IAC-AH-SC-V1

Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Numbers: IA/11971/2021**
UI-2022-000509; HU/53012/2021

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On the 12th May 2022	**On the 18th July 2022**

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

MR KARAM ELAHI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr R Dar (Solicitor) Trojan Solicitors
For the Respondent: Ms S Cunha (Home Office Presenting Officer)

DECISION AND REASONS

1. The appellant appeals against the decision of First-tier Tribunal Judge Fox (the judge) who dismissed the appellant's appeal against the decision of the respondent made on 27th May 2021 to refuse him entry clearance as a spouse of Maaria Saqlain a British citizen (the sponsor).

2. The judge recorded that the respondent asserted that the appellant had previously breached the Immigration Rules and contrived in a significant way to frustrate the intentions of the Immigration Rules specifically

Appendix FM paragraph 9.8.2(a) and (c). (In fact it is under Paragraph 9.8.2 of the Immigration Rules that an application for entry clearance or permission to enter may be refused where the applicant has previously breached immigration laws). The Secretary of State considered that the appellant did not satisfy the suitability criteria of the Immigration Rules. The judge dismissed the appellant's appeal.

3. The grounds of appeal against that decision were as follows:

   (1) That the Tribunal, while determining the issue, misdirected itself and reached a determination based on an error of law.

   (2) The Tribunal had erred by overemphasising the relevance of the appellant's precarious immigration status and immigration history when embarking on his relationship with his British citizen spouse.

   (3) The appellant averred that the judge had prejudiced his decision-making process when considering the balancing exercise on the issue of proportionality and "reached at (sic) a rather harsh decision".

4. It was asserted that the judge overemphasised the immigration history even though the standard of proof was low. The application was refused under paragraph 9.8.2 of 'Appendix FM' (that was incorrect in the grounds) which was on the basis of a discretionary refusal. The appellant accepted that he had previously breached the Immigration Rules but he was remorseful and had now established a family life as a British citizen spouse. The judge's decision showed that 9.8.2 was engaged, paragraphs 17 and 22, but at this point the judge's conclusion that the appellant could not meet the Immigration Rules was premature and the judge ought to have gone through the steps in paragraphs 9.8.2(a), (b) and (c) of the Immigration Rules.

5. The judge confirmed at paragraphs 23 and 24 that Article 8 of the ECHR was engaged and the respondent's decision interfered with the appellant's right to respect for family life and "therefore, the judge has erred in law by dismissing the appeal". The judge erred in law by applying a higher standard despite accepting the interference.

6. Further the judge erred by stating that the appellant accepted there should be sanctions but there is no mention by the appellant of such that would provide the judge a reason to conclude the same.

7. The judge also erred in law in stating that there was an exclusion period of five years due to removal at public expense. There was generally an exclusion of ten years if removed on public expense, but that exclusion does not apply to applications under Appendix FM. Paragraph 9.8.7 of the Immigration Rules provides the relevant time period under paragraphs 9.8.1 and 9.8.2 in a table, but none of the conditions applied to the appellant's case and therefore the judge erred by stating there was an exclusion period of five years. The respondent's representative confirmed that there was no specific period according to their instructions for which

the appellant was excluded and therefore the judge should not have applied an exclusion because paragraph 9.1.1(a) clearly states that part 9 does not apply to Appendix FM.

8. Further the judge had erred in law by stating that the relationship requirement was accepted by implication only at paragraph 17 and the respondent was silent on the remaining criteria relating to the appellant's application for entry clearance as the sponsor's spouse (see paragraph 21). However, the respondent had clearly stated in the reasons for refusal letter that the appellant met the eligibility requirements of Section E-ECP of Appendix FM which included the financial relationship, financial and English language requirements.

9. The judge had not applied the principles of **Chikwamba [2008] UKHL 40** and **Secretary of State for the Home Department v Hayat** [2012] EWCA Civ 1054 (and the respondent's own guidance) which state that if the immigration history is poor individuals are expected to return and apply for entry clearance . The appellant did that and applied for entry clearance and therefore his previous immigration history should not necessarily be an excuse to refuse the appellant entry and cause the appellant grave disruption to his and his sponsor's Article 8 family life.

10. The Tribunal also arguably erred in law by failing to give proper weight to the adverse impact on the appellant's wife of having to leave the United Kingdom in circumstances where she had been born and brought up in the UK and her whole family life was in the UK. The outline at paragraph 20 by the judge formulates the test in terms of reasonableness and the ultimate question being whether the refusal of entry clearance in circumstances where the family cannot reasonably be expected to be enjoyed elsewhere, taking full account of all considerations weighing in favour of the refusal prejudices the family life of the applicant in a manner sufficiently serious to amount to a breach of the fundamental right protected by Article 8. The judge, however, erred in not applying the five-stage test out of **Razgar v SSHD [**2004] UKHL 27 .

The Hearing

11. At the hearing before me, although Ms Cunha initially resisted the grounds of appeal, she sensibly, in my view, conceded there was a material error of law.

12. Mr Dar accepted that the standard of proof was the civil standard of proof, but nonetheless relied on his written grounds of appeal.

Analysis

13. The application was considered by the respondent under Appendix FM as it stated, *'Under paragraph EC-P.1.1.(c), your application falls for refusal on grounds of suitability under Section S-EC of Appendix FM'*.

14. As the judge identified at paragraph 21, the respondent's only objection to the appellant's application for entry clearance was the suitability criteria. At paragraph 22 the judge said, '*there is no dispute that the appellant's immigration history engages paragraph 9.8.2'*.

15. It was correct that the appellant's immigration history engaged paragraph 9.8.2, which is not of Appendix FM, as the judge stated, but of the Immigration Rules.

16. The material parts of part 9 of the Immigration Rules, however, are set out as follows:

> 9.1.1. Part 9 does not apply to the following:
>
> (a) Appendix FM, except paragraphs 9.2.2, 9.3.2, 9.4.5, 9.9.2, 9.15.1, 9.15.2, 9.15.3, 9.16.2, 9.19.2, 9.20.1, 9.23.1 and 9.24.1. apply, and paragraph 9.7.3 applies to permission to stay; and paragraph 9.8.2 (a) and (c). applies where the application is for entry clearance;
>
> **Previous breach of immigration laws grounds**
>
> ...
>
> 9.8.2. An application for entry clearance or permission to enter may be refused where:
>
> (a) the applicant has previously breached immigration laws; and
>
> (b) the application was made outside the relevant time period in paragraph 9.8.7; and
>
> (c) the applicant has previously contrived in a significant way to frustrate the intention of the rules, or there are other aggravating circumstances (in addition to the immigration breach), such as a failure to cooperate with the redocumentation process, such as using a false identity, or a failure to comply with enforcement processes, such as failing to report, or absconding.

17. At paragraph 26 the judge said this stated

> *'In essence the appellant accepts that he should be subject to sanctions in these circumstances though he disputes the indefinite period of their imposition. It is information in the public domain that exclusion periods follow a formula depending on the circumstances of the exclusion and the nature of a migrant's departure from the UK. For those subject to enforced removal at public expense the exclusion period is 5 years. I note the appellant was removed from the UK in 2017 and therefore his continued presence outside the UK falls within this exclusion period'.*

It would appear that the judge derived his timescale of 5 years, which he factored against the appellant in his proportionality assessment, from 9.8.7 which gives relevant time periods under paragraphs 9.8.1 and 9.8.2 during which (subject to conditions) an application may be refused.

18. When considering paragraph 9.8.2 the judge failed to realise that 9.1.1 of the Immigration Rules specifies that part 9 does not apply to Appendix FM except paragraph 9.8.2(a) and (c) – ie not paragraph 9.8.2(b) and not 9.8.7. In fact the judge recorded at paragraph 2 that that was the position of the Entry Clearance Officer. Nonetheless, the judge at paragraph 26 wholly misapplied this section by considering that 9.8.2(b) was engaged. That was incorrect and in my view a material error of law when making the proportionality assessment under Article 8. Not only did the judge misapply the law, which would have a material effect, but as a result took into account an irrelevant factor.

19. I raised the case of **PS (paragraph 320(11) discretion: care needed) India [2010] UKUT 440 (IAC)** and note that this applies to a different rule but nonetheless the principle is similar in that care needs to be taken when considering such factors and this decision did not demonstrate that such care had been taken when assessing any aggravating features. The grounds of appeal have force. Those grounds also call into question the conclusion at paragraph 28 that the sponsor would be aware that the appellant would be unable to join her in the UK for a limited period at the minimum and as can be seen from above that conclusion was without adequate reasoning. There was no defined exclusion period following a formula depending on the circumstances of the exclusion as the judge stated.

20. Nor was there an adequate exploration of the factors in relation to the wife's circumstances and the relevant factor as outlined by the grounds of appeal that in accordance with principles highlighted in **Hayat** the appellant had indeed returned to Pakistan to make an entry clearance application.

21. I find a material errors of law and the decision is set aside with no preserved findings.

Notice of Decision

22. The Judge erred materially for the reasons identified. I set aside the decision pursuant to Section 12(2)(a) of the Tribunals Courts and Enforcement Act 2007 (TCE 2007). Bearing in mind the nature and extent of the findings to be made the matter should be remitted to the First-tier Tribunal under section 12(2) (b) (i) of the TCE 2007 and further to 7.2 (b) of the Presidential Practice Statement.

Direction

Any further evidence together with skeleton arguments should be filed and served at least fourteen days prior to the hearing.

23. No anonymity direction is made.

Signed Helen Rimington Date15th June 2022

Upper Tribunal Judge Rimington