



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/25058/2012

THE IMMIGRATION ACTS

Heard at Field House
On 29 May 2014

Determination Promulgated
On 12 June 2014

Before

UPPER TRIBUNAL JUDGE DAWSON

Between

ENTRY CLEARANCE OFFICER - KINGSTON

Appellant

and

ROLDON ROGER JOHN COOMBS

Respondent

Representation:

For the Appellant: Mr S Walker, Senior Presenting Officer

For the Respondent: Mr N Nason, Solicitor from Luqmani Thompson & Partners

DETERMINATION AND REASONS

1. The Entry Clearance Officer, Kingston appeals with permission the decision of First-tier Tribunal Judge Russell who for reasons given in a determination dated 28 January 2014 allowed the respondent's appeal on human rights grounds under Article 8 against the Entry Clearance Officer's decision dated 27 November 2012 refusing entry clearance to the respondent as the partner of a British national, Mrs

McCarty with reference to the relevant provisions of Appendix FM of the Immigration Rules.

2. The respondent is a citizen of Granada born 24 August 1977. He married Mrs McCarty on 14 February 2009 and on 7 October that year was granted entry clearance to come to the United Kingdom as her spouse. He was granted leave to remain until 7 January 2012. The respondent and his wife believed on a misreading of the dates that had been entered by the New York post that he had leave to remain until 1 July 2012. On 10 March 2012 the respondent left the United Kingdom for his mother's funeral. On attempting to return to the United Kingdom he was informed that his leave to enter had expired and thus the fresh application for entry clearance which was submitted online on 19 September 2012.
3. That application was refused because of the failure by the sponsor, Mrs McCarty to demonstrate she had a gross income of at least £18,600 per annum as defined in E-ECP.3.3.1. Her gross income from her employment with Hayes Staff Recruitment was £12,701.04 per annum. No evidence of savings had been provided and accordingly the application was refused. In a review by the Entry Clearance Manager it was observed that the respondent last worked in the United Kingdom over one year previously and had also worked in breach of the conditions of his visa and thus that previous income could not be taken into account.
4. The judge found the respondent had not demonstrated he met the requirements of the Immigration Rules. He reached a more positive conclusion however under Article 8 after directing himself in relation to the most recent authorities on the correct approach to Article 8 under the new Rules including *Gulshan* (Article 8 - new Rules - correct approach) [2013] UKUT 640 (IAC) and *The Queen (on the application of) Nagre v SSHD* [2013] EWHC 720 (Admin).
5. The judge found the respondent had family life with Mrs McCarty. He also found that she had a troubled medical history which required a "not inconsiderable need of medical attention" owing to her diagnoses of Conn Syndrome including a requirement for careful management. The judge considered that the interference was sufficiently serious to engage the operation of Article 8. The judge concluded that it was hard to see what the legitimate aim was although he acknowledged this to be one of maintaining effective immigration control. He considered the respondent had demonstrated he did not need recourse to public funds and further noted that the respondent had been present in the United Kingdom and engaged in obtaining qualifications and work. In short, he considered the denial of entry clearance to be disproportionate to the aim to be achieved.
6. The grounds of challenge are as follows:
 - (a) The judge's conclusion that the fact that the respondent would have qualified under the old Rules was irrelevant and should not enhance the claim under Article 8;

- (b) The judge's conclusion that the sponsor's health may be set back by the refusal did not appear to be supported by any objective evidence; the instant appeal was far removed from the instances where the protection of an individual's moral and physical integrity is engaged;
 - (c) As to the reliance by the judge on *MM and Others v SSHD* [2013] EWHC 1900 (Admin) it was submitted that the judge in that case had wrongly assumed the role of the democratically accountable decision maker in the formulation of policy and had insufficient regard to the width of discretion afforded to the Secretary of State in formulating that policy;
 - (d) Relying on *MM* as a fundamental element of the proportionality assessment had been material misdirection;
 - (e) The judge had failed to apply the income threshold in its Article 8 assessment;
 - (f) The income threshold ensured that those who choose to establish their family life in the UK should have the financial ability to support themselves and to be able to support their partner's integration into British society. It was therefore inappropriate the judge should decide to disregard those points in its proportionality assessment.
7. Mr Walker explained that the decision in *MM* had been appealed to the Court of Appeal and he accepted that he would be in difficulties if that appeal were not successful. Mr Nason explained that the judge's decision to allow the appeal did not stand and fall on *MM* only having regard to the reasons given by the judge.
8. Mr Walker candidly accepted that the grounds were not clear as to the argument advanced and observed that the grounds were a disagreement with the findings that had been made. Mr Nason referred to the objective evidence of Mrs McCarty's medical position at various locations in the bundle which included medical records, records of her mental health and general evidence regarding her syndrome. Mr Walker accepted that the ground at (b) was erroneous with reference to the analysis by the judge of the impact of Mrs McCarty's medical condition as observed by the judge at [39] and [40] of his decision. He further accepted that the challenge at (a) in the grounds did not reflect the approach taken by the judge in his findings under Article 8. He similarly accepted the grounds were similarly misconceived at (c), (e), as well as difficulty with the argument at (f). He concluded his submissions with the candid acknowledgement that the findings by the judge were clear on all aspects and that family life had been established.
9. I consider Mr Walker was correct to take the position he did in respect of the grounds. I am satisfied that the judge reached conclusions rationally open to him on the evidence, correctly directed himself to the law and reached a permissible conclusion on Article 8 grounds without material error.

10. Accordingly the appeal by the Secretary of State to the Upper Tribunal is dismissed and the decision of the First-tier Tribunal stands.

Signed

Date 12 June 2014

A handwritten signature in blue ink, appearing to read "Dawson", with a horizontal line extending to the right.

Upper Tribunal Judge Dawson