



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/27798/2015

THE IMMIGRATION ACTS

Heard at: Manchester
On: 13th September 2017

Decision & Reasons Promulgated
On: 23rd October 2017

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

The Secretary of State for the Home Department

Appellant

And

Mehtab Riaz
(No anonymity direction made)

Respondent

For the Appellant: Ms Pettersen, Senior Home Office Presenting Officer
For the Respondent: Mr Hussain of Counsel instructed by Equity Law Chambers Sols
(Oldham)

DETERMINATION AND REASONS

1. The Respondent is a national of Pakistan date of birth 23rd November 1989. On the 24th November 2016 the First-tier Tribunal (Judge AK Simpson) allowed his appeal on human rights grounds. The Secretary of State for the Home Department obtained permission to appeal against that decision on the 4th April 2017, granted by First-tier Tribunal Judge Dineen.

Background and Decision of the First-tier Tribunal

2. The Respondent Mr Riaz came to the United Kingdom as a student in 2009. He has remained here ever since and in February 2015 he applied for leave to remain on human rights grounds on the basis that he was married to a British national, Mrs Nabila Riaz. The reasons for refusal letter is dated the 16th July 2015. The claim failed for the following reasons:
 - i) Mr Riaz did not meet the suitability requirements set out in Appendix FM. He had submitted an English language test certificate issued by the Educational Testing Service (ETS) which had subsequently been invalidated. ETS had confirmed to the Secretary of State for the Home Department that they believed that the test scores on this certificate had been obtained through deception, namely the use of a proxy to take the speaking test;
 - ii) Nor had he produced sufficient evidence to satisfy the Secretary of State that his marriage was genuine and subsisting;
 - iii) In respect of EX.1 the Secretary of State was not satisfied that there were insurmountable obstacles to family life continuing outside of the UK;
 - iv) It was not considered that there were exceptional circumstances such that leave should be granted 'outside of the rules'.
3. Those then were the matters in issue before the First-tier Tribunal.
4. The matter came before Judge Simpson on the 4th April 2016, and a further hearing took place on the 9th May 2016. The First-tier Tribunal heard oral evidence from Mr Riaz and his wife. It directed itself to the conclusions of the President of this Chamber, McCloskey J, in SM & Qadir v Secretary of State for the Home Department (ETS -Evidence- Burden of Proof) [2016] UKUT 00229 (IAC).
5. Dealing first with the question of the alleged deception the Tribunal found itself satisfied that the Secretary of State had discharged the evidential burden, in that she had produced the 'generic' evidence familiar in ETS cases (the witness statements by Millington and Collins) and evidence specifically linking the ETS findings with Mr Riaz (an "albeit illegible" printout). However, having had regard to all of the evidence the Tribunal was not satisfied that the overall legal burden had been discharged. Accordingly the 'ETS' issue was resolved in favour of Mr Riaz.

6. The Tribunal found there to be “copious” evidence that this marriage was genuine and subsisting, and that the relationship eligibility requirements were therefore satisfied.
7. Moving on to consider proportionality the Tribunal examined with care the financial material that was placed before it. It concluded that the couple had established that the household income was well above the requisite £18,600, but that there was a failure to meet all of the requirements in Appendix FM-SE. Specifically, Mrs Riaz could not produce a letter from her employer stating her annual salary because she was on a zero hours contract. The Tribunal directed itself to the guidance in R (Sunasee) v Upper Tribunal (IAC) & Anor [2015] EWHC 1604 (Admin) to the effect that a ‘near miss’ could not be determinative of the appeal, but nor could it be excluded as irrelevant. It then concluded [at 18]:

“Having weighed all relevant factors in the balance, including (1) that the respondent’s reasons for refusal have been shown to be unjustified and (2) that the appellant’s wife did earn more than the £18,600 income threshold but was unable to provide a satisfactory employer’s letter through no fault of her own ie simply because she had a zero hours’ contract, I take the view that the decision to remove the appellant in these circumstances would be disproportionate”.

The Challenge

8. The Secretary of State for the Home Department has two complaints about the way that the First-tier Tribunal approached the appeal:
 - i) In light of the evidence it is clear that the Secretary of State for the Home Department reasonably concluded that the appellant had used deception in his application;
 - ii) The Article 8 balancing exercise is flawed for a failure to weigh in the public interest.

Error of Law

9. The matter came before me on the 14th June 2017. The Secretary of State for the Home Department was that day represented by Senior Presenting Officer Mr McVeety. Mr Riaz was represented by Mr Hussain. Having heard their submissions I made the following findings.

10. I am satisfied that the 'ETS' findings were open to the Judge on the evidence that was before her and for the reasons that she gives. The grounds of appeal are curiously drafted. This was not a judicial review and the First-tier Tribunal was not confined to considering whether the decision of the Secretary of State was a "reasonable" one. The Tribunal was obliged to conduct a merits review and weigh all of the evidence in the balance itself. The Tribunal accepted that the Secretary of State had discharged the evidential burden of proof on the basis of the generic evidence. I must say that I have my doubts about this: if the spreadsheet was illegible and there was no other evidence linking Mr Riaz to the alleged fraud it is difficult to see how that was so. In any event, that burden was found to be discharged. It was then for Mr Riaz to provide his explanation of events. This he did, and his detailed evidence about where he went to take the test, what was in it and the circumstances is set out at paragraphs 7-9 of the decision. Judge Simpson then considered all of this evidence in the round, and found that on balance the legal burden was not discharged. I can find no legal error in the approach taken, nor the conclusions reached. That part of the decision is upheld.
11. The same cannot be said of the Article 8 reasoning. Decision-makers are not obliged to set out s117B of the Nationality, Immigration and Asylum Act 2002 chapter and verse, but some at least some regard must be had to the public interest in refusing leave to persons who do not qualify for it under the rules. In this case the substance of the proportionality assessment was the observation that the ETS allegation had not been made out, the relationship was real and that Mr Riaz failed under the rules for want of specified evidence. That was not a complete assessment, because the Tribunal did not consider the public interest in removing persons who do not qualify for leave under the Rules: it follows that this part of the decision must be set aside.

The Re-Made Decision

12. This is a human rights appeal and the ultimate question I must therefore decide upon is whether, at the date that I re-make this decision, the refusal of leave to Mr Riaz would amount to a disproportionate interference with his Article 8 rights. My starting point must be the Immigration Rules.
13. At the date that the Secretary of State considered this application she assessed it to fail under the rules for the reasons set out at paragraph 2 (i)-(iii) above. The first two matters in issue were resolved in favour of Mr Riaz, and I have upheld those findings: the application should not have been refused on 'suitability' (ETS) grounds, and this is a genuine and subsisting relationship. The remaining issue arising under Appendix FM was whether EX.1 was engaged. This 'exception' only becomes relevant where an applicant is 'eligible' under the terms of Appendix FM but he for some reason fails to meet the requirements for leave to remain under the 'five year route to settlement'. Most commonly this

will be because the applicant does not have valid leave at the time that he made his application, or because he is unable to demonstrate that he meets the financial requirements set out in E-LTRP.3.1 with reference to the 'specified evidence' set out in Appendix FM-SE. In this case the Secretary of State considered that Mr Riaz was unable to do either. His leave to remain had been curtailed prior to the application being made, because of the ETS allegation, and although evidence had been supplied showing household income to be above the minimum income requirement of £18,600, it had not been provided in the specified form. The only way that Mr Riaz could therefore succeed under the Rules would be by showing that he met the requirements in EX.1. This, in short, required him to show that there were 'insurmountable obstacles' to family life continuing outside of the United Kingdom. Although that form of words should not be read literally, the courts have repeatedly emphasised that this is a stringent test: R (on the application of Agyarko)(FC) v Secretary of State for the Home Department [2017] UKSC 11. It is now defined at EX.2 of Appendix FM:

"For the purposes of paragraph EX.1(b) 'insurmountable obstacles' means the very significant difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner."

14. In its determination the First-tier Tribunal did not address this test at all. This was possibly because Mr Hussain did not pursue it with any vigour. The highest that the evidence could be put was this. The sponsor Mrs Riaz does not like Pakistan. Although she is of Pakistani heritage she has been there only once in her adult life and stayed only a short time. This was a trip for her brother's wedding. She does not want to live there. It is trite law that Article 8 does not confer upon couples a choice about where they live. The fact that Mrs Riaz does not want to live in Pakistan does not amount to an 'insurmountable obstacle'. The other factor of potential relevance to EX.1 is the fact that Mrs Riaz is currently undergoing fertility treatment in the UK. This is a matter to which I return below, in the context of Article 8 'outside of the rules', but I am not satisfied that it is a matter that I could properly take into account when considering whether there are any 'insurmountable obstacles' to family life continuing in Pakistan, for the simple reason that such treatment is, as I understand it, available in that country. In the absence of any other possible reasons why relocation might involve very serious hardship for either Mr or Mrs Riaz, I proceed on the basis that the requirements of EX.1 are not met and that the application must fail under the Rules.

15. I am satisfied that there is a genuine family life in this case. The First-tier Tribunal found that Mr and Mrs Riaz have been in a genuine and subsisting relationship for a number of years, and they have been validly married under English law since the 5th November 2013. I accept that the refusal of leave, and

the attendant requisite that Mr Riaz should leave the United Kingdom, would amount to an interference with that family life.

16. There is no dispute that the Secretary of State holds the legal powers to take such a decision, or that it is taken in pursuit of one or more of the legitimate aims set out in Article 8(2): in the context of immigration control that aim would be the protection of the economy.
17. The question remains whether the decision would be proportionate. In determining this matter I am required to weigh the rights of Mr Riaz, and the consequences for him, against the public interest in removing persons who do not have leave to remain. My starting point must be the factors set out in s117B of the Nationality Immigration and Asylum Act 2002 (as amended).
18. The maintenance of immigration control is in the public interest. Mr Riaz does not currently meet the requirements of the Rules and he has not held valid leave since the 24th October 2014: this must weigh against him in the balance. Ordinarily that weight would be substantial, but in this case it is mitigated by the particular circumstances. I must bear in mind that Mr Riaz entered this country with lawful leave as a Tier 4 (General) Student Migrant and properly renewed that leave when required to do so. On the 24th October 2014 the Secretary of State's decided to curtail that leave on the basis that Mr Riaz had relied on a fraudulently procured English language test certificate. That decision has been held by the First-tier Tribunal to be wrong. The Secretary of State did not have the evidence to warrant curtailment. But for that erroneous decision Mr Riaz would have held valid leave at the time that he made his application for leave to remain as a spouse. But for that erroneous decision he would still be lawfully in the UK today: his Tier 4 leave had been due to expire on the 30th April 2015 and his human rights application was lodged on the 20th February 2015; he would therefore currently have leave conferred by section 3C of the Immigration Act 1971.
19. It is in the public interest that persons who wish to remain in the United Kingdom can speak English, because this better aids their integration. I accept and find as fact that Mr Riaz can speak English. This is not therefore a matter that weighs against him.
20. It is in the public interest that persons who wish to remain in the United Kingdom are financially independent, because financial independence better aids their integration. The First-tier Tribunal found that the household income in this case was well above the 'minimum income' requirement set out in section E-LTRP.3.1 of Appendix FM. I accept that Mr Riaz is financially self-sufficient. This matter does not therefore weigh against him in the balance.
21. Section 117B (4) mandates that I can attach only a little weight to a relationship with a qualifying partner established whilst Mr Riaz was in this country

unlawfully. That provision does not apply to the relationship with Mrs Riaz, since they were married when Mr Riaz indisputably held lawful leave to remain. Their English marriage took place on the 5th November 2013 and their *nikah* predated that. The First-tier Tribunal found as fact that this is a genuine and subsisting relationship and having heard from the parties myself I do not doubt that. Mrs Riaz gave evidence that they had believed that it would be straightforward for Mr Riaz to switch categories so as to obtain leave to remain as a spouse. At the time of their marriage they had every reason to believe that would be possible: he had leave, theirs was a genuine relationship and their income was above the Appendix FM threshold. This is not therefore a case where the parties entered into a relationship knowing that one or other of them was without leave. They married in good faith that they would be able to obtain permission to remain living in this country. I therefore attach some weight to their relationship, whilst bearing in mind the limitations thereof, given the European jurisprudence on relationships established under 'precarious' circumstances: see for instance Rodrigues da Silva v The Netherlands (2007) 44 EHRR 729.

22. I am required to only attach a little weight to any private life that Mr Riaz has established whilst living in the UK with 'precarious' status. His status has always been precarious and I therefore attach only a little weight to the private life (friends, study, work, home, wider family members) that he has established since he came to live in the United Kingdom in October 2009.
23. The couple do not yet have any children so I disregard s117B(6) for the purpose of this decision.
24. In addition to these statutory considerations I find there to be two other matters which assume some significance in the balancing exercise.
25. The first is the fact that Mrs Riaz is receiving fertility treatment in the UK. As she explained in her unchallenged oral evidence, this requires both mother and father to be present. At the hospital where she is receiving the treatment the collection and fertilization takes place on the same day. She has been told that her husband's physical presence in the UK is required for her to undergo a further cycle, and I have no reason to doubt her evidence that she is anxious about the process and relies heavily on the emotional support provided by her husband. As I note above, the fact that she is receiving this treatment is clearly not an 'insurmountable obstacle', but it is one that attracts some weight in my deliberations. Mrs Riaz is a British national who is entitled to be receiving that treatment on the NHS. Her desire and efforts to have a child are of paramount importance to her, and form an important component of her Article 8 family life with her husband, read with Article 12 ECHR, the right to marry and found a family. If Mr Riaz were to leave the United Kingdom that treatment would be substantially interfered with. Mrs Riaz is 35 years old with a diagnosis of endometriosis. She is well aware that the longer she leaves it the harder it will

be to become pregnant. Having heard her evidence, and having applied the principles in Beoku-Betts v Secretary of State for the Home Department [2008] UKHL 39, that is a matter that I attach some weight to.

26. In respect of the second matter I return to the Rules. It will be recalled (see paragraph 7 above) that the only reason left for refusing leave under the Rules was the inability of Mrs Riaz to produce a letter from her employer confirming that she had a permanent contract. Mrs Riaz had, the First-tier Tribunal held, earned over the required minimum for some years, but she failed to meet this requirement of Appendix FM-SE because her employer chose to offer her what was in effect full time work on a 'zero hours' contract. That decision had two serious consequences for Mrs Riaz. First it denied her basic employment rights to which she might otherwise be entitled, second it meant that she could not provide the mandatory documents required to secure her husband leave to remain. As Judge Simpson noted below, a 'near miss' argument under the Rules cannot be determinative in the proportionality balancing exercise, but such a factor can legitimately be considered as part of the overall assessment as to whether a fair balance has been struck. I do not however consider that this factor should be framed as a 'near miss' argument. Rather the focus of my enquiry should be on the fact that the household income in this case was accepted to be comfortably above the required minimum. In R (on the application of MM (Lebanon) and Others) (Appellants) v Secretary of State for the Home Department (Respondent) [2017] UKSC 10 the Supreme Court held that the minimum income requirement was lawful, but held that overly prescriptive rules on how compliance with it can be demonstrated widened the scope for consideration of Article 8 'outside of the rules':

"As has been seen, avoiding a financial burden on the state can be relevant to the fair balance required by the article. But that judgment cannot properly be constrained by a rigid restriction in the rules. Certainly, nothing that is said in the instructions to case officers can prevent the tribunal on appeal from looking at the matter more broadly. These are not matters of policy on which special weight has to be accorded to the judgment of the Secretary of State. There is nothing to prevent the tribunal, in the context of the HRA appeal, from judging for itself the reliability of any alternative sources of finance in the light of the evidence before it".

27. I have considered all of the abovementioned factors. Having done so I come firmly to the view that a denial of leave would not be proportionate in this case. The factual matrix before me is substantially different from that applied by the Secretary of State when she took her decision. The Secretary of State has been unable to show that Mr Riaz committed ETS fraud. Mr Riaz has demonstrated that he is in a genuine relationship, and that the family are economically secure. The Supreme Court in MM (Lebanon) has cautioned against an overly rigid approach to how such financial security might be demonstrated. Mrs Riaz has

satisfied me that it is extremely important to her to have her husband with her so that she can found a family. All of these matters considered alongside the public interest, I conclude that a refusal of leave would be disproportionate to the legitimate aim pursued and the appeal must be allowed.

Decisions

28. The decision of the First-tier Tribunal contains an error of law such that the decision must be set aside to the limited extent identified above.
29. The decision is remade as follows: the appeal is allowed on human rights grounds.
30. There is no direction for anonymity.

Upper Tribunal Judge Bruce
20th October 2017