



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/22125/2013

THE IMMIGRATION ACTS

Heard at Field House
On 4 December 2014

Determination Promulgated
On 12 December 2014

Before

THE HON. MRS JUSTICE CARR DBE
UPPER TRIBUNAL JUDGE MOULDEN

Between

MR ZAHEER AHMED
(No Anonymity Direction Made)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Randhawa a solicitor from Sky Solicitors
For the Respondent: Mr Hyde Jarvis a Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Pakistan who was born on 23 April 1982. He has been given permission to appeal the determination of First-Tier Tribunal Judge Callow ("the FTTJ") who dismissed his appeal against the respondent's decision of 21 May 2013 to refuse to grant him leave to remain in the UK as a Tier 4 (General) Student Migrant under the Points-based System and to give directions for his removal under section 47 of the Immigration and Asylum and Nationality Act 2006.

2. The appellant had been a student in the UK since 16 May 2009. He was last granted leave to remain in this capacity on 16 January 2012 for a period expiring on 1 June 2013. This leave was granted to enable him to undertake a course of study at London College of Business Management & Information Technology ("London College"). London College's Tier 4 licence was suspended by the respondent. The appellant enrolled on a course of study at Maryland College. On 3 April 2013 he applied for further leave to remain as a student to study at Queensbury College on a course leading to the award of a Diploma in Health Care Management.
3. The respondent considered the application and awarded the appellant the required 30 points for the Confirmation of Acceptance for Studies (CAS) and 10 points for Maintenance (Funds). However the application was refused for the following reasons

"Where a Tier 4 Student Migrant made a successful application for leave to remain on or after 5 October 2009, Section 50 of the Borders, Citizenship and Immigration Act 2009 prohibits that student from study other than at the institution that the Confirmation of Acceptance for Studies Checking Service records as the student's Sponsor. If you choose to study at another institution that holds a different sponsor licence number to the institution where you are granted leave to remain to study at, you must make a fresh application for leave to remain. If you switch to studying at a Tier 4 Sponsor that holds Highly Trusted status you may commence the course of study while you await the outcome of your fresh application, providing that application was submitted whilst you had extent leave to remain.

You were last granted leave based on a successful application made on 13 November 2011 for leave to remain as a Tier 4 (General) Student Migrant to study with London College of Business Management and IT until 1 June 2013.

In view of the fact that you have submitted evidence of studying a Postgraduate Diploma in Information System - Level 7 at Maryland College London from 23 January 2011 to 24 January 2013, the Secretary of State is not satisfied that you have complied with the conditions attached to your leave to remain.

Therefore you do not satisfy the requirements for this category and it has been decided to refuse your application for leave to remain as a Tier 4 (General) Student Migrant under paragraph 322(3) with reference to 245ZY(c)(iv) of the Immigration Rules".

4. The appellant appealed and the FTTJ heard his appeal on 24 March and 26 June 2014. Both parties were represented, the appellant by Mr Randhawa who appears before us. At the first hearing the FTTJ refused to admit a s120 Statement of Additional Grounds in which the appellant made the additional

claim for leave to remain as the spouse of his wife and sponsor Bahar Rasool. However, having heard submissions and reserved his determination the FTTJ reconsidered the application and then reconvened the hearing. At the adjourned hearing he admitted a Statement of Additional Grounds by which the appellant claimed leave to remain in the UK as the spouse of his sponsor under the provisions of Appendix FM of the Immigration Rules.

5. The FTTJ heard evidence from the appellant and his wife. After hearing submissions he reserved his determination.
6. In relation to the student appeal the FTTJ found that with effect from 1 October 2009 the Rules were amended so that under paragraph 245ZY(c)(1) students were restricted to studying at their sponsoring institutions. Any student who wanted to do anything more than “supplementary study” at a different institution had to apply to vary their leave. Failure to do so would amount to failure to comply with a condition attached to the grant of leave to enter or remain and would normally lead to refusal under paragraph 322(3).
7. The FTTJ found that the appellant was ignorant of this provision and failed to make an application to study at Maryland College. He should have made an application vary his leave to remain once he stopped studying at London College and decided to study at Maryland College. In these circumstances he was not entitled to rely on the respondent’s evidential flexibility policy which related to errors or omissions in specified documents. The FTTJ found that there was no common-law duty of fairness which required the respondent to inform the appellant.
8. The FTTJ dismissed the student appeal under the Immigration Rules. He went on to consider the appellant’s Article 8 private life claim. The appellant did not meet any of the requirements of paragraph 276ADE(1) and there were no arguably good grounds for granting leave on the basis of compelling circumstances not sufficiently recognised under the Rules. However, in case he was mistaken in that conclusion, the FTTJ went on to address the Article 8 private life grounds outside the Rules, applying Razgar principles. He concluded that this Article 8 claim and appeal failed.
9. In relation to the claim for leave to remain as a spouse, the FTTJ addressed the financial requirements of the Rules. The appellant needed to show by way of specified evidence from the required sources that he had a gross annual income of at least £18,600 plus another £3800 for the first child. It was common ground that as the appellant had a wife and stepchild he needed to show a gross income of at least £22,400 and at best he had shown that he had £18,370.
10. The FTTJ considered the Article 8 human rights requirements of Appendix FM. The appellant had to show that he met the requirements at the date of the application. The FTTJ found that the date of application was 18 March 2014 which was the date of the appellant’s first Statement of Additional Grounds for leave to remain as a spouse. He did not meet the requirements of E-ECP.3.1

because his income and that of his spouse fell short of the required £22,400 by £4030. It had not been argued that the provisions of EX.1. (a) or (b) applied.

11. The FTTJ found that there were contact proceedings in the Family Division of the High Court between the appellant's wife and her former husband relating to their daughter (the appellant's stepdaughter) which meant that if the appellant was removed from the UK his wife and stepdaughter would not be able to accompany him. The FTTJ considered the opinions of the House of Lords in Chikwamba [2008] UKHL 40 and other authorities before concluding that the appellant could be required to return to Pakistan to make an entry clearance application. To do so would not simply be a matter of policy but a reflection that the appellant's student application had failed and he did not meet the financial requirements of the Rules for leave to remain as a spouse. There would be a public interest purpose in discouraging others from circumventing the entry clearance requirements and system.
12. The FTTJ dismissed the appeals.
13. The appellant applied for and was granted permission to appeal. It is submitted that there are material errors of law.
14. Firstly, the FTTJ erred in law by finding that the appellant was required to make an application to study with Maryland College because he had not stopped studying with London College. He had continued to study with London College even though its licence had been suspended. His studies with London College were an "extra/supplementary course". When, by March 2013, the Tier 4 licence of London College had not been reinstated or revoked the appellant decided to change his sponsor in order to pursue a course of studies at Queensbury College.
15. Secondly, the FTTJ misinterpreted the financial requirements of Appendix FM. Because the appellant had a stepchild who was a British citizen she did not fall within the definition of a "child" in E-LTPR 3.1. The appellant did not have to establish that he had an additional £3800. All that he had to show was £18,600.
16. Thirdly, the FTTJ miscalculated the gross annual income required in the light of the documentary evidence submitted by the appellant. The decision was based on the P60s showing the appellant's annual income to be £11,500 and his wife's to be £6870. Under paragraph 13 of Appendix FM-SE as his wife had been in employment for more than six months with her current employer her annual income should have been calculated on the basis of her average monthly salary over the last six months. The appellant received a salary of £6500 in the six months between September 2013 and February 2014 which equated to £13,000 per annum. His wife received a salary of £4940 in the six months between September 2013 and February 2014 which equated to £9880 per annum. Between them they had shown a gross annual income of £22,800. The FTTJ also erred by assuming that section 85A(4) applied. The application for leave to remain under Appendix FM was not governed by the Points Based System.

17. Fourthly, the FTTJ erred in law in paragraph 35 by stating that it had not been argued or shown that EX.1(b) of Appendix FM applied in the light of the evidence as the family proceedings relating to the appellant's stepdaughter. The fact that the stepdaughter could not leave the UK meant that there were insurmountable obstacles to the appellant and his wife continuing their family life outside the UK. The ground should have been considered under EX.1(b) of Appendix FM.
18. Fifthly, the FTTJ misdirected himself in his consideration of the principles in Chikwamba. There would be no circumvention of the entry clearance system where the appellant, as a Tier 4 Migrant was entitled to switch and apply for leave as a spouse whilst in the UK.
19. Mr Randhawa relied on the grounds of appeal. In reply to our question he accepted that there was no evidence from the appellant as to how much time he spent studying at Maryland College. He submitted that the appellant had gone on studying full-time at London College whilst doing an "extra" course at Maryland College.
20. Following a discussion between Mr Randhawa and Mr Jarvis in relation to the second ground of appeal, Mr Jarvis accepted that because the appellant had a stepchild who was a British citizen she did not fall within the definition of a "child" in E-LTPR 3.1. The appellant did not have to establish that he had an additional £3800. All that he had to show was £18,600.
21. Mr Randhawa accepted that the FTTJ reached the correct conclusion in paragraph 37 "that should the appellant be removed from the UK his wife and stepchild will be unable to accompany him" but not the route by which he arrived at it. Perhaps surprisingly in the light of the fifth ground of appeal is submitted that Chikwamba was irrelevant.
22. Mr Jarvis submitted that in considering whether there were errors of law we needed to take into account how the appeal was put to the FTTJ. Mr Randhawa was making submissions both as a representative and a witness. This was not permissible. Allegations as to what was put to the FTTJ at the hearing should have been included in the grounds of appeal, a request made for the FTTJ's record of proceedings and the opportunity given to the FTTJ to comment on the allegations. None of this had been done. The FTTJ had to deal with the case as it was put to him. The grounds of appeal which fell foul of this procedural irregularity were those relating to the financial threshold, paragraph 7(d) and EX1 (a) and (b) in paragraph 35.
23. In relation to the first ground of appeal, Mr Jarvis submitted that the appellant's evidence as to what colleges he attended and when was unclear. Neither the evidence before the FTT nor the submissions made to him showed that the appellant's attendance at Maryland College came within the required exception.

24. As to the second ground, Mr Jarvis accepted that because the appellant had a stepchild who was a British citizen she did not fall within the definition of a "child" in E-LTPR 3.1. The appellant did not have to establish that he had an additional £3800. All that he had to show was £18,600. However, this was not a point put to the FTTJ.
25. The point raised in the third ground of appeal as to taking the average of the lowest monthly salary over a six-month period had not been put to the FTTJ. One of the issues in relation to this basis of calculation was to decide the date of the application as the starting point for calculating the six-month period. No marriage application had been made to the respondent and it was raised for the first time before the FTTJ. In these circumstances it was not clear what the starting date was. However, the appellant failed in any event because he had failed to provide the required letters from the employers, the contracts of employment or the linked bank statements. The evidence in the appellant's bundle did not comply with these requirements.
26. As to the fourth ground, EX1 was not freestanding provision. There were a number of possible routes into it none of which were argued before the FTTJ. All the requirements had to be met and it was not suggested to the FTTJ that this had been done. EX1 only came into effect under R-LTPR d (1) (iii). Even if the appellant managed to get this far it had not been argued that there was a genuine and subsisting parental relationship.
27. In relation to the fifth ground, the FTTJ relied on Chikwamba which favoured the appellant. This was a case where the maintenance requirements were not met and EX1 was not argued.
28. In reply Mr Randhawa drew attention to paragraph 7 of the determination in which the FTTJ set out the appellant's case. He accepted that the P60s showed an income of less than £18,600 and that no employer's letter or contract of employment had been submitted. These were now available but post-dated the hearing before the FTTJ. In reply to our question, Mr Randhawa accepted that the EX1 point was not put to the FTTJ, although he suggested that this might have been deduced from what was said in the witness statements. It would be unduly harsh to expect the appellant to leave the UK.
29. We reserved our determination.
30. A major difficulty facing the appellant is that the case variously set out in the grounds of appeal to the Upper Tribunal or argued before us differs in a number of important respects from the case put to the FTTJ. The course of action which those representing the appellant should have followed if they considered that the determination did not properly record the submissions made to the FTTJ, the concessions made or facts agreed was to spell these out in detail in the grounds of appeal to the Upper Tribunal, ask that these be put to the FTTJ for his comments and also ask that he produce a legible/typed record of proceedings. This would also have given the respondent the opportunity to

produce any notes prepared by her counsel at the hearing. None of this was done.

31. We find that the FTTJ could not have erred in law in relation to any legal argument not put to him either in writing or oral submissions, any concession subsequently withdrawn or any evidence of which he was unaware. The only possible exception would be in relation to a matter so obvious that it should not have been overlooked. In an appeal such as this, addressing extremely complicated provisions, we can find no element which comes within this category.
32. In relation to the first ground of appeal relating to the appellant's possible concurrent studies the FTTJ found, in paragraphs 4 and 6(b), that the appellant did not pursue his course of studies at London College because the College's Tier 4 licence was suspended by the respondent. As a result he enrolled on a comparable course of study at Maryland College which he successfully completed. In his witness statement dated 18 March 2014 the appellant referred to "parallel" studies but did not say that he continued with the full course at London College. The grounds of appeal to the Upper Tribunal submit that the appellant never stopped studying at London College and that the course at Maryland College was an "extra/supplementary course". This ground fails to identify any material error of law. The argument that the appellant was entitled to benefit from the provision in paragraph 313 of the Tier 4 policy guidance was never put to the FTTJ. Even if it had been the evidence before the FTTJ would not have established that the studies at Maryland College were an "extra" course which did not get in the way of his continuing studies at London College. Even now the evidence before us does not show this. There are bare assertions in the grounds of appeal unsupported by any further witness statement or documentary evidence from the appellant covering, for example, the hours and regularity of the two courses which he claimed to have attended during the same period and how he managed to do this.
33. The ground of appeal that the FTTJ misinterpreted the financial requirements of Appendix FM because the appellant had a stepchild who was a British citizen who thus did not fall within the definition of a "child" in E-LTPR 3.1 and accordingly the appellant did not have to establish that he had an additional £3800 was not put to the FTTJ. It is not an obvious point. However, Mr Jarvis now concedes that this is correct.
34. The argument that the FTTJ should have calculated the income of the appellant and his wife on the basis of six-month average income based on the lowest monthly pay in the six months preceding the date of application rather than on the basis of their P60s was not one relied on or even suggested to the FTTJ. On the contrary, the FTTJ recorded in paragraph 7(d) that "Mr Randhawa acknowledged that the P60s showed gross income lower than £18,600 but that the appellant should nonetheless be granted leave to remain as a spouse under the Rules failing which, as the appellant clearly established family life, his appeal should be allowed under Article 8". In paragraph 32 the FTTJ said "It is

common cause in this appeal that the appellant (as he has a stepchild in addition to his wife) is required to show a specified gross annual income of at least £22,400, and that at best the party's annual income amounts to only £18,370".

35. Even if the point had been argued before the FTTJ and even if the appellant had been able to establish that the six months' payslips showed the correct amounts during the required period the appellant would have failed because under Appendix FM-SE and in relation to salaried employment in the UK he was required to provide letters from the employers and signed contracts of employment. Mr Randhawa concedes that these were not before the FTTJ and were not available at that time.
36. In relation to the fourth ground which submits that the FTTJ erred in law in paragraph 35 by stating that it had not been argued or shown that EX.1(b) of Appendix FM applied in the light of the evidence as the family proceedings relating to the appellant's stepdaughter we find that the FTTJ was correct to say that the point had not been argued. We agree with Mr Jarvis's submission that EX1 is not a freestanding provision. It is complicated and there are a number of possible alternative routes into it, in this case through section R-LTPR. The appellant did not put forward any argument that these provisions were met and even now there are no detailed submissions as to how the provisions might be satisfied.
37. We find no error in the FTTJ's consideration of the principles in Chikwamba. On the authorities to which he referred it was open to him to find that the application of the principles depended on an assessment of the particular facts. This was not a case where the appellant would be required to return to Pakistan merely in order to satisfy policy requirements but where he had failed both in his appeal for leave to remain as a student and for leave to remain as a spouse.
38. The FTTJ did not make an anonymity direction. We have not been asked to make such a direction and can see no good reason to do so.
39. We find that the FTTJ did not err in law and we uphold his determination.

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Signed

Date 10 December 2014

Upper Tribunal Judge Moulden