



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: OA/05931/2015

THE IMMIGRATION ACTS

Heard at Field House  
On 1<sup>st</sup> September 2017

Decision & Reasons Promulgated  
On 4<sup>th</sup> October 2017

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

ENTRY CLEARANCE OFFICER - ISLAMABAD

Appellant

and

NAGHMANA FAROOQ  
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr P Nath, Home Office Presenting Officer  
For the Respondent: Mr Farooq (Sponsor)

DECISION AND REASONS

1. The application for permission to appeal was made by the Secretary of State but nonetheless I shall refer to the parties as they were described before the First-tier Tribunal, that is Mrs Naghmana Farooq as the appellant and the Entry Clearance Officer as the respondent.
2. The Entry Clearance Officer applied for permission to appeal against the decision of First-tier Tribunal Judge Randall who dismissed the appeal under the Immigration Rules but allowed the appeal on human rights grounds. The appellant failed to

provide the required financial evidence in accordance with the FM-SE and thus the application was refused under the Rules. That conclusion did not appear to be disputed at paragraph 21 of the decision. The Presenting Officer conceded the genuineness of the relationship and therefore that was no longer an issue.

3. The First-tier Tribunal Judge allowed the appeal however pursuant to Article 8 on the basis that it would be disproportionate interference with the appellant's family life and it was submitted that the judge had erred in the following ways:

Ground (i), although the judge accepted the requirements of the financial requirements were not satisfied under the Immigration Rules, the judge failed to have due regard to the importance of the requirements contained therein at paragraph 29. The requirements of Appendix FM-SE do not provide a "general gloss" but are strict requirements imposed to be met. The required level of income could not as a matter of fact be demonstrated. The Court of Appeal in **SS Congo v SSHD [2015] EWCA Civ 317** reiterated that there was no distinction between the weight to be afforded to Appendix FM-SE and the substantive Rules and that could be seen from paragraph 51.

4. The only "compelling circumstance" identified by the Tribunal was the financial dependency of the sponsor's parents in Pakistan. It was said that if the sponsor was to relocate that would cease (see paragraphs 27 and 29). The respondent submitted that the Tribunal was misdirected in its appraisal of the compelling circumstances.
5. There was no adequate reason given for establishing that the sponsor could not gain any employment in the country where both his wife and parents resided and where he retained a significant nexus. Simply because he had lived in Abu Dhabi does not mean he could not pursue employment in Pakistan and had shown that he integrated into Pakistan.
6. The judge had failed to consider why the appellant should be treated more favourably than other applicants and had not identified a good reason for permitting more preferential treatment.
7. Indeed, should the appellant think their ability to meet the requirements of the Rules had improved, there was no reason why it should not be disproportionate for another application to be made in the future, see paragraph 57 of **SS (Congo)**.
8. In essence no compelling circumstances had been identified.
9. At the hearing before me Mr Nath relied on the grounds.
10. The sponsor attended and gave oral testimony that he was an eBay seller and that he now earned approximately £40,000 per year and could not return to Pakistan because there was no eBay or PayPal platform there. He had been told he could do it online but that would not afford him sufficient income and it was not possible for him to print and package goods.

11. He confirmed that he had lived in Abu Dhabi but had returned to Pakistan in 1996 and then entered the UK as a student in 2004 and achieved a business administration degree and thereafter in 2008 started working at Metro Properties Limited. In 2014 he married his wife in Pakistan.
12. He was specifically asked why his wife could not make another application and he said at present it was difficult for her to do the IELTS exams as she was pregnant but she should be able to undertake the exams once her pregnancy was over, which would be in October. She had previously undertaken and passed an IELTS exam in 2015 but that certificate had now expired. The sponsor confirmed that his wife lived with his parents and brother and they supported her and took her to the doctors. The difficulty would be taking the exam which was 200 miles away, but that would be possible in the future. He also stated that his child was a British citizen child and he would like the child to come to the UK and live as a family unit.
13. I have no hesitation in concluding that there was an error of law in the judge's decision. It was quite clear that at paragraph 21 the judge found that the appellant and sponsor did not fulfil the requirements of Appendix FM. As pointed out by the judge himself at paragraph 22:
 

*"It was and is of course open to the appellant to apply for entry clearance again relying on the sponsor's present income over the most recent six months, this time properly evidenced. The application would, in all likelihood, be bolstered by the respondent's concession as to the genuineness of the relationship and the existence of the child's couple. However the appellant has chosen, as is her right, to press on with this appeal".*
14. The judge did not appear to factor that finding into his determination when addressing the elements under human rights.
15. I further notice that there was passing reference to Section 117 and although that was not pleaded in the grounds it is a clear error that Section 117, having found that the financial requirements have not been made out, that it is not applied in relation to whether the appellant would be financially independent on entry into the UK.
16. It may be that there was a significant interference for the entitlement to respect for family life because the financial arrangements meant that it was difficult for the sponsor to travel to Pakistan more than once a year, but as pointed out in **SS (Congo)** at paragraph 82, Article 8 does not give rise to an obligation on the state to accommodate a preference to pursue family life in the United Kingdom rather than overseas.
17. The judge at paragraph 29 states that he had regard to the decision in **SS (Congo)** that there must be very compelling circumstances, but merely states that the sponsor's obligations to support his wider family in Pakistan meant there was no prospect of the couple enjoying their family life in Pakistan and he must remain here to generate the income to support them. The judge factored in that the sponsor now did have sufficient funds to support his wife and that the proposed accommodation was not called into question.

18. What the judge does not do is factor in that the appellant's wife can make a further application. The failure to comply with paragraph FM-SE is not just a technical failure but an important aspect of the Immigration Rules namely financial independence from being a burden on public funds.
19. There has been an acceptance by the Entry Clearance Officer that the relationship is genuine. I accept that there is a genuine relationship between the sponsor and his wife and child and Article 8 is engaged but the decision was made for a legitimate purpose and in accordance with the law. The Supreme Court has upheld the financial requirements under the Immigration Rules as being lawful.
20. In my view there are no compelling factors leading to unjustifiably harsh consequences in this case. Section 55 of the Borders Citizenship and Immigration Act 2009 does not apply to children overseas but I have nevertheless considered the best interests of the child, which is to remain with the mother in the status quo, with the assistance of the family in Pakistan until secure financial arrangements can be made for the family to relocate. I am obliged to apply Section 117 of the Nationality Immigration and Asylum Act 2002 and this includes consideration of whether the family would be financially independent. To date the financial documentation has not been accepted but, according to the sponsor can be provided for verification. I note the existing child is a British citizen but there is nothing to prevent the child from entering the UK, if so desired by the parents. The sponsor also told me that once the second child is born that it would be possible for the appellant to take the English language test as required. She has already passed the test which has expired.
21. In evidence the sponsor explained that his real difficulty was the delay, which although the husband and wife have been separated they would have, at the outset, appreciated that there are Immigration Rules with which they should comply. Article 8 does not afford the opportunity to foreign nationals simply to choose where to exercise their family life. The wife is being supported at present and there is no reason why an application cannot be resolved within a matter of months, although clearly I cannot anticipate the success or otherwise.
22. As advanced in **SS (Congo)** it is open to the appellant to make a further application and indeed in the evidence given to me in the hearing, when I indicated that an error of law, the sponsor told me that it was clearly possible for him to support his wife and she could make a further application and that he now had the financial resources with which to pursue and secure her application. The Immigration Rules clearly set out the position of the Secretary of State and applying **Huang v SSHD** [2007] UKHL 11, I am not persuaded that the refusal decision is disproportionate in all the circumstances.
23. I therefore find an error of law, set aside that decision and for the reasons given above remake it dismissing the appeal both under the Immigration Rules and under Article 8.

Decision

The appeal of Mrs N Farooq is dismissed under the Immigration Rules and on Article 8 grounds.

No anonymity direction is made.

Signed *Helen Rimington*

Date 3<sup>rd</sup> October 2017

Upper Tribunal Judge Rimington