IAC-CH-AP-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/00279/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 1st September 2015	**On 17th September 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE DAVIDGE

Between

MR WASAYULLAH HUSSAINI SYED
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr J Welsh, Counsel
For the Respondent: Mr P Duffy, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant appeals with permission a determination of First-tier Tribunal Judge M A Hall promulgated on 27th April 2015 dismissing his appeal against a decision of the Secretary of State to refuse him leave to remain as a partner, and to remove him from the United Kingdom.

2. The grounds assert a material error of law in the judge's consideration of the Immigration Rules and of Article 8.

3. In the context of the Immigration Rules the complaint is that although the refusal as at the date of decision was correct, the Appellant having no qualifying relationship because he was not married to his partner, and there was no two years' cohabitation, by the date of the judge's assessment the couple had married. The grounds continue that had the judge conducted a proper assessment of the partner rules under Appendix FM the Appellant would have met the requirements of the Rules because a detailed examination of the financial evidence would have revealed that all the requirements of the Rules would have been met, including the financial requirements as the Appellant and his wife were both working and had a joint income which exceeded the £18,600 threshold.

4. In the alternative the grounds contend that the judge's assessment under Article 8 ECHR was flawed because as the only issue under the Immigration Rules was the satisfaction of the relationship requirement this was a case which benefited from the Chikwamba principle and that the Appellant's British wife could not reasonably be expected to relocate to India given that she is British born, not of Indian ethnicity, unable to speak the language and unfamiliar with the culture.

My Consideration and Findings

Immigration Rules grounds

5. The application was made when the Appellant had leave to remain in the United Kingdom as a student and so the relevant date for the satisfaction of the Immigration Rules in the appeal before the First-tier Tribunal was the date of hearing. In that regard the parties obtained the benefit or detriment of any change in circumstances relevant to the disputed issues, including the fact of marriage resulting in the Appellant beign able to show that as at the date of hearing he met that part of the rule.The Respondent's refusal decision was predicated on the nature of the relationship. The Respondent failed to assess the financial requirements. The approach of the Respondent ran the risk that in the event, as here, that the reason for refusal initially relied upon fell away, the Respondent's assessment of the financial requirements was not available to the judge from the reasons for refusal letter. The Appellant could have approached the Respondent in connection with the application so as to provide additional evidence. He did not. Absent any concession that the other parts of the rule were met he retains the obligation of demonstrating at the hearing that his evidence relating to those parts was sufficient to meet the requirements.

6. In this case that meant that the Appellant needed to show that as at the date of application he and his partner had a joint income in excess of £18,600 **and that they had provided the specified evidence of the same to the Respondent with the application**. In the event the representative on the day, who did not draft the grounds of appeal before me, conceded that the requirements of the Rules were not met and so there was no effort to demonstrate that the specified evidence had accompanied the application.

7. Theses grounds' treatment of that position is flawed. Given that it was not asserted that the relevant specified evidence had been provided, the judge's failure to make any finding as to whether or not it had, cannot give rise to any material error of law.

8. Further, the bare assertion made in these grounds that the Appellant and his partner had a joint income in excess of £18,600 falls far short of establishing the requirement of the Rules in terms of the specified evidence. The requirements go to demonstrate that the couple have had a consistent and stable position; hence the requirement is over a specific length of time.

9. Further, any suggestion (and it only remains a speculative suggestion) that they could have met the specified evidence requirements, does not give rise to a Robinson obvious point that the judge should have investigated or called evidence about in order to decide. The entitlement to remain based on satisfaction of the rules is self-evidently a Rules-based entitlement as opposed to Convention-based. The Robinson principle is limited to Convention issues.

10. The judge could have been invited to ascertain whether the application of EX.1 excused any failure of the financial requirements of the Rules, including those regarding specified evidence. However he was not invited to do that. In any event the test in EX.1 is whether there are insurmountable obstacles to the Sponsor relocating to India. As defined in EX.2 that means very significant difficulties in continuing family life in India, which could not be overcome or would entail very serious hardship.

11. The judge considers the position of relocation of the Appellant and his spouse at paragraph 42 in the context of Article 8.

> "If the Sponsor decided to relocate to India, this may cause her some hardship because it would mean living in a country that is completely unfamiliar, and being separated from her own family and leaving her employment. I do not however find that this hardship would mean that the Appellant's removal would be disproportionate. It does not reach the threshold referred to in VW (Uganda)."

12. It is quite clear from that finding that the judge did not accept that the evidence revealed insurmountable obstacles of the character and quality required in the Rules, so that in any event the same test is answered negatively in the decision elsewhere.

13. In short, the grounds arguing error on the basis of the Appellant in fact satisfying the immigration rules are not made out. It was not argued, or evidenced, that the Appellant could meet the financial requirements of the Rules, or that the position was excused through the application of EX.1. The judge did not consider it. It was not an omission amenable to the Robinson principle being a Rules rather than Convention-based entitlement, but in any event given the judge's consideration of the substantive test in the context of proportionality it is not an omission that is capable of establishing material error.

Article 8 ECHR outside of the rules

14. Turning to the Article 8 consideration the grounds assert material error in the context of Section 117 of the Nationality, Immigration and Asylum Act 2002.

    (i) Section 117(3): the issue of whether or not an Appellant is financially independent is not determined by the specified evidence and it is apparent that the judge has discounted the evidence of the Appellant's own income.

    (ii) Section 117(4): the assessment of the weight to be given to the Appellant's family life, because the family life is established at a time when the Appellant is here lawfully, albeit in the context of a precarious leave to remain, should not have been determined by the insurmountable obstacles test and the judge should instead have been looking at Chikwamba v SSHD [2008] UKHL 40. which reveals that requiring the Appellant to go to India to make an application for entry clearance would be a procedural requirement because the Rules were in substance now met. Before me Mr Welsh developed the point to the contrary position: because the financial out of country Rules were more arduous than the in-country position because potential earnings of the Appellant could not be used to satisfy the maintenance requirements, to the point that if he had to return to India to make an application for entry clearance on current circumstances it would be refused.

15. This is not a case, as in Chikwamba, of someone being required to leave the United Kingdom purely for a procedural reason of making an out of country application which it was acknowledged was bound to succeed, or where such a merely procedural requirement was a grave interference with family life taking into account the best interest of children. R (On the application of Chen) v SSHD (Appendix FM – Chikwamba – temporary separation – proportionality) IJR [2015] UKUT 00189 (IAC) points out that the Appellant would need to be able to show that entry clearance from abroad would be granted and that there would be significant interference with family life by temporary removal so that the weight to be accorded to the formal requirement of obtaining entry clearance is reduced. The grounds are misconceived in relying upon Chikwamba in the context of this case.

16. The grounds fail to appreciate the evaluative nature of the proportionality assessment. Nothing argued here can be said to be determinative in the appellant's favour so as to show the decision to be perverse, in particular the fact of financial independence as at the date of hearing, or the inability to meet the out of country financial requirements. The rules provide the opportunity of making an in country application and the Appellant did not bring himself within them. The judge was entitled to find that that position ran contrary to the public interest and to give it significant weight. The finding that the spouse could relocate was a finding which was open to the judge to make. The burden is on the Appellant. In this case the Appellant fell short in his application and the judge found that family life could be continued in India, so that the proportionality balance fell against the Appellant. The judge was entitled to that conclusion.

17. The grounds reveal no material error of law.

Decision

18. The decision of the First-tier Tribunal dismissing the Appellant's appeal on Immigration Rules and Article 8 grounds stands.

19. No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge Davidge