



Upper Tier Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/43323/2014

THE IMMIGRATION ACTS

Heard at Birmingham
On 6 April 2016

Decision Promulgated
On 25 April 2016

Before

Deputy Upper Tribunal Judge Pickup
Between

Secretary of State for the Home Department

and

Chaudhry Wajid Hussain
[No anonymity direction made]

Appellant

Claimant

Representation:

For the claimant: Ms E Norman, instructed by Bhogal & Co Solicitors
For the respondent: Ms C Johnstone, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Secretary of State appeals against the decision of First-tier Tribunal Judge Cox promulgated 19.1.15, dismissing on immigration grounds but allowing on human rights grounds, the claimant's appeal against the decision of the Secretary of State, dated 15.10.14, to refuse his application for leave to remain in the UK as the spouse of a person present and settled in the UK. The Judge heard the appeal on 7.1.15.
2. First-tier Tribunal Judge Parkes granted permission to appeal on 26.2.15.

3. Thus the matter came before me on 6.4.16 as an appeal in the Upper Tribunal.

Error of Law

4. At the hearing before me I found no material error of law in the making of the decision of the First-tier Tribunal such as to require the decision of Judge Cox to be set aside. Having announced my decision at the hearing, I now give my reasons.
5. The claimant entered the UK as spouse in 2010 with leave to remain until January 2013. The application was refused under Appendix FM because his application was made after he had overstayed more than 28 days and thus could not meet the eligibility requirements of Appendix FM and he did not meet the requirements of EX1 to show insurmountable obstacles to continuing family life with his partner outside the UK. He also failed to demonstrate that there were very significant obstacles to integration in Pakistan.
6. Judge Cox found that the appellant could not meet the Rules, and in particular that there were no insurmountable obstacles to family life in Pakistan. However, the judge went on to conduct an article 8 ECHR Razgar stepped assessment and reached the conclusion that the decision was disproportionate.
7. In summary, the grounds of appeal point to the finding of no insurmountable obstacles and complain that the judge failed to identify any compelling circumstances insufficiently recognised under the Rules to justify granting leave to remain on the basis of article 8 ECHR. "It is respectfully submitted that the learned judge having found that the appellant cannot meet the article 8 ECHR compliant rules, has taken the same facts and reasoning and allowed the appeal having failed to direct himself properly, and failed to give any adequate reasons for so doing. This is submitted to be clearly wrong in law."
8. In granting permission to appeal, Judge Parkes observed, "The decision makes no reference to either Gulshan or Nagre and it is not clear what it is about their circumstances that are not adequately considered within the Rules. On that basis the grounds are arguable and permission to appeal is granted."
9. I find that at §81 the judge was referencing the compelling circumstances test, and found that in this particular case the Rules do not provide a complete code "in the circumstances I find exist." The judge then went on to make a reasoned article 8 proportionality assessment, stating that it was a finely balanced matter.
10. Ms Norman pointed out that this is not a case of person coming to the UK on an entirely temporary basis and then seeking to remain on a different basis. The claimant was married in 2008 and came to the UK as a spouse in 2010, with leave limited in the usual way, to January 2013. The relationship was thus not entered into in the UK whilst his immigration status was unlawful or precarious. He came with a legitimate expectation of settlement once the probationary period had been completed. His family life was not precarious. Ms Norman submits that this

distinguishes this case from the Nagre situation. His wife is a British citizen and his child is also a British citizen.

11. Unfortunately it was only after his leave expired that he made an application in March 2013 for further leave to remain as a spouse, refused in May 2013, with no right of appeal. In January 2014 he was served with a liability to removal notice. The claimant's case was that the delay in making the application was the fault of his solicitors; it does not appear that this was challenged.
12. In essence, the appellant finds himself in difficulty because his application to vary leave to remain made in March 2013 was made approximately 6 weeks after expiry of his leave.
13. On 23.4.14 the appellant submitted a human rights application on the basis of article 8 ECHR, refused on 15.7.14 with a right of appeal. After lodging his appeal, in October 2014 the Secretary of State withdrew the refusal decision of April 2014. The remaking of the decision on 15.10.14 and the subsequent appeal against the refusal is the subject matter of this appeal.
14. There are some difficulties with the refusal decision and its reasoning is hard to follow. It was submitted to the First-tier Tribunal that it was the result of a 'cut and paste' exercise with the consequence that there are inconsistent statements. For example, even though the relationship between the appellant and his British citizen wife is accepted to be genuine and subsisting, the decision states that family and private life does not specifically engage article 8 ECHR.
15. The circumstances above are capable of being found to be compelling circumstances insufficiently recognised in the Immigration Rules, so as to justify the First-tier Tribunal Judge going on to make his article 8 ECHR private and family life assessment. Whilst the layout and content of the First-tier Tribunal decision could have been clearer, I cannot find that the decision to conduct the article 8 assessment or the finding that the decision of the Secretary of State was disproportionate, to be either perverse or irrational. The judge carefully considered all the evidence and reached a perfectly reasonable and reasoned conclusion.
16. This was the only ground of appeal. In the circumstances, I find no material error of law and the appeal of the Secretary of State must fail.

Conclusions:

17. The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law such that the decision should be set aside.

I do not set aside the decision.

The decision of the First-tier Tribunal stands and the appeal remains allowed on human rights grounds.



Signed

Deputy Upper Tribunal Judge Pickup

Dated

Deputy Upper Tribunal Judge Pickup

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order.

Given the circumstances, I make no anonymity order.

Fee Award

Note: this is not part of the determination.

In the light of my decision, I have considered whether to make a fee award.

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: The appeal was brought by the Secretary of State and has been dismissed.



Signed

Deputy Upper Tribunal Judge Pickup

Dated