordingly submits with some merit, that even had the Judge considered the income of the sponsor in the light of **MM** there would be little apart from that to justify Article 8. It has been made clear that Article 8 is not to be used to circumvent the application of the Immigration Rules.
16. It seems to me that the merits of this matter are finely balanced. It is also a matter of importance that justice not only must be done, but to be seen to be done. It is clear that the proportionality balancing exercise, as envisaged in **MM**, was not fully

conducted, given that the Judge failed to apply the wider consideration to the means of the sponsor to ask the question was it proportionate in those circumstances given all matters to deny entry to the appellant? Indeed, in granting permission Judge Gibb also highlights the importance of considering the overall impact of the decision on family life and the practical burden in requiring a fresh application.

17. I find that the Judge was clearly in error in the approach taken to the funding of the sponsor, overlooking indeed the self-direction as found in paragraph 20 of the determination.
18. In the circumstances, and with some hesitation, I consider that the interests of justice does require a full and proper consideration of proportionality.
19. In those circumstances the appellant's appeal is allowed to the extent that the decision of Judge Phull is set aside to be remade by the First-tier Tribunal in accordance with the Senior President's Practice Directions.
20. It will of course be incumbent upon the appellant to produce cogent evidence, both from herself and from the sponsor as to why continued residence in Pakistan will significantly and adversely impinge upon her private and family life. No doubt up-to-date evidence as to means would also be of importance so far as the sponsor is concerned, not to postdate the Immigration Rule decision but to inform the human rights argument.
21. In granting leave, however, I do highlight a matter which in fact was touched upon by the First-tier Tribunal Judge in the determination and that is whether it would not be more expedient to make a fresh application under the Immigration Rules with all the relevant documents. In two years many matters have developed or moved on . However, that must be a matter for those advising the appellant. No doubt the First-tier Tribunal will issue such directions for the further progress of the hearing as may be required.

Notice of Decision

22. The decision of First-tier Tribunal Judge Phull is set aside. The matter is remitted to the First-tier Tribunal in order to have a de novo hearing on the issue of Article 8.
23. No anonymity direction is made.



Signed

Date 22 August 2017

Upper Tribunal Judge King TD