IAC-BH-PMP-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/45488/2014

THE IMMIGRATION ACTS

Heard at Bennett House, Stoke
On 29th May 2015

Decision & Reasons Promulgated
On 19th June 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE GARRATT

Between

AHSAN RAFIQ
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S Lotay, legal representative of Derby Immigration Aid Consultants
For the Respondent: Mr A McVeety, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Before the Upper Tribunal the Secretary of State becomes the appellant. However, for the avoidance of confusion, I shall continue to refer to the parties as they were before the First-tier Tribunal.

Background

2. On 22nd April 2015 Judge of the First-tier Tribunal N Osborne gave permission to the respondent to appeal against the decision of Judge of the First-tier Tribunal V A Cox in which she allowed the appeal under the Immigration Rules against the decision of

the respondent to refuse leave to remain as a spouse in accordance with the provisions of paragraph 284 and Appendix FM of the Immigration Rules and paragraph 276ADE of those Rules on private life grounds. The appellant is a citizen of Pakistan born on 3rd May 1990 who entered the United Kingdom on 8th July 2012 with entry clearance as a spouse expiring on 14th September 2014.

Error on a Point of Law

3. In the grounds of application the respondent contended that the judge was in error in making reference to section 3 of the respondent's IDIs of April 2013 on the basis that this excluded the application of the English language requirement set out in paragraph 284(ix)(a) of the Immigration Rules. In particular, it is submitted that the judge had isolated her consideration of section 3 to the key points set out in section 3.1. of the IDIs overlooking the overriding requirement of the need to meet the provisions of paragraph 284 which included the English language provision.

4. The grounds also contend that the judge's proportionality assessment is materially flawed as she failed to provide adequate reasons to support the finding that the appellant's wife had no understanding of traditional Pakistani culture and no connection to Pakistan despite the evidence.

5. At the hearing Mr McVeety confirmed that the respondent relied on the grounds of application. He added that, if the judge had thought that the respondent had not followed her own IDIs, then the appeal should have been allowed to the limited extent that the decision was not in accordance with the law and remitted the application back for a fresh decision. He also emphasised that, in considering human rights issues, the judge should have applied the provisions of Section 117B of the Nationality, Immigration and Asylum Act 2002 (as amended) in relation to the proportionality of the Respondent's decision.

6. Mr Lotay reminded me that the appellant had submitted a Rule 24 response upon which he relied. This contends that the judge was not wrong to refer to the key point's paragraph of the IDIs as this omitted reference to the English language requirement. The appellant could therefore be regarded as someone whose circumstances were exceptional whether or not the matter was considered within the Immigration Rules or outside them. In this respect he also contended that the appellant had failed to meet the provisions of paragraph 284 of the Immigration Rules on a "somewhat technical basis" because he had taken and passed an English language test even if one not recognised by the Home Office. Mr Lotay also submitted that the judge was right to conclude that the appellant's wife had no connection to Pakistan.

7. The response also makes reference to a First-tier Tribunal decision which followed a hearing at Manchester on 16th June 2014. However, I pointed out to Mr Lotay that the decision is not reported and creates no precedent in these proceedings.

8. After I had considered the matter for a few moments, I announced that I was satisfied that the decision showed material errors on points of law such that the decision should be set aside and re-made. My reasons for that conclusion follow.

9. The judge's consideration of IDIs as a means to exclude the English language requirement specifically set out in paragraph 284(ix)(a) of the Immigration Rules is clearly flawed. The key points set out in section 3.1. of the IDIs for April 2013 cannot be read in isolation. The initial part of that section reads as follows:

> "As stated above **all** of the relevant provisions **must** be referred to when considering applications for leave to remain in this category, but in general caseworkers need to be satisfied that: ...".

The emboldened words in the section quoted are in the respondent's original document a copy of which was handed to me at the hearing. The preceding section 3 contains the following statement:

> "From 29 November 2010, applicants in this category need to meet the new English language requirement for partners ...".

10. Thus, none of the guidance contained in the IDIs at section 3 in any way qualifies the requirement for an English language test certificate from a provider approved by the respondent. From paragraph 33 onwards of the decision the judge erred in making the absence of any reference to the English language requirement in the key points section the significant factor in allowing the appeal. Further, although the judge finds that the respondent's decision is not, therefore, in accordance with the law it is not clear that the appeal was allowed on that limited basis leaving it open to the respondent to make a fresh decision. The decision suggests that the judge intended to allow the appeal outright on that basis. This is a further error.

11. As to the second point, that the judge was wrong to conclude that the appellant's wife had no connection to Pakistan, I also find that the judge erred. It is concluded in paragraph 46 of the decision that the appellant's wife "has absolutely no connection with Pakistan and no understanding of traditional Pakistani culture ...". But no reasons are given for this conclusion even though the evidence put before the judge showed that the appellant's wife is a British citizen who was born in Derby. There was other evidence, including photographs, which suggested that her family's origins are in Pakistan where the wedding between the parties took place on 18th July 2010. Cogent reasons for the judge's conclusion were required but not given. This also amounts to an error.

Re-Making the Decision

12. Both representatives agreed that the re-making of the decision could proceed by way of submissions only.

13. Mr Lotay outlined the circumstances of the appellant's marriage which were conceded by Mr McVeety. The appellant had entered the United Kingdom lawfully with leave as a spouse following an arranged marriage between the parties in Pakistan. The appellant's wife, Farzana Rehmat, is a British citizen who was born in Derby where she has lived with her parents. The parties have a genuine and subsisting relationship.

14. As to the proportionality of the respondent's decision Mr Lotay pointed out that the applicant had an English language qualification which had been taken on the advice of his representatives at the time. He attended English classes and then obtained

the EDEXCEL certificates which are on pages B1 and 2 of his bundle of documents. The certificate is dated March 2014. Mr Lotay submitted that the appellant had been unable to take a further test with an approved provider because the respondent still held his passport from the time of his application. He contended that the appellant should not have to return to Pakistan and apply for re-entry bearing in mind that he had already qualified for entry clearance in 2012 before his arrival here.

15. Mr McVeety made reference to the Upper Tribunal decision in *R (On the Application of Chen) (Appendix FM – Chikwamba – temporary separation – proportionality)* [2015] UKUT 00189 (IAC) on the basis that it would not be disproportionate for the appellant to return to Pakistan to make a fresh application for entry clearance. He also made reference to the decision of the Court of Appeal in *SS (Nigeria)* [2013] EWCA Civ 550 which emphasised the impact of a powerful public interest in what needs to be demonstrated for an Article 8 claim to prevail. He also suggested that the parties could continue their family life in Pakistan a country to which he believed the appellant's wife had family connections.

16. In conclusion Mr Lotay emphasised that there could be a long period of separation if the appellant were forced to return to Pakistan bearing in mind that he could not, at present, meet the financial requirements for entry clearance which would then be imposed upon him.

Conclusions

17. In immigration appeals the burden of proof is on the appellant and the standard of proof is a balance of probabilities. In this appeal, which involves human rights issues, I take into consideration the circumstances as at the date of hearing.

18. The respondent's refusal decision examines the appellant's application under both paragraph 284 and Appendix FM of the Immigration Rules. I consider the appeal under these parts of the Immigration Rules first before considering human rights issues. I bear in mind that, following the comments of the Court of Appeal in *MM* [2014] EWCA Civ 985 there is no need for me to consider any intermediary test before moving to consider the appeal on Article 8 human rights grounds outside the Rules in the event that the Rules cannot avail the appellant. In considering the matter outside the Rules I adopt the five stage approach recommended in *Razgar* [2004] UKHL 27 and I also refer, as necessary, to other case law where relevant, as indicated below.

19. The appellant cannot satisfy the provisions of paragraph 284 of the Immigration Rules even though it is accepted that he was granted leave to enter the United Kingdom as the husband of his sponsor in 2012 and the respondent accepts that the parties intend to live permanently with each other as spouses and the marriage is subsisting. No issue is taken with accommodation or maintenance under the provisions of paragraph 284. However, the appellant falls foul of the provisions set out in sub-paragraph (ix)(a) of the Rule because he did not provide the respondent with an English language test certificate in speaking and listening from an English language test provider approved by the respondent. The exceptions to the provision of such a certificate do not apply. In particular it cannot be said that there are

exceptional circumstances which would prevent the applicant from meeting the requirement.

20. The fact is that the applicant took an unapproved test provided the wrong test certificate. Although he blames his representatives for misleading him in this respect, there is no evidence to suggest that he has taken any action against those representatives nor can I conclude that there are any other circumstances which might be regarded as exceptionally compassionate which could exclude him from the requirement. The applicant claims that he could not sit a test with an approved provider after he was aware of the refusal of his application because the respondent held his passport which would have been needed to support the test application. However, the appellant has not satisfied me that he took steps to contact the respondent to enable his passport to be provided so that he could make an application or, at least, to confirm his immigration status to an approved provider at the time.

21. As to the possibility that the appellant's application might meet with approval under Appendix FM of the Immigration Rules, paragraph EX.1 only might apply as the applicant cannot meet the specific financial requirements of section EX-LTRP. Under EX.1 the applicant must have a genuine and subsisting relationship with a partner who is in the United Kingdom and is a British citizen and there are insurmountable obstacles to family life with that partner continuing outside the United Kingdom. The term "insurmountable obstacles" under the rule means very significant difficulties which would be faced by the applicant or their partner in continuing their family life outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner (EX.2.).

22. It is suggested that there are such insurmountable obstacles because the sponsor has no connections with Pakistan. In her statement the sponsor says that she cannot live in Pakistan as it is a country she does not know about and she would not want to live there because she was born and bred in the United Kingdom. However, it is difficult to see how such a statement can amount to an insurmountable obstacle when it is evident that she entered into an arranged marriage with a Pakistani national no doubt at her parents' request. The marriage ceremony took place in Pakistan and her husband is a Pakistani national with family members living there. The photographs in the appellant's bundle do not suggest that the appellant and his sponsor are a couple who would in any way look unusual in Pakistani society. Indeed, the photographs show the sponsor in traditional Asian dress. It is not suggested that the appellant cannot speak a language of Pakistan a country which she has evidently visited despite her British nationality. I do not conclude that there will be significant difficulties in her continuing her family life in that country from where her own family originate.

23. As I am not satisfied that the appellant cannot meet the requirements of the Immigration Rules I consider the claim on human rights grounds outside them. If the parties are separated because the appellant returns to Pakistan without his wife then, applying the five stage *Razgar* tests, I conclude that removal of the appellant will be an interference with his family life which the respondent accepts exists. It will also have consequences of such gravity as potentially to engage the operation of Article 8 because, in particular, I bear in mind that the parties have lived together in UK for two years as husband and wife and the sponsor expresses no enthusiasm to go to live in

Pakistan. Bearing in mind that the respondent's decision is in accordance with the law, the issue is, therefore, whether or not that decision is proportionate.

24. In reaching my conclusions about proportionality I have regard to the provisions of Section 117B of the 2014 Act. In particular, I am required to consider that it is in the public interest that a person who seeks to remain in the United Kingdom is able to speak English. Although the appellant has shown that he has obtained an English language qualification, I cannot conclude that his standard of English excludes the operation of Section 117B. He has a qualification which is not approved by the respondent and has not taken steps to show that he does have the required qualification.

25. However, I also have to consider that, if the appellant now returns to Pakistan and has to make a fresh application, he will have to show that he complies with the provisions of Appendix FM, particularly the financial requirements, which he says he cannot meet at present. He also asserts that it would be disproportionate to expect him to return to Pakistan to make that entry clearance application on the basis set out in *Chikwamba* [2008] UKHL 40. I have already indicated that I am not satisfied that the parties have shown that it would be unreasonable to expect the sponsor to move to Pakistan so that the parties can enjoy their family life there. Additionally, the Upper Tribunal has commented on the application of *Chikwamba* in *R (On the Application of Chen)* acknowledging that there may be cases where there are no insurmountable obstacles for enjoyment of family life outside the United Kingdom but where temporary separation may be disproportionate. However, I do not conclude that this is one such case. There are no children involved and the parties have known or ought to have known from the outset that there was no right for them to choose the country in which their family life could be enjoyed. I do not regard it as significant that the appellant claims it will be difficult for him to make a successful application to return to UK because of the financial requirements which he concedes he cannot meet at present, when it has not been shown that the parties cannot continue to enjoy their family life in Pakistan.

26. The failure of the appellant to obtain the right English language qualification is not simply a technical breach of the Rules as representative's claim because, unless an applicant takes the approved test the required level of his knowledge of the English language will remain uncertain. The reasons for the requirement to speak English are now set out in section 117 of the 2002 Act which makes it clear that a refusal decision based on a failure to show that an individual can speak English is in the public interest.

27. For the reasons I have given I dismiss the appeal on immigration and human rights grounds.

Notice of Decision

The decision of the First-tier Tribunal shows an error on a point of law. I set aside the decision and re-make it by dismissing the appeal on immigration and human rights grounds.

Anonymity

Anonymity was not requested nor do I consider it appropriate in this appeal.

Signed Date

Deputy Upper Tribunal Judge Garratt

TO THE RESPONDENT
FEE AWARD

As I have dismissed this appeal there can be no fees award.

Signed Date

Deputy Upper Tribunal Judge Garratt