



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/23362/2012

THE IMMIGRATION ACTS

Heard at Manchester
On 30th April, 2014
Signed 16th May, 2014

Determination Promulgated
On 19th May 2014

Before

Upper Tribunal Judge Chalkley

Between

THE ENTRY CLEARANCE OFFICER - ISLAMABAD

Appellant

and

ZAHEER MUHAMMAD

Respondent

Representation:

For the Appellant: Mr McVite
For the Respondent: Mr D K Marrington of Alam Ahmed Ltd

DETERMINATION AND REASONS

1. The appellant in this appeal is the Entry Clearance Officer to whom I shall refer as “the claimant”. The respondent is Zaheer Muhammad who was born on 30th December, 1974, and who is a citizen of Pakistan. On 29th July, 2012, the respondent completed an application for entry clearance as a partner under Appendix FM of Statement of Changes in Immigration Rules, HC 395, as amended (“the Immigration Rules”).

2. The claimant considered the respondent's application but refused it on 1st November, 2012. In doing so, the claimant said this:-

“You state at question 1.28 that your sponsor is responsible for the financial support of a child, Muhammad Anis born 05/07/12. You state that ‘being new born, child is breast-fed’. You completed your application form on 29/07/2012. The certificate provided with your application states the child was stillborn. Your statements on your application lead me to doubt that you either are aware of this fact or understand it, leading me to strongly doubt that you are in regular contact with your sponsor or that your sponsorship is subsisting and genuine. You have provided no evidence of ongoing contact or communication with your sponsor, notably at a difficult time in your sponsor's life, furthering doubts regarding your relationship. I am therefore not satisfied your relationship with your sponsor is genuine and subsisting or that you intend to live together permanently in the UK. I therefore refuse your application under paragraph EC-P.1.1(d) of Appendix FM of the Immigration Rules.

Your sponsor is not exempt from the financial requirements as defined at paragraph E-ECP.3.3. I am not able to take into account any potential employment you have available to you in the UK or any offers of financial support from third parties. In order to meet the financial requirements of the Rules your sponsor needs a gross income of at least £18,600 per annum.

You state your sponsor has a gross income of £18,980 per annum. Where the person is in salaried employment in the UK at the date of application and has been employed by their current employer for at least six months, their gross annual income will be the total of the gross annual salary from their employment as it was at its lowest level in the six months prior to the date of application. Your sponsor's stated income is based on a single pay slip showing a gross payment of £365 for one week. Your sponsor's other pay slips indicate a salary of £194.56 gross per week. This equates to £10,117.12 per annum gross.

In order to qualify, you and your sponsor require £37,207.20 in savings in order to meet the financial requirements. You have provided no evidence of savings at this level. I therefore refuse your application under paragraph EC-P1.1(b) of Appendix FM of the Immigration Rules.

In addition, in respect of salaried employment in the UK all of the following evidence (original documents) must be provided:-

- The P60 for the relevant period or periods (if issued).
- Wage slips covering:
 - (i) a period of six months prior to the date of the application if the applicant has been employed by their current employer for at least six months; or
 - (ii) a period of twelve months prior to the date of the application if the applicant has been employed by their current employer for less than six months.
- A letter from the employer confirming:
 - (i) the person's employment and gross annual salary;
 - (ii) the length of their employment;
 - (iii) the period over which they have been or were paid the level of salary relied upon in the application; and
 - (iv) the type of employment (permanent, fixed term contract or agency).
- A signed contract of employment.

- Monthly personal bank statements corresponding to the same period as the wage slips, showing that the salary has been paid into an account in the name of the person or in the name of the person and their partner jointly.

These documents are specified in the Immigration Rules in appendix FM-SE and must be provided. You have not submitted all of the required documentation to demonstrate your sponsor's income as claimed. You have not provided six months' pay slips and your income is not seen in your statement. No contract of employment has been provided. I therefore refuse your application under paragraph EC-P.1.1(b) of Appendix FM of the Immigration Rules."

3. The respondent appealed that decision and his appeal was heard by First-tier Tribunal Judge Ince sitting at Bradford on 7th November, 2013. In the judge's determination, promulgated on 19th December, 2013, the judge found the sponsor to be a credible witness and on the basis of the evidence she heard, concluded that the couple have demonstrated that the relationship between them is genuine and subsisting. In respect of maintenance, the judge noted that were the couple to make an application now they would apparently fall within the Rules because the sponsor has been in full-time employment for more than six months earning a weekly wage of £365 gross. The judge appeared to proceed to consider the respondent's Article 8 rights and noted that there appeared to be no dispute that family life existed between the couple having found the marriage to be genuine and noted that the sponsor was a UK citizen and noted too that the appellant now appears to meet the requirements of the Rules. The judge concluded that she should allow the appeal, "under the Immigration Rules Appendix FM." The judge went on at paragraph 38 to say this:-

"Notwithstanding that the couple, as at the date of decision, did not strictly satisfy the maintenance requirements of Appendix FM they do now and therefore, in relation to this issue, I allow the appeal under Article 8."

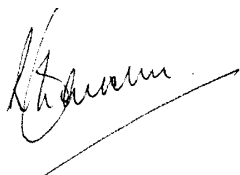
4. The claimant challenged the judge's decision, pointing out that the evidence before the Tribunal did not show that the sponsor could meet the income threshold requirements for the period of six months before the date of the application. They assert that the Tribunal made no finding on this point. Neither did the judge explain how the decision in *MM* (no citation is given in the determination) was relevant in concluding that the sponsor meets the requirements of the Immigration Rules. The judge does not apply the comprehensive Rules relating to specified evidence contained within Appendix FM-SC. The challenge suggested that given that the respondent clearly did not meet the conditions of the Immigration Rules, the Article 8 assessment was similarly flawed.
5. At the hearing before me Mr McVite relied on the grounds and asked me to note that the appeal had been allowed under Article 8. Notwithstanding this, at paragraph 20 of the determination the judge noted a concession made by the sponsor's representative. At paragraph 20 the judge recorded the following:-

"Ms Aktar conceded that the [respondent] could not succeed under Appendix FM in relation to the financial matters or in relation to family life. Accordingly, those parts of the appeal fell to be considered under the residual Article 8 provisions."

6. Notwithstanding that the maintenance provisions were not satisfied, the judge then purported to allow the appeal under the Rules at paragraphs 37 and 38, where the judge said:-

"37. I therefore conclude that this is nothing other than a genuine marriage, that the marriage is subsisting and that each of the couple has the intention to live permanently with the other. I therefore allow the appeal on this issue under the Immigration Rules Appendix FM.

38. Notwithstanding that the couple, as at the date of decision, did not strictly satisfy the maintenance requirements of Appendix FM, they do now and therefore, in relation to this issue, I allow the appeal under Article 8.”
7. The determination is a confused document. In considering the question of proportionality the judge has wrongly assumed that as at the date of the hearing the respondent does meet the requirement of the Rules, when very clearly he does not.
 8. For the respondent, Mr Marrington accepted that the judge had erred and should not have allowed the appeal under the Immigration Rules. He suggested, however, that the judge was entitled to allow the appeal under Article 8, because at the date of the hearing the sponsor was earning sufficient and at paragraph 16 of the determination he noted an exceptional circumstance, namely the fact that the couple’s child was stillborn.
 9. I reserved my determination.
 10. It was conceded at the hearing before the judge on behalf of the respondent, that the appeal could not succeed under Appendix FM in relation to financial matters nor in relation to family life. As at the date of the hearing, the judge found that the sponsor was earning sufficient to satisfy the requirements of the Rules, but what the judge did not do was to consider whether the documents specified in Appendix FM-SE had been provided without making a find that they had been. The judge was not, therefore, in a position to find that the respondent met the requirements of the Immigration Rules as at the date of the hearing.
 11. Given that the parties could not meet the requirements of the Immigration Rules, the appeal could not succeed under Article 8. I do not accept that the tragic stillbirth of the parties’ child is an exceptional circumstance. I know from my own bitter personal experience that it is a most tragic and upsetting experience for any couple to lose a child, whether because of a miscarriage or because of a stillbirth where the mother has carried the foetus for a full term. I do not seek in any way to under undermine this couple’s very sad and tragic loss but, regrettably, it is not an uncommon event. In my view it is not an event which renders the claimant’s decision disproportionate to the need to maintain effective immigration control.
 12. For the reasons I have given, I set aside the determination of First-tier Tribunal Judge Ince, having found it contains errors on a point of law and I remake the decision myself. The respondent’s appeal against the decision of the Entry Clearance Officer to refuse to grant entry clearance as a partner under Appendix FM of the Immigration Rules dated 1st November, 2012 is **dismissed**.



Upper Tribunal Judge Chalkley