IAC-FH-NL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/10237/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 31 July 2014	**On 7 November 2014**

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

ENTRY CLEARANCE OFFICER

Appellant

and

MR ANTONY JERAD VISHNUKUMAR

Respondent

Representation:

For the Appellant (Entry Clearance Officer): Mr P Nath, Home Office Presenting Officer
For the Respondent (Mr Vishnukumar): Mr P Turner, Counsel instructed by A P Solicitors

DETERMINATION AND REASONS

1. This is the Entry Clearance Officer's appeal against a determination of First-tier Tribunal Judge Onoufriou, who had allowed Mr Vishnukumar's appeal against the Entry Clearance Officer's decision refusing his application for entry clearance. For ease of reference, throughout this

determination I shall refer to the Entry Clearance Officer, who was the original respondent as "the Entry Clearance Officer" and to Mr Vishnukumar, who was the original appellant, as "the claimant".

2. The claimant is a citizen of Sri Lanka whose claimed date of birth is 2 May 1995. He applied for entry clearance to join his parents, who are settled in the United Kingdom, under paragraph 297 of the Immigration Rules, but this application was refused by the Entry Clearance Officer on 7 March 2013 (just after the claimant's 18th birthday). The Entry Clearance Officer was not satisfied that the maintenance requirements under paragraph 297(v) were satisfied.

3. The claimant appealed against this decision, and following a review by an Entry Clearance Manager (in which the decision was affirmed) his appeal was, as already noted above, heard before First-tier Tribunal Judge Onoufriou, sitting at Hatton Cross on 5 March 2014.

4. At this hearing, it was conceded on behalf of the claimant that the Entry Clearance Officer's decision "was in accordance with the Immigration Rules" (this is apparent from paragraph 6 of the judge's determination). The sponsor's income was not sufficient to satisfy the maintenance requirements under paragraph 297 (v), and thus the appeal had to be dismissed under the Rules.

5. However, the judge allowed the appeal under Article 8.

6. Having stated at paragraph 14 of his determination that "it is ... clear that, as at the date of the [claimant's] application, his sponsor was not earning sufficient funds to be able to adequately maintain him in accordance with the Immigration Rules to a minimum level of income support for a family of this nature" and that "it has been conceded by [the claimant's Counsel] that [the Entry Clearance Officer's] decision to refuse entry clearance was in accordance with the Immigration Rules", the judge's reasons for allowing the appeal under Article 8 are set out in one paragraph, paragraph 15. The Judge sets out the positive factors in favour of the claimant before finding as follows:

> "Taking all these factors into account and taking into account the best interests of the child, bearing in mind the [claimant] was under 18 at the time of his application, I find that it is disproportionate to keep [the claimant] apart from his family, taking into account the circumstances which caused them to be separated in the first place and the circumstances which exacerbated that situation. After taking into account the fact that his family have not sought to rely upon public funds, I find it disproportionate that the need to maintain effective immigration control should keep this family apart."

Grounds of Appeal

7. Essentially, the grounds complain that the judge made no reference to the new Immigration Rules which had been introduced from 9 July 2012, and which, it is submitted, are now "a complete code that form the starting point for the decision-maker", as confirmed by the Court of Appeal in *MF (Nigeria)* [2013] EWCA Civ 1192. It is submitted that "any Article 8 assessment should only be made after consideration under these Rules" which "was not done in this case".

8. It is submitted that the failure to consider this appeal in the context of the new Rules was a material error, because in light of current jurisprudence (in particular *MF (Nigeria)*, *Nagre* [2013] EWHC 720 (Admin) and *Gulshan* [2013] UKUT 00640) it was incumbent on the Tribunal to consider whether there were compelling circumstances not recognised by the Rules such that refusal of the application would lead to "unjustifiably harsh" consequences to the claimant. The Tribunal failed to follow this approach.

The Hearing

9. This appeal first came before this Tribunal on 17 June 2014. On that occasion, Mr Turner submitted that the effect of the transitional provisions, which are to be found at A277-A280 of the Rules is that no additional Appendix FM requirements were introduced with regard to applications under paragraph 297; accordingly there was no need to consider the recent jurisprudence relied upon by the Entry Clearance Officer in this appeal, which was only relevant in the context of the new Rules which did not apply here.

10. As this argument had not previously been canvassed, it was agreed by both parties that this point would have to be properly argued and it was apparent there was insufficient court time available on that date.

11. The hearing was accordingly adjourned until 31 July 2014, but I directed that Mr Turner was to set out his submissions on this point in a skeleton argument prior to that hearing, which he did.

12. Regrettably, this skeleton argument is not wholly relevant to this appeal, but appears to have been adapted from another document prepared in respect of another applicant. When setting out the "factual background" at paragraphs 4 and 5 of this skeleton argument, reference is made to the claimant being a national of Pakistan, born on 1 November 1981 whose application for leave to remain as the spouse of her husband had been refused. As the claimant in this case is a young man who was born some 14 years later, and is a national of Sri Lanka who was applying to join his parents, this factual background clearly does not relate to him. Also, there is reference within the document to judicial review proceedings which had been brought, which again cannot relate to this case.

13. Notwithstanding that the skeleton argument is not wholly specific to this case, Mr Turner's submissions nonetheless have generic relevance. If and

to the extent that they are found to be sound, they would apply in this case as well.

14. Mr Turner's submissions were developed in argument before me and I also heard submissions from Mr Nath on behalf of the Entry Clearance Officer. These were recorded contemporaneously and are contained in the Record of Proceedings. Accordingly, I shall not set out below everything which was said to me in oral argument, but shall refer only to such of the submissions as are necessary for the purposes of this determination. I have, however, taken full account of everything which was said to me during the course of the hearing, and to all the documents contained within the file, whether or not this is specifically set out below.

15. Mr Turner's essential argument was that because the provisions of paragraph 297 were retained after 9 July 2012 (because this paragraph was not amended to include any Appendix FM considerations) consideration of whether or not an applicant who applies under paragraph 297 should in the alternative succeed under Article 8 must accordingly also be unaffected by the changes in the Rules. This will be discussed below.

16. Although Mr Turner asserted that even if the judge should have considered the position under the new Rules, the claimant's appeal could still succeed because it was in his best interests that the family "stay together", this argument was not fully developed at the hearing, which was confined to consideration of whether or not there was an error of law in the First-tier Tribunal Judge's determination. Mr Turner submitted that if an error of law was found, the proper course would be to remit this appeal back to the First-tier Tribunal for reconsideration. This will also be discussed below.

Discussion

17. The transitional provisions were set out within the skeleton argument submitted by Mr Turner, and they are now set out within this determination (although some of these provisions, which are not relevant to this appeal, have been excluded):

> **"Transitional provisions and interaction between Part 8, Appendix FM and Appendix FM-SE**
>
> ***A277*** From 9 July 2012 Appendix FM will apply to all applications to which Part 8 of these rules applied on or before 8 July 2012 except where the provisions of Part 8 are preserved and continue to apply, as set out in paragraph A280.
>
> ***A277A*** Where the Secretary of State is considering an application for indefinite leave to remain to which Part 8 of these rules continues to apply (excluding an application from a family member of a Relevant Points Based System Migrant), and where the applicant:

(a) does not meet the requirements of Part 8 for indefinite leave to remain, and

(b) continues to meet the requirements for limited leave to remain on which the applicant's last grant of limited leave to remain under Part 8 was based, further limited leave to remain under Part 8 may be granted of such a period and subject to such conditions as the Secretary of State deems appropriate. For the purposes of this sub-paragraph an applicant last granted limited leave to enter under Part 8 will be considered as if they had last been granted limited leave to remain under Part 8; or

(c) if the applicant does not meet the requirements of Part 8 for indefinite leave to remain as a bereaved partner only because paragraph 322(1C)(iii) or 322(1C)(iv) of these rules applies, the applicant will be granted limited leave to remain under Part 8 for a period not exceeding 30 months and subject to such conditions as the Secretary of State deems appropriate.

A277B Where the Secretary of State is considering an application for indefinite leave to remain to which Part 8 of these rules continues to apply (excluding an application from a family member of a Relevant Points Based System Migrant) and where the application does not meet the requirements of Part 8 for indefinite leave to remain or limited leave to remain:

(a) the application will also be considered under paragraphs R-LTRP.1.1.(a), (b) and (d), R-LTRPT.1.1.(a), (b) and (d) and EX.1. of Appendix FM (family life) and paragraphs 276ADE to 276DH (private life) of these rules;

(b) if the applicant meets the requirements for leave under those paragraphs of Appendix FM or paragraphs 276ADE to 276DH (except the requirement for a valid application under that route), the applicant will be granted leave under those provisions; and

(c) if the applicant is granted leave under those provisions, the period of the applicant's continuous leave under Part 8 at the date of application will be counted towards the period of continuous leave which must be completed before the applicant can apply for indefinite leave to remain under those provisions.

(d) Except sub-paragraph (c) does not apply to a person last granted leave as the family member of a Relevant Points Based System Migrant.

A277C Subject to paragraphs A277 to A280, paragraph 276A0 and paragraph GEN.1.9. of Appendix FM of these rules, where the Secretary of State deems it appropriate, the Secretary of State will consider any application to which the provisions of Appendix FM (family life) and paragraphs 276ADE to 276DH (private life) of these rules do not already apply, under paragraphs R-LTRP.1.1.(a), (b) and (d), R-LTRPT.1.1.(a), (b) and (d) and EX.1. of Appendix FM (family life) and paragraph 276ADE (private life) of these rules. If the applicant meets the requirements for leave under those provisions (except the requirement for a valid application),

the applicant will be granted leave under paragraph D-LTRP.1.2. or D-LTRPT.1.2. of Appendix FM or under paragraph 276BE(1) of these rules.

A278 The requirements to be met under Part 8 after 9 July 2012 may be modified or supplemented by the requirements in Appendix FM and Appendix FM-SE.

A279 Paragraphs 398-399D apply to all immigration decisions made further to applications under Part 8 and paragraphs 276A-276D where a decision is made on or after 28 July 2014, irrespective of the date the application was made.

A280 The following provisions of Part 8 apply in the manner and circumstances specified:

(a) The following paragraphs apply in respect of all applications made under Part 8 and Appendix FM, irrespective of the date of application or decision:
277-280
289AA
295AA
296

(b) The following paragraphs of Part 8 continue to apply to all applications made on or after 9 July 2012. The paragraphs apply in their current form unless an additional requirement by reference to Appendix FM is specified:

Paragraph number	**Additional requirement**
295J	None
297-300	None
304-309	None …”

18. Mr Turner’s submission, which can be summarised briefly, is superficially attractive. It is provided by A277 that from 9 July 2012 Appendix FM will apply “to all applications to which Part 8” applied prior to that date

"except where the provisions of Part 8 are preserved and continue to apply, as set out in paragraph A280".

19. By A280, Part 8 (that is the old Rules) will continue to apply to applications brought under paragraph 297 without any additional requirements. As this is an application brought under paragraph 297, the new Rules will accordingly not have effect.

20. The flaw in this submission is that Mr Turner has completely overlooked the effect of paragraphs A277B and A277C of the transitional provisions, from which it is clear that the new Rules do apply when consideration is given to Article 8 in respect of applications which continue to be made under the old Rules but which fail. The wording of A277B is clear on this, and bears repeating:

> "Where the Secretary of State is considering an application for indefinite leave to remain to which Part 8 of these Rules continues to apply... and where the application does not meet the requirements of Part 8 for indefinite leave to remain or limited leave to remain... (a) the application will also be considered under paragraphs LTRP.1.1.(a), (b) and (d), R-LTRPT.1.1.(a), (b) and (d) and EX.1. of Appendix FM (family life) and paragraphs 276ADE to 276DH (private life) of these Rules; (b) if the applicant meets the requirements for leave under those paragraphs of Appendix FM or paragraphs 276ADE to 276DH... the applicant will be granted leave under those provisions."

21. In other words, the new Rules relating to Article 8 are specifically said to apply in cases such as the present, which is precisely an application where the claimant has not met the requirements of Part 8 (in this case the maintenance requirements under paragraph 297).

22. The Secretary of State has given guidance as to how she will consider applications outside the Rules in these circumstances and the courts, from *Nagre* onwards, have made clear the basis upon which the consideration of an applicant's Article 8 rights in these circumstances should now be undertaken. Before allowing an appeal under article 8, in circumstances where an applicant cannot succeed under the rules as contained within the new provisions referred to in A277B, a decision maker (in this case the First-tier Tribunal Judge) is obliged to consider whether or not there are compelling reasons why the consequences of the decision in question (in this case the refusal of entry clearance) would be "unjustifiably harsh".

23. It is clear in this case that the judge did not carry out this balancing exercise. While he set out those factors which in his judgment favoured the claimant, it is not apparent that he appreciated the very great weight which must be given to the public interest in securing the economic well-being of the UK by sensible immigration control, considered on the macro as well as the micro level (see in particular the decision of the Court of Appeal in *FK & OK (Botswana)* [2013] EWCA Civ 238, and of this Tribunal in *Shahzad (Article 8: legitimate aim: Pakistan)* [2014] UKUT 85) and he

failed to give adequate (or even any) reasons for concluding that the factors which favoured allowing this appeal were so compelling as to outweigh this public interest. The judge does not appear to have given any consideration to the effect of the new Rules, which he was obliged to do. Even had I accepted Mr Turner's submissions as to the effect of the transitional provisions, I would still have found that there had been a failure to consider what weight needed to be attached to the public interest in not generally allowing leave to enter to persons who cannot otherwise succeed under the Rules. A balancing exercise cannot properly be conducted without proper consideration of the factors on both sides.

24. It follows that this decision will have to be set aside and re-made. When considering whether or not this appeal should be remitted I am very conscious of the guidance given by the President of this Tribunal in the recently reported Tribunal decision in *MM (unfairness; E & R Sudan)* [2014] UKUT 00105, in which it is stated at paragraph 26 as follows:

> "By section 12 of the 2007 Act, where the Upper Tribunal concludes that the decision of the First-Tier Tribunal involved the making of an error on a point of law **and** decides to set the decision aside, it must either remit the case to the First-tier Tribunal or remake the decision itself. We consider that, as a fairly strong general rule, where a first instance decision is set aside on the basis of an error of law involving the deprivation of the Appellant's right to a fair hearing, the appropriate course will be to remit to a newly constituted First-Tier Tribunal for a fresh hearing. This is so because the common law right to a fair hearing is generally considered to rank as a right of constitutional importance and it is preferable that the litigant's statutory right of appeal to the Upper Tribunal should be triggered only where the former right has been fully enjoyed."

25. In this case the effect of the error of law is that the claimant's appeal was not considered properly because the Tribunal did not carry out a proper balancing exercise which was necessary in order for the decision to be made properly. Accordingly, although on the facts of this case the claimant might find it difficult to persuade a Tribunal that there are compelling reasons why it should consider, exceptionally, that even though the requirements of the Rules are not satisfied, it would nonetheless be unjustifiably harsh not to grant him entry clearance, nonetheless as a matter of fairness and proper procedure, he ought to be allowed this opportunity. As I consider that there is no reason in this case to depart from what is said in *MM* to be the "fairly strong general rule" that the appropriate course is to remit back to the First-tier Tribunal so that a differently constituted Tribunal can now reconsider the appeal, I will so order. This Tribunal will also have to have in mind the provisions of part 5A of the Nationality, Immigration and Asylum act 2002, which was inserted by section 19 of the Immigration Act 2014, but that is not a matter which it is necessary for me to consider now.

Decision

I set aside the decision of First-tier Tribunal Onoufriou as containing a material error of law and direct that the appeal be remitted to the First-tier Tribunal to be heard by any First-tier Tribunal Judge other than Judge Onoufriou.

Signed: Date: 31 October 2014

Upper Tribunal Judge Craig