



IAC-AH-SAR-V1

**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: OA/11388/2014

THE IMMIGRATION ACTS

**Heard at Centre City Tower, Birmingham
On 19th February 2016**

**Decision & Reasons Promulgated
On 8th March 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

ENTRY CLEARANCE OFFICER - ISLAMABAD

Appellant

and

**UMAR FAYYAZ
(ANONYMITY ORDER NOT MADE)**

Respondent

Representation:

For the Appellant: Mr I Richards, Senior Home Office Presenting Officer
For the Respondent: Mr C Lane of Counsel instructed by D & A Solicitors

DECISION AND REASONS

Introduction and Background

1. The Entry Clearance Officer (ECO) appeals against the decision of Judge Heatherington of the First-tier Tribunal (the FtT) promulgated on 1st 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 citizen of Pakistan born 10th November 1986 who applied for entry clearance to the United Kingdom as the spouse of a British citizen, Zalekha Amina Taras (the Sponsor).
4. The application was refused on 28th July 2014 on financial grounds. The ECO did not accept that the requirements of E-ECP.3.1 of Appendix FM were satisfied in that it was not accepted that the Sponsor had a specified gross annual income of at least £18,600.
5. It was noted that the Sponsor had two employments, but the specified documentation had not been submitted to demonstrate that the Sponsor's income was as claimed. The bank statements submitted did not show the Sponsor's income from her employment with Hounsfield Printing being paid into her bank account as required.
6. The Appellant appealed, his representatives contending that documentary evidence had been submitted to prove the Sponsor's income, and the Sponsor had explained why she did not deposit all of her income from her employment with Hounsfield Printing into her account. This was because she was paid cash, and she used some of this cash to pay her expenses.
7. The decision was then reviewed by an Entry Clearance Manager, who found that specified evidence in relation to the Sponsor's income had not been submitted, and maintained the decision to refuse entry clearance on that basis.
8. The Entry Clearance Manager considered Article 8 of the 1950 European Convention on Human Rights (the 1950 Convention) and was satisfied that refusal of entry clearance was justified by the need to maintain effective immigration control, and did not accept that the decision breached Article 8.
9. The appeal was heard by the FtT on 15th May 2015. It was conceded on behalf of the claimant that the appeal could not succeed under the Immigration Rules as specified evidence had not been submitted with the application to prove the Sponsor had an annual income of at least £18,600.
10. Reliance was placed upon Article 8, and the FtT allowed the appeal under Article 8, outside the Immigration Rules.
11. The ECO applied for permission to appeal. In summary it was contended that the FtT had made a material misdirection of law in allowing the appeal under Article 8. Reliance was placed upon paragraph 38 of SS (Congo) [2015] EWCA Civ 387 which states that requirements upon the state in regard to Article 8 are less stringent in a leave to enter (LTE) application.
12. It was contended that the FtT had failed to make a finding as to why the claimant and Sponsor could not enjoy their family life outside the United Kingdom, and although the FtT had referred to SS (Congo) it was submitted that the FtT had erred by relying on this decision to establish that refusal of the application for entry

clearance would be unduly harsh. There was no finding that it would be unduly harsh for the Appellant and Sponsor to relocate to Pakistan to pursue their family life.

13. Permission to appeal was granted by Judge P J G White of the FtT in the following terms;
 - “(a) It was accepted on behalf of the Appellant that he could not meet the financial requirements of Appendix FM (paras 3-10). The judge however allowed the appeal under Article 8 ECHR (para 25).
 - (b) I am satisfied that in regard to ‘compelling circumstances outside the Rules’ the judge arguably made an error of law by failing to take into account and/or failing to make adequate findings in regard to
 - (i) the ability of the parties to live together in Pakistan (see for example the discussion of the interrelationship between EX1 (insurmountable obstacles) and Article 8 (exceptional circumstances) in Agyarko and Others [2015] EWCA Civ 440 and
 - (ii) the ability of the Appellant to make a fresh application for entry clearance (see for example the discussion in Sabir (Appendix FM - EX.1 not freestanding) [2014] UKUT 00063 (IAC))”.
14. Following the grant of permission there was no response from the claimant pursuant to rule 24 of The Tribunal Procedure (Upper Tribunal) Rules 2008. The Tribunal issued directions that there should be a hearing before the Upper Tribunal to decide whether the FtT decision contained an error of law such that it should be set aside.

The Upper Tribunal Hearing

The ECO’s Submissions

15. Mr Richards relied upon the grounds contained within the application for permission to appeal. He submitted that the FtT had not identified what compelling circumstances existed to make it appropriate to allow the appeal under Article 8 outside the Immigration Rules. Mr Richards submitted that inadequate reasons had been given for finding that compelling circumstances existed.
16. I asked Mr Richards if he could explain the reference in paragraph 25 of the FtT decision, to the Presenting Officer before the FtT indicating “that the decision under appeal was no longer proportionate”. Mr Richards stated that he could not explain this, and there was no reference to this in the Presenting Officer’s minutes of the hearing.

The Claimant’s Submissions

17. Mr Lane relied upon his skeleton argument dated 17th February 2016 which I will not set out in full, but will briefly summarise Mr Lane’s submissions below.

18. Mr Lane noted that the FtT found that the Sponsor's income from her two jobs exceeded the threshold of £18,600, but had not been evidenced in accordance with the rules.
19. The FtT correctly considered section 117B of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act) noting an English language ability, and financial independence. In considering proportionality the FtT found that the Sponsor had genuine employment, and had paid tax, and that there was reference at the FtT hearing to the Presenting Officer indicating that the decision under appeal was no longer proportionate.
20. Mr Lane submitted that the inability to satisfy the Immigration Rules was a technicality, and was the nearest of misses, and the FtT was entitled to take this into account when assessing proportionality.
21. Mr Lane submitted that Judge White when granting permission was in error in referring to Agyarko, which involved the principles to be considered in leave to remain cases rather than leave to enter, and had granted permission on an issue that had not been raised by the ECO, that being the possibility of the claimant making a fresh application for entry clearance. In any event it was submitted that this would not be appropriate given the amount of time that had passed since the application was made, and the unchallenged findings of fact made by the FtT.
22. Mr Lane's primary submission was that the FtT had not materially erred in law, but in the alternative, if it was found that there was an error, the decision could be re-made by the Upper Tribunal based on the unchallenged findings of fact summarised at paragraph 4 of the skeleton argument.
23. Mr Richards had no response to make, and did not disagree that if an error was found, the decision could be re-made by the Upper Tribunal without a further hearing.
24. I reserved my decision.

My Conclusions and Reasons

25. I am satisfied that Judge White did not err in granting permission, and that he was entitled to grant permission to appeal on the circumstances set out in his decision. In my view the challenge to the FtT decision was that compelling circumstances had not been identified and adequate reasons for those findings had not been given.
26. In my view the FtT did materially err in allowing the appeal under Article 8 outside the Immigration Rules, for the following reasons.
27. The FtT did not apply in full the principles set out in SS (Congo) and I set out below paragraph 37 of that decision;

"On the other hand, if someone from the United Kingdom marries a foreign national or establishes a family life with them at a stage when they are contemplating trying to live

together in the United Kingdom, or when they know that their partner does not have a right to come there (an extreme example of this would be the case of a so-called mail order bride), the relationship will have been formed under conditions of known precariousness which will make the analogy with Strasbourg case law reviewed in Nagre a close one (see also Abdulaziz, Cabales and Balkandali v United Kingdom (1985) 7 EHRR 471 at [68]). In that sort of case, it will be appropriate to apply a similar test of exceptional circumstances before a violation of Article 8 will be found to arise in relation to a refusal to grant LTE outside the Rules”.

28. It is also relevant to consider paragraph 40 which I set out below in part;

“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”.

29. The FtT considered proportionality at paragraph 25, and concluded that there are exceptional circumstances that would arise if the claimant was not granted leave to enter, and the FtT found that compelling circumstances existed for granting leave to the claimant to enter the United Kingdom. The error of the FtT is not to adequately explain what in this case amounts to compelling and exceptional circumstances. The FtT notes that the Sponsor is a British citizen and has employment in the United Kingdom, and notes that when the Sponsor and claimant married, they knew the claimant had no right to come to the United Kingdom. In my view, those findings do not amount to exceptional or compelling circumstances. The FtT also records that the claimant can speak English and there would be financial independence. The FtT appears not to have considered the principles in AM Malawi [2015] UKUT 0260 (IAC) and I set out below the second paragraph in the head note;

“(2) An Appellant can obtain no positive right to a grant of leave to remain from either s117B(2) or (3), whatever the degree of his fluency in English, or the strength of his financial resources”.

30. I appreciate that in this case the application is for leave to enter rather than leave to remain, but the principle set out above is the same.

31. The FtT does not consider the possibility of the Sponsor relocating to Pakistan, and this is an error, neither does the FtT consider why the claimant could not make a further application for entry clearance, and again in my view this is an error of law.

32. Therefore the decision of the FtT cannot stand because of the material error of law, and is set aside.

33. Both representatives invited me to re-make the decision, if a material error of law was found and the decision of the FtT was set aside, and I find that it is appropriate to do so.

34. It has been rightly conceded that the claimant cannot succeed by reliance upon the Immigration Rules as the financial requirements are not satisfied. I therefore consider Article 8 outside the Immigration Rules and I set out below Article 8 of the 1950 Convention;
- (1) Everyone has the right to respect for his private and family life, his home and his correspondence.
 - (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.
35. The claimant must establish that he has established a family or private life that engages Article 8, and the ECO must then establish that the decision is in accordance with the law, necessary for one of the reasons set out in Article 8(2), and proportionate.
36. In considering Article 8 I have followed the five stage approach advocated in Razgar [2004] UKHL 27. The decision in Beoku-Betts [2008] UKHL 39, means that I must consider the family and private life of the Sponsor as well as the claimant.
37. I am satisfied that the Sponsor and claimant have established a family life. I accept that they have a genuine relationship, and that they married on 6th April 2012. I find that refusal of entry clearance is an interference with their family life, which they wish to pursue together in the United Kingdom.
38. However I find that the proposed interference is in accordance with the law insofar as it is accepted that the claimant cannot satisfy the Immigration Rules in order to be granted entry clearance to the United Kingdom.
39. I then have to consider whether the interference is necessary for one of the reasons set out in Article 8(2), and whether it is proportionate. When considering proportionality I take into account the considerations set out in section 117B of the 2002 Act.
40. The unchallenged findings of the FtT are that the claimant and Sponsor are married and have a genuine relationship. Both are able to speak English. The Sponsor has employment and is distressed at separation from the claimant.
41. Mention has been made of the Presenting Officer before the FtT commenting that the decision under appeal was no longer proportionate. I cannot ascertain any relevant reference to this in the Record of Proceedings, and this observation by the FtT seems unexplained. In any event, the decision on proportionality is one for the Tribunal, and the Record of Proceedings does not indicate that the Presenting Officer before the FtT conceded that the appeal should be allowed. On the contrary, the Record of Proceedings indicates that the Presenting Officer relied upon the ECO decision to refuse entry clearance dated 28th July 2014.

42. The Court of Appeal gave further guidance in relation to an application for leave to enter on the basis of family life with a person already in the United Kingdom at paragraph 39 of SS (Congo). In brief summary a person outside the United Kingdom may have a good claim under Article 8 to be allowed to enter to join family members already here, but Article 8 does not confer an automatic right of entry, and imposes no general obligation on the state to facilitate the choice made by a married couple to reside in it. The state is entitled to control immigration. There are a range of factors to be taken into account, and in paragraph 40 it is stated that the state has a wider margin of appreciation in determining the conditions to be satisfied before leave to enter is granted, by contrast with the position in relation to decisions regarding leave to remain for persons with a non-precarious family life already established in the United Kingdom.
43. I have taken into account Mr Lane's submission as to the technical nature of the failure to meet the Immigration Rules and the near miss aspect of this case. I think it appropriate to set out the guidance from SS (Congo) in relation to Appendix FM-SE which contains the evidential requirements;
51. In our judgment, the approach to Article 8 in the light of the Rules in Appendix FM-SE should be the same as in respect of the substantive LTE and LTR Rules in Appendix FM. In other words, the same general position applies, that compelling circumstances will have to apply to justify a grant of LTE or LTR where the evidence Rules are not complied with.
52. This is for two principal reasons. First, the evidence rules have the same general objective as the substantive rules, namely to limit the risk that someone is admitted into the United Kingdom and then becomes a burden on public resources, and the Secretary of State has the same primary function in relation to them, to assess the risk and put in place measures which are judged suitable to contain it within acceptable bounds. Similar weight should be given to her assessment of what the public interest requires in both contexts.
53. Secondly, enforcement of the evidence rules ensures that everyone applying for LTE or LTR is treated equally and fairly in relation to the evidential requirements they must satisfy.
44. I remind myself of the comment made by the Supreme Court in Patel and Others [2013] UKSC 72 at paragraph 57;
57. It is important to remember that Article 8 is not a general dispensing power.
45. In this appeal, I do not find that there are compelling or exceptional circumstances. The claimant and Sponsor married in the knowledge that the claimant did not have the right to enter the United Kingdom. This is not a case where there are any medical issues or children.
46. The couple wish to live in the United Kingdom, but it is clear that Article 8 does not bestow upon an individual an automatic right to choose in which country he or she wishes to live.

47. I am being asked to allow this appeal under Article 8, on the basis that the decision of the ECO is disproportionate. I am, therefore, being asked to disregard the fact that the financial requirements of the Immigration Rules cannot be met. The Court of Appeal have made it clear in SS (Congo) that in relation to a failure to meet the evidential requirements, compelling circumstances need to exist to justify a grant of leave to enter.
48. It is open to the claimant to make a fresh application for entry clearance. I reject the submission that this would not be appropriate because of the length of time that has elapsed. In my view, the weight to be attached to maintaining effective immigration control outweighs the weight to be attached to the wishes of the Sponsor and claimant to live together in the United Kingdom, notwithstanding that the Immigration Rules cannot be satisfied.
49. The decision of the ECO is proportionate, and does not breach Article 8 of the 1950 Convention.

Notice of Decision

The decision of the FtT involved the making of an error of law and was set aside.

I re-make the decision. The appeal of the claimant is dismissed under the Immigration Rules and on human rights grounds.

Anonymity

No anonymity direction was made by the FtT. There has been no request for anonymity made to the Upper Tribunal and no anonymity order is made.

Signed

Date 26th February 2016

Deputy Upper Tribunal Judge M A Hall

TO THE RESPONDENT FEE AWARD

The appeal is dismissed. There is no fee award.

Signed

Date 26th February 2016

Deputy Upper Tribunal Judge M A Hall