



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: OA/15433/2013
OA/15434/2013
OA/15438/2013

THE IMMIGRATION ACTS

Heard at Field House
On 3rd September 2014

Determination Promulgated
On 30th September 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE HARRIES

Between

ENTRY CLEARANCE OFFICER - NEW DELHI

Appellant

And

MRS ANITA RANI
MR NAVDEEP SINGH
MR SANDEEP SINGH
(ANONYMITY DIRECTION NOT MADE)

Respondents

Representation:

For the Appellant: Mr P Nath, Home Office Presenting Officer
For the Respondents: Miss A Sehra, Counsel

DETERMINATION AND REASONS

The Parties and Proceedings

1. The appellant in this appeal is the entry clearance officer (ECO). The respondents are referred to collectively hereafter as the claimants and references to the claimant are to Mrs Anita Rani. Mrs Rani was born on 30th May 1970; Mr Navdeep Singh was born on 15th December 1996 and Mr Sandeep Singh was born on 30th November 1997. The claimants are all nationals of India; the second and third appellants are the dependent children of Mrs Rani. In a decision made on

20th June 2013 the ECO refused their applications for entry clearance to the United Kingdom as the partner and children of a person settled in the United Kingdom.

2. They appealed the refusal before First-tier Tribunal Judge P A Corben (the Judge) sitting at Richmond Magistrates' Court on 8th April 2014. In a determination dated 20th June 2014 the Judge dismissed the appeals under the Immigration Rules but allowed them under Article 8 of the ECHR. Permission to appeal to the Upper Tribunal against the Judge's Article 8 decision was granted on 14th July 2014 to the ECO by Designated First-tier Tribunal Judge Garratt for the following reasons:

The (ECO) argues that the determination is flawed because, before allowing the appeal on human rights grounds, the Judge failed to follow the guidance of the Upper Tribunal set out in Gulshan [2013] UKUT 00640 (IAC) and related case law by considering whether there were compelling circumstances not sufficiently recognised under the rules to consider claims outside them. In this respect it is also pointed out that there was no analysis by the Judge of the ability of the appellants to submit a further application or the parties' inability to meet the minimum income threshold under the Rules.

The grounds are arguable. The determination does not show that the Judge proceeded to consider human rights issues outside the Rules by applying the "compelling circumstances" test or that the judge considered the shortfall in maintenance having regard to both Appendix FM and FM-SE.

3. The matter accordingly came before me for an initial hearing to determine whether the making of the decision in the First-tier Tribunal involved the making of an error on a point of law.

Consideration of Issues and Submissions

4. The evidence before the Judge was that the sponsor and claimant married in India on 10th March 1996; their two sons were born and have remained there with their mother. The sponsor left India in late 1999 arriving in the United Kingdom in 2000; he entered illegally and made an unsuccessful asylum claim. He has lived here ever since. None of the claimants has travelled to the United Kingdom in the last 10 years but they maintain frequent contact with the sponsor through his visits to India and by telephone calls. All parties are citizens of India and the sponsor was granted indefinite leave to remain in the United Kingdom on 10th August 2011.
5. The judge heard oral evidence from the sponsor and found him to be credible. He accepted the evidence of the relationships between the sponsor and claimants and their genuine intention to live together in the United Kingdom as a family unit. The Judge accepted that the accommodation requirements of the Immigration Rules were met and found that the sponsor needed to show a minimum annual gross income of £24,800 to meet the financial requirements. The applications were made on 24th March 2013 and the judge found that at this date none of the claimants was able to meet the financial requirements because the sponsor was at

the relevant time earning less than £16,000 gross per annum, although from May 2013 he had been employed on a PAYE basis earning £25,200 per annum by January 2014.

6. The grounds of appeal relied upon by Mr Nath at the hearing on behalf of the ECO are that the Judge allowed the appeals under Article 8 of the ECHR, after finding that the maintenance requirements of Appendix FM could not be met, without first directing himself as to any compelling circumstances not sufficiently recognised by the Rules in accordance with R (Nagre) v SSHD [2013] EWCH 720 (Admin). The failure of the Judge to consider any such compelling circumstances is submitted to be a material error of law. Appendix FM is submitted to sufficiently recognise and cater for the circumstances of this case such that there were no grounds to go beyond the Rules.
7. The grounds for the ECO further assert that the case of Gulshan [2013] UKUT 00640 (IAC) makes clear that an Article 8 assessment should only be carried out when compelling circumstances not recognised by the Rules are present; the Secretary of State is entitled to set a minimum income threshold to ensure that those who seek to establish family life in the United Kingdom have the ability to financially support themselves such that the migrant partner does not become a burden upon the tax payer and is better able to integrate into British society. Only if there are arguably good grounds for granting leave to remain outside the Rules is it necessary for Article 8 purposes to go on to consider compelling circumstances not sufficiently recognised by them.
8. The grounds of appeal further assert that in accordance with Gulshan at this stage an appeal should only be allowed where there are exceptional circumstances, namely that refusal would lead to an unjustifiably harsh outcome. It is submitted that there is no prejudice to the claimants flowing from the ECO's approach to their applications; family life could continue in India and the Judge had failed to consider this or the ability of the claimants to submit a further application once the sponsor is in a position to meet the financial requirements. The Judge has found no unjustifiably harsh outcome and the ECO's decision simply preserve the status quo.
9. Mr Nath relied on the continuing grounds of appeal that the claimants failed by a significant margin and with a lack of specified evidence to meet the requirements of the Rules. In these circumstances Article 8 should not be used to circumvent the Rules or to allow appeals. The claimant married the sponsor in India and there could be no legitimate expectation that family life could be established in the United Kingdom; no evidence is provided to show why family life could not continue there and the Judge attached undue significant weight to the sponsor's 14-year presence in the United Kingdom after his illegal entry.
10. The Judge is submitted to have failed to take account of the sponsor's visits to India on several occasions since the grant of his indefinite leave to remain. One such visit was for the duration of 3 months and after the resolution of a land dispute on which an asylum claim was based by the sponsor he is able, on his

own admission, to return to India without difficulty. The grounds of appeal for the ECO draw attention to the Judge's finding that the sponsor's reasons for leaving India were not credible.

11. The public interest in maintaining immigration control by requiring the Immigration Rules to be met in this case is submitted not to lead to a disproportionately detrimental effect on the best interests of the children who have resided with their mother in India and maintain contact with their father through visits. This situation can continue until such time as the requirements of the Rules can be met and the Judge has attached too much weight to the best interests of teenage children whose lives have been spent settled in India without their father. The evidence does not show their best interests to be served by coming to the United Kingdom.
12. No Rule 24 response was submitted for the claimants in response to the grounds of appeal and Miss Seehra confirmed that no skeleton argument had been drafted. However, she outlined the claimants' opposition to the appeal in her oral submissions as follows. She accepted that there is some foundation to the grounds and that the Judge had not looked at any compelling or exceptional circumstances but he had nonetheless done everything required on a consideration of the case outside the Rules. Miss Seehra submitted that there is no "exceptional circumstances" test; the claimants' circumstances do not have to be elevated to "compelling" and case law makes clear throughout that there is no test of exceptionality.
13. The judge was submitted to have considered the Immigration Rules in detail and to have found the sponsor's income to fluctuate, as set out in paragraph 30 of the determination. The ECO had considered the application on the basis of documents only, having doubted the relationships claimed between the sponsor and claimants. The Judge had, however, accepted the existence of a family unit and found the claimants to present no burden upon the state. He took account of savings and the claimant's ability and intention to work in the United Kingdom. The ECO had embarked upon no so such consideration in the light of his findings; the judge did not take account of post-decision evidence - he looked at the position at the time of the decision.
14. Miss Seehra submitted that the Judge had properly assessed the financial situation in the light of the evidence of the sponsor's changed employment status to that of an employee, his increased earnings at the date of decision, available savings and the earning ability and capacity of his claimant spouse. Miss Seehra submitted that the Judge had carried out a proper assessment under Article 8 of all the evidence including the legitimate aim, the burden upon the state and the position of the children. The children wished to be reunited with their father and the Judge was entitled to conclude that the continuing separation of the family was neither necessary nor proportionate; he had made a finding on the unreasonableness of the sponsor to relocate abroad.

15. Having found the requirements of the Immigration Rules not to be met The Judge moved directly to a free-wheeling consideration of Article 8 under the ECHR and found that it was not reasonable for the sponsor to give up his home and employment in the United Kingdom to embark upon the uncertainty of seeking employment overseas. He took account of the sponsor's increased earnings after the date of decision and he found as a primary consideration that the best interests of the children were met by being re-united with their father. He found the refusal of entry clearance in these circumstances to be disproportionate.
16. Miss Seehra referred to MM (Lebanon) v SSHD [2014] EWCA Civ 985, at paragraphs 130, 159 and 160 in particular, in relation to the lawfulness of the ECO's decision in the light of no consideration having been given to the claimants' position outside the Rules and no consideration of proportionality; there had been no two-stage approach adopted to the applications. At the conclusion of all the submissions I reserved my decision on error of law and heard brief submissions from the representatives as to the manner of remaking the decision should I find that the First-tier decision must be set aside.
17. Having considered all the submissions I find merit in those for the claimants that the Judge did not make a material error of law. The Judge embarked upon an Article 8 consideration of the claimants' position by conducting a balancing exercise within the approved structure set out in Razgar v SSHD [2004] UKHL 27 in circumstances where the ECO had not done so in the light of adverse findings about the genuine nature of the relationship between the parties. The Judge reached favourable conclusions about the relationships between the claimants and sponsor and found the sponsor to be credible about the core aspects of the appeal before him.
18. This is an out of country case where the discretion afforded in in-country cases is not applicable, as submitted by Miss Seehra for the claimants. There was no reference to proportionality when the ECO refused the applications so that their consideration with reference to the Rules only did not provide a comprehensive consideration of all relevant Article 8 factors. I am satisfied that the Judge did not circumvent the Rules by using Article 8 as he carried out a proper analysis of the financial evidence under the Rules and carried forward his findings into the proportionality assessment and gave appropriate weight, at paragraph 35 of his determination, to the public interest.
19. At paragraph 35 of his determination the Judge stated that: "there is no doubt that there is a strong public interest in refusing applicant entry clearance if they thought to be likely to have recourse to public funds". He found the sponsor's situation to have improved to the extent that the financial requirements of the Rules were by then met taking account of the evidence as set out above in Miss Seehra's submissions. In these circumstances I find that the Judge did not circumvent the Rules. In conducting the proportionality assessment I am satisfied that the Judge paid due regard to both the public interest in the enforcement of the Immigration Rules and the particular family circumstances and rights of the claimants and sponsor.

20. The Judge took account of the best interests of the children in the balancing exercise and found that they were not met by the refusal of their applications. I find that the Judge was entitled to come to this conclusion, contrary to the submission for the ECO that too much weight was attached to these interests. Looking at the decision as a whole I find that the lack of explicit reference to case law, including Gulshan [2013] UKUT 00640 (IAC), in the Judge's self-direction does not amount to any material error of law as his reasons show in effect that he considered the claimants' and sponsor's particular situation to amount to exceptional and compelling circumstances in the context of Article 8 which tipped the balance in their favour. The decision of the Judge is not submitted on behalf of the ECO to be perverse.
21. I find that the making of the First-tier Tribunal decision allowing the claimants' appeals under Article 8 of the ECHR did not involve the making of an error on a point of law and the decision therefore stands.

Summary of Decisions

22. The making of the First-tier Tribunal decision allowing the claimants' appeals under Article 8 of the ECHR did not involve the making of an error on a point of law.
23. The decision accordingly stands.
24. The ECO's appeal to the Upper Tribunal does not succeed.

Anonymity

I find no reason to change the decision of the First-tier Tribunal not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Signed: J Harries

Deputy Upper Tribunal Judge
Dated: 30th September 2014

Fee Award

The making of a full fee award by the First-tier Tribunal remains unchanged.

Signed: J Harries

Deputy Upper Tribunal Judge
Dated: 30th September 2014