Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/24533/2012

THE IMMIGRATION ACTS

Heard at Field House
On 21 May 2014
Prepared 21 May 2014

Determination Promulgated
On 2 July 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE DAVEY

Between

MRS LUTHFUN NAHAR CHOWDHURY

Appellant

and

ENTRY CLEARANCE OFFICER - DHAKA

Respondent

Representation:

For the Appellant: Mr M Zahir, Solicitor of Law Advisers
For the Respondent: Mr S Walker, Senior Presenting Officer

DETERMINATION AND REASONS

1. The Appellant, a national of Bangladesh, date of birth 10 March 1998, appealed against the Respondent's decision, dated 23 October 2012, to refuse entry clearance

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for settlement as the spouse of the Sponsor with reference to paragraph 281 of the Immigration Rules HC 395 (The Rules).

2. The appeal against that decision came before First-tier Tribunal Judge Majid (The Judge) who, on 7 November 2013, dismissed the appeal under the Rules but made no decision with respect to a claim, in the grounds of appeal, based on Article 8 of the ECHR. Permission to appeal the judge's decision was given by First-tier Tribunal Judge Foudy on 31 March 2014.

3. It is common ground between the parties, with whom I agree, that the judge made a number of errors of law. In particular he failed to properly take into account evidence provided at the appeal which related back to and preceded the date of the Respondent's decision. The evidence showed the availability of accommodation, in a flat owned by the Sponsor, in respect of which they would have exclusive possession of part of the premises; even if any other part was sublet. In addition, evidence was provided to the judge from specialist property assessors showing that the occupation of the Appellant even with other tenants was plainly far below a standard which would amount to statutory overcrowding for the purposes of the Housing Acts.

4. The judge's reasoning for rejecting the evidence was that simply the evidence had been received after the date of the Respondent's decision. However it was not appoints based scheme (PBS) case. It is clear that the judge has failed to appreciate the significance of Section 85 of the 2002 Act and had also failed to understand or apply the case of DR (ECO: post-decision evidence) Morocco* [2005] UKIAT 00038.

5. I find that the original Tribunal's decision cannot stand: The matter will have to be remade. In the light of findings or conclusions reached the sole issue remains, in remaking it, is whether or not the Appellant met the accommodation requirements under the Rules.

6. In the light of that evidence Mr Walker sensible accepts that there really is no sustainable argument to say that the accommodation did not meet the necessary requirements of the Rules. Therefore there is no other outcome than that the appeal under the Immigration Rules should be allowed.

7. It is unnecessary to do so but the matter was pursued also addressed Article 8. The judge never dealt with it and that was a further error of law on his part. Having looked at the matters which were being advanced before the judge, it is plain that the Sponsor, originally from Bangladesh,had worked in the UK for a number of years currently as a chef. Mr Zahir referred to him as an integral part of the restaurant's operations, it seems to me that establishing family life in certain circumstances, not least in the light of Kugathas [2003] EWCA Civ 31, is regarded as a legitimate objective under Article 8 of the ECHR.

8. A number of points therefore arise. First, the application was originally made around about 5 July 2012. If that is the correct date it predated the changes to the Rules on 9 July 2012 but it does not seem to me that makes a difference. It is not asserted that the Appellant could have succeeded under the amendments to the Rules in any event. Essentially the argument has therefore solely addressed "old" Article 8 considerations.

9. I, looking at this matter, look at it as of now. It seems to me that the correct view to take is that the Appellant and Sponsor do not simply have a choice to pick where they live, and there is no general right vested in the Sponsor to bring his wife to the United Kingdom. Therefore in principle compliance with the Rules is a relevant consideration and also the fact that they could have and do maintain a family life in the home country of the Appellant, to which there are no apparent obstacles to the Sponsor returning.

10. Ultimately therefore, applying the approach identified in Razgar [2004] UKHL 27 and Huang [2007] UKHL 11, it seems to me that the position is, if I find that the first

four questions in Razgar are answered in the affirmative, in terms of proportionality it cannot be said to be on the face of it unreasonable to expect the Sponsor to be with the Appellant and nor does on this hypothetical basis strike me as disproportionate to stand by that position. The consideration of Article 8 is entirely a hypothetical one in the circumstances of the case when the appeal succeeds under the Immigration Rules. However, for the sake of completeness lest this matter go any further, I would have dismissed the appeal under Article 8 of the ECHR.

11. The Original Tribunal decision can not stand. The following decision is substituted. The Appeal on immigration grounds is allowed.

ANONYMITY ORDER

No anonymity order was requested and none it strikes me is either appropriate or necessary.

TO THE RESPONDENT
FEE AWARD

A fee of £140 was paid for the hearing of the appeal. It seems to me that this is a case where although the appeal evidently should have succeeded before the judge the Respondent's original decision was based upon evidence briefly presented at the time. Therefore it was perhaps unsurprising that both the Respondent and for what it is worth the view of the Entry Clearance Manager supporting the Respondent's decision illustrated what was in reality a shortfall in the evidence as presented at the hearing before the judge. In those circumstances this seems to me a case where it would not be appropriate to make a costs order against the Respondent.

Signed Date 24 June 2014

Deputy Upper Tribunal Judge Davey