



IAC-FH-NL-V1

**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/48442/2014

THE IMMIGRATION ACTS

**Heard at Bradford
On 30th June 2015**

**Decision & Reasons Promulgated
On 8th July 2015**

Before

UPPER TRIBUNAL JUDGE D E TAYLOR

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**WAQAS ASLAM
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr M Diwnycz, Home Office Presenting Officer
For the Respondent: Mr P Thornhill, Thornhills Solicitors

DECISION AND REASONS

Background

1. This is the Secretary of State's appeal against the decision of Judge Hillis made following a hearing at Bradford on 17th February 2015.

Background

2. The claimant is a citizen of Pakistan born on 8th July 1988. He entered the UK with entry clearance as a student on 3rd April 2011 valid to 23rd June 2012. He submitted a further application which was refused. However his appeal against that decision was allowed and, on 18th January 2014, his case was reconsidered.
3. On 11th March 2014 he submitted an application as the spouse of a settled person which was rejected due to payment of an incorrect fee and resubmitted on 2nd April 2014.
4. The claimant was refused on suitability grounds because it was considered that his English language test taken on 17th July 2012 had been obtained through deception and an anomaly with the speaking test indicated the presence of a proxy test taker.
5. So far as his family life was concerned, his spouse did not meet the definition of a partner, and he was also refused on private life grounds.
6. The Immigration Judge found that the claimant was in a genuine and subsisting relationship with his spouse. He also concluded that the claimant took and passed the test on 17th July 2012 personally and that the Secretary of State's finding that he used deception was unfounded.
7. So far as the financial requirements of the Rules were concerned he said that the couple earned £13,533 which was below the minimum requirement of £18,600.
8. He then concluded as follows:-

"Applying the relevant law to the established facts I find that the appellant has satisfied all the relevant requirements of Appendix FM. He and his sponsor are currently in a genuine and subsisting marriage and intend to live permanently together as each other's spouse. I therefore find that the decision of the respondent appealed against is not in accordance with the law and the applicable Immigration Rules."
9. He also allowed the appeal on Article 8 grounds.

The grounds of application

10. The Secretary of State sought permission to appeal on the grounds that the judge had materially misdirected himself in law in finding that the requirements of Appendix FM were satisfied despite also finding that the income threshold requirement was not met. He also failed to give any reasons why the claimant could not return to Pakistan in order to apply for entry clearance.
11. Permission to appeal was granted by Judge P J G White for the reasons stated in the grounds.

Consideration of whether there is an error of law

12. At the hearing Mr Thornhill frankly conceded that this appeal could not stand. First the judge contradicted himself in finding that the requirements of Appendix FM were met when the couple could not meet the financial requirements, and made no findings in respect of EX(1). Second, there is no proper analysis of the relevant facts in the judge's consideration of Article 8.
13. The decision is set aside.
14. Mr Thornhill submitted that the appeal ought nevertheless to be allowed because there were insurmountable obstacles as at the date of hearing to the claimant's spouse joining him in the UK. Their first baby is due imminently and no airline would take her.

Findings and Conclusions

15. Under Section R-LTRP.1.1 the requirements to be met for limited leave to remain as a partner are -
 - (a) The applicant and their partner must be in the UK;
 - (b) The applicant must have made a valid application for limited or indefinite leave to remain as a partner; and either
 - (c) (i) the applicant must not fall for refusal under Section S/LTR suitability for leave to remain and
 - (ii) the applicant meets all of the requirements of Section E-LTRP: eligibility for leave to remain as a partner; or
 - (d) (i) the applicant must not fall for refusal under Sections S/LTR suitability leave to remain; and
 - (ii) the applicant meets the requirements of paragraph E-LTRP.1.2-2.12 and E-LTRP.2.1; and
 - (iii) EX.1 applies.
16. The judge found in the claimant's favour so far as the suitability requirements are concerned and no challenge to his findings have been made by the Secretary of State. He also meets the relationship requirements set out in E-LTRP.1.2-1.12 since the judge has found that he is in a genuine and subsisting relationship with his spouse.
17. He cannot meet the financial requirements and therefore the issue is whether paragraph EX.1 applies.
18. This paragraph applies if -
 - (a) (i) the applicant has a genuine and subsisting parental relationship with a child who -
 - (aa) is under the age of 18 years;

- (bb) is in the UK;
- (cc) is a British Citizen or has lived in the UK continuously for at least the 7 years immediately preceding the date of application; and

(ii) it would not be reasonable to expect the child to leave the UK; or

- (b) the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British citizen, settled in the UK or in the UK with refugee leave or humanitarian protection, and there are insurmountable obstacles to family life with that partner continuing outside the UK.

19. The claimant cannot meet the requirements of EX.1(a) because as at the date of hearing he does not have a genuine and subsisting parental relationship with a child. His child is not yet born.
20. His wife is settled in the UK and is clearly at present unable physically to take a flight to Pakistan because she is very heavily pregnant. However EX.1(b) looks to the future in that it refers to family life continuing. The situation in principle is no different than if she had an infectious illness which prevented her flying or if there was an aeroplane strike or indeed a myriad of other reasons physical travel to Pakistan was momentarily not practicable.
21. The obstacle to her travelling is strictly temporary and therefore not insurmountable. The family life which she has enjoyed with her spouse in the UK could continue outside the UK within a few weeks. The fact that, as at the date of hearing, she could not physically get on an aeroplane, does not mean that the requirements of EX.1(b) are met.
22. The application therefore cannot succeed under the Rules.
23. In R (on the application of Davindra Sunassee) v Upper Tribunal (Immigration and Asylum Chamber) v SSHD [2015] EWHC 1604 Mr Justice Edis said at para 36:

“In SS (Congo) the Court of Appeal restated the context and considered the role of public policy as expressed in the Rules in the proportionality assessment. This is at the heart of the present issue. The law is as I have said that the decision maker is entitled to decide that Article 8 considerations have been fully addressed in the Rules when dealing with stage 2. If they have it is enough to say so. This will necessarily involve deciding whether there is a gap between the Rules and Article 8 and then whether there are circumstances in the case under consideration which take it outside the class of cases which the Rules properly provide for. Whether these circumstances are described as compelling or exceptional is not a matter of substance. They must be relevant, weighty and not fully provided for within the Rules. In practice they are likely to be both compelling and exceptional but this is not a legal requirement.”
24. No submissions were made by Mr Thornhill to suggest that any such circumstances are present in this case.

Decision

25. The original judge erred in law. His decision is set aside. The following decision is substituted. The appeal is dismissed.

Signed

Date

Upper Tribunal Judge Taylor