Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: OA/01157/2014
OA/01159/2014
OA/01161/2014

THE IMMIGRATION ACTS

Heard at Field House, London
On 14 October 2015

Decision & Reasons Promulgated
On 10 May 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE BAGRAL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

PADMA KUMARI TAMANG
EMMA TAMANG
EVA TAMANG
(ANONYMITY DIRECTION NOT MADE)

Respondents

Representation:

For the Appellant: Mr P Duffy, Senior Home Office Presenting Officer
For the Respondents: Ms B Asanovic, of Counsel, instructed by Howe & Co Solicitors

DECISION AND REASONS

Introduction

1. While the (the "*Secretary of State*") is, at this stage, the appellant, I shall continue to describe the three original appellants as "*the Appellants*".

2. The Appellants, all citizens of Nepal, are a mother and her two daughters, the latter now aged 15 and 10 years respectively. They applied to the Entry Clearance Officer of New Delhi (the "*ECO*") for permission to enter the United Kingdom for the purpose of settlement as the dependants of the first Appellant's husband (the father

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of the other two Appellants) under Appendix FM of the Immigration Rules (the "*Rules*"). Their applications were refused. They pursued an appeal to the First-tier Tribunal (the "*FtT*"). By its decision promulgated on 16 June 2015 the FtT allowed their appeals. The Secretary of State has been granted permission to appeal to this Tribunal.

<u>The ECO's Decisions</u>

3. The first ground upon which the applications were refused by the ECO is expressed in the following passage in the decision concerning the first Appellant:

> "*I am not satisfied that your relationship with your Sponsor is genuine and subsisting or that you intend to live permanently in the United Kingdom*".

The constituent elements of this discrete ground of refusal are expressed in fourfold terms:

(a) Having noted the first Appellant's claim that her relationship with her husband, who is said to be a disabled person, dates from 1998 in Nepal, when she was aged 16, that in 2009 he moved to the United Kingdom as the dependant of his father and that they were married in March 2011, the ECO addresses the assertion that they were last together in March 2013 (some months before the three inter-related entry clearance applications were made), when he allegedly visited Nepal. The ECO concludes that there is no satisfactory evidence of this visit, leading to the assessment:

> "*I am not satisfied that you have provided evidence of <u>face to face</u> contact which would be consistent with your stated relationship*".

[My emphasis]

(b) Next, the ECO considers the evidence of six Skype screenshots said to relate to three separate calls, stating:

> "*I am not satisfied that these screenshots in isolation are evidence of an ongoing and subsisting relationship. You have provided no other evidence whatsoever relating to your ongoing contact with each other*".

(c) Thirdly, the ECO addresses the evidence consisting of a DNA paternity test report provided by the National Forensic Science Laboratory of Nepal. Two concerns are identified: first, that this is not an organisation recognised by UKVI for the purpose of conducting DNA tests; and second, that the report contains no conclusion about the paternity of the children. For these two reasons, it qualifies for "*little evidential weight*". As regards the birth registration certificates, these too are given "*little evidential weight*" because registration was delayed until five and eleven years respectively after the childrens' births. These assessments lead the ECO to conclude:

> "*I am not satisfied that you have provided adequate evidence that you, your sponsor and your children are a genuine and subsisting family unit*".

(d) Next, the ECO notes that the husband/father was granted clearance to enter the United Kingdom on 20 May 2009 in his capacity of over age dependant of his parents. Given the claim that, at this time, the first Appellant and he had been in a relationship for eleven years in a union which had generated two children, the ECO states:

> "*These circumstances are not consistent with an application by your husband to settle in the United Kingdom as an over age dependent relative, an application which would indicate that he had nobody in Nepal to whom he was close. Indeed, in his supporting statement, your husband states that when he was granted entry clearance for settlement in 2009, there was nobody who could care for him in Nepal.*"

4. In the next section of the decision the issue of "*financial requirements*" is given separate consideration. The ECO refers to the requirement of the Rules that the husband, as sponsor, must be able to maintain and accommodate all three Appellants in the United Kingdom without recourse to public funds. It is noted that he is in receipt of Disability Living Allowance ("DLA"). The ECO concludes that the requirement of the Rules is not satisfied. The decision states:

> "*The calculation below sets out your net income after accommodation costs has* [sic] *been deducted. These figures demonstrate that your net income ……… is less than the level a British family of that size would be entitled to under Income Support.*"

The calculation which follows is quite straightforward. The husband's weekly DLA and Employment and Support Allowance ("ESA") are said to total £206.05. Accommodation costs are noted as nil, given the claim (evidently accepted) that the sponsor lives rent free in his father's property. The United Kingdom Income Support rates for a couple aged over 18 years and two additional dependent children are computed to be £261.19 per week. Thus a shortfall of some £55 was assessed. The decision continues:

> "*Based on the current benefit and tax rates it is apparent that your net income after accommodation costs have been deducted is less than would be available to a British family of equivalent size. It is therefore found that you do not have adequate maintenance to support you and your partner and any dependants. I am aware that you have provided evidence of third party support in the form of income from your husband's parents, but I am unable to take this into account*".

[Emphasis added]

This is the second reason proffered for refusing the entry clearance applications.

5. This is followed by a third refusal reason, based on the adequacy of the property in which it was proposed that the Appellants would reside. Having noted that the

occupants of this property are the Appellants' husband/father and his father and having acknowledged the architect's report suggesting that there would be no overcrowding, the decision maker states:

> "*However, you have also submitted your father's tenancy agreement. This clearly states that the permitted number of people allowed to reside in the premises is five. In view of this, I am not satisfied that there will be adequate accommodation for you without recourse to public funds*".

6. To summarise, the Appellants' applications for entry clearance were refused on the following grounds:

   (a) The asserted relationship with the sponsor was not considered to be genuine and subsisting.

   (b) Linked to (a), It was considered that the Appellants did not intend to live permanently with the sponsor in the United Kingdom.

   (c) The Appellants and the sponsor would be unable to maintain and accommodate themselves adequately without recourse to public funds.

   (d) The proposed accommodation for everyone concerned would not be adequate.

Decision of the FtT

7. Significantly, the appeal proceeded on the basis of an acknowledgement on behalf of the Appellants that they could not "*technically*" satisfy the requirements of the Rules. I shall revisit this infra. The evidence considered by the Tribunal included the oral testimony of the sponsor and his father. Article 8 ECHR was evidently the centrepiece of the appeal. The Tribunal noted, in [20], that the two enduring contentious issues were (a) whether the relationship between husband and wife was genuine and subsisting and (b) financial self-sufficiency. As regards the accommodation issue, the Judge noted:

   > "*It was now conceded that there was evidence as to the adequacy of accommodation*".

   Furthermore, the judge recorded that paternity was now conceded.

8. It is appropriate to reproduce the following passage in the Tribunal's decision:

   > "[Counsel for the Appellants] *accepted that the Immigration Rules did not permit third party support. However, the sponsor had a joint account with his father and had access to the funds in the account and there were substantial savings available to him. It was accepted that there was a shortfall of £55.14 per week, but she asserted that savings could be taken into account, which were enough to make up the shortfall. She suggested that there was substantial compliance with the Immigration Rules, but just not in the form of the specified documents. I queried what her position was on the Immigration Rules and she confirmed that the Appellants did indeed accept that they were unable to meet the requirements of the Immigration Rules*".

In this context, the argument advanced on behalf of the Appellants was that there were "*weighty proportionality arguments under Article 8*".

9. The FtT found the "*total evidence*" of the sponsor and his father credible, noting that it was unchallenged in cross-examination. The tribunal further found specifically that the asserted marital relationship is subsisting and that the couple intend to live together. It also found that there is a father/child relationship between the sponsor and his two daughters, the second and third Appellants. The tribunal further found that the asserted visits in 2013 had occurred and that there was virtually daily contact by telephone and internet. Next, the tribunal acknowledged the Appellants' inability to satisfy the specific maintenance requirements of the Rules. It followed, the tribunal reasoned, that the appeals could not succeed under the Rules.

10. The FtT then turned to examine the Article 8 claim, stating:

> "*It cannot be right in principle, however, that simply because somebody is disabled, they therefore cannot be permitted to have family members join them. Whilst the financial aspects of maintenance are clearly important, one would expect to be able to look at the case and see how proportionate adjustments could be made which do not undermine the legitimate aim of immigration control and other public interests.*"

Next, the tribunal acknowledged that a successful freestanding Article 8 appeal would be "*somewhat unlikely*". Having done so, the judge then formulated the test of "*exceptional circumstances*", continuing:

> "*The exceptional circumstances are that the Sponsor ……… is disabled, but has the benefit of support of parents who help him financially. In those circumstances the understandable wish to have his wife and children with him is, in my estimation, all the stronger an argument. Whilst, plainly, that does not dispose of the matter, I consider that this is clearly one of those relatively rare appeals where there is an unusual set of facts giving rise to a perfectly respectable Article 8 argument outside the Rules.*"

The Judge then conducted the "Razgar" exercise, quickly (and correctly) concluding that the fundamental issue was that of proportionality. She continued:

> "*In considering proportionality in respect of interference with family life, I take account* [of] *the effect of Section 117B(1) - (3) of the 2002 Act. Effective immigration control is important, but in a case where a disabled person cannot provide the maintenance, but his able-bodied and economically active parents can and will provide the necessary maintenance, I find that there is only limited weight to be attached to the public interest in maintaining effective immigration controls through a strict application of this part of the Immigration Rules: see Section 117B(1)*".

The decision continues:

> "*I note that the first Appellant has passed her ESOL test, albeit clearly the Appellants are not fluent in English. However, this is a matter which can be remedied ………*

I attach only limited weight to any arguments as to fluency in English: Section 117B(2). The issue of financial independence – Section 117B(3) – is linked to the point already made above. I do accept that this is a public interest factor, but the reality is also that disabled people are able to integrate into society, but will often not have the financial independence as able-bodied counterparts. This is a legitimate point to take into account in the public interest, also reflected in the Immigration Rules, but as indicated above the fact that a sponsor is disabled adds a further dimension to the balancing act required by proportionality."

Finally, the FtT found, in terms, that it would be unreasonable to expect the sponsor to return to Nepal and that the family life aspirations in the United Kingdom of all concerned were not tainted by illegitimate economic ambition.

11. In allowing the appeals, the FtT expressed its omnibus conclusion in the following terms:

> *"In light of the exceptional circumstances of the sponsor's disability and the fact that the financial provisions of the Immigration Rules could easily in fact be met if one takes into account third party support (which is clearly available in this case), I consider that the balancing exercise in considering proportionality comes down in the Appellants' favour. I have considered the severity and consequences of the interference and I consider that this is a significant interference, especially in view of the sponsor's vulnerability and need for support, in light of his disability ……… I find that the life of the family cannot reasonably be expected to be enjoyed elsewhere ……… and I conclude that prejudices the family life of the applicant* [sic] *in a manner sufficiently serious to amount to a breach of the fundamental right protected by Article 8."*

The appeals were allowed under Article 8 ECHR accordingly.

Permission to Appeal

12. It is appropriate to reproduce in substantial part the grant of permission to appeal to this Tribunal:

> "2. *The grounds of* [the] *application for permission to appeal assert that the judge made a material error of law in the consideration of maintenance requirements. It is recorded that the judge's view* [was] *that maintenance requirements could never be met because of the sponsor's disability and his inability therefore to work. The Respondent submits that this is incorrect as third party support is allowed as set out in FM-SE.*
>
> 3. *It is arguable that the judge allowing the Appellants' appeals outside the Immigration Rules under Article 8 did so in the belief that the Appellants had no alternative route to entry. There is an arguable error of law in this finding."*

Notably, no consideration was given to the materiality of the arguable error of law diagnosed.

Consideration and Conclusions

13. I shall proceed on the basis that, in the context of the three conjoined appeals before the FtT, the availability of income from third party sources satisfying the financial requirements of the Rules could have been lawfully considered by both the ECO and the FtT. This concession is clearly implicit in both the grounds of appeal and the grant of permission to appeal. It is correctly made, having regard to Appendix FM-SE of the Rules, paragraph 1(b)(iii), in particular. From this starting point, I readily adopt, as a second starting point, the proposition implicit in the grounds of appeal and the grant of permission, namely that it was open to the FtT to allow the appeals under the Rules, rather than Article 8 ECHR.

14. This, in my judgment, quickly and inexorably invites the analysis that, as regards the financial requirements specified in the Rules, this discrete refusal reason advanced by the ECO was erroneous in law and, therefore, the FtT could lawfully have allowed the appeals under the Rules. There is nothing to the contrary in either the Secretary of State's grounds of appeal or the grant of permission to appeal. It follows that accepting the Secretary of State's appellate challenge at its zenith this is a classic illustration of an immaterial error of law.

15. I note the terms of the final ground of appeal:

> "6. *As a result of this the Judge's further findings about Section 117B are unlawful as well as the remaining findings at [34].*"

This invites two comments. The first is that it is strikingly unparticularised and, as such, devoid of meaningful content. The second is that permission to appeal to this Tribunal has not been granted on this discrete ground. I would add that if this ground <u>had</u> been encompassed within the grant of permission to appeal, my assessment in [13] and [14] above would apply *mutatis mutandis*.

16. Finally, it is appropriate to record the quite unsatisfactory circumstance that the argument canvassed in the Secretary of State's grounds of appeal is clearly the antithesis of the position adopted by the Secretary of State's representative at the hearing: I refer particularly to [20] of the FtT's decision.

Decision

17. On the grounds and for the reasons elaborated above, I affirm the decision of the FtT and dismiss the Secretary of State's appeal.

No anonymity direction is made.

DEPUTY UPPER TRIBUNAL JUDGE BAGRAL
IMMIGRATION AND ASYLUM CHAMBER

<u>Date:</u> 22 April 2016

TO THE RESPONDENT
FEE AWARD

The fee awards granted by the FtT for each Appellant shall stand.

DEPUTY UPPER TRIBUNAL JUDGE BAGRAL
IMMIGRATION AND ASYLUM CHAMBER

Date: 22 April 2016