



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/00767/2014

THE IMMIGRATION ACTS

Heard at Birmingham Employment Centre
On 28 April 2015

Decision Promulgated
On 19 May 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE McCARTHY

Between

ENTRY CLERANCE OFFICER (ECO), ISLAMABAD

Appellant

and

SIDRA FIAZ

Respondent

Representation:

For the Appellant: Mr N Smart, Senior Home Office Presenting Officer

For the Respondent: Mr N Ahmed, instructed by Syeds Solicitors

DECISION ON ERROR ON POINT OF LAW

1. At the end of the hearing that took place on 28 April 2015 I announced that I would allow the ECO's appeal to the Upper Tribunal because I found that there was a material error on a point of law in the decision and reasons statement of First-tier Tribunal Judge Lagunju that was promulgated on 26 January 2015. I reserved my reasons which I now give.

2. By way of background, it is sufficient to record that Judge Lagunju was seized initially with determining whether Ms Fiaz met the requirements of the immigration rules as a partner. Judge Lagunju found, with good reason, that Ms Fiaz could not be regarded as being lawfully married to the sponsor and that in any event she had not shown that the financial requirements of appendix FM were met. Judge Lagunju reached these conclusions based on the evidence presented, bearing in mind that she had to consider the situation at the date of decision. There is no challenge to these findings. They are preserved as they contain no obvious legal error and there has been no cross appeal.
3. These were not the only issues Judge Lagunju had to determine. Ms Fiaz also relied on arguments that refusing her entry clearance violated her family life rights under Article 8 of the human rights convention and that the refusal was also contrary to EU law. These issues arose from the fact that Ms Fiaz was the primary carer of her son, a British citizen, who lived with her in Pakistan.
4. In relation to the EU law issues, Judge Lagunju found against Ms Fiaz. She considered the case of MA and SM (Zambrano: EU children outside EU) Iran [2013] UKUT 380 (IAC) but found that the child would not be deprived of his citizenship rights as he could live in the UK with his father. Again, there is no challenge to these findings and there is no cross appeal. Therefore, these conclusions are also preserved.
5. It is the Article 8 decision that the ECO challenges. In paragraph 24 of her decision and reasons statement, Judge Lagunju said:

“24. Accordingly I accept that [Ms Fiaz] shares family life with her partner and child, thus the decision does interfere with family life as it would cause the applicant and her child to be separated. I find such interference is of sufficient severity to engage Article 8.”

In subsequent paragraphs, Judge Lagunju considered the impact on Ms Fiaz, her partner and their child on the basis that the child would move to the UK to exercise his citizenship rights thereby leaving Ms Fiaz on her own in Pakistan. In other words, it is clear that Judge Lagunju considered the Article 8 issues on a hypothetical basis and not on the situation as it was at the date of decision.

6. This approach has no basis in law. The House of Lords confirmed in AS (Somalia) & Anor v SSHD [2009] UKHL 32 that the relevant date in an appeal against refusal of entry clearance remained the date of decision even in relation to grounds of appeal relating to family life rights. As such, Judge Lagunju’s approach is legally flawed and her conclusions regarding Article 8 cannot stand.
7. Following this decision, I discussed with the parties how the case should be determined. I decided that it should be retained in the Upper Tribunal because of the fixed findings in relation to the immigration rules and EU law. However, in relation to Article 8, I recognised the fact that it would be essential to consider the wellbeing of the child and agreed to give Ms Fiaz time to present evidence on that issue. There

was some indication in the papers that there were some medical issues relating to the child and it would seem necessary to have those issues ventilated and clarified before reaching a conclusion. I reminded Mr Ahmed – although no reminder was required – that the Tribunal would only be able to consider evidence appertaining to the date of decision.

8. In choosing this path, I indicated to the parties that I would have to have regard to the Court of Appeal's judgment in SS (Congo) and others v SSHD [2015] EWCA Civ 387 because of what it says regarding the impact the best interests of a child overseas might have on the proportionality assessment. I also reminded the parties that I would have to have regard to the fact that the child would be a dual national, and currently would be regarded as exercising his entitlement to live in Pakistan.

Decision

The ECO's appeal to the Upper Tribunal is allowed because the decision and reasons statement of Judge Lagunju contains an error on a point of law and must be set aside.

Directions

1. The resumed hearing will be before Deputy Upper Tribunal Judge McCarthy.
2. The issues are limited to consideration of the Article 8 rights of Ms Fiaz.
3. Any further evidence must be filed and served at least 14 calendar days before the next hearing.

Signed

Date

Judge McCarthy
Deputy Judge of the Upper Tribunal