



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/26684/2016

THE IMMIGRATION ACTS

Heard at Liverpool
On 25 July 2018

Decision & Reasons Promulgated
On 06 August 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

Between

MR MAHINDRAKUMAR SHANKERBHAI PATEL
(NO ANONYMITY DIRECTION MADE)

Appellant

and

THE ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Mr Thornhill, Solicitor

For the Respondent: Mr McVeety, Senior Home Office Presenting Officer

DECISION AND REASONS

1. No anonymity direction is made.
2. The appellant is a national of India. He submitted an application for entry clearance as a partner under Appendix FM of the Immigration Rules. The respondent refused his application on October 26, 2016 because he was not satisfied that the appellant and sponsor were in a genuine and subsisting relationship or that they intended to live together. Additionally, the respondent was not satisfied the marriage was valid and refused the application under paragraph EC-P 1.1(d) of Appendix FM of the

Immigration Rules. The respondent went on to consider the application under article 8 and found that there were no exceptional circumstances that engaged article 8 ECHR.

3. The appellant lodged grounds of appeal on November 30, 2016 under Section 82(1) of the Nationality, Immigration and Asylum Act 2002.
4. Her appeal came before Judge of the First-tier Tribunal Dearden (hereinafter called "the Judge") on February 21, 2018 and he dismissed the appellant's appeal on human rights grounds on February 27, 2018.
5. The appellant appealed this decision on March 19, 2018 on the grounds that the Judge had erred by deciding the case on personal belief and confusion rather than the requirements of the Immigration Rules. The grounds further argued the Judge approached article 8 ECHR incorrectly.
6. Permission to appeal was granted on a limited basis by Judge of the First-tier Tribunal Parker on April 30, 2018 who found it arguable the Judge had erred in his consideration of article 8 ECHR. The Judge found nothing wrong in the Judge's approach to the other matters raised in the grounds of appeal.

PRELIMINARY ISSUE

7. By a letter dated July 10, 2018 the appellant's representatives sought permission under Rule 5 of the Tribunal Procedure (Upper Tribunal) Rules 2008 to advance new grounds of appeal. Rule 5 of the 2008 Rules is concerned with case management issues.
8. The Tribunal has recently issued further guidance in AZ (error of law: jurisdiction; PTA practice) Iran [2018] UKUT 00245 (IAC) on what matters may be considered by the Upper Tribunal at the hearing such as this. The Tribunal stated:

"Permission to appeal to the Upper Tribunal should be granted on a ground that was not advanced by an applicant for permission, only if:

(a) the judge is satisfied that the ground he or she has identified is one which has a strong prospect of success:

(i) for the original appellant; or

(ii) for the Secretary of State, where the ground relates to a decision which, if undisturbed, would breach the United Kingdom's international Treaty obligations; or

(b) (possibly) the ground relates to an issue of general importance, which the Upper Tribunal needs to address."

9. The amended grounds argue that the Judge erred by failing to recognise that with entry clearance cases the definition of "partner" includes fiancé and when considering alternatives, such as living together as partners in a relation akin to marriage, the Judge should have considered this bearing in mind the parties believed they were married.

PRELIMINARY ISSUES

10. At the commencement of the hearing Mr McVeety did not oppose the addition of the new ground of appeal on the basis that the Judge had accepted the appellant and sponsor were in a genuine and subsisting relationship, had a child and had been living together previously. He accepted that the Judge's assessment under article 8 was flawed and he invited the Tribunal to remake the decision today.
11. Mr Thornhill stated that he would be submitting that the Immigration Rules were met and that this was positively determinative when considering an appeal under article 8 ECHR. Mr Thornhill referred to paragraph 34 in the judgement of TZ (Pakistan) and PG (India) and The Secretary of State for the Home Department [2018] EWCA Civ 1109 in which the Court of Appeal stated, "The policy of the Secretary of State as expressed in the Rules is not to be ignored when a decision about article 8 is to be made outside the Rules... where a person satisfies the Rules, whether or not by reference to an article 8 informed requirement, then this will be positively determinative of that person's article 8 appeal provided their case engages article 8(1), for the very reason that it would then be disproportionate that person to be removed.

FINDINGS

12. The Tribunal was concerned with an application for entry clearance as a spouse that had been made by the appellant. The evidence before the Judge was that the appellant and sponsor had married on June 6, 2014 but there were issues over whether the sponsor was divorced. The Judge recognised this fact and dealt with the issue of validity in considerable detail and found the sponsor was still married when she married the appellant and therefore the marriage was not valid.
13. The Judge went on to consider whether the appellant and sponsor could satisfy the Immigration Rules and the Judge reminded himself that the definition of "partners", where they are not married, required the appellant and sponsor to demonstrate that they had lived together in a relationship akin to marriage for two years prior to the date of application. The Judge correctly concluded that they could not meet this requirement.
14. The additional grounds of appeal, presented by Mr Thornhill, raised what is commonly described as a *Robinson* error.
15. Paragraph GEN 1.2(iii) of Appendix FM of the Immigration Rules defines a partner as a "fiancée". Under the Immigration Rules it is open to an appellant to seek entry clearance as a fiancé although in doing so the appellant would have to intend to marry the sponsor within a short period of time. This was not a box ticked on the application form because at the time the appellant and sponsor believed they were married.
16. Mr McVeety accepted that as the Judge accepted they were in genuine and subsisting relationship, from which there had been a child born (British citizen), the Judge should have given consideration as to whether the appellant and sponsor were fiancés in light of the fact he considered the appellant's application as if he was a partner.

17. Mr McVeety indicated that based on the Judge's findings about the relationship he accepted that the appellants could be viewed as fiancés and he also accepted that all other requirements Appendix FM of the Immigration Rules were met.
18. Leaving aside the issue that they had a British child, Mr McVeety acknowledged that as the entry clearance requirements as a fiancé were met this in itself would be a reason to allow the appeal under article 8 ECHR.
19. I am mindful of the Court of Appeal decision above and I am always reminded by the respondent's representatives that if a person met the Immigration Rules then they should be granted entry clearance.
20. I do not have the power to allow this appeal under the Immigration Rules but I am satisfied that there is family life in existence between the appellant, sponsor and their child that would engage article 8 ECHR.
21. I accept the appellant satisfied the English language requirements for the purposes of entry clearance and that he and the sponsor meet the financial requirements of Appendix FM of the Immigration Rules.
22. There are no adverse factors under section 117B of the 2002 Act. The fact the Immigration Rules are accepted as being satisfied is positively determinative of the article 8 claim.

DECISION

23. There is an error in law and I set aside the decision. I remake the decision and allow the appeal under article 8 ECHR.

Signed

Date 25/07/2018



Deputy Upper Tribunal Judge Alis