IAC-AH-LEM-VP/V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: IA/44524/2014
IA/44526/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 5 January 2016	**On 18 February 2016**

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

ASIF UDDIN AHMED
AYESHA TAMANNA ZEBIN

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr I Hossain, Legal Representative instructed by London Law Associates
For the Respondent: Mr T Wilding, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellants are nationals of Bangladesh, having been born on 14 December 1987 and 2 June 1990, respectively. The first appellant arrived in the UK in October 2009 with leave as a Tier 4 Migrant, and subsequently as a Tier 1 (Post-Study Work) Migrant with leave valid until 30 August 2014. The second appellant is the first appellant's wife, and has leave in line with him.

2. Applications were made to vary their leave to remain on 29 August 2014, the applications being made outside the Immigration Rules. On 24 October 2014 those applications were refused. The appellants appealed and their appeals came before First-tier Tribunal Judge Devittie who dismissed the appeals.

3. The basis of the application for leave to remain and of the appeal was that the first appellant required a short period of leave whilst his employer obtained a Tier 2 sponsor licence and a certificate of sponsorship in favour of the appellant. The respondent concluded that it was reasonable for the appellants to return to Bangladesh until a point when the first appellant's employer was in a position to offer the appellant a certificate of sponsorship ("CoS").

4. It was said that there was no guarantee that the appellant would receive a CoS allocation given that there was no certainty that his employer would be successful with the Tier 2 application. The appellants had visited Bangladesh on several occasions whilst in the UK and as recently as about a year before the application for leave.

5. It was further noted that almost two months had passed since the application for further leave had been made, a period during which the first appellant had suggested his employer's affairs would have been in order. The first appellant therefore had had sufficient time for the Tier 2 sponsor licence and CoS to be concluded.

6. In the case of both appellants it was concluded that there were no exceptional circumstances indicating that a grant of leave with reference to Article 8 of the ECHR was appropriate.

7. The grounds of appeal before me state that the First-tier Judge "has failed to apply the practical condition of the point based systems migrants who have been hugely affected by the recent changes in the Immigration rules and the hardship imposed on the Tier 2 sponsors." The grounds go on to state that the first appellant had invested a large amount of money but "he had not have the opportunity to get the job" and "the time elapsed from the life of Appellant has a serious impact on his career, but the honourable IJ has failed to understand the real circumstances."

8. More coherently, the grounds continue with a complaint that the First-tier Judge failed to consider paragraph 276ADE(vi), suggesting that the appellants "will have significant obstacle with the country to which he would have to go if required to leave the UK." The next paragraph quotes section 86 of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act")", to the effect that the judge failed to consider the Article 8 ground of appeal.

9. It is lastly contended that the judge "never dealt with the principle of common law fairness, concept of Natural Justice, reasonableness and the fairness".

10. In submissions Mr Hossain submitted that it was not proportionate to require the appellants to return to apply for entry clearance. The second appellant is pregnant and expecting a baby next month. Although it was initially suggested that the fact of the second appellant's pregnancy was made known to the respondent, Mr Hossain seemed then to concede that this was not a matter drawn to the respondent's attention or to the attention of the First-tier Tribunal.

11. It was then submitted that the case solely depended on Article 8 outside the Immigration Rules, although it was not entirely clear as to whether the contention in the grounds to the Upper Tribunal in respect of paragraph 276ADE was maintained.

12. I was referred to the appellant's skeleton argument which, amongst other things, reiterates the second appellant's pregnancy, although Mr Hossain was unable to explain how that information which was not before the First-tier Tribunal was relevant to whether the Tribunal erred in law. The skeleton argument also raises Article 3 of the ECHR suggesting that disruption to the second appellant's medical treatment would cause significant harm to the unborn child. Mr Hossain submitted that the second appellant was not now able to travel because of the advanced stage of her pregnancy.

13. Mr Wilding accepted that Article 8 was raised in the grounds of appeal to the First-tier Tribunal. However, he contended that there was no case on Article 8 that could have succeeded because nothing was provided to support any Article 8 case. There was nothing to indicate that the appellants could not return to Bangladesh. If there is an error of law in the decision of the First-tier Tribunal it is not material. All that the judge could have been expected to have concluded was that Article 8 was not made out.

14. So far as the appellants' skeleton argument is concerned, it was submitted that most of it is irrelevant, for example in terms of the fact that the second appellant is now pregnant. If the second appellant is unfit to fly, the Secretary of State would not enforce her return.

My conclusions

15. There is no complaint about the First-tier judge having dismissed the appeal with reference to paragraph 322(i) of the Rules, which was the basis of the application for leave to remain.

16. It is still not clear whether the contention is that the judge should have dealt with the appeal on the basis of the Article 8 Immigration Rules, i.e. paragraph 276ADE(vi) or under a 'pure' Article 8 assessment. The grounds before the First-tier Tribunal make it clear that the Article 8 case is outside the Rules, whereas the grounds before the Upper Tribunal, and the skeleton argument, raise paragraph 276ADE(vi).

17. Regardless of that, it is the case that there was before the First-tier Judge an Article 8 ground of appeal which needed to be determined (see S.86(2) of the 2002 Act).

18. At [4] the judge stated that he was satisfied "that grounds of appeal do not implicate a human right question (sic)". That suggests that the judge was aware that Article 8 was a matter raised in the grounds of appeal. There is no further explanation from the judge as to why, if that was his view, Article 8 was not engaged.

19. However, aside from suggesting that it was not reasonable to ask the appellants to return to Bangladesh to obtain entry clearance, and that the first appellant had relied on his employer's assurance of obtaining a Tier 2 licence, there is little if anything in the grounds to the First-tier Tribunal which supports an Article 8 case. Various authorities are quoted in the grounds but the only assertions personal to the appellants are the reiteration of the basis of the application for leave to remain, the assertion that "the Appellant" has established a private life in the UK "through his studies, works, and social networks", that it would not be in the interests of immigration control to remove the appellant "without giving him the opportunity to organise his career", and that "the life of the family formed by the Appellant cannot reasonably be expected to be enjoyed elsewhere if he [is] forced to leave the UK all [of] a sudden".

20. Furthermore, there was no actual evidence before the First-tier Tribunal supporting any of those assertions, which in my judgement are in any event weak assertions in support of an Article 8 case.

21. None of the evidence in relation to the second appellant's pregnancy was before the First-tier Judge. Indeed, at the time of the hearing before the First-tier Tribunal the second appellant would only have been about four weeks pregnant, as according to the documents put before me, her due date is 14 February 2016.

22. The First-tier Judge stating that the grounds of appeal do not "implicate" a human rights question is in my judgement accurate if by that the judge meant that the appellants' case does not engage Article 8. However, he was nevertheless required to explain why that was so, and in not doing so I am satisfied that he erred in law. More so is there an error of law if what the judge said at [4] is interpreted as a lack of recognition of the Article 8 ground, being a ground that did require to be determined.

23. However, not every error of law requires a decision to be set aside and this is just such an error of law. There was no positive case put before the First-tier Tribunal in terms of why the appellants could not leave the UK and apply for entry clearance. Their personal circumstances as referred to in the grounds did not advance any rational basis for a potential conclusion in their favour in Article 8 terms. Furthermore, there was no actual evidence before the First-tier Tribunal which would suggest that they could have succeeded under the Article 8 Immigration Rules or under

Article 8 proper. The evidence now relied on was not before the First-tier Judge, and even if it had been it could not have resulted in a decision in their favour on Article 8 grounds.

24. The judge did not err in failing to conclude that there was an issue of common law fairness that arose in the appellants' application for leave to remain. They applied for leave to remain outside the Immigration Rules, the first appellant not being able to make an application for leave to remain under Tier 2 because his employer did not have a Tier 2 sponsor licence. As the judge said at [4], the appellants' recourse, as the respondent had also pointed out, was to leave the UK and make such an out of country application as advised, to enable the first appellant to return to the UK with the assistance of his sponsor.

25. In the circumstances, I am satisfied that the First-tier Tribunal's decision to dismiss the appeal is to stand, notwithstanding the error of law which I have identified.

Decision

26. The decision of the First-tier Tribunal did involve the making of an error on a point of law. However, its decision is not set aside, and the decision to dismiss the appeal stands.

Upper Tribunal Judge Kopieczek 11/02/16