IAC-AH-DN-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/02955/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 11th December 2015	**On 5th January 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

ENTRY CLEARANCE OFFICER – KINGSTON

Appellant

and

DARIEN CLARKE
(ANONYMITY ORDER NOT MADE)

Respondent

Representation:
For the Appellant: Miss A Fijiwala, Senior Home Office Presenting Officer
For the Respondent: Mrs D Clarke (the Sponsor)

DECISION AND REASONS

Introduction and Background

1. The Entry Clearance Officer (ECO) appealed against a decision of Judge Shamash of the First-tier Tribunal (the FtT) promulgated on 15th June 2015.

2. The Respondent before the Upper Tribunal was the Appellant before the FtT and I will refer to him as the Claimant.

3. The Claimant is a male Jamaican citizen born 18th May 1986 who applied for entry clearance to enable him to join his British spouse, Deborah Clarke (the Sponsor) in the United Kingdom.

4. The application was refused on 5th February 2014. The ECO considered Appendix FM of the Immigration Rules and refused the application with reference to E-ECP.2.6 and 2.10 not accepting that the parties were in a genuine and subsisting relationship, nor that they intended to live together permanently in the UK.

5. The application was also refused with reference to E-ECP.3.3(b) as it was not accepted that evidence had been provided that the Sponsor could adequately maintain and accommodate the Appellant and any dependants without recourse to public funds and E-ECP.3.4, as it was not accepted evidence had been submitted to prove that there would be adequate accommodation without recourse to public funds, for the family, including other family members not included in the application but who live in the same household.

6. The Claimant's appeal was heard by the FtT on 24th April 2015, and a finding made that the Claimant and Sponsor are in a genuine relationship, and intend to live together as husband and wife. The FtT also found that adequate financial maintenance would be available, but the appeal was dismissed under the Immigration Rules for one reason. This was that the FtT found that, at the date of refusal, there was insufficient evidence to prove adequacy of accommodation.

7. The FtT then went on to consider Article 8 of the 1950 European Convention on Human Rights (the 1950 Convention) outside the Immigration Rules. The FtT found that to refuse entry clearance would be disproportionate, and noted that at the date of the hearing, there was further evidence in relation to accommodation, which postdated the refusal, but which indicated that adequate accommodation would now be available. The appeal was allowed pursuant to Article 8.

8. The ECO applied for and was granted permission to appeal to the Upper Tribunal. In summary it was contended that the FtT had erred in considering Article 8. It was contended that the case law considered by the FtT was not of relevance, that being Hyatt v SSHD [2012] EWCA Civ 104, and Chikwamba v SSHD [2008] UKHL. It was contended that the FtT had misapplied the principles in SS (Congo) [2015] EWCA Civ 387 and had failed to explain what compelling circumstances existed to justify granting the appeal under Article 8, when the Immigration Rules could not be satisfied. It was submitted that the FtT had erred in failing to consider the weight to be afforded to the public interest in the maintenance of effective immigration control, when it was accepted that the Claimant could make a further application for entry clearance without undue delay.

Error of Law

9. The error of law hearing took place on 2nd October 2015. There was no attendance on behalf of the Claimant and no explanation for non-attendance by the Sponsor and no application for an adjournment. A telephone call was made to the Sponsor in an effort to ascertain why there was no attendance, but the telephone call was not answered. The hearing

therefore proceeded, rule 38 of the Tribunal Procedure (Upper Tribunal) Rules 2008 having been considered.

10. The ECO's representative relied upon the grounds contained within the application for permission to appeal, and submitted evidence that visa processing times in Kingston, Jamaica indicated that all applications are decided within 90 days, and 93% of applications are decided within 60 days.

11. It was submitted that the FtT had failed to consider the principles in AS (Somalia) [2009] UKHL 32, which confirm that as this was an appeal against refusal of entry clearance, Article 8 should have been considered at the date of refusal, and the FtT had erred by considering Article 8 as at the date of hearing.

Error of Law Conclusions

12. I found that the FtT had considered Article 8 as at the date of hearing, which was an error of law, as AS (Somalia) confirms that the FtT should have considered the circumstances appertaining at the date of refusal, both in relation to the Immigration Rules and human rights, because this was an appeal against refusal of entry clearance.

13. The FtT erred in allowing the appeal pursuant to Article 8 outside the Immigration Rules on the basis that evidence had been provided that adequate accommodation was available at the date of hearing. The FtT should have considered the circumstances appertaining at the date of refusal of entry clearance, that being 5th February 2014.

14. The FtT erred in considering Hyatt and Chikwamba, which related to applications and appeals made in-country. The FtT set out in paragraph 52 that in Hyatt the court stated that a judge should look at whether or not someone "will now meet the rules." That is correct if there is an in-country appeal, but incorrect in an appeal against refusal of entry clearance.

15. I found that the FtT misapplied the principles in SS (Congo) and failed in particular to take into account the guidance set out in paragraph 40 of that decision. The FtT did not adequately analyse whether compelling circumstances existed which would justify allowing the appeal under Article 8 outside the Immigration Rules. The FtT did not adequately explain why it would be disproportionate for the Claimant to make a further application in order to satisfy the Immigration Rules, given that it was not contended that there would be an undue delay in such an application being considered.

16. Therefore the decision of the FtT was set aside. I considered whether to remake the decision or whether it was appropriate to adjourn the hearing to enable the Sponsor to attend. I decided on balance, that it was appropriate to adjourn to give the Sponsor an opportunity to attend, as the Tribunal file indicated that although there had been no attendance at the error of law hearing, the Sponsor had previously been in contact with the

Tribunal, and had indicated, before a hearing date was set, that she was anxious to attend the appeal hearing.

17. I therefore adjourned for a resumed hearing to take place. I directed that the findings made by the FtT that the parties are in a genuine relationship and intend to live together as husband and wife would be preserved. Also preserved was the finding that the appeal could not succeed under the Immigration Rules because there was no evidence that the parties would have adequate accommodation as at the date of refusal.

Re-making the Decision

Preliminary Issues

18. The resumed hearing took place on 11th December 2015. The Sponsor attended. She explained that she had not attended the error of law hearing, because when she received notification of the hearing, she had already arranged to travel to Jamaica to spend time with the Claimant. She travelled to Jamaica on 22nd September 2015 staying for two weeks. The Sponsor produced a copy of a fax which she stated had been sent to the Tribunal prior to the error of law hearing, indicating that she and her youngest son were travelling to Jamaica, and asking whether the hearing could be adjourned. The fax indicates that the Sponsor was content for the case to be heard in her absence if it could not be adjourned. I explained to the Sponsor that there was no record of the Tribunal having received this fax, and it was not on the Tribunal file.

19. I established that the Sponsor had seen the error of law decision, which I explained to her. I explained my reasons for finding that the FtT had been correct to find that the appeal could not succeed under the Immigration Rules, but had erred, for the reasons given in my written decision, for concluding that the appeal should be allowed pursuant to Article 8 outside the Immigration Rules. I confirmed that the findings made by the FtT in relation to the Sponsor and Appellant having a genuine and subsisting relationship and intending to live permanently with each other as husband and wife were preserved and were no longer in issue.

20. I established that I had all documentation upon which the parties intended to rely, and neither party had any further documentation to submit.

21. The Sponsor indicated that she would give evidence to confirm her reasons for believing that the appeal should be allowed, and the Claimant should be granted entry clearance as her spouse.

The Sponsor's Evidence

22. The Sponsor confirmed that she had moved address shortly after the application for entry clearance was made, and she moved to her current address which has three bedrooms.

23. The Sponsor explained that in her view she is entitled to a family life in the UK with her husband, the Claimant. She did not see why he should make a further application for entry clearance. She pointed out that initially the

ECO had not accepted that she was in a genuine relationship, but it had now been established that she is.

24. The Sponsor has her two youngest sons living with her, and she thought it was unfair that her youngest son was missing out on the support that the Claimant could give.

25. The Sponsor explained that she had recently undergone two major operations and that she had been forced to recover without the support of the Claimant and she had also suffered a bereavement, in that her father had passed away, and she was unable to rely upon the support of the Claimant because he had not been granted entry clearance.

26. The Sponsor was briefly cross-examined and asked the dates of her operations, and she replied that she underwent a gastric bypass on 23rd August 2015, and that she had an operation on her foot approximately two weeks ago.

The Entry Clearance Officer's Submissions

27. Miss Fijiwala relied upon the refusal decision dated 5th February 2014, although it was accepted that there was no challenge to the genuineness of the Sponsor's relationship with the Claimant.

28. The FtT findings in relation to the relationship and the inadequacy of accommodation had been preserved and therefore the issue before the Upper Tribunal related to Article 8 of the 1950 Convention, and Miss Fijiwala submitted that this should be considered at the date of refusal of entry clearance.

29. Miss Fijiwala submitted that there were no compelling circumstances to justify allowing this appeal under Article 8 outside the Immigration Rules. I was asked to note that there was no undue delay in visa processing times in Kingston, and I was asked to dismiss the appeal.

The Sponsor's Representations

30. The Sponsor pointed out that evidence of her accommodation had been provided to the FtT. There had been written confirmation that the Claimant could live at the Sponsor's address pursuant to the tenancy agreement that she had signed. That property had three bedrooms and therefore there would be adequate accommodation for the Sponsor and Claimant, and the Sponsor's two children.

31. The Sponsor asked that the appeal be allowed.

32. At the conclusion of oral submissions I reserved my decision.

My Conclusions and Reasons

33. I have taken into account all of the evidence both oral and documentary placed before me and considered that evidence in the round.

34. When considering the Immigration Rules in an appeal such as this the burden of proof is on the Appellant and the standard of proof is a balance of probability.

35. When considering Article 8, the burden of proof is on the Claimant to show that he has established a family and/or private life that would engage Article 8. It is then for the ECO to prove that the decision is lawful, necessary and proportionate.

36. I must consider the circumstances appertaining at the date of refusal of entry clearance that being 5th February 2014. This is because section 85A(2) of the Nationality, Immigration and Asylum Act 2002 states that in an appeal against refusal of entry clearance, the Tribunal may consider only the circumstances appertaining at the time of the decision. I understand that section 85A was repealed by the Immigration Act 2014, but was in force at the relevant time. The issues before me do not in fact relate to the Immigration Rules, because the findings made by the FtT in relation to the Claimant and Sponsor having a genuine and subsisting relationship and intending to live with each other permanently as spouses have been preserved, but so has the finding that at the date of refusal, it had not been proved that adequate accommodation was available.

37. By way of explanation, in relation to the issue of accommodation, it is apparent that there was no satisfactory evidence of adequate accommodation before the ECO when the decision was made. When the FtT heard the appeal, there was evidence that postdated the refusal. That evidence related to a tenancy agreement made by the Sponsor with Affinity Sutton dated 30th April 2014, which confirmed that as from that date the Sponsor had a property with three bedrooms suitable for occupation by four people. There was a letter from Affinity Sutton dated 22nd January 2015 confirming that the Claimant could live at that address.

38. The FtT was correct to find that this evidence of accommodation, did not prove that adequate accommodation existed when the application for entry clearance was refused on 5th February 2014. That is why the FtT decision dismissing the appeal under the Immigration Rules was upheld. However if a fresh application was to be made, it would appear, provided the necessary evidence is submitted, that the application should succeed as the Tribunal has made a finding in relation to the relationship, and evidence has been submitted that there is now adequate accommodation.

39. I now turn to consider Article 8 outside the Immigration Rules. AS (Somalia) is authority to confirm that the human rights aspect of an appeal against refusal of entry clearance, must consider only the circumstances appertaining at the time of the decision to refuse, in this case, 5th February 2014. At that time, the Immigration Rules were not satisfied because there was no adequate accommodation.

40. In considering Article 8 and the five stage test set out in Razgar [2004] UKHL, I find that the Sponsor and Claimant have established family life, and that refusal of entry clearance does interfere with that family life and therefore Article 8 is engaged. I find that the decision to refuse entry

clearance is in accordance with the law, on the basis that the Immigration Rules cannot be satisfied, I then have to decide whether the interference is necessary and proportionate. This involves considering section 117B of the 2002 Act. Sub-section (1) confirms that the maintenance of effective immigration controls is in the public interest. I attach weight to this, and attach weight to the fact that the Immigration Rules cannot be satisfied.

41. Sub-section (2) confirms that it is in the public interest that an applicant can speak English, and I am satisfied that the Claimant can speak English.

42. Sub-section (3) refers to an applicant being financially independent and there was no evidence to submit that that was the case. I do not find that sub-sections (4), (5), and (6), are applicable. I take into account the guidance given in SS (Congo) and set out below paragraph 40:

> "40. In the light of these authorities, we consider that the state has a wider margin of appreciation in determining the conditions to be satisfied before LTE is granted, by contrast with the position in relation to decisions regarding LTR for persons with a (non-precarious) family life already established in the United Kingdom. The Secretary of State has already, in effect, made some use of this wider margin of appreciation by excluding section EX.1 as a basis for grant of LTE, although it is available as a basis for grant of LTR. The LTE rules therefore maintain, in general terms, a reasonable relationship with the requirements of Article 8 in the ordinary run of cases. However, it remains possible to imagine cases where the individual interests at stake are of a particularly pressing nature so that a good claim for LTE can be established outside the rules. In our view, the appropriate general formulation for this category is that such cases will arise where an applicant for LTE can show that compelling circumstances exist (which are not sufficiently recognised under the new Rules) to require the grant of such leave."

43. Therefore an individual claiming leave to enter the United Kingdom, who cannot succeed under the Immigration Rules, must show that compelling circumstances exist which are not sufficiently recognised under the Immigration Rules, to require the grant of such leave.

44. I do not find, considering the circumstances appertaining in February 2014, that it has been proved that any such compelling circumstances exist. At that time the Immigration Rules could not be satisfied on accommodation. I do not find that there were any relevant medical issues that amounted to compelling circumstances requiring entry clearance to be granted to the Claimant. The Sponsor and Claimant do not have any children together. I take into account what was stated by the Supreme Court in Patel and Others [2012] EWCA Civ 741 at paragraph 57;

> "57. It is important to remember that Article 8 is not a general dispensing power."

45. I accept that the vast majority of visa applications made to the ECO Kingston, are processed within 60 days. All are processed within 90 days. I therefore find that there would be no undue delay in processing a visa application, and in making that finding I am conscious of the fact that

these proceedings have gone on too long, taking into account the initial application was refused as long ago as 5th February 2014.

46. I appreciate the disappointment expressed by the Sponsor because the decision of the FtT was set aside. I appreciate that although the Sponsor has continued to visit the Claimant in Jamaica, the couple wish to live in the UK. Article 8 does not however extend to the parties, the right to choose in which country they live.

47. I also appreciate that a further application for entry clearance will incur further expense, but I find that it is appropriate to place weight upon the fact that at the relevant time the Immigration Rules were not satisfied, and it is not appropriate to disregard those rules, and use Article 8 as a general dispensing power.

48. I therefore do not find that there are compelling circumstances to require this appeal to be allowed under Article 8 outside the Immigration Rules, and I find that the ECO has established that the decision is in accordance with the law, necessary in the interests of maintaining effective immigration control, and proportionate. The appropriate course is for a further application for entry clearance to be made, presumably, if the appropriate documentary evidence is submitted with the application, the ECO will take note of the findings made by the Tribunal in relation to the relationship between the parties, and accommodation.

Notice of Decision

The decision of the First-tier Tribunal contained an error of law and was set aside. I substitute a fresh decision.

The Claimant's appeal under the Immigration Rules is dismissed.

The Claimant's appeal on human rights grounds is dismissed.

Anonymity

No anonymity direction was made by the First-tier Tribunal. There has been no request for anonymity made to the Upper Tribunal, and I see no need to make an anonymity order.

Signed Date 14th December 2015

Deputy Upper Tribunal Judge M A Hall

TO THE RESPONDENT
FEE AWARD

The Claimant's appeal is dismissed. There is no fee award.

Signed Date 14th December 2015

Deputy Upper Tribunal Judge M A Hall