



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

Appeal Number: IA/13926/2014

THE IMMIGRATION ACTS

**Heard at Glasgow
On 8th September 2014**

**Determination Promulgated
On 17th September 2014**

Before

UPPER TRIBUNAL JUDGE COKER

Between

**N B
(anonymity order made)**

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Bryce, counsel, instructed by Morton Fraser
For the Respondent: Mr M Mathews, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant appeals a decision of a First-tier Tribunal judge who dismissed an appeal against a decision of the Secretary of State dated 27th February 2014 refusing to vary his leave to remain and to remove him in accordance with s47 Immigration Asylum and Nationality Act 2006.

Background

2. The appellant is a Turkish National. He and his British Citizen wife married on 23rd December 2003. They lived together in Turkey since their marriage where their first child was born on 4th May 2007; he is a dual British/Turkish citizen. The appellant's wife (and the appellant) returned to the UK on various occasions to visit family and to provide support to other family members during the spouse's father's periods of illness and/or hospitalisation. In October 2012 the family entered the UK; the appellant left prior to expiry of his visit visa (mid March 2013) but his wife and the oldest child remained in the UK. She had decided that because of her father's deteriorating health and the health problems of one of her sister's and a nephew, she could not return to Turkey but that she would remain in the UK for the foreseeable future. The child was registered in and commenced school in the UK. She and the child went to Turkey to visit the appellant in June 2013 and returned a few weeks later because her nephew was seriously ill.
3. The appellant then returned to the UK, again as a visitor, with valid entry clearance on 14th August 2013. 6 days prior to expiry of the visit visa he made an application for leave to remain on a discretionary basis.

Error of law

4. Permission to appeal had been granted on the basis that it was arguable that the First-tier Tribunal had failed to give any or any adequate reasons for finding that the appellant did not meet the requirements of the Immigration Rules, in particular that paragraph EX.1 applied to the appellant and he met those requirements. Other grounds were argued and it does not appear from the grant of permission that the judge considered those other than to state that there was no merit in the argument that the judge should have given reasons for not accepting the filing of two unreported and redacted determinations.
5. The respondent had filed a Rule 24 response and the appellant a Rule 25 reply. Although the latter was out of time Mr Mathews did not object and I admitted it. Nor did Mr Mathews object to the amendment to the grounds seeking permission to appeal.
6. The grounds upon which I am to determine this appeal are thus, in essence, twofold:
 - (a) That the judge erred in law in failing to provide reasons for his finding that R-LTRP.1.1(d) with EX.1(a) did not apply; that EX.1 does apply and the appellant meets those criteria thus succeeding under the Rules.
 - (b) That the appeal falls to be allowed under Article 8.

The Immigration Rules and EX.1

7. The application by this appellant for leave to remain as a spouse was governed by R-LTRP of Appendix FM. This provides for two routes to a grant of leave to remain as the spouse of British Citizen. The first requires that the appellant

satisfy all of the eligibility requirements including financial and language. It was accepted that the appellant does not satisfy the financial requirements and, at the date of decision he did not meet the language certificate requirements although he now does. Although he did not give oral evidence it was very apparent, from his ability to follow the proceedings, that his standard of English was very high. The second route requires paragraph E-LTRP. 2.1 (a) to be construed so as to be subject to paragraph EX.1 and that therefore, because paragraph EX.1(a) applied, the appellant met the requisite criteria in the Immigration Rules.

8. The rules in so far as relevant to this appeal are as follows:

“Section R-LTRP: Requirements for limited leave to remain as a partner

R-LTRP.1.1. The requirements to be met for limited leave to remain as a partner are-

- (a) the applicant and their partner must be in the UK;
- (b) the applicant must have made a valid application for limited or indefinite leave to remain as a partner; and either
- (c) (i) the applicant must not fall for refusal under Section S-LTR: Suitability leave to remain; and
(ii) the applicant meets all of the requirements of Section E-LTRP: Eligibility for leave to remain as a partner; or
- (d) (i) the applicant must not fall for refusal under Section S-LTR: Suitability leave to remain; and
(ii) the applicant meets the requirements of paragraphs E-LTRP.1.2-1.12. and E-LTRP.2.1.;
and
(iii) paragraph EX.1 applies.

Relationship requirements

E-LTRP.1.2. The applicant's partner must be-

- (a) a British Citizen in the UK;
- (b) present and settled in the UK; or
- (c) in the UK with refugee leave or as a person with humanitarian protection.

E-LTRP.1.3. The applicant must be aged 18 or over at the date of application.

E-LTRP.1.4. The partner must be aged 18 or over at the date of application.

E-LTRP.1.5. The applicant and their partner must not be within the prohibited degree of relationship.

E-LTRP.1.6. The applicant and their partner must have met in person.

E-LTRP.1.7. The relationship between the applicant and their partner must be genuine and subsisting.

E-LTRP.1.8. If the applicant and partner are married or in a civil partnership it must be a valid marriage or civil partnership, as specified.

E-LTRP.1.9. Any previous relationship of the applicant or their partner must have broken down permanently, unless it is a relationship which falls within paragraph 278(i) of these Rules.

E-LTRP.1.10. The applicant and their partner must intend to live together permanently in the UK and, in any application for further leave to remain as a partner (except where the applicant is in

the UK as a fiancé(e) or proposed civil partner) and in any application for indefinite leave to remain as a partner, the applicant must provide evidence that, since entry clearance as a partner was granted under paragraph D-ECP1.1. or since the last grant of limited leave to remain as a partner, the applicant and their partner have lived together in the UK or there is good reason, consistent with a continuing intention to live together permanently in the UK, for any period in which they have not done so.

E-LTRP.1.11. If the applicant is in the UK with leave as a fiancé(e) or proposed civil partner and the marriage or civil partnership did not take place during that period of leave, there must be good reason why and evidence that it will take place within the next 6 months.

E-LTRP.1.12. The applicant's partner cannot be the applicant's fiancé(e) or proposed civil partner, unless the applicant was granted entry clearance as that person's fiancé(e) or proposed civil partner.

Immigration status requirements

E-LTRP.2.1. The applicant must not be in the UK-

(a) as a visitor;

(b) with valid leave granted for a period of 6 months or less, unless that leave is as a fiancé(e) or proposed civil partner, or was granted pending the outcome of family court or divorce proceedings; or

(c) on temporary admission or temporary release (unless paragraph EX.1 applies).

E-LTRP.2.2. The applicant must not be in the UK in breach of immigration laws (disregarding any period of overstaying for a period of 28 days or less), unless paragraph EX.1 applies.

Section D-LTRP: Decision on application for limited leave to remain as a partner

D-LTRP.1.1. If the applicant meets the requirements in paragraph R-LTRP.1.1.(a) to (c) for limited leave to remain as a partner the applicant will be granted limited leave to remain for a period not exceeding 30 months, and subject to a condition of no recourse to public funds, and they will be eligible to apply for settlement after a continuous period of at least 60 months with such leave or in the UK with entry clearance as a partner under paragraph D-ECP1.1. (excluding in all cases any period of entry clearance or limited leave as a fiancé(e) or proposed civil partner); or, if paragraph E-LTRP.1.11. applies, the applicant will be granted limited leave for a period not exceeding 6 months and subject to a condition of no recourse to public funds and a prohibition on employment.

D-LTRP.1.2. If the applicant meets the requirements in paragraph R-LTRP.1.1.(a), (b) and (d) for limited leave to remain as a partner they will be granted leave to remain for a period not exceeding 30 months and subject to a condition of no recourse to public funds unless the Secretary of State deems such recourse to be appropriate, and they will be eligible to apply for settlement after a continuous period of at least 120 months with such leave, with limited leave as a partner under paragraph D-LTRP.1.1., or in the UK with entry clearance as a partner under paragraph D-ECP1.1. (excluding in all cases any period of entry clearance or limited leave as a fiancé(e) or proposed civil partner), or, if paragraph E-LTRP.1.11. applies, the applicant will be granted limited leave for a period not exceeding 6 months and subject to a condition of no recourse to public funds and a prohibition on employment.

D-LTRP.1.3. If the applicant does not meet the requirements for limited leave to remain as a partner the application will be refused.

Section EX: Exception

EX.1 This paragraph applies if

(a) (i) the applicant has a genuine and subsisting parental relationship with a child who-

(aa) is under the age of 18 years, or was under the age of 18 years when the

applicant was first granted leave on the basis that this paragraph applied;

(bb) is in the UK;

(cc) is a British Citizen or has lived in the UK continuously for at least the 7 years immediately preceding the date of application ;and

(ii) it would not be reasonable to expect the child to leave the UK; or

(b) the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen, settled in the UK or in the UK with refugee leave or humanitarian protection, and there are insurmountable obstacles to family life with that partner continuing outside the UK.”

9. Mr Bryce submitted that a failure to read EX.1 as applying to those in the country as visitors, privileges those who are overstayers or have never had lawful leave to be in the country over those who have. He submitted that paragraph E-LTRP.2.2 has not been broken into sub paragraphs and EX.1 applies to the whole of that paragraph; had there been an intention to distinguish E-LTRP.2.1 from E-LTRP.2.2 this would have been accomplished by unambiguous words inserted at the beginning of the paragraph. He called in aid the drafting history and referred to the guidance issued and to the most recent Rule changes pursuant to the Immigration Act 2014. Had there been no ambiguity, he submits, there would have been no need for such clarification.
10. Mr Mathews submits that there is no ambiguity; that there has been a long history prohibiting “switching” and the Rules merely reiterate that. He submitted that it was clear that the words “unless paragraph EX.1 applies” were specific to E-LTRP.2.1 (c) and not to (a).
11. This issue is not one that was considered in Sabir (Appendix FM – EX.1 not free standing) [2014] UKUT 63 (IAC) the italicized words of which are:
It is plain from the architecture of the Rules as regards partners that EX.1 is “parasitic” on the relevant Rule within Appendix FM that otherwise grants leave to remain. If EX.1 was intended to be a free- standing element some mechanism of identification would have been used. The structure of the Rules as presently drafted requires it to be a component part of the leave granting Rule. This is now made plain by the respondent’s guidance dated October 2013.
Although the appeal in Sabir related to a partner who had entered the UK as a visitor it was not submitted in that case that the words in question applied to (a) and the issue was thus not canvassed.
12. The Secretary of State is entitled to draft and publish Rules as she wishes. The history of the Rules has been an increasing reduction in the categories that enable switching. There has been no switching from short-term categories to those that require a more in depth analysis of an applicant’s finances and status for a number of years. One of the characteristics of entry as a visitor is that the applicant must intend to leave the UK on completion of the visit and, given the relatively short period of time that a person spends in the UK there is little need for a person to meet the more stringent requirements of maintenance as required in categories leading to settlement or more long term stay. Obviously this leads to some anomalies – if a person has overstayed by a very short period of time or a long period of time and makes an application they will be privileged in that they can take the benefit of EX.1. But those anomalies are anomalies that

exist because of the drafting; they do not render the drafting itself ambiguous or unclear.

13. The purpose of parentheses is to enclose information that clarifies the subject matter or as an aside. Paragraph 350 of HC 760 amends the previous version of the Rules. It plainly amends E-LTRP.2.1.(c). The words in parentheses remain as words following (c). Had there been any intention to amend (a) or (b) or for those words to be utilised to clarify or enclose information relevant to the subject matter of (a) or (b) then the words would have to be added to be seen to be relevant to the subject matter of those sections.
14. In conclusion therefore although the First-tier Tribunal judge failed to give any reasons for finding that EX.1 did not apply to this appellant, and that is an error of law, the finding itself is correct and thus the error is not such that the decision is set aside to be remade.

Article 8

15. Mr Bryce in a helpful Rule 25 response and in oral submissions relied upon the First-tier Tribunal judge's approach to what he termed the 'precariousness issue'. He explained this as drawn from Izuazu [2013] UKUT 00045 (IAC) where it was held that an important consideration was whether family life was created at a time when the persons involved "*were aware that the immigration status of one of them was such that the persistence of that family life within the host state would from the outset be precarious*". He submitted that throughout the period of time that the appellant's wife has been in Turkey (until the introduction of Appendix FM) it was open and foreseeable that had an application been made by him to come to the UK to settle then it would have been granted without any difficulty. He submitted that the appellant and his wife could not have foreseen the introduction of such restrictive criteria as in Appendix FM and nor could they have foreseen the deterioration in his father in law's health or the illness of his sister in law or the illness of his nephew; those factors were factors that led to the decision to relocate to the UK. Had those factors occurred earlier the appellant would have succeeded in an application to settle in the UK either immediately or after a 'probationary period'. The failure of the judge to take this into account as raising a good arguable case and thus enabling all other factors to be considered in addition in determining whether the appellant could succeed under Article 8 was an error of law such that the decision be set aside to be remade.
16. Mr Bryce acknowledged that without this finding, thus rendering it a good arguable case as required by MS (India) [2013] CSIH 52 then the other factors including the father in law's medical condition, the age of the oldest child, the birth of the youngest child, the evidence with regards to the wife's siblings were insufficient to found a successful Article 8 claim.
17. The Immigration Rules have over the years become increasingly restrictive in the requirements to be fulfilled by spouses/partners seeking to settle in the UK with their British Citizen or settled wives. Criteria as to maintenance and accommodation had to be met and those criteria have increased in specificity and restriction. There was no evidence before the First-tier Tribunal that the

appellant would have met such criteria at the dates of the relevant changes to the Immigration Rules and I am not satisfied that it can be said with such categorical assurance that had an application been made the appellant would inevitably have been granted entry clearance to settle. Although it is asserted that the family had every expectation of being able to come to the UK should the family circumstances change that is not accurate; they had an expectation that the appellant would be granted entry clearance if he met the Immigration Rules in force at the date of any decision. The Rules have changed on numerous occasions over the period of time that the family has been outside the UK. It cannot conceivably be argued that changes in the Rules could not be anticipated to impact upon them in some way or another.

18. It is trite law that a decision is taken in accordance with the Immigration Rules in force at the date of decision, absent transitional provisions. Even if it were the case that the introduction of Rules has adversely affected the chances of the appellant being granted entry clearance leading to settlement that does not and cannot result in the utilisation of Article 8 to circumvent the Immigration Rules. The First-tier Tribunal judge was correct in stating that it was foreseeable that the appellant's father in law would deteriorate in health over the years to come having had a stroke in 2000. Whilst it is correct to say that the appellant and his wife could not have foreseen the sister in law's illness or that of the nephew, these are matters that can occur in any family. The fact that such untoward matters occur with the resulting adverse impact on families cannot amount to a factor to, in effect, lead to a sustainable conclusion that the Rules that should be considered in Article 8 terms are those which are more favourable to the appellant had those events taken place at an earlier date. Nor does it lead to a sustainable argument that because the appellant may (although not would) have been able to apply successfully for entry clearance at an earlier date whereas today he cannot results in a good arguable case thus enabling full and detailed consideration of the claim under Article 8.
19. The consideration of whether there is a good arguable case in terms of MS (India) requires consideration of reasons put forward by the appellant that the circumstances are such that "refusal would result in unjustifiably harsh consequences for the individual such that refusal of the application would not be proportionate" ([28] of MS (India) quoting from the Secretary of States guidance) be disproportionate.) MS (India) goes on to conclude ([28]) that
- "in considering whether such circumstances have been demonstrated by an applicant, the criterion that should be used is that of a "good arguable case",... The decision maker should examine the circumstances put forward by the applicant and determine whether they disclose a good arguable case that the rules would produce an unfair or disproportionate result such that the applicant's Article 8 rights would be infringed. It is only if that test is satisfied that there is any need to go on to consider the application of Article 8 in detail."
20. Mr Bryce in his Rule 25 response makes clear ([2]) that the predicament the family found themselves in was not as a result of the deterioration of the father in law's health but rather the introduction of Appendix FM. Although that is clearly a predicament I do not accept that this is sufficient to find that there is a good arguable case.

21. I am satisfied that there is no error of law in the treatment by the First-tier Tribunal of Article 8.
22. I would also comment that the First-tier Tribunal judge appears to have considered the elements of the appellant's claim to remain in the UK under Article 8 in any event. Although some of the comments he makes as to the cost and availability of care may be speculative he notes that there was no evidence that the father in law would have to move into a care home if the appellant's wife were to leave the UK, that she was in any event working and it was the appellant who was visiting him and that she was not in receipt of carer's allowance. Although there were submissions that she would at some stage in the future be likely to be able to avail herself of that and that at that time the appellant would be eligible for entry clearance as a spouse that was not the issue to be determined by the judge at this hearing. The judge considered the sister and nephew's health problems and he considered the separation of the child from his father and that the child had been in Turkey, a country of which he is a citizen, for most of his life.
23. Although the decision was not one that all judges would have come to if they had considered the appeal as a "full blown Article 8 appeal", the decision reached was one to which the judge was entitled to reach on the evidence before him.
24. The introduction of s117 Immigration Act 2014 does now, of course, change the landscape in terms of matters that are to be taken into account and the weight to be placed upon particular circumstances. The Secretary of State may consider whether this impacts on this appellant.

Conclusions:

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law such that the decision is set aside to be remade.

I do not set aside the decision

Anonymity

The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

No representations having been made in relation to the continuance or otherwise of the order I continue that order (pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008).

Upper Tribunal Judge Coker

Date: 11th September 2014