



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/15054/2014

THE IMMIGRATION ACTS

Heard at Field House
On 26 February 2016

Decision and Reasons Promulgated
On 7 March 2016

Before
UPPER TRIBUNAL JUDGE SMITH

Between

ENTRY CLEARANCE OFFICER - ISLAMABAD

Appellant

and

MRS NASNEEN KAUSAR
(NO ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Ms A Everett, Senior Home Office Presenting Officer
For the Respondent: Mr Naeem Mohammed (sponsor)

Anonymity

Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008

No anonymity order was made by the First-tier Tribunal. I find that no particular issues arise on the facts of this case that give rise to the need for a direction. For this reason no anonymity direction is made.

DECISION AND REASONS

Background

1. This is an appeal by the Entry Clearance Officer ("ECO"). For ease of reference, I refer below to the parties as they were in the First-Tier Tribunal albeit that the ECO is technically the Appellant in this particular appeal. The ECO appeals against a decision of First-Tier Tribunal Judge Majid promulgated on 14

September 2015 (“the Decision”) allowing the Appellant’s appeal against the ECO’s decision dated 28 October 2014 refusing her entry clearance as a spouse under paragraph EC-P.1.1(d) of Appendix FM to the Immigration Rules (“the Rules”).

2. The Appellant is a citizen of Pakistan. She was represented at the hearing by Mr Mohammed, her husband and sponsor. They married in Pakistan on 1 October 2009. The ECO took issue in the decision with the genuineness of the relationship. The Judge in the Decision accepted that the relationship is genuine, in reliance in particular on the fact that she and Mr Mohammed now have a child together. There is no challenge to that finding. The only issue which remains therefore is whether the Appellant and her husband are able to meet the financial requirements of the Rules. The Judge made a finding that they could. The Judge also appears to find that Article 8 ECHR is breached by the ECO’s decision although the Respondent submits (and I accept) that the finding is somewhat opaque and devoid of reasoning.
3. Permission to appeal the Decision was granted by First-tier Tribunal Judge Astle on 19 January 2016 on the basis that the Judge failed to make findings as to how the Appellant met the Rules when she had failed to provide the evidence specified by the Rules and also on the basis that there is no clear finding or reasoning as to Article 8 ECHR. The matter comes before me to decide whether the Judge made an error of law in the Decision.

Grounds of appeal and submissions

4. Ms Everett relied on the Respondent’s written grounds. The first ground is that the Judge failed to give adequate reasons for the finding at [28] of the Decision that the Appellant meets the requirements of the Rules. The second ground is that this finding was not open to the Judge given the Appellant’s failure to provide the evidence specified under the Rules and the Judge’s failure to explain on what basis the Respondent should have exercised discretion in this case. The paragraphs of the Rules specifying the evidence which is to be produced to satisfy the requirements of the particular rule are as much a part of the Rules as what that evidence is required to show. This ground also challenges the Judge’s apparent finding that Article 8 and section 55 of the Borders, Citizenship and Immigration Act 2009 (“section 55”) amounted to the reasons for the Respondent to exercise her discretion under the Rules. The Respondent submits that this is not a permissible approach. If the Judge intended to find that the Appellant should succeed based on Article 8 and section 55, he would need to so find on the basis of there being “exceptional circumstances”. Judge Astle did not grant permission for the Respondent to argue that the Judge was not entitled to take account of section 55 notwithstanding that the Appellant and Mr Mohammed’s child is resident abroad. Ms Everett accepted that, notwithstanding that section 55 has no direct application to children who are not in the UK, guidance to ECOs is to apply the spirit of that guidance.

5. I enquired of Mr Mohammed whether he had produced any additional evidence in relation to his financial circumstances at the hearing before the Judge. He confirmed that he had not as he had expected that the Respondent would be able to check his circumstances. He produced to me however a letter from HMRC dated 26 November 2014 which set out his earnings for the tax years ending 5 April 2014 and 5 April 2015. He confirmed (and Ms Everett accepted) that this document was also before Judge Majid. However, Ms Everett submitted that this would still be insufficient evidence to satisfy the Rules. I explained to Mr Mohammed what evidence the Rules required him to produce, particularly in relation to the periods covered by the evidence. He very fairly conceded that he had not produced that evidence but said that he would be able to do so if given more time.
6. Ms Everett submitted that if I were to find an error of law, I should remit the appeal to the First-tier Tribunal given the lack of factual findings in the Decision. She accepted that the finding that the relationship between the Appellant and Mr Mohammed is genuine should in that event be preserved.

Discussion and conclusions

7. I set out below the relevant part of Appendix FM as it stood both at the date of the hearing before the Judge and now.

“APPENDIX FM

Section EC-P: Entry clearance as a partner

EC-P.1.1. The requirements to be met for entry clearance as a partner are that-

- (a) the applicant must be outside the UK;
- (b) the applicant must have made a valid application for entry clearance as a partner;
- (c) the applicant must not fall for refusal under any of the grounds in Section S-EC: Suitability—entry clearance; and
- (d) the applicant must meet all of the requirements of Section E-ECP: Eligibility for entry clearance as a partner.

Section E-ECP: Eligibility for entry clearance as a partner

E-ECP.1.1. To meet the eligibility requirements for entry clearance as a partner all of the requirements in paragraphs E-ECP.2.1. to 4.2. must be met.

Financial requirements

E-ECP.3.1. The applicant must provide specified evidence, from the sources listed in paragraph E-ECP.3.2., of-

- (a) a specified gross annual income of at least-
 - (i) £18,600;

.....

E-ECP.3.2. When determining whether the financial requirement in paragraph E-ECP. 3.1. is met only the following sources will be taken into account-

- (a) income of the partner from specified employment or self-employment, which, in respect of a partner returning to the UK with the applicant, can include specified employment or self-employment overseas and in the UK;
- (b) specified pension income of the applicant and partner;
- (c) any specified maternity allowance or bereavement benefit received by the partner in the UK or any specified payment relating to service in HM Forces received by the applicant or partner;
- (d) other specified income of the applicant and partner; and
- (e) specified savings of the applicant and partner.

Appendix FM-SE

Family Members - Specified Evidence

- A. This Appendix sets out the specified evidence applicants need to provide to meet the requirements of rules contained in Appendix FM and, where those requirements are also contained in other rules, including Appendix Armed Forces, and unless otherwise stated, the specified evidence applicants need to provide to meet the requirements of those rules.

Evidence of Financial Requirements under Appendix FM

A1. To meet the financial requirement under paragraphs E-ECP.3.1.....of Appendix FM, the applicant must meet:

- (a) The level of financial requirement applicable to the application under Appendix FM; and
- (b) The requirements specified in Appendix FM and this Appendix as to:
 - (i) The permitted sources of income and savings;
 - (ii) The time periods and permitted combinations of sources applicable to each permitted source relied upon; and
 - (iii) The evidence required for each permitted source relied upon.

1. In relation to evidencing the financial requirements in Appendix FM the following general provisions shall apply:

.....

- (1) Where this Appendix requires the applicant to provide specified evidence relating to a period which ends with the date of application, that evidence, or the most recently dated part of it, must be dated no earlier than 28 days before the date of application.

.....

2. In respect of salaried employment in the UK all of the following evidence must be provided:

- (a) Payslips covering:
 - (i) a period of 6 months prior to the date of application if the person has been employed by their current employer for at least 6 months (and where paragraph 13(b) of this Appendix does not apply); or
 - (ii) any period of salaried employment in the period of 12 months prior to the date of application if the person has been employed by their current employer for less than 6 months (or at least 6 months but the person does not rely on paragraph 13(a) of this Appendix), or in the financial year(s) relied upon by a self-employed person.

(b) A letter from the employer(s) who issued the payslips at paragraph 2(a) confirming:

(i) the person's employment and gross annual salary;

(ii) the length of their employment;

(iii) the period over which they have been or were paid the level of salary relied upon in the application; and

(iv) the type of employment (permanent, fixed-term contract or agency).

(c) Personal bank statements corresponding to the same period(s) as the payslips at paragraph 2(a), showing that the salary has been paid into an account in the name of the person or in the name of the person and their partner jointly. "

[my emphasis]

8. There can be no dispute that the Respondent is entitled to set out in the Rules both the requirements to be met and the evidence required to meet the relevant test (see R(on the application of Alvi) v Secretary of State for the Home Department [2012] UKSC 33; Mandalia v Secretary of State for the Home Department [2015] UKSC 59). As the latter authority makes clear however the requirements to provide specified evidence are subject to a discretion to call for evidence where it is not produced in the right form. The Supreme Court in that case was considering a policy which is now replaced by the Rules. The relevant rule in relation to specified evidence in this case is at "D" of Appendix FM-SE. The Judge did not however decide that the ECO should have exercised discretion to call for further documents and nor did he have before him the documents which were missing with the Appellant's application. I do not therefore need to consider this further.
9. The Judge at [10] of the Decision appears to have misread the ECM's statement in response to the appeal. He appears to have thought that the ECM was impermissibly seeking to fetter the Tribunal's decision to look at evidence post-dating the decision. That is not the way in which I read that document. The point being made by the ECM quite correctly identified that the Appellant and her sponsor were alerted to the documents which were missing with their application and given the opportunity to provide those for consideration on review of the decision. However, they failed to provide those. The ECM rightly pointed out that the Tribunal could only take account of evidence provided to both parties to the appeal and that if the Appellant submitted further documents, the Respondent ought to be given the opportunity prior to the hearing date to review the decision. As a matter of fairness that must be right and that is something which the Appellant's sponsor needs to ensure is done if the appeal is to be re-heard.
10. The Appellant submitted with her application the documents which appear in the Tribunal's bundle and which consist of the following:-
 - A letter from HC&MS and Zaks Cleaning Company setting out the Appellant's sponsor's employment with those companies. Those letters do not set out the Appellant's sponsor's period of employment with the

companies nor the period for which the salary specified in the letter has been paid but it may be that, coupled with pay slips and bank statements for the relevant period, the Respondent would accept those letters as substantially conforming with the requirements;

- Payslips from both companies for the pay periods from May 2013 to November 2013. The application in this case was made on 20 April 2014. As the ECO notes, therefore, these documents do not cover the necessary period. They cover a six month period but significantly prior to the period leading up to 28 days before the application was made. They would need to be for the pay periods September 2013 to March 2014 or October 2013 to April 2014;
- Bank statements for the same period as the pay slips. Again, as the ECO notes, those cover a six month period but they do not cover the relevant six month period.

11. I do not need in my reasoning to go beyond pointing out that the Judge made no reference in the Decision to what documents the Appellant and her sponsor provided with the application nor why the ECO considered those insufficient and why he considered they were in fact sufficient. At [13], the Judge said the following:-

“[13] As I have said before, the income of the Appellant’s sponsor should have been looked at in a discretionary manner. The sponsor (not realising that the burden of proof was on him) offered the ECO to check his income from the HMRC but the ECO remained technically fidel to the technical burden on him. Insufficiency of maintenance was not raised as a reason for refusal and, therefore, I did not allow the Presenting Officer to go onto that route – I do remember that any new issue cannot be raised if it is totally absent in the Refusal Letter. I must say that my conclusion that the wage slips are genuine was confirmed by the HMRC by the new documents handed over by the sponsor on the date of hearing. Also one has to bear in mind that in this case, as it is confirmed by the Registration Certificate displayed in the Appellant’s bundle, we are also dealing with an 18 month old British child and his best interests.”

It is in fact inaccurate to say that the ECO did not dispute sufficiency of maintenance. The ECO’s decision makes clear that the refusal is on the basis that the Appellant failed to provide the evidence required to show that her sponsor had available the specified gross income. Whilst that was on the basis of an evidential dispute, it still amounts to a decision that the Appellant’s sponsor did not meet the minimum income threshold.

12. In the above citation and at [11] of the Decision the Judge points to the ECO’s discretion which, as I note at [8] above, evidently exists. However, the Judge clearly erred both in finding that the rule requiring specified evidence to be produced amounted to a “technical” legal requirement and in finding that the ECO could have avoided this by making enquiries of HMRC for himself rather than requiring the Appellant to submit the correct documents. As the Supreme Court found in Mandalia whilst Courts and Tribunals might disagree with the way in which the Rules are framed and find them unnecessarily complex, it is not

for individual Judges to rewrite Rules which have Parliamentary approval. That is the error into which this Judge fell.

13. I have considered whether it could be said that the error of law is not material. This might arise either from consideration of the additional evidence produced in the form of the HMRC letter or on the basis of the Judge's treatment of the case under Article 8. In relation to the HMRC letter whilst it is the case that the HMRC letter refers to income in the year to 5 April 2014 (which roughly equates to the period immediately before the application) and whilst that shows that the Appellant's sponsor (just) meets the minimum threshold for the year in question, this is not enough to show that the Appellant could meet the Rules nor indeed that the sponsor was earning that income at the relevant time. It might be the case for example that the Appellant's sponsor earned considerably more at the start of the tax year than in the final six months which might cause his income to fall below the required threshold. In relation to Article 8, I accept the Respondent's submission that there is no clear finding articulated that the refusal of entry clearance would breach Article 8 and, even if there were, the Decision does not disclose any reasoning taking into account the public interest for example in the Appellant and her sponsor being able to meet the Rules in relation to the sponsor's income.
14. I am therefore satisfied that the Decision contains a material error of law in relation to the finding that the Appellant could meet the Rules, in particular paragraph A1.2 which is cited above. The Appellant's sponsor would be well advised to read also paragraph A1.1 to ensure that the evidence which he wishes to produce to the Respondent to satisfy him that the Appellant can meet the financial requirements is in the correct form and covers the correct period.
15. I therefore set the Decision aside. I agree with Ms Everett that the appropriate course is to remit the appeal in light of the absence of factual findings and reasoning. The finding that the Appellant and her sponsor are in a genuine and subsisting relationship is preserved. It will be for the Appellant to provide additional documents to satisfy the evidential requirement regarding his income. I have set out the relevant Rules at [7] above to assist him in identifying the documents which he needs to provide.

DECISION

The First-tier Tribunal decision did involve the making of an error on a point of law. I set aside the Decision. I remit the appeal to the First-Tier Tribunal for re-hearing with the direction that it be heard by another Judge of the First-Tier Tribunal. The finding that the Appellant and her sponsor are in a genuine and subsisting relationship is preserved.



Signed
Upper Tribunal Judge Smith

Date 29 February 2016