Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/15081/2013

THE IMMIGRATION ACTS

Heard at North Shields
On 8 January 2014

Determination Promulgated
On 5 March 2014

Before

UPPER TRIBUNAL JUDGE DEANS

Between

MR ARPIT MALHOTRA

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Samra, Harbans Singh & Co Solicitors
For the Respondent: Mr P Mangion, Home Office Presenting Officer

DETERMINATION AND REASONS

1) Judge of the First-tier Tribunal Fisher dismissed this appeal against refusal to vary leave. A removal decision purporting to be made under section 47 of the Immigration, Asylum and Nationality Act 2006 on 19 April 2013 was withdrawn on behalf of the respondent at the hearing.

2) According to the Judge of the First-tier Tribunal, the appellant applied for leave to remain in the United Kingdom in January 2013 outside the Immigration Rules because he wanted to continue his studies and was awaiting a response from various universities. As part of the refusal decision a one stop notice was issued. An appeal was submitted, following which a bundle of documentary evidence was served on

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behalf of the appellant. From this bundle it was apparent that the appellant was married in the UK to a British citizen on 25 July 2013.

3) The Judge of the First-tier Tribunal found that the appellant could not satisfy paragraph S-LTR.2.2 of Appendix FM of the Immigration Rules because he had failed to disclose a material fact in relation to his application. This was his marriage on 25 July 2013. This was not disclosed to the respondent until 10 October 2013. Although the refusal under paragraph S-LTR.2.2 was discretionary, there was no reason why the normal course of refusal should not be followed.

4) The judge nevertheless accepted on the evidence that the marriage was genuine and subsisting.

5) The judge went on to consider the relationship under Appendix FM. He pointed out that the financial documents provided by the appellant did not meet the requirements of Appendix FM-SE. The judge further considered paragraph EX.1 of Appendix FM, in terms of which the appellant had to show that there were insurmountable obstacles to family life with his partner continuing outside the UK. In this regard the judge was referred to medical evidence in relation to the appellant's mother-in-law. The judge found, however, that this evidence was not up-to-date and did not state either the care she required or the overall prognosis. The judge was not satisfied that if the appellant's mother-in-law required care there was no-one else who could perform this role. The judge accepted that as a British citizen the appellant's wife could not be required to leave the UK. On the other hand, she married the appellant at a time when he had no other status than an application pending for leave to remain outside the Rules. Both parties should have been aware that the appellant's immigration status was precarious. The judge was not satisfied on the available evidence that there were insurmountable obstacles to family life continuing in India.

6) The judge did not then proceed to consider the appellant's private or family life outside the Rules under Article 8. This was because Article 8 was not specified in the original grounds of appeal. The appellant's representative was instructed late and did not have sight of the grounds of appeal until the day of the hearing. The appellant's representative made an application for the grounds to be varied to include Article 8 but the Judge of the First-tier Tribunal refused this application. The judge did not consider it reasonable for the representative to have waited until the hearing to make this application. In addition, as the removal decision had been withdrawn on behalf of the respondent, there was no prejudice to the appellant from not considering Article 8 as Article 8 grounds could be raised if and when the point arose when a lawful removal decision was made.

7) Permission to appeal was granted on the basis that the Judge of the First-tier Tribunal arguable erred in refusing to allow the grounds of appeal to be varied. This was alleged to be a procedural irregularity which made a material difference to the outcome of the appeal and was arguably unfair.

8) It was pointed out in the application for permission to appeal that the judge had accepted that the parties were in a genuine and subsisting relationship. The judge ought then to have considered in terms of Appendix FM whether the appellant met the relevant criteria in EX.1. The judge was wrong to consider the suitability requirement under S-LTR and should have gone on to consider the financial requirements under E-LTRP.3.1.

Submissions

9) A skeleton argument was lodged on behalf of the appellant in which it was stated that the proper approach for the judge would have been to consider the appeal under the Immigration Rules and then to make an assessment under Article 8. Reference was made to the case of Kabia (MF: para 298 -"exceptional circumstances") [2013] UKUT 00569. Reference was also made to the respondent's IDI on paragraph EX.1 in relation to the meaning of exceptional circumstances. The skeleton argument referred to the case of MM [2013] EWHC (Admin) 1900 with regard to the financial requirements under Appendix FM.

10) At the hearing before me Mr Samra made a submission on behalf of the appellant. He said that he was instructed for the hearing on 14 October before the First-tier Tribunal only on 27 September. This left little more than two weeks for preparation. He did not see the grounds of appeal until they were read out by the judge at the hearing. The grounds included the Immigration Rules and referred to paragraph 276ADE.

11) Mr Samra submitted that the proper test was a two stage test in which the Rules were looked at first and then Article 8. The judge did not properly consider either stage of this test, although the judge made a positive finding on the relationship. The judge found that there were no insurmountable obstacles to family life being carried on in India notwithstanding the appellant's evidence, including medical evidence. Since the hearing further medical evidence had been produced as the appellant's mother-in-law had been diagnosed with terminal cancer and a fresh application had been made. Mr Samra submitted that the judge did not follow the two stage approach in accordance with Green (Article 8 – new rules) [2013] UKUT 00254.

12) The question arose as to whether the proper approach under Article 8 would have been to consider whether the appellant could return to India to apply for entry clearance. Mr Samra responded that this was not satisfactory because the Judge of the First-tier Tribunal had concluded that the appellant had failed to disclose a material fact in this application. Mr Mangion confirmed that this would count against the appellant under paragraph 320(7B).

13) In his submission for the respondent Mr Mangion referred to the judge's reasoning at paragraph 3 of the determination, in which he said that as the Section 47 decision had been withdrawn the appellant would have an opportunity at a later stage to assert his Article 8 rights. Mr Mangion referred to the case of Mirza [2011] EWCA Civ 159. Mr Mangion was asked if a section 120 notice had been served on the appellant but he was

uncertain whether it had or not. According to the determination, however, at paragraph 13, the judge records that a "one stop notice" was issued to the appellant with the refusal decision.

14) Mr Mangion referred to MF (Nigeria) on the issue of insurmountable obstacles. He accepted that this could be equated with reasonableness but said there was not an obvious error of law in the determination in this regard. He submitted that the judge did not err in failing to make a freestanding finding under Article 8.

15) Mr Samra replied by pointing out that at the hearing both parties had requested an adjournment and this was refused. The outcome might have been different if the appellant had had the opportunity of showing that his mother-in-law was largely dependent on the sponsor. An application would be made, however, to lodge new evidence. It was put to Mr Samra that even if the appellant's case was taken at its highest, it would not be disproportionate to expect the appellant to return to India to apply for entry clearance. In response Mr Samra sought to rely on Chikwamba [2008] UKHL 40 and Hayat EWCA Civ 1054. He said there was also an issue of delay, in relation to which he sought to rely on EB (Kosovo) [2008] UKHL 41.

Discussion

16) I was referred on behalf of the appellant to the case of Kabia in terms of which an Article 8 claim outside the Rules is likely to succeed only where removal would resulting unjustifiably harsh consequences for the appellant or their family. In an appeal like this, even where the judge has found that there is a genuine and subsisting relationship between the appellant and his spouse, it would still need to be shown that there were unjustifiably harsh consequences, or very compelling reasons, in the language of MF (Nigeria), for finding that removal would be disproportionate.

17) Nevertheless, before a Tribunal can make a decision under Article 8 or under the Immigration Rules it is necessary to have a fair hearing. I have considerable reservations about the course taken by the Judge of the First-tier Tribunal in hearing this appeal. There clearly was an Article 8 issue before the judge, namely the appellant's marriage, but the judge refused to allow the grounds to be varied to include Article 8. Before examining the reasons given by the judge for refusing the variation, I would observe that under Section 6 of the Human Rights Act 1998 the judge was bound to act in a way that was not incompatible with the Human Rights Convention. It may be inferred from this that if there was an obvious Article 8 point, the judge should have considered it.

18) Instead the judge considered that the appellant would be able to plead Article 8 in a later appeal if a removal decision was served in due course. Mr Mangion considered that this was a proper course of action in accordance with the case of Mirza and he was uncertain as to whether there had been a one stop notice served or not. The determination provides the answer to this question, however, as the judge states there was such a notice. The appellant was therefore entitled to raise the issue of his

marriage under the one stop procedure and in terms of section 85(2) of the 2002 Act the judge ought to have considered it.

19) The case of Mirza is authority for the point that the Secretary of State is not required to make a removal decision at the same time or shortly after the decision to refuse leave to remain. As was pointed out by the Supreme Court in Patel [2013] UKSC 72 at paragraph 67, however, a matter raised in response to a one stop notice can legitimately be treated as constituting a ground of appeal even it was not raised before or decided by the Secretary of State. On this basis instead of relying on the Immigration Rules to justify leave to remain, the appellant can rely on a Human Rights ground (paragraph 68).

20) Furthermore, had the judge followed the two stage approach in MF (Nigeria) then the judge should have considered the appeal outwith the Rules. This is a further indication that the proper approach would have been to consider the appeal under Article 8.

21) I have an additional difficulty with the judge's decision in respect of his finding under paragraph S-LTR.2.2 of Appendix FM. This concerned the alleged failure by the appellant to disclose his relationship with the sponsor in his application for leave to remain made in January 2013. The point was raised only at the hearing, presumably by the Presenting Officer, who did not receive the appellant's bundle referring to the existence of the marriage until either shortly before the hearing or on the day of the hearing itself. The Presenting Officer had in fact asked for more time to consider the documentary evidence given that the new issue of marriage had been raised.

22) I note from the findings made by the judge that the application for leave to remain was made in January 2013 but the marriage did not take place until 25 July 2013. It must be concluded from this that at the time the appellant made his application he was not married. Furthermore, the appellant and sponsor do not appear to be been living together even at the date of the application as the judge referred at paragraph 15 to Facebook messages being passed between them. Accordingly, if at the time of making the application the sponsor was neither the appellant's spouse nor his cohabitee, the question arises whether the appellant was under any obligation to mention the existence of a relationship with the sponsor. Furthermore, if the issue addressed by the judge under paragraph S-LTR.2.2 had arisen prior to the hearing, the appellant would have had notice of it and been in a better position to respond to it.

23) I am satisfied that there has been procedural unfairness in the conduct of this appeal amounting to an error of law by refusing a variation in the grounds of appeal and by failing to consider Article 8. I consider also that there has been unfairness in relation to the judge's finding under Paragraph S-LTR.2.2.

24) As I have already stated, even though a case may appear to be weak, the appellant is entitled to a fair hearing in which to make out his case as best he can. In the circumstances of this appeal I am not satisfied that the appellant had a fair hearing

before the First-tier Tribunal. The proper course is for the appeal to be remitted to the First-tier Tribunal under Practice Statement 7.2. None of the findings made by the Judge of the First-tier Tribunal should be preserved. Although the judge made a finding in favour of the appellant to the effect that his marriage was genuine and subsisting, I consider that in order for the parties to be afforded a fair hearing following remittal none of the findings can be allowed to stand.

Conclusions

25) The decision of the First-tier Tribunal discloses an error on a point of law such that it is set aside and will be remitted to the First-tier Tribunal to be remade before a judge other than Judge Fisher.

Anonymity

26) No anonymity direction was made by the First-tier Tribunal and I do not consider that there is a need for an anonymity order at this stage.

Signed Date 28/02/2014

Judge of the Upper Tribunal