



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/12264/2013
OA/12265/2013
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THE IMMIGRATION ACTS

Heard at Stoke
On 31st July 2014

Determination Promulgated
On 11th September 2014

Before

UPPER TRIBUNAL JUDGE HANSON

Between

ROZINA AYUB
ABDULLAH KHAN
CONAIN KHAN
(Anonymity direction not made)

Appellant

and

ENTRY CLARANCE OFFICER - ISLAMABAD

Respondent

Representation:

For the Appellant: Mr Jafferji instructed by SKR Legal Solicitors

For the Respondent: Mr Harrison – Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is an appeal against a determination of First-tier Tribunal Judge Frankish, promulgated on 18th December 2013, in which he dismissed the appeals of this

family unit against the refusal of their applications for leave to enter the United Kingdom for the purposes of settlement.

2. The appellants are all citizens of Pakistan born on 8th December 1973, 16th July 2001 and 30th August 2008 respectively. They are the wife and children of their sponsor Mr Duad Khan.
3. The application by the first appellant was for leave as a partner under Appendix FM of the Immigration Rules and in respect of the other two appellants as a child under Appendix FM. The application of the first appellant was refused under the provisions of EC-P.1.1(d) as it was said she had not provided the necessary evidence for the specified periods as stated in Appendix FM-SE. As a result it was not established that she could meet the financial requirements. The applications of the children were refused in line with that of their mother. The dates of decision are 9th May 2013. The Judge notes there is an additional claim that the decision will breach the applicants' human rights.
4. The Judge sets out his findings from paragraph 7 of the determination noting there was only one issue in the case which was whether the required sum of £24,800 had been demonstrated as being available in the prescribed form over the prescribed period. The requirement to demonstrate this is clearly set out in E-ECP 3.1 of the Rules which also sets out the nature of the evidence required to show that such income genuinely exists.
5. The sponsor, who is providing funding, is stated to be a self-employed person and so there was a requirement to produce evidence of earnings for the previous twelve months or, failing that, two-year average which the Judge found the sponsor could not do especially as he only set up his pound shop in April 2012; having spent a lot of time in Pakistan, including from 20th September 2011 until 20th February 2012, a year to the day before the application was submitted.
6. The Judge sets out details of the evidence provided before concluding in paragraph 12 that the application is premature for the reasons set out in that paragraph. He thereafter went on to consider the human rights claim and found that Article 8 was not engaged although, to the extent it was, the decision is proportionate.
7. The grounds seeking permission to appeal assert the Judge erred in reducing the figure for the sponsor's self-employed earnings from £26,398 to £19,198 which the Judge stated was the correct figure as it represented the net income for tax purposes whereas the Rule requires a 'specified gross annual income'. It is submitted the documents provided show such income existed.
8. The grounds also assert that earnings over a 12 month period was produced and a full year's end accounts, bank statements etc were provided in the bundle. The grounds challenge the Judge's findings regarding post decision evidence as not

being admissible and claim the evidence provided reflected the circumstances appertaining at the date of decision and was therefore admissible. It is stated that as the business had been running successfully for nearly two years by the date of the hearing there was ample evidence that the business was viable.

9. The grounds are also critical of the Article 8 finding which is said to be inadequate as it failed to consider the best interests of the children and disruption to the sponsor's business was not considered. Also that the family had adequate income even if not able to satisfy the requirements of the Immigration Rules. The Grounds assert the Judge failed to take into account "the leading case" of MM [2013] EWHC 1900 (Admin) in undertaking the Article 8 assessment.

Discussion

10. The requirement under the Rules is for the appellants to produce evidence with the application, by the production of specified evidence, to demonstrate the required minimum level of financial support is available. This is not an abstract exercise but one conducted to ensure that credible documents are produced enabling the decision maker to either have confidence that the claimed level of income is available for the specified period and/or to enable checks to be undertaken with recognised institutions who it is claimed have produced such documentation.
11. Appendix FM-SE (A) states that the Appendix sets out the specified evidence applicants need to provide to meet the requirements contained in Appendix FM, indicating the need to do so would have been known to any applicant. Appendix FM-SE (D) states that in deciding an application in relation to which this Appendix states that specified documents must be provided, the Entry Clearance Officer or Secretary of State ("the decision maker") will consider documents that have been submitted with the application, and will only consider documents submitted after the application where subparagraph (b) or (e) applies. In this case it is not established that either paragraph is applicable as the conditions in (b) are not shown to be met and (e) provides that where the decision maker is satisfied that there is a valid reason why a specified document(s) cannot be supplied, e.g. because it is not issued in a particular country or has been permanently lost, he or she may exercise discretion not to apply the requirement for the document(s) or to request alternative or additional information or document(s) to be submitted by the applicant. In this case it is not established that there was any valid reason why specified document could not be supplied other than the fact that the documentary evidence did not exist at the date the application was made due to the length of time the business producing the income had been in existence.
12. Mr Jafferji's argument that Appendix FM-SE (D) only applies to an Entry Clearance Officer or Secretary of State and by inference has no application to the

Tribunal as appeals to the Tribunal are governed by statutory provisions, meaning later acquired documents such as those the Appellants sought to rely upon can be considered, has no arguable merit. The Rules require the information to be provided with the application and paragraph (D) makes it clear that in considering whether this requirement has been fulfilled only documents provided with the application will be considered unless an exception applies. The question for the appeal tribunal is 'has the applicant proved that they are able to satisfy the requirements of the Rules by meeting the specific provisions which, in this case, included providing evidence of the relevant level of income for the proscribed time by the provision of specific documents?' Not whether the failure to do so can be remedied by evidence dated after the date of application in relation to matters such as an income level which was not shown to exist at the date of the application even if it came into existence as a result of later trading.

13. The Rules provide a bright line in relation to the time when such evidence must be provided and for what period in the absence of the two specified provisions enabling other documents to be considered. The statutory provisions in entry clearance applications make it clear that an appeal tribunal is considering the position appertaining to the date of decision with later acquired evidence not being admissible except in the circumstances provided. In a case of this nature such evidence will still have to prove that at the date of application the required level of income was available by reference to specific evidence for the required period. That did not occur in this case.
14. The Judge clearly considered the evidence with the degree of care required, that of anxious scrutiny, and gave adequate reasons for why the appellants were unable to satisfy the relevant rules. No legal error material to this element of the case has been proved.
15. In relation to Article 8 ECHR: it is submitted the Judge was required to do more than he did as it is asserted it was established in the evidence there was available a level of income sufficient to support the family and that all relevant elements should have been properly considered.
16. I accept that the Judge's Article 8 findings are brief but the conclusion is that it had not been established that the necessary requirements to succeed under this provision had been met. The case relied upon in the grounds has been overturned by the Court of Appeal in MM(Lebanon) and others [2014] EWCA Civ 985 in which it was said that in setting the maintenance limits the Secretary of State had "discharged the burden of demonstrating that the interference was both the minimum necessary and strikes a fair balance between the interests of the groups concerned and the community in general. Individuals will have different views on what constitutes the minimum income requirements needed to accomplish the stated policy aims. In my judgment it is not the court's job to impose its own view unless, objectively judged, the levels chosen are to be

characterised as irrational, or inherently unjust or inherently unfair. In my view they cannot be".

17. In Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 640 (IAC) (Mr Justice Cranston) it was held that (i) the maintenance requirements of E-LTRP.3.1-3.2 stand.
18. The economic well being of the United Kingdom is a legitimate aim under Article 8 ECHR but before that is considered it is necessary to establish whether there is a requirement to consider Article 8 is a freestanding element at all. The family will remain separated but it has not been established that they cannot continue their family life in Pakistan as they have before. It has not been established that there are unjustifiably harsh consequences arising from the decision or that if Article 8 was to be considered as a freestanding element that the decision would be found to be disproportionate; which was the Judges finding in the alternative. No arguable material legal error is established.
19. If the sponsor has now been trading for a two-year period and has the required minimum level of income that he can prove by the provision of specified documents, the family may be in a strong position in relation to the making of a fresh application. That is, however, a matter for them.

Decision

20. **There is no material error of law in the First-tier Tribunal Judge’s decision. The determination shall stand.**

Anonymity.

21. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed.....
Upper Tribunal Judge Hanson

Dated the 10th September 2014