



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/05067/2017

THE IMMIGRATION ACTS

Heard at Field House
On 15 August 2018

Decision & Reasons Promulgated
On 11 September 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE I A M MURRAY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR AHMED GHAZALI

Respondent

Representation:

For the Appellant: Mr Tufan, Home Office Presenting Officer

For the Respondent: Ms Jones, Counsel for City Legal Partnership, London

DECISION AND REASONS

1. The appellant in these proceedings is the Secretary of State however for convenience I shall now refer to the parties as they were before the First-Tier Tribunal.
2. The appellant is a citizen of Morocco born on 1 January 1975. He appealed the Entry Clearance Officer's decision of 10 February 2017 refusing him entry clearance to the United Kingdom as a partner under Appendix FM of the Immigration Rules. His appeal was heard by Judge of the First-Tier Tribunal Lucas on 15 January 2018 and was allowed under Article 8 of ECHR in a decision promulgated on 26 January 2018.

3. An application for permission to appeal was lodged and permission was granted by Judge of the First-Tier Tribunal L Murray on 13 June 2018. The permission states that the Judge arguably erred by allowing the appeal on Article 8 outside the Rules. The Judge found that the appellant who is seeking entry clearance as a spouse could not meet the financial requirements of the Rules and found that his claimed job offer was not credible. The grounds state that it is arguable that the First-Tier Tribunal failed to identify any circumstances sufficiently compelling to outweigh the public interest and justify allowing the appeal outside the Rules. They go on to state that the Judge arguably failed to identify why the appellant's claim was a very strong or compelling claim, sufficient to outweigh the public interest in immigration control.
4. There is no Rule 24 response.

The Hearing

5. The Presenting Officer made his submissions relying on the grounds of application. He submitted that the income threshold cannot be met. The income threshold is £18,600 and the sponsor earns £2,600 less than that but an offer of employment was provided which, if this goes ahead, could make up the shortfall.
6. The Presenting Officer submitted that at paragraph 18 of the decision the Judge finds that the job offer is not satisfactory. There is no indication of how and why the employer is prepared to offer a job to an unknown foreign national, what type of employment is envisaged or how much the appellant would be paid. Because of this the Judge does not accept that the offer of employment is genuine, credible or sufficient to discharge the requirements of the Rules.
7. At paragraph 22 the Judge states that there has been no recourse to public funds by the sponsor and that her income is not far below the required threshold and there is no reason why the appellant could not follow up the offer of employment that has been made to him. The Presenting Officer submitted that this contradicts paragraph 18.
8. I was referred to the case of *SS (Congo) & Others* [2015] EWCA Civ 387 at paragraph 89 which states that if an appellant's application fails to comply with the Immigration Rules and no compelling circumstances are identified, the Rules should be applied in the usual way. That would not be disproportionate and if the appellant's application failed because the terms of the Rules could not be satisfied she would have to make a new application and this would not be disproportionate.
9. He submitted that there is a material error of law in the Judge's decision and it should be set aside and remade.
10. Counsel for the appellant made her submissions, submitting that although the respondent is stating that no exceptional circumstances have been cited by the Judge which would enable him to allow the appeal outside the Immigration Rules,

exceptional circumstances have been cited by him at paragraphs 19 and 20 of the decision. I was referred to Counsel's skeleton argument and she submitted that the sponsor has two daughters, both British nationals, whose father is a British national of Moroccan origin. The sponsor was divorced in August 2012 and the appellant and the sponsor were married on 11 September 2014. The evidence is that the sponsor's two daughters have a relationship with their father who is also a British national and they have developed a relationship with the appellant since the marriage in 2014. She submitted that the Judge refers to the sponsor as now living in the UK for more than 20 years and she is the girls' sole carer. She submitted that the Judge states it would neither be proportionate nor fair to require a UK citizen and her two children to leave the UK in order to continue their family life and that no challenge has been made by the respondent about the genuineness of the relationship in this case.

11. I pointed out that these girls are not the appellant's children but she submitted that he has family life with them and their mother and it would not be proportionate for the sponsor to go to Morocco with the girls as they are all British citizens and as the girls' sole carer she cannot go to Morocco without them. She submitted that in the said case of SS (Congo) and Others there are no children. She referred to paragraph 82 of that case and she submitted that this claim is not on all fours with the said case of SS (Congo) and Others.
12. Counsel submitted that the Judge's findings about the job offer could have been more clear but the terms of the Rules cannot be satisfied regarding the financial requirements, however she submitted that the fact that there is a job offer shows that on arrival in the United Kingdom the appellant is likely to be able to get work and she submitted that that is why the Judge has worded paragraph 22 of the decision in the way he did. She submitted that this job offer makes it clear that the appellant has earning capacity if he comes to the United Kingdom and in this case there is an insurmountable obstacle to the appellant, his wife and her two children living together in Morocco as the children see their British father and she submitted that there is no material error in the Judge's decision and the exceptional circumstances are referred to at paragraphs 19 and 20 of the decision.
13. She submitted that the Presenting Officer has suggested that the appellant makes another application but she submitted that that would only be possible if the terms of the Rules can then be satisfied and at present they cannot because of the financial situation. She submitted that what the appellant will be able to do in the United Kingdom, is blue collar work in a shop. At present the sponsor is working in three jobs and earns £16,000 per annum and looks after herself and her two children out of this sum. She submitted that because of these exceptional circumstances there is no material error in the Judge's decision and that the appeal should have been allowed outside the Immigration Rules under Article 8.
14. The Presenting Officer submitted that when the appellant and the sponsor entered into their relationship they were aware that the terms of the Rules had to be satisfied before the appellant could enter the United Kingdom, even if he is married to a British citizen.

15. He submitted that with regard to SS (Congo) and Others there are no children but the general ratio applies and a new application can be made once the terms of the Rules can be satisfied. I was referred to paragraph 82 of SS (Congo) which states that if the couple in that case wish to carry on their family life in the United Kingdom there is no obligation on the United Kingdom to accommodate a preference to pursue family life here rather than overseas and at the time of the refusal of leave to enter the minimum income requirements in the Rules in respect of the sponsor, were not satisfied and there were no compelling circumstances to enable a grant of leave to enter outside the Rules. The paragraph goes on to state that if the sponsor expects to be able to satisfy the minimum income and evidence requirements in the near future, the appropriate course is to wait and submit a properly supported application for leave to enter when the requirements of the Rules can be satisfied and there is nothing disproportionate in the respondent applying the Rules according to their terms. He submitted that that is the same situation here and although there are children who cannot move to Morocco as they are in touch with their father in the United Kingdom, the same principles apply and he submitted that there are no exceptional circumstances and it would not be disproportionate to dismiss the appeal.
16. He submitted that although the Immigration Rules are not a complete code for a claim under Article 8 outside the Rules, to succeed, there have to be exceptional circumstances and he submitted that the circumstances in this case are not exceptional. In this case there are two British children who cannot go to live in Morocco and cannot be separated from their mother and this must have been known by the appellant and his spouse when they married.

Decision and Reasons

17. It is clear that the terms of the Rules cannot be satisfied in this case. There is no near miss. The income of the sponsor is short by £2,600.
18. I accept that the respondent's findings at paragraphs 18 and 22 contradict each other. The Judge is dissatisfied with the job offer which the appellant has and gives proper reasons for this but for the Judge to say that the sponsor's income is not far below the required threshold is a flawed finding and after finding that the offer of employment is unsatisfactory to state that there is no reason why the appellant could not follow up on the offer of employment this must also be a flawed finding.
19. There has been no question of the genuineness of the appellant's relationship with the sponsor but it is clear that the sponsor does not earn sufficient money to meet the terms of the Rules. The Judge makes it clear at paragraph 18 of the decision that he is not satisfied with the job offer for the appellant and paragraph 22 contradicts this and is not sustainable. As there is no mention of what the appellant would be earning if he did have a job in Mr Kaylan's convenience store it is not even clear whether the sum of £18,600 could be reached.
20. I have considered the case of MM [2017] UKSC 10 about the minimum income requirements set out in Appendix FM. This states that there can be no question of the

Rules relating to the minimum income requirement being a complete code and Article 8 has to be considered anyway.

21. I have considered the case of Razgar [2004] UKHL 27 and proportionality. Public interest has to be considered when considering paragraph 117 of Part 5 of the 2002 Act. The fact that the terms of the Rules cannot be satisfied must weigh against the appellant's claim. The children involved in this case are in touch with their biological father in the United Kingdom and are not the children of the appellant. The sponsor is their primary carer but as previously stated she must have been aware when she married the appellant that there are Immigration Rules which have to be satisfied unless there are exceptional circumstances. I do not find that the circumstances in this claim are exceptional. There is public interest in ensuring effective immigration control and as the job offer for the appellant is not satisfactory it cannot be said that he will not be a drain on public resources.
22. The sponsor is working three jobs. It is likely that her salary will increase as time goes on and at that stage when the terms of the Rules can be satisfied a further application can be made.
23. I find that it would not be disproportionate to dismiss this appeal and I find that there are material errors of law in the First-Tier Judge's decision, particularly relating to the appellant's job offer and by allowing the appeal after accepting that the terms of the Rules cannot be satisfied. Nothing compelling has been shown to justify the appeal to be allowed outside the Rules

Notice of Decision

As I find there to be material errors of law in the First-Tier Judge's decision I am setting that decision, promulgated on 26 January 2018, aside.

I dismiss the appellant's appeal under the Immigration Rules and under Article 8 of ECHR.

No anonymity direction is made.



Signed

Date 6 September 2018

Deputy Upper Tribunal Judge I A M Murray