



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/12038/2018

THE IMMIGRATION ACTS

Heard at Field House
On 15th November 2019

Decision & Reasons Promulgated
On 22nd November 2019

Before

UPPER TRIBUNAL JUDGE JACKSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

NUMAN AZEEM
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Ms I Vijiwale, Senior Home Officer presenting Officer
For the Respondent: Not legally represented

DECISION AND REASONS

1. The Secretary of State appeals with permission against the decision of First-tier Tribunal Judge Howard promulgated on 4 July 2019, in which Mr Azeem's appeal against the decision to refuse his application for entry clearance dated 16 April 2018 was allowed. For ease I continue to refer to the parties as they were before the First-

tier Tribunal, with Mr Azeem as the Appellant and the Secretary of State as the Respondent.

2. The Appellant is a national of Pakistan, born on 28 December 1988, who applied for entry clearance to the United Kingdom as the spouse of a person present and settled in the United Kingdom.
3. The Respondent refused the application for two reasons. First, that the Appellant did not meet the suitability requirements for a grant because he had failed to disclose an unsuccessful application for entry clearance made in 2009. Secondly, the financial requirement in Appendix FM had not been met as the Sponsor's income was only £17,307.72, short of the £18,600 required and there was insufficient evidence of the required savings of £19,230.70 which would be needed to top up the income. It was accepted that the Appellant was in a genuine and subsisting relationship with his partner in the United Kingdom and that he satisfied the English language requirements. The Respondent did not consider that there were any exceptional circumstances to warrant a grant of leave to remain outside of the Immigration Rules. An entry clearance manager reviewed and maintained the decision on 14 November 2018.
4. Judge Howard allowed the appeal in a decision promulgated on 4 July 2019 on human rights grounds. Although accepting that the Appellant did not meet the suitability requirements for a grant of leave to remain as he had failed to disclose previous unsuccessful application for entry clearance, it was found that the Applicant did have sufficient earnings, together with a sufficient level of savings to meet the financial requirements of Appendix FM to the Immigration Rules; matters which were taken into account in the assessment of the appeal on Article 8 grounds. There was no dispute that this was a genuine and subsisting marriage, with a young child and that the refusal of entry clearance would be an interference with the family's right to respect for family life.
5. When undertaking the final balancing exercise, the First-tier Tribunal took into account the factors in section 117B of the Nationality, Immigration and Asylum Act 2002, noting that the Appellant would not be a burden on the taxpayer given that the financial requirements had been met and that he was likely to be able to successfully seek employment in the United Kingdom as a primary school teacher. Further, it was noted that the Respondent had not alleged any dishonesty on the part of the Appellant nor any substantive reason why his earlier application was refused that would have a bearing on the public interest to be taken into account now, such that in all of the circumstances, the weight to be attached to the maintenance of immigration control was limited and overall the public interest was outweighed in favour of admitting the Appellant to the United Kingdom to pursue family life and undertake his role as a parent.

The appeal

6. The Respondent appeals on three grounds as follows. First, that the decision was inconsistent in finding first that the suitability requirements had not been met by the

Appellant, but later finding that the requirements of Appendix FM of the Immigration Rules had been met. The First-tier Tribunal erred in law in not properly factoring into the proportionality assessment for the purposes of Article 8, the public interest which went beyond the maintenance of immigration control, in circumstances where the Appellant could not meet all of the requirements of the Immigration Rules for a grant of leave to remain given his failure to disclose an earlier unsuccessful application. Secondly, that the First-tier Tribunal erred in accepting the sponsor's income based on assertion in her evidence, without giving reasons for the finding that she would earn £18,200 per annum. Thirdly, that the First-tier Tribunal erred in finding that the Appellant had sufficient savings to supplement her income to the required level to meet the financial requirements and fails to give adequate reasons given the reference to savings of £12,000 when over £19,000 was needed.

7. At the oral hearing, on behalf of the Respondent, Ms Vijiwale made oral submissions only in respect of the first ground of appeal on the basis that the Appellant's failure to meet the suitability criteria for failing to disclose an earlier unsuccessful application for entry clearance is significant, as is the mere fact that he did not meet all of the requirements for a grant of leave to remain under the Immigration Rules. It was submitted that the First-tier Tribunal failed to take this into account or attach appropriate weight to it, leading to a failure to undertake a proper balancing exercise for the purposes of Article 8 of the European Convention on Human Rights.
8. The Appellant's wife, his sponsor, attended the oral hearing, supporting the decision made by the First-tier Tribunal and emphasising that there was no dishonesty in the failure to disclose details of the earlier unsuccessful application but that the Appellant was simply not aware of all of the details having been the victim of fraud by his previous representatives who submitted an appeal against refusal without his knowledge. In any event it was suggested that the refusal was than 10 years ago should not be given significant weight in all the circumstances.

Findings and reasons

9. In relation to the first ground of appeal, I do not find that there is any material discrepancy in the decision as to whether the Appellant can meet the requirements of the Immigration Rules for a grant of leave to remain, nor is there any failure when undertaking the balancing exercise to attach weight to the fact that the Appellant could not meet the suitability requirements under Appendix FM. In paragraph 17 of the decision, the First-tier Tribunal is satisfied that the sponsor has sufficient income and savings to satisfy that requirement of Appendix FM (my emphasis), i.e., the financial requirement and in paragraph 21, records that the Appellant fails to meet all of the requirements of Appendix FM, by reference to the preceding three paragraphs referring to the suitability criteria.
10. The later reference in paragraph 26(4) of the decision to the Appellant now meeting the relevant requirements of Appendix FM, in particular the financial threshold, is in the context of consideration of the public interest in section 117B(3) of the

Nationality, Immigration and Asylum Act 2002 only. It is followed by a reference to the reality of the circumstances being that if the Appellant were to make a fresh application for entry clearance, disclosing this and the earlier unsuccessful application, he would meet the requirements of the Immigration Rules for a grant of entry clearance.

11. In any event, in the final substantive paragraph of the decision. There is express acknowledgement by the First-tier Tribunal that in this appeal the Immigration Rules were not met, with reasons then given as to why in all of the circumstances of the case, the weight to be attached to the maintenance of effective immigration control is limited and in any event the matters in favour of the Appellant outweigh the public interest in refusal, such that the decision is a disproportionate interference with his right to respect for private and family life under Article 8 of the European Convention on Human Rights. The weight to be attached to particular factors is primarily a matter for the First-tier Tribunal and it is clear that all relevant factors, including the failure to meet the suitability criteria, have been expressly taken into account and a conclusion reached which was open to the Judge on the facts when conducting the balancing exercise. There is no error of law on the first ground relied upon by the Respondent.
12. The second and third grounds of challenge were not pursued orally by the Respondent, given the view in the grant of permission that these were not arguable. For completeness, there is no material error of law on either of these two grounds given that there was documentary evidence in the form of the bank statement available before the First-tier Tribunal showing savings of over £20,000, which is sufficient to cover any shortfall in earnings, either on the higher amount claimed by the Sponsor or on the lower amount supported by documentary evidence. On any view of the evidence, the financial requirements were met at the date of hearing before the First-tier Tribunal.

Notice of Decision

The making of the decision of the First-tier Tribunal did not involve the making of a material error of law. As such it is not necessary to set aside the decision.

The decision to allow the appeal is therefore confirmed.

No anonymity direction is made.

Signed



Date

18th November 2019

Upper Tribunal Judge Jackson