



**Upper Tribunal
(Immigration and Asylum Chamber)
Number: IA/10082/2015**

Appeal

THE IMMIGRATION ACTS

Heard at Field House

On 22 February 2016

**Decision & Reasons
Promulgated
On 26 April 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE MAHMOOD

Between

**Mr MUHAMMAD YOUNIS
(ANONYMITY DIRECTION NOT MADE)**

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr T. Mahmood, legal representative at Zenith Solicitors.

For the Respondent: Ms S Sreeraman, Senior Presenting Officer

DECISION AND REASONS

1. This matter comes before me pursuant to permission having been granted by First-tier Tribunal Judge Brunnen dated 16 December 2015. The appeal relates to a decision by First-tier Tribunal Judge O'Hagan in respect of a Decision promulgated on 19 August 2015. The Judge dismissed the appeal based on the Immigration Rules and Article 8 of the European Convention on Human Rights.

2. The Appellant's original application to the Respondent was one seeking further leave to remain as a partner based on Appendix FM-SE.
3. The Appellant's grounds of appeal against the First-tier Tribunal's decision can be summarised as:
 - (1) *"The appellant submits that the reasoning of the Judge of the FtT not finding the documents in the Home Office Bundle is inadequate and insufficient"*
 - (2) The Appellant had applied for an extension of his stay in early January 2015 as his visa was about to expire. He had submitted 5 months of wage slips and a letter from the English language test centre confirming he had passed because the certificate was not then available. The Appellant had submitted the missing salary slip and the English certificate on 28 January 2015. It was not until 9 March 2015 that the application was refused.
 - (3) The Judge should have used his discretion to allow the appeal.
 - (4) The Judge had failed to consider Article 8 in a structured approach to the issue of proportionality.
4. At the hearing before me Mr Mahmood said that before the decision had been made the Appellant had submitted his 6th wage slip and his English Language Test Certificate. The documents were sent in before the decision had been made by the Respondent. Section 85A should have been used. As for Article 8, the Appellant has a son.
5. Ms Sreeraman said that she relied on the Rule 24 Reply. She said that the Judge had correctly approached his determination. It was important to note that at paragraph 14 Mr Mahmood had conceded before the Judge that Appendix FM-SE was not met. The requirements for Appendix FM had evidential requirements. The salary slips had to be provided at the date of the application. There had to be a valid English language test certificate prior to the date of the application. Therefore on the factual premise it was conceded by the Appellant that he could not meet Appendix FM and therefore there was no error of law. The Rule 24 Reply state that Paragraph D of Appendix FM-SE is clear that the Secretary of State will only consider documents that have been submitted with the application.
6. Alternatively in respect of EX 1 the appropriate guidance was applied. There was no insurmountable obstacles test. Based on that acceptance there is no material error of law. Given the breadth of the reasons why the application had failed there was no reason to consider evidential flexibility. I was asked to consider paragraph 57 of **SS (Congo) v Secretary of State for the Home Department**.
7. Mr Mahmood in reply said that the evidence was submitted. At its highest there was already 5 months of salary slips. He said he had

conceded that there was only 5 months of salary but this was not a PBS case. Therefore any documents submitted thereafter should have been considered by the caseworker.

8. I had reserved my decision.
9. Paragraph D Appendix FM-SE provides,

“D. (a) In deciding an application in relation to which this Appendix states that specified documents must be provided, the Entry Clearance Officer or Secretary of State (“the decision-maker”) will consider documents that have been submitted with the application, and will only consider documents submitted after the application where sub-paragraph (b) or (e) applies.”
10. This therefore does indeed limit the documents which the Secretary of State can consider to those submitted with the application. However because this was not a Points Based System or an entry clearance appeal, then as was stated when permission to appeal was granted, such evidence could be submitted once at the appeal was at the Tribunal. Therefore the Judge did err when concluding that the English Language Test Certificate could not be considered.
11. The matter does not end there though. As paragraph 12(ii) of the Judge’s decision shows, there were also issues in respect of the Appellant’s income. It was not only that there were 5 months payslips instead of 6 months payslips. The added deficiency was that there were either no or at least not enough bank statements. Other inconsistencies were also referred to. It is perhaps for that reason that the concession noted in paragraph 14 of the Judge’s decision was made.
12. In my judgment, the error of law was therefore not material. That is because there remained other deficiencies with the Appellant’s application. Those deficiencies were not dealt with to the Judge’s satisfaction at the time of the hearing at the First-tier Tribunal. Therefore in respect of Appendix FM-SE the decision must stand. That is despite the evidential flexibility issues which arose in the Supreme Court’s decision in **Mandalia v Secretary of State for the Home Department**. This was not a missing series of bank statements-type of case. That is because there were no bank statements submitted as required by the Rules. The Judge explained at paragraph 20 of his decision that there was a breadth of information missing. This clearly refers to the missing bank statements and not just the payslip.
13. Therefore although the Appellant was able to rely on the English Language Test Certificate submitted after his application to the Respondent and indeed rely too on his later payslip, the failure to provide the bank statements as required by the Rules was fatal to his application. All parts of the relevant Rule had to be met.

14. In so far as EX.1 to Appendix FM is concerned, no permission to appeal was granted in respect of that aspect. Even if there had been permission to appeal, it is clear that there is no material error of law in the Judge's decision. It was noted by the Judge that the Appellant's partner is not British. The couple have had no children together. The Appellant has a child following a previous relationship but he had not had contact with that child for some two years. There was clearly no genuine and subsisting relationship between the Appellant and the child.
15. The Judge referred to the correct insurmountable obstacles test. There was also correct reference to the Court of Appeal's decision in **R on the application of Adyarko and others v Secretary of State for the Home Department** [2015] EWCA Civ 440. This relationship was relatively recent. The Appellant and his partner are both citizens of Pakistan. The Judge noted that there would be hardship in them having to move back to Pakistan, but there were no insurmountable obstacles. Paragraph 276ADE was also considered and could not be met.
16. In respect of Article 8 outside of the Rules, the Judge had considered the correct case law and his legal approach in respect of the House of Lords decision in **Razgar** was faultless. Section 117 NIAA and the House of Lords decision in **Huang** were also correctly considered.
17. Therefore, although sympathetic to the Appellant's situation, the Appellant's appeal has to be dismissed as there is no material error of law. It has been made clear in numerous cases that sympathy for an Appellant's situation is not a sufficient reason to allow an appeal. Nor is Article 8 to be used as a general dispensing power.

Notice of Decision

The decision of the First tier Tribunal Judge did not involve the making of a material error of law and therefore stands.

The Appellant's appeal remains dismissed on all grounds.

An anonymity direction is not made.

Signed

Date: 1 March 2016

Deputy Upper Tribunal Judge Mahmood