Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/11172/2013

THE IMMIGRATION ACTS

Heard at Manchester	**Determination Promulgated**
On 3 July 2014	**On 11 July 2014**

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

ENTRY CLEARANCE OFFICER – ISLAMABAD

Respondent

and

IRFAN YOUSIF

Claimant

Representation:

For the Claimant: Mr Hussain, Counsel
For the Respondent: Mr Harrison, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The respondent appeals with permission against the determination of First-tier Tribunal Judge De Haney promulgated on 20 February 2014, allowing the appeal of Irfan Yousif ("the claimant") against the decision made on 17 April 2013 to refuse him entry clearance to the United Kingdom as the spouse of Tahrah Yasmin Ali.

2. The claimant's case is that he was entitled to entry clearance to the United Kingdom as the spouse of Ms Tahrah Yasmin Ali ("the sponsor") on the basis that the

requirements of the Immigration Rules are met and/or in the alternative that refusal to grant him entry clearance would be disproportionate and thus contrary to the United Kingdom's obligations pursuant to Article 8 of the Human Rights Convention.

3. The sponsor has two jobs, working for Tesco and at Watan Superstore. The couple have a daughter born in the United Kingdom on 5 February 2013 who is a British citizen. The sponsor lives with her stepmother and brother. The stepmother undergoes dialysis three times a week and requires a considerable degree of care as a result; her father lives in the house next door which also belongs to him. The sponsor's mother lives some distance away but travels to Oldham to look after the daughter to allow the sponsor to work seven days a week.

4. The application was refused on the basis that the claimant had not provided the specified evidence to show that the sponsor earns the income claimed from her employment by Watan Superstore and thus did not fulfil the requirements of Appendix FM-SE.

5. The appeal came before Judge De Haney at Manchester on 7 February 2014. He heard evidence from the sponsor and found that:-

   (a) there was no doubt that the sponsor was in genuine employment and that her combined salaries were in excess of £18,600 [16], it had not been challenged by the respondent [17];

   (b) the gross annual salary paid by Watan could be calculated by reference to the letter provided but did not meet the requirement of Appendix FM-SE as it did not give the date upon which she started work [17];

   (c) the sponsor's bank statements did not show wages being paid in from Watan because, as she worked seven days a week, she was unable to pay money into the bank in working hours [18];

   (d) "in all the particular circumstances of this appeal it is such that it is a disproportionate interference with the right to family life of the appellant, his British citizen child and wife" and the interference by refusal of entry clearance was not proportionate.

6. The respondent sought permission to appeal on the grounds that:-

   (a) that the judge had erred in going on to consider Article 8 without first considering, as he was bound to do, whether there were arguably good grounds for doing so as per **Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 640**;

   (b) that the findings do not amount to a compelling basis on which to allow the appeal as the judge did not provide adequate reasons as to why there were

compelling circumstances or why it would be disproportionate to require the claimant to make a fresh application and maintain the status quo.

7. Permission to appeal was granted by First-tier Tribunal Judge Saffer on 13 May 2014.

The Hearing

8. Mr Harrison submitted that Judge De Haney had failed to provide any proper basis for allowing the appeal and did not appear to have taken into account the fact that the claimant had not met the requirements of the Rules.

9. Mr Hussain submitted that the conclusion had been one open to the judge and that this was not a "near miss" argument. He submitted that, given that Article 8 was not provided for in the Rules insofar as it relates to entry clearance, as opposed to leave to remain, it was a relevant factor to take into account and that the judge did not take into account matters which were not open to him following **Patel and others v SSHD** [2013] UKSC 72.

10. It is not arguable that Judge De Haney erred in proceeding directly to consider Article 8 outside the Immigration Rules. Whilst the decision in **Gulshan** may indicate those circumstances in which it is not necessary for a judge to consider Article 8 outside the Rules it must be borne in mind that, unlike cases regarding leave to remain, the issue of Article 8 with respect to entry clearance is not provided for in a similar way. Further, the proposition that a judge need not go on to consider Article 8 unless there are compelling circumstances is not authority for the proposition that he should not do so and that doing so is an error of law in itself.

11. That said, the decision with regards to Article 8 and in particular proportionality fails to set out in any adequate way the factors which Judge De Haney took into account both in favour of the claimant and in favour of the respondent bearing in mind the public interest in the maintenance of a system of immigration control which is certain, even if complex, and containing Rules which are applicable to all.

12. On that basis I was satisfied the determination of Judge De Haney did involve the making of an error of law with respect to Article 8 and that that part of the determination would need to be set aside. There is no reason on which his findings of fact should be set aside.

13. Both representatives agreed that it would be sensible to hear some additional brief evidence from the sponsor and her mother.

14. The sponsor explained that she has worked continuously, seven days a week, in two jobs full-time in order to make it possible for her husband to join her. She said that she found it very draining looking after a small child as well even with the support of her mother and that this has had the result of her being diagnosed with depression and prescribed antidepressants. She said that she does not wish to take these given that this makes it difficult for her to look after her child properly and to work. She said that she is partly reliant on her mother to help.

15. The sponsor's mother gave evidence explaining that in order to allow the sponsor to do early shifts she gets a bus at 5.10am from Manchester to travel to Oldham, sometimes having to take a taxi to get into Manchester first, and stays looking after the child. This is not that easy given that her former husband's new wife lives in the house (the sponsor's stepmother). She described the sponsor as an excellent mother who is doing her best to bring up a child in difficult circumstances and that there are significant difficulties caused to the whole extended family by the refusal of entry clearance.

16. In closing submissions Mr Harrison said that he had nothing materially to add to what was set out in the Entry Clearance Officer's refusal other than to say that it was open for a fresh application to be made.

17. Mr Hussain submitted that there were on the facts of this case compelling reasons given the impact on the extended family; the fact that the sponsor is unwell and suffering from depression; the difficulty arising from the stepmother's dialysis three days a week and that when taking this as a whole, there were compassionate circumstances.

18. Both the sponsor and her mother gave evidence in clear, forthright terms and with considerable articulacy. Both were impressive and compelling witnesses. Their evidence was sincere, and given with considerable candour.

19. I am satisfied from the evidence before me that the sponsor is deeply committed to her relationship to the claimant. I am satisfied that she has suffered from depression as a result of the separation from her husband as confirmed in the letters from the doctor and also the evidence from her mother. None of this has been challenged by the respondent.

20. I am satisfied also by the sponsor's mother that she is committed to ensuring a good family life for her daughter and grandchild; I accept that she goes to considerable lengths to look after the child so that the sponsor can continue to work, as she said.

21. The sponsor's problems are compounded by the fact that her stepmother, with whom she lives, and who is partially dependent on her, undergoes dialysis three days a week and that puts a significant strain on the family although the sponsor did quite spontaneously say that her sister-in-law helps look after the mother and the father lives next door. Again, that is not challenged.

22. I accept also that the presence of the claimant in the United Kingdom would make this situation considerably easier. He would be able to look after the child and to assist round the house, as the sponsor said.

23. Whilst I accept that the sponsor is providing care for her daughter, I accept also that she is not able to spend much time with her and that this contributes to her depression. None of this is in the best interests of the child. This is a case in which there is clearly a strong family life and where there is no suggestion of dishonesty on the part of either the claimant or the sponsor in any way whatsoever.

24. In assessing article 8, I bear in mind the decision of the Supreme Court in **Patel & Ors v SSHD** [2013] UKSC 72 per Lord Carnwath

> 54. The difference between the two positions may not be as stark as the submissions before us have suggested. The most authoritative guidance on the correct approach of the tribunal to article 8 remains that of Lord Bingham in *Huang*. In the passage cited by Burnton LJ Lord Bingham observed that the rules are designed to identify those to whom "on grounds such as kinship and family relationship and dependence" leave to enter should be granted, and that such rules "to be administratively workable, require that a line be drawn somewhere". But that was no more than the starting point for the consideration of article 8. Thus in Mrs Huang's own case, the most relevant rule (rule 317) was not satisfied, since she was not, when the decision was made, aged 65 or over and she was not a widow. He commented at para 6:
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> > "Such a rule, which does not lack a rational basis, is not to be stigmatised as arbitrary or objectionable. But an applicant's failure to qualify under the rules is for present purposes the point at which to begin, not end, consideration of the claim under article 8. The terms of the rules are relevant to that consideration, but they are not determinative."
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> 55. Thus the balance drawn by the rules may be relevant to the consideration of proportionality. I said much the same in *Rudi*. Although I rejected the concept of a "near-miss principle", I did not see this as inconsistent with the Collins J's words in *Lekstaka*:
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> > "Collins J's statement, on which the court relied [in *SB*], seems unexceptionable. It is saying no more, as I read it, than that the practical or compassionate considerations which underlie the policy are also likely to be relevant to the cases of those who fall just outside it, and to that extent may add weight to their argument for exceptional treatment. He is not saying that there arises any presumption or expectation that the policy will be extended to embrace them." (para 31(ii))
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> (My reference to "exceptional treatment" needs to be read now in the light of *Huang* para 20 in which Lord Bingham made clear that, contrary to previous Court of Appeal case-law, there was no separate "test of exceptionality".)
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> 56. Although the context of the rules may be relevant to the consideration of proportionality, I agree with Burnton LJ that this cannot be equated with a formalised "near-miss" or "sliding scale" principle, as argued for by Mr Malik. That approach is unsupported by Strasbourg authority, or by a proper reading of Lord Bingham's words. Mrs Huang's case for favourable treatment outside the rules did not turn on how close she had come to compliance with rule 317, but on the application of the family values which underlie that rule and are at the heart also of article 8. Conversely, a near-miss under the rules cannot provide substance to a human rights case which is otherwise lacking in merit.
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> 57. It is important to remember that article 8 is not a general dispensing power. It is to be distinguished from the Secretary of State's discretion to allow leave to remain outside the rules, which may be unrelated to any protected human right. The merits of a decision not to depart from the rules are not reviewable on appeal: section 86(6). One may sympathise with Sedley LJ's call in *Pankina* for "common sense" in the application of the rules to graduates who have

25. In principle this is the type of case where the rules allow for an applicant to enter the United Kingdom; there is no objection in principle to a spouse entering the United Kingdom particularly where there is no doubt that the marriage is subsisting and where he is the father of a British born child. That said, it is not in dispute that the requirements of the Rules have not been met insofar as they relate to documentary evidence. Even though it is accepted that there will in practice be no recourse to public funds, and it is not challenged that the sponsor does in fact earn more than the income required, in this case significant weight is to be attached to the fact that there should be a system of Rules applicable to all and it is open to the Secretary of State to include within that system detailed requirements as to the documents which must be produced in order to show that the requirements of the Rules are met.

26. In this case, however, there are a number of factors which must be taken into account in the claimant's favour including the continued strain on the sponsor; the effect on other members of the family; the difficulties that the sponsor has in either taking medication to alleviate her depression in which case she would not properly be able to work as she could not get up early enough due to the soporific effects of the medication and the impact on the extended family whereby the status quo can only be maintained by quite extraordinary commitment on behalf of the sponsor's mother. As here, as with the appellant in **Huang** to which Lord Carnwath refers, a case of favourable treatment outside the Rules is not sought on the basis of how close the claimant came to compliance but it is submitted that the application of family values which underlie the Rule and are at the heart of Article 8 militates in favour of the claimant. I bear in mind also that it would be possible for the claimant to make a fresh application but that would not inevitably succeed and may result in significant other delays. Both the claimant and sponsor are aware that in consequence if the appeal succeeds, the claimant will need to spend ten years in the United Kingdom before being granted settlement. That is something they accept.

27. I am satisfied that although the Immigration Rules have not been met, it is nonetheless, on the facts of this case, appropriate to consider whether, nonetheless, it would be in breach of Article 8 to refuse entry clearance to the claimant. I am satisfied that a family life exists between the claimant and his wife and between the claimant, his wife and their child. The child is a British citizen and has an extended family in the United Kingdom as does the sponsor. I am satisfied therefore that refusal of entry clearance does constitute an interference with the right to respect for family life.

28. Whilst I consider that significant weight is to be attached to the public interest in the maintenance of immigration control and a system of Rules which is applicable to all, I consider that on the particular facts of this case and given the number and variety of the circumstances set out above that whilst no one of them might amount to compelling circumstances, that viewed together, and weighed against the significant weight to be attached to the public interest in maintaining immigration control, that in this case it would not be proportionate to refuse entry clearance to the claimant, given the compelling nature of the circumstances.

29. Accordingly, for these reasons, the determination of First-tier Tribunal Judge De Haney is set aside. I remake the decision by allowing the appeal on article 8 grounds.

SUMMARY OF CONCLUSIONS

1 The decision of First-tier Tribunal Judge De Haney is set aside.

2 I remake the decision by allowing the appeal on article 8 grounds.

Signed Date: 10 July 2014

Upper Tribunal Judge Rintoul