



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/24624/2012
OA/24628/2012

THE IMMIGRATION ACTS

Heard at Field House
On 12th August 2014

Determination Promulgated
On 18th August 2014

Before

UPPER TRIBUNAL JUDGE POOLE

Between

ENTRY CLEARANCE OFFICER - BEIJING

Appellant

and

(1) WANZHU ZHENG

(2) XINBING LI

(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr P Deller, Home Office Presenting Officer
For the Respondents: No Representation or Appearance

DETERMINATION AND REASONS

1. For the purposes of this determination I will refer to the parties in the style they were referred to before the First-Tier Tribunal.

2. No representative appeared for the appellants. A letter was received dated 5 August 2014 from solicitors previously instructed. The contents of that letter indicate that the appellants would not be represented at the hearing before the Upper Tribunal “due to cost reasons”. The sponsor did not attend.
3. In the circumstances I considered it appropriate to proceed to deal with the appeal, noting of course that the appellants are residents outside the United Kingdom. The notice of hearing having been properly served and acknowledged by the letter mentioned above.
4. The appellants are both citizens of China and are mother and son. They originally appealed against decisions of the Entry Clearance Officer dated 5 October 2012 refusing entry clearance for settlement as wife and child of a person present and settled in the United Kingdom. The respondent considered the application by reference to Appendix FM of the Immigration Rules, but decided that the sponsor did not meet the financial requirements of those rules as at the date of application. The application therefore failed to be refused under paragraph EC-P.1.1.(d) of Appendix FM.
5. The appellants appealed those decisions and the appeal was heard at Taylor House on 8 May 2014 before Judge of the First-Tier Tribunal Bird. Each party was represented.
6. In a determination promulgated on 20 May 2014 Judge Bird recorded that it had been accepted on behalf of the appellants that they did not meet the requirements of the Immigration Rules because of the sponsor’s income (£14,506 per annum as opposed to a requirement under the rules of £22,400).
7. Judge Bird then went on to consider Article 8 ECHR with specific reference to the High Court case of **MM [2013] EWHC 1900 (Admin)**. Whilst this was a High Court case reference is made in the determination to it being an Upper Tribunal case. Reference is also made to the question posed in that case as to whether the appellant’s arrival in the United Kingdom would cause a further recourse to public funds.
8. At paragraph 11 a submission by the appellant’s rep is recorded that there were good reason why Article 8 should be considered. The judge allowed the appeal under Article 8 whilst dismissed the appeal under the Immigration Rules.
9. The respondent then sought leave to appeal alleging one ground being that the judge had made material misdirection in law by failing to properly deal with the case by reference to guidance set out in the cases of **R (Nagre) v Home Secretary [2013] EWHC 720 (Admin)** and **Gulshan [2013] UKUT 00640 (IAC)**. Reference is also made to the case of **MM** which the grounds allege was “an unsafe authority”.

10. In granting permission to appeal another judge of the First-Tier Tribunal gave the following as reasons:

“1. The respondent seeks permission to appeal against the decision of the First-Tier Tribunal (Judge Bird) who, in a determination promulgated on 20th May 2014, allowed the appellant’s appeal against the respondent’s decision to refuse the appellant’s application for leave to enter the United Kingdom under the immigration rules as the child of a person settled here.

2. This appeal was linked with that of appeal number OA/24624/2012.
3. In summary the respondent’s Grounds and Reasons for Permission to Appeal submit that the judge made a material misdirection in law:
 - a. The judge allowed the appeal under article 8 ECHR without having found that there are compelling circumstances not sufficiently recognised under the rules as per **R (Nagre) [2013]**.
 - b. The judge has failed to identify the nature of “compelling circumstances not sufficiently recognised under the rules”.
 - c. There has been no analysis by the judge of why the appellant cannot submit a further application.
 - d. The secretary of state is entitled to set a minimum income threshold; the appellant can submit a further application once the sponsor and demonstrate the financial requirements are met.
 - e. The judge attached weights to a material matters such as the fact that the appellant submitted their application a few days earlier their applications would probably have been successful under the old rules. This is speculative.
 - f. The judge had a particular regard to the case of **MM** therefore the judge is relying upon and unsafe authority.
4. Permission to appeal can only be granted if I am satisfied that there was a material error of law that would have made a material difference to the outcome of the original appeal. This could be due to adverse or irrational findings or a lack of findings on core issues as established in the case of **R (Iran etc) v SSHD [2005] EWCA Civ 982**.
5. When considering the determination it is arguable that the judge has made a material error in law in the determination for the reasons outlined in the respondent’s application”.

11. Hence the matter came before me in the Upper Tribunal.
12. Mr Deller referred to the grounds seeking leave. He did not make any further verbal submission.
13. At this stage I indicated to Mr Deller (there being no one else present) that I considered there was a material error of law contained within the determination of Judge Bird and that her decision to allow the appeal must be set aside. I indicated that I proposed to remake the decision, but that I would reserve that decision which I now give and explain.
14. The grounds seeking leave can be summarised in two parts. Firstly that the judge failed to properly direct herself with regard to the Rules/Article 8. Secondly that she relied upon what the respondent has described as an unsafe authority. In fact the High Court case of **MM** has now been overturned by the Court of Appeal in the case that can now be referred to as **MM (Lebanon) [2014] EWCA Civ 985**. This case in effect overturns the views of Blake J by holding that the Secretary of State is entitled to fix the required level of income under the Rules (in this case £22,400 per annum).
15. Having found that the appellants could not meet the requirements of Appendix FM the judge was then required to consider the merits of the human rights claim in accordance with the approach set out by the Court of Appeal in **MF (Nigeria) [2013] EWCA Civ 1192**, the High Court is **Nagre [2013] EWHC 720 (Admin)** and by the Upper Tribunal in **Gulshan [2013] UKUT 640** has also confirmed by **Shahzad (Article 8 - Legitimate Aim) [2014] UKUT 0085 (IAC)**. These judgments have made it clear that the question of proportionality must be looked at in the context of the Immigration Rules with no need to go on to a specific assessment under Article 8 if it is clear from the facts that there are no particular compelling or exceptional circumstances requiring that course to be taken. This approach has been further confirmed by the Court of Appeal in the more recent case of **Haleemundeen v SSHD [2014] EWCA Civ 558**.
16. As alleged in the grounds seeking leave Judge Bird failed to adopt this approach, though I do note at paragraph 15 of the determination reference is made to "good reason". With respect I do not consider that is a sufficient bridge to allow a stand alone consideration of Article 8. The remainder of the determination focuses on the question of public funds, whereas what is needed is a consideration of particular compelling or exceptional circumstances. In failing to adopt this, the judge erred in material way and her decision cannot stand.
17. Turning now to the remaking of the decision, I have no additional evidence or indeed submissions that any exceptional or compelling circumstance exists. The appellants through their representative have had notice of the proceedings before the Upper Tribunal; no further information has been forthcoming.

18. I am conscious of the age of the second appellant. I have read the statements that were before Judge Bird and the skeleton argument. I note the skeleton argument did deal with the cases that I have referred to above and does indeed refer to the need for “compelling circumstances”. However, I can find no such particular compelling or exceptional circumstances for either appellant that would enable a stand alone Article 8 consideration to take place.
19. It has been acknowledged that the appellants cannot succeed under the Rules; neither can they succeed under Article 8.
20. The decision of Judge Bird contained a material error of law and is set aside. I remake the decision dismissing the appeal under the Immigration Rules and dismissing the appeal under Article 8 ECHR.

Signed

Date

Upper Tribunal Judge Poole