



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

Appeal Number: OA/04211/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 7 October 2015**

**Decision and Reasons
Promulgated
On 9 November 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN

Between

ENTRY CLEARANCE OFFICER - ISLAMABAD

Appellant

and

**MRS. ZUBARIA SHARAZ
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr. S. Kandola, Home Office Presenting Officer
For the Respondents: Miss. R. Akther, instructed by Time Solicitors

DECISION AND REASONS

The Appeal

1. This is an appeal by the Entry Clearance Officer against a decision of First-tier Tribunal Judge Abebrese which allowed the appeal of Mrs. Sharaz against the decision to refuse entry clearance as the spouse of the Sponsor, Mr. Sharaz Hussain, under Appendix FM of the immigration rules.

2. For the purposes of this decision, I refer to Mrs. Sharaz as the Appellant and to the Entry Clearance Officer as the Respondent, reflecting their positions as they were before the First-tier Tribunal.
3. Permission to appeal was granted on the basis that the judge arguably erred in law in allowing the appeal on the basis that the Respondent's decision was not proportionate. The judge failed to consider the public interest factors in section 117B of the 2002 Act, and failed to give reasons as to why family life could not reasonably be enjoyed outside of the UK.
4. The judge found that the appeal could not succeed under the immigration rules as the Sponsor's wages were not paid in full into his bank account ([10] and [11]), and this is not in dispute.

Error of law

5. I have considered carefully the case of SS (Congo) [2015] EWCA Civ 387, in particular paragraphs 51, 53, 55 and 56 to which I was referred by Mr. Kandola. Paragraph 51 states:

"In our judgment, the approach to Article 8 in the light of the Rules in Appendix FM-SE should be the same as in respect of the substantive LTE and LTR Rules in Appendix FM. In other words, the same general position applies, that compelling circumstances would have to apply to justify a grant of LTE or LTR where the evidence Rules are not complied with."
6. In paragraph 53 of SS (Congo) it states: "Good reason would need to be shown why a particular applicant was entitled to more preferential treatment with respect to evidence than other applicants would expect to receive under the Rules."
7. It was submitted that there were no compelling circumstances made out in the Appellant's case. I find that in order for the judge to have found that the decision of the Respondent was disproportionate, following SS (Congo), the judge needs to have found that there were compelling circumstances, and that there was a good reason as to why the Appellant was entitled to more preferential treatment than others.
8. In relation to the "near miss" cases SS (Congo) provides that the "fact that an applicant may be able to say that their case is a "near miss" in relation to satisfying the requirements of the Rules will by no means show that compelling circumstances exist requiring the grant of LTE outside the Rules. A good deal more than this would need to be shown to make out such a case." [56]
9. Paragraph [13] of the decision states:

"The Tribunal considered that based on the facts and information before them that there are good arguable grounds and also compelling and compassionate circumstances which do warrant this appeal to be further considered outside of the immigration rules and under Article 8".

However, the judge did not set out what these compelling and compassionate circumstances were aside from his findings in paragraph [14] that the Appellant and Sponsor are a couple who have been married since 2011, and that the decision prevents them from continuing their married life together [15]. No other compelling or compassionate circumstances are set out. In paragraph [16] the judge accepts that the Appellant does not meet the requirements of the rules but finds that the Sponsor earns “a sum equivalent to the required figure”. SS (Congo) is clear that being a “near miss” case “will by no means show that compelling circumstances exist.

10. While SS (Congo) provides that the fact that a case involves a “near miss” cannot be said to be “wholly irrelevant” to the balancing exercise required under Article 8, it is clear that an applicant must “show that there are individual interests at stake covered by Article 8 which give rise to a strong claim that compelling circumstances may exist to justify the grant of LTE outside the Rules” [56]. Only then can the fact that the case is also a “near miss” be considered to be a relevant consideration.
11. It was necessary for the Appellant to show that there were individual interests which gave rise to a “strong claim” that “compelling circumstances” exist. The decision records no evidence of any compelling circumstances beyond the fact that she and the Sponsor are married. There are no children of the relationship. There is no evidence of anything compelling about the Appellant’s circumstances in Pakistan, or the Sponsor’s circumstances in the United Kingdom. There is no evidence of anything which sets them apart from any other couple in their situation. Any consideration of the fact that the sum earned by the Sponsor was equivalent to the sum required by the immigration rules is only relevant to the proportionality exercise once compelling circumstances have been established. The judge’s consideration of the fact that the Sponsor earned an equivalent sum to the required figure came without first establishing that there were any compelling circumstances.
12. Paragraph [57] of SS (Congo) states:

“Generally, it is fair that the applicant should wait until the circumstances have changed and the requirements in the Rules are satisfied and then apply, rather than attempting to jump the queue by asking for preferential treatment outside the Rules in advance.”
13. The decision does not identify any reasons why the Appellant warranted preferential treatment and a grant of leave to enter under Article 8 despite her failure to meet the immigration rules.
14. I find that the decision involved the making of an error of law by allowing the appeal under Article 8. There was no evidence before the judge of any compelling circumstances which warranted allowing the appeal outside the immigration rules following the case of SS (Congo).

Remaking

15. I have taken into account my findings above when remaking the decision under Article 8.
16. No new evidence was provided for the hearing before me. The Sponsor, Mr. Hussain, provided a witness statement and gave oral evidence before the First-tier Tribunal. The Appellant provided a witness statement in which she adopted the contents of her husband's statement.
17. I have considered Mr. Hussain's witness statement. There is no evidence of any compelling circumstances in his witness statement. He states "I feel that she has been away from me for many years and it is extremely unbearable. Due to this we are unable to start a family together" [13]. Later he states that he has an amazing relationship with the Appellant and is emotionally attached to her [14]. However, there is no evidence of anything which would prevent him from going to Pakistan to be with the Appellant.
18. I have found above that although the judge stated that there were "compelling and compassionate circumstances", he failed to identify any such circumstances. I find that no compelling circumstances were demonstrated in the evidence before the First-tier Tribunal sufficient to justify allowing the appeal on human rights grounds.
19. In assessing the public interest, I have taken into account section 117B of the 2002 Act insofar as it is relevant to the Appellant. Section 117B(1) provides that the maintenance of effective immigration control is in the public interest. There is a significant public interest in refusing leave to enter to those who have failed to meet the requirements of the immigration rules. The application was not refused in relation to the Appellant's English language ability, but the Respondent was not satisfied that the Appellant met the financial requirements of the immigration rules. The fact that all of the Sponsor's wages may now be paid into a bank account means that the Appellant may be able to show that she satisfies the immigration rules at some point in the future, but following SS (Congo) this is not a reason to allow the appeal outside of the immigration rules for the reasons set out above ([5] to [14]).
20. Any family life between the Appellant and Sponsor can continue in the way in which it has done for the past four years, or alternatively the Sponsor can relocate to Pakistan to enjoy family life there. There was no evidence before the First-tier Tribunal of anything which would prevent the Sponsor from relocating to Pakistan to be with the Appellant.
21. Further, as the Sponsor now states that he pays all his wages into the bank, the correct approach would be to make a fresh application, rather than seek preferential treatment in the form of a grant of leave to enter outside the immigration rules.
22. I find that the Appellant has failed to show on the balance of probabilities that the decision is disproportionate. I find that she has failed to show that

the decision is a breach of her rights, or those of the Sponsor, to a family life under Article 8, or indeed any other rights protected by the Human Rights Act 1998.

Decision

The decision of the First-tier Tribunal discloses an error on a point of law.

The decision of the First-tier Tribunal to dismiss the appeal under the immigration rules is preserved.

The decision of the First-tier Tribunal to allow the appeal under Article 8 is set aside.

I re-make the decision, dismissing it on human rights grounds.

Signed:

Deputy Upper Tribunal Judge Chamberlain

Date: 5 November 2015