Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/04204/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 12th March 2015	**On 26th March 2015**
Extempore Judgment	

Before

UPPER TRIBUNAL JUDGE MARTIN

Between

ENTRY CLEARANCE OFFICER - PRETORIA

Appellant

and

MR MICHAEL ANTHONY KOSTER
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Ms K Pal (Senior Home Office Presenting Officer)
For the Respondent: Not Present or Represented

DECISION AND REASONS

1. This is an appeal to the Upper Tribunal by the Entry Clearance Officer in this case in relation to a Decision and Reasons prepared on the papers by First-tier Tribunal Judge Roopnarine-Davies on 16th October 2014 and promulgated on 11th November 2014.

2. The appeal concerned a South African man who had sought entry clearance under paragraph 194 of the Rules to join his work permit holder spouse in the UK. She had been issued with a work ancestry visa valid

from 1st August 2010 to 1st August 2015. The application had been refused by the Entry Clearance Officer on 21st February 2014 both under paragraph 194 and under paragraph 320(7B). 320(7B) is a mandatory ground of refusal where an applicant has previously breached the UK's immigration laws and was 18 or over at the time of his most recent breach by

(a) overstaying;

(b) breaching a condition attached to his leave;

(c) being an illegal entrant;

(d) using deception in an application for entry clearance, leave to enter or remain or in order to obtain documents from the Secretary of State or a third party required in support of the application whether successful or not,

There are then various exceptions to that part.

3. The particular offending behaviour by the Appellant in this case was that he had overstayed his own work permit visa by a period in excess of 90 days. His visa had expired on 1st August 2013 and he did not go back to South Africa until January 2014. His explanation was not accepted, namely that he was saving up to pay the fare.

4. Although a spouse paragraph 320(7B) can properly be applied to this application and the Entry Clearance Officer was entitled to and properly refused the application on that basis. Indeed he had no choice Judge Roopnarine-Davies agreed with that. At paragraph 4 of his decision he said that he was satisfied that the Respondent correctly refused the application under paragraph 320(7B), which is a mandatory ground for refusal in which he did not have a discretion.

5. However, having found that the mandatory refusal under the Rules applied, what he should have done then in line with Nagre [2013] EWHC 720 (Admin) , which we now know remains good law, in particular paragraph 30 thereof, and the most recent case of Khalid and Singh [2015] EWCA Civ 74 the Judge should have then considered whether the Article 8 Rules could apply to this case in terms of Appendix FM or paragraph 276ADE. In fact they do not. However, what the Judge should have done was to consider that and then explain, if he was going to go on to consider Article 8 under the ECHR, what the circumstances of the case were that were not covered by the Rules and warranted consideration outside the Rules. He did not do so but immediately considered the ECHR. That is an error of law.

6. It is also an error of law, bordering on perversity, to find that an Appellant who had overstayed, was subject to a mandatory refusal, had commenced a relationship whilst unlawfully in the UK with a woman form the same country present in the UK herself on a temporary basis should succeed on

Article 8 grounds. That is an error of law. It was an error of law in allowing the appeal to fail to attach any weight to the 320(7B) point and the fact that the Sponsor is in the UK only on a temporary basis.

7. He also failed to attach any significant weight to the fact that both the Appellant and the Sponsor are South African nationals and that there is absolutely nothing to prevent the Sponsor, who was expecting a child, to travel to South Africa and have the child there with the support of the Appellant. The couple are known to have got married in South Africa.

8. All of the factors that weigh against the Appellant in this case were brushed over or quite simply ignored by the Judge. All of these amount to errors of law of such severity given that they were determinative of the outcome, such to mean that the only thing for me to do is to set the First-tier Tribunal's decision aside in its entirety.

9. Having set the decision aside, I then have to decide what to do with it next. There is no appearance by the Sponsor or by Representatives for the Sponsor in front of me and indeed they chose not to attend the hearing before the First-tier Tribunal. If there was any attendance they may have been able to make better arguments in relation to Article 8 but the fact is there is not. There is no reason therefore why I should not go ahead today and redecide the appeal on the basis of the evidence that there is.

10. So, approaching this appeal in the order the Court of Appeal has now indicated to be correct, the Appellant does not succeed under the Immigration Rules. He cannot succeed under Appendix FM. Paragraph 276ADE clearly cannot apply because he is outwith this country.

11. I then have to consider whether there is anything about the case which warrants it being decided under the ECHR. Looking at the facts of this case, it is difficult to say that Article 8 is even engaged. For the reasons that I have indicated above the Sponsor herself is only here temporarily and indeed her leave runs out later this year. She is a South African national. The Appellant is a South African national. They got married in South Africa. If they wish to have a family life together that should properly be in South Africa, the country of which they are both nationals and where they chose to get married.

12. However, even if Article 8 was engaged and the issue was down to proportionality, for the same reasons that I have already indicated refusal to allow the Appellant entry to the UK on a temporary basis would be entirely proportionate. It is arguable also that any interference in their family life is of their making, not the Entry Clearance Officer's making. They are not living together because the Sponsor has chosen to come and work in the UK.

13. On that basis I dismiss the appeal.

Signed Date 25th March 2015

Upper Tribunal Judge Martin