



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

Appeal Number: OA/02678/2013

THE IMMIGRATION ACTS

Heard at Field House

**Determination
Promulgated**

On 9th September 2014

On 15th September 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE DAVIDGE

Between

KAMRAN ZAFAR

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr C Yaqub, instructed by Yaqub & Co Solicitors

For the Respondent: Mr P Nath, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant appeals with permission a decision of First-tier Tribunal Judge Moore promulgated on 1st May 2014 in which the judge dismissed the Appellant's appeal against the refusal of a spousal entry clearance on the basis that the Appellant failed to meet the requirements of the Immigration Rules at paragraph 281 HC 395 because the evidence submitted prior to the decision, as opposed to subsequently, did not establish that the Sponsor was free to marry the Appellant. Further the judge found that, it being accepted that the requirement to provide an

English language certificate to a specified level applied to the Appellant, he had not obtained the same.

2. The Appellant was granted permission on grounds that assert that the judge could and should have taken into account postdecision evidence establishing that in fact she was free to marry the Appellant, so that the marriage was valid, and further, that the judge should have accepted that the post evidence decision of the Appellant obtaining the requisite certificate on 22 April 2013 was sufficient to establish the position as at the date of decision.
3. In addition the grounds asserted error in terms of Article 8 ECHR because even though not raised in the appeal grounds the judge knew that the Appellant, who was unrepresented before the First-tier Tribunal Judge, had travelled to Pakistan following the refusal in December 2012, and had subsequently, on 8th February 2014, given birth to a daughter. The grounds aver the judge should have taken it on himself to decide whether or not the decision affected the best interests of the child, and have conducted an Article 8 ECHR assessment to the point that if he had done so a proportionality exercise may have resulted in a decision favourable to the Appellant.
4. The Sponsor attended to support her husband's appeal. The hearing proceeded on the basis of submissions. Mr Yaqub relied on the grounds of the application for permission and the grant based on the same. He addressed me at length to the point that postdecision evidence going to establish facts as at the date of decision could be admitted to establish the relevant factual matrix. In the context of Article 8 the Sponsor's position now was that she was unable to support a fresh application for entry clearance because of an inability currently to meet the maintenance requirements. As a result the refusal resulted in unduly harsh consequences for her.
5. Mr Nath referred me to the Respondent's Rule 24 response pointing out that the Appellant did not have a relevant English language test certificate at the date of the immigration decision and accordingly could not satisfy the Immigration Rules.
6. In response to my seeking to clarify the issues Mr Nath conceded that the judge could, as the grounds assert, have taken into account when considering HC 395 paragraph 281 provisions as to the validity and subsistence of the marriage taken into account the late produced evidence in respect of the Sponsor's ability to marry the Appellant, in the context of the admissibility of late evidence going to established facts and existence as at the date of decision, but submitted that the failure to do was not material in light of the justified dismissal on the alternative other Rules based grounds .
7. In respect of Article 8 Mr Nath reminded me the Appellant had raised no Article 8 grounds in the Grounds of Appeal, and, relying on the case of

Sarkar v SSHD [2014] EWCA Civ 195 submitted the failure of the judge to address Article 8 is not an error of law. Alternatively even if he should have considered Article 8 there was no material error of law in the absence of evidence as to any unjustifiable harshness as at the date of decision in requiring the Appellant to make a new application.

8. I find that the judge's decision in respect of the English Language requirement to possess a test certificate issued by an approved provider and to a relevant standard as at the date of decision, in this case 3rd December 2012, cannot be met by the provision of a test certificate subsequently awarded. The relevant date for assessment in out of country entry clearance applications is the date of decision, i.e. 3rd December, and the requirement for the possession of a certificate cannot intelligently be answered by evidence that they did not possess it at that date but have it now. In this regard Mr Yaqub's submission to the point that because the certificate was awarded on 22nd February 2013 there was merit in the Appellant's assertion that he had established on a balance of probabilities that he had the requisite level of skill to have been able to pass a test as at the date of decision is of no avail. Any error in the position concerning the failure to consider the post decision evidence about the sponsor's ability to enter into marriage is not material because the appeal would in any event be dismissed on English Language grounds.
9. In respect of the challenge brought on Article 8 grounds: this is not a case where a judge has failed to deal with a Ground of Appeal. The Grounds of Appeal only encompass issues relating to the refusal under paragraph 281. I am satisfied that there is no merit in Mr Yaqub's efforts to assert a Robinson obvious point in favour of the Appellant. There was no evidence adduced in support of the Appellant's appeal capable of supporting the findings of fact necessary to enable an Article 8 ECHR ground to succeed in the context of a failure to meet the Immigration Rule. Mr Yaqub prays in aid changes in the Appellant's circumstances and in particular an assertion that the Sponsor would no longer be able to provide the necessary evidence to meet the financial requirements of the Rule. There was no evidence before the judge relating to that issue. The mere fact that the Appellant and his Sponsor had had a baby falls far short of evidence required to establish significant merit in an Article 8 case so as to establish a Robinson obvious point, and in any event overlooks the position that the assessment is made as at the date of refusal. On the facts here the Appellant at that date had yet to make the trip to see her husband which resulted in the pregnancy. The proportionality issue as at the date of refusal was in any event answered by the availability of a fresh application. Mr Yacub's efforts to equate his apparent sympathy for the Sponsor, in the context of her current inability to meet the financial requirements of the rule, with an error of law made by the judge, are misconceived.
10. I dismiss the Appellant's appeal. The decision of the First-tier Tribunal dismissing the Appellant's appeal reveals no material error of law requiring it to be set aside and it stands.

Signed

Date

Deputy Upper Tribunal Judge Davidge