



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/02461/2015

THE IMMIGRATION ACTS

Heard at Birmingham Employment Centre
On 12th April 2017

Decision & Reasons Promulgated
On 9th May 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MR AMIR SOHAIL
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER, ISLAMABAD

Respondent

Representation:

For the Appellant: No legal representation
For the Respondent: Ms H Aboni (HOPO)

DETERMINATION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Raikes promulgated on 25th January 2016, following a hearing at Stoke-on-Trent on 12th January 2015. In the determination, the judge had dismissed the appeal of Amir Sohail, whereupon the Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a citizen of Pakistan who was born on 8th November 1976. He applied for entry clearance as a partner under EC-P.1.1 of Appendix FM of the Immigration Rules, as the spouse of a person present and settled in the UK, namely, of Ms Shahina Pathan, a British citizen of Indian origin.

The Judge's Findings

3. The relevant facts and documentary material are set out in the determination under appeal. The legal framework is also set out in the determination by Judge Raikes. He notes that the essence of the Appellant's claim is that he has a genuine and subsisting family life relationship with Ms Shahina Pathan, that he has funds available that meet the financial threshold requirement, and that there are medical problems on the part both of the Appellant and his sponsoring wife, such that he succeeds in his application to be with his wife in the UK.
4. The judge took into account, as relevant matters, the fact that the Appellant had originally come to the UK as a visitor and had then overstayed and worked illegally before voluntarily returning back to Pakistan. He held that, "I am satisfied that notwithstanding that the Sponsor is the Appellant's wife, and the relationship is genuine and subsisting, she is not the only family the Appellant has and he does have family in Pakistan" (paragraph 31).
5. At another place, the judge observes that, "I do not consider the Appellant enjoys family life such as to engage Article 8" (paragraph 32). He goes on to explain that,

"Aside from a limited period in the UK when they formed a relationship knowing the position of the Appellant, they appear to have always lived in separate countries for the duration of their marriage. I am not satisfied that he does not continue to have relatives there with whom he is able to live and have support from" (paragraph 32).

The judge then went on also to consider the issue of proportionality and held that the legitimate public end is to maintain immigration control and that the decision against the Appellant was not disproportionate (paragraph 35). Finally, regard was had to Section 117B and the judge held that "I am satisfied that those seeking to enter or stay in the UK should meet the requirements of the immigration laws and Rules", and that "any family life established or anticipated in the UK was whilst his immigration status was precarious" (paragraph 36).

6. The Grounds of Appeal assert three essential grounds. First, that the decision was disproportionate and in breach of Article 8 because the Appellant's wife was of Indian origin and could not live permanently in Pakistan. Second, that the wife had a daughter, Miss Lubna Sheikh, from her ex-husband who died on 13th November 2007, and she was fully dependent upon her mother, and currently studying at university in any event. Third, that the Appellant's wife, Shahina Pathan, had an old age mother with poor health, who was a widow, and was currently dependent upon

her daughter, requiring close assistance as he is unable to live alone, even though she has other children.

7. On 10th November 2016, permission to appeal was granted by the Upper Tribunal on the basis that, in view of the fact that the Appellant was unrepresented at the hearing, the judge arguably fell into error in three respects. First, that there was a finding that there was no family life between the Appellant and his wife (see paragraphs 31 to 32), even though they had lived together in the UK after having undergone an Islamic marriage, and then returned to Pakistan to undertake another marriage there. Second, that the judge had held that there was no evidence that the Appellant's wife could not join him in Pakistan (see paragraph 35), but this overlooked the fact that she was a person of Muslim religion but of Indian origin who would have difficulties living there. Thirdly, that the judge approached the question of Section 117B of the 2002 Act in an erroneous fashion.
8. A Rule 24 response was entered on 22nd November 2016, where it was asserted that no evidence was shown as to why the Sponsor could not obtain a visa to Pakistan for longer than three months as she was alleging, and the Sponsor's daughter was in any event an adult now who was at university, such that the judge's findings were properly open to him.

Submissions

9. At the hearing before me on 12th April 2017, the Appellant was again legally unrepresented. His stepdaughter, Miss Lubna Sheikh, spoke on his behalf. In the court present also was the sponsoring wife, Shahina Pathan, and at the back of the courtroom was the Appellant's mother-in-law. Miss Lubna Sheikh submitted that the decision failed to take into account the Appellant's family life and the fact that there were medical problems here. The mother could not go to Pakistan because she was looking after her own mother who was entirely dependent upon her, and she in any event, stated Miss Lubna Sheikh, was a Muslim woman of Indian origin, and as such could not settle there.
10. For her part, Ms Aboni relied upon the Rule 24 response. She stated that there was a potential conflict in finding of fact by the judge when it is stated (at paragraph 31) that the Appellant and his wife have a relationship which "is genuine and subsisting". This conflicts with the subsequent statement (at paragraph 32) that, "I do not consider that the Appellant enjoys family life such as to engage Article 8". Nevertheless, if the determination is read as a whole, submitted Ms Aboni, there was no error of law here at all. What the judge had done was to maintain the status quo, which was of the Appellant and his wife living in different countries. Furthermore, the plain fact here was that the parties could not meet the financial requirement threshold because, although there was a house in Pakistan, this had not been sold, despite repeated assertions to the effect that it would be, such that it was not possible still to show that the Appellant could satisfy the precise financial threshold applicable to him.
11. In reply, Miss Lubna Sheikh submitted that her mother, Ms Shahina Pathan, and the Appellant had lived together in the UK for seven years, whilst he was working here

illegally, and they had been enjoying a family life, so that it was simply not accurate to suggest that there was no family life between them. Secondly, her grandmother (namely, the Appellant's mother-in-law) was very ill and needed looking after, so that the wife of the Appellant, Ms Shahina Pathan, could not go for a prolonged period of time to Pakistan, even if she were able to do so. She stated that the Appellant was sending monies from Pakistan and still maintaining their upkeep in this country and they were a viable family unit.

Error of Law

12. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision. My reasons are as follows.
13. First, there is a contradiction in the judge's fundamental finding as to the existence, or otherwise of a genuine and subsisting family life between the Appellant and his wife. This goes to the crux of this appeal. At paragraph 31 he finds that there is a genuine and subsisting relationship. However, at paragraph 32 he concludes there is not.
14. Second, less it be thought that this is simply a slip of language, the manner in which the subsequent conclusion is drawn (at paragraph 32) is in the context of the judge concluding that the Appellant also has a family life with wider family members in Pakistan. However, whilst this may be true, it is not a finding that can be used to detract from the quality of the relationship that the Appellant may, or may not, have enjoyed with his sponsoring wife, Ms Shahina Pathan. This is clear from the assertion that,

"Aside from a limited period in the UK when they formed a relationship knowing the position of the Appellant, they appear to have always lived in separate countries for the duration of their marriage. I am not satisfied that he does not continue to have relatives there with whom he is able to live and have support from".
15. Whether or not the Appellant can have support from other relatives, or whether he can live with them, is beside the point, when consideration is given as to whether he actually has a relationship of a husband and wife with Shahina Pathan. The resultant confusion has led to a finding that the Appellant does not enjoy family life so as to engage Article 8. On the evidence, such a conclusion is unsustainable.
16. Third, this is not least because the Home Office Presenting Officer at the hearing accepted that, "there was a finding that there was a genuine and subsisting marriage [although] the financial requirements could not be met" (see paragraph 16).
17. Finally, the issue of Section 117B needs to be more comprehensively addressed. Although the judge states (at paragraph 36) that the Appellant's immigration status was always precarious, which is entirely correct, as is the fact that the Appellant's wife had undergone this Islamic marriage with the Appellant in the UK knowing full well what his immigration status was, the fact that the Appellant's wife was a person

of Indian origin, and (as stated in the earlier determination that her child, Miss Lubna Sheikh, is born of a Somali father, thus resulting in difficulties of her residence in Pakistan) needs to be weighed in the balance, as does the ill-health both of the sponsoring wife and the sponsoring wife's mother, because that too goes to the issue of whether she can leave the UK to go to Pakistan for any appreciable period of time.

Decision

18. The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. I remake the decision as follows. This appeal is allowed to the extent that it is remitted back to the First-tier Tribunal under practice statement 7.2(a) to be determined by a judge other than Judge Raikes. As I have made it clear to the Appellant's relatives in court today they would be well advised to seek legal assistance in this complex appeal.
19. No anonymity direction is made.
20. The appeal is allowed to this limited extent.

Signed

Dated

Deputy Upper Tribunal Judge Juss

8th May 2017