



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/02990/2013

THE IMMIGRATION ACTS

Heard at Field House
On 17 July 2014

Determination Promulgated
On 23 July 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE MCWILLIAM

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR JOHNNY CASSEL CHAMBERS

Respondent

Representation:

For the Appellant: Mr T Melvin, a Home Office Presenting Officer
For the Respondent: Not represented

DETERMINATION AND REASONS

1. The respondent Johnny Cassel Chambers, whom I shall refer to as the appellant as he was before the First-tier Tribunal, is a citizen of Jamaica and his date of birth is 22 April 1966. He made an application to enter the UK as a partner and the applicant was refused by the ECO in Kingston on 7 December 2012. The application was refused solely on maintenance grounds. It was not accepted that the appellant's

partner's, Anne Marie Fayne, income was sufficient to meet the requirements of the Immigration Rules.

The Background

2. The appellant appealed and his appeal was allowed by Judge of the FtT Woodhouse in a determination which was promulgated on 16 April 2014 following a hearing on 18 March 2014. The Secretary of State made an application for permission to appeal and this was granted by Judge Hollingsworth in a decision of 23 May 2014. The grounds seeking leave to appeal assert that the FtT made a material misdirection in finding that there were compelling circumstances and yet failing to identify what these are. It is argued that the Judge did not adequately reason why the circumstances were exceptional or why the decision was unjustifiably harsh.
3. I heard oral submissions from Mr T Melvin. The appellant's representatives did not attend the hearing before me and nor did the sponsor. The findings of the FtT are contained within paragraphs 45 to 56 and read as follows:

- "45. In addressing the appellant's case I note that the decision to refuse his application was taken on 7 December 2012. It was based solely on the sponsor's financial circumstances. The respondent accepted all other aspects of the appellant's case. The relationship was accepted as genuine and subsisting as was the adequacy of the accommodation.
46. The respondent acknowledged that the sponsor was employed, that she had savings and the prospect that she had provided for her old age by establishing a pension plan with both Scottish Widow and with Equitable Life all of which she had provided for from her own income. She had her own property in London which was of some significant value.
47. There was no doubt therefore on the respondent's part the sponsor was someone who was financially sound but not sound enough to have income at the date of decision of £18,600. The shortfall could not be overcome because the calculations set out in the Rules require the figure for savings in excess of the £19,000 available to this appellant.
48. The pension provisions recorded as available in 2014 have now been revised to May 2016. I accept that this was an unintentional error on the sponsor's part. However the evidence before me which I saw no reason to doubt was that £33,000 in cash would be available to the sponsor when she reaches the age of 55 in two years' time.

Conclusion

49. Although the appellant's representatives made valiant efforts to address the shortfall to which the respondent refer, reducing it I accept to the sum of £307, it is not disputed that the shortfall remains. Therefore the

appellant is unable to comply with paragraph EC-P.1.1.(d) of Appendix FM of the Immigration Rules.

50. However I then went on to consider whether under the Rules there are any compelling circumstances that I am required to consider.
51. In addressing these circumstances I accept that the parties to this relationship are in middle age. This is a late marriage and a genuine relationship the respondent accepts.
52. The original application was made in October 2012. In an interview with the ECO on 7 December 2012 the sponsor stated that the marriage was intended for June/July 2013.
53. However despite a prompt decision by the ECO a delay then ensued in the review of this appeal. There was a very substantial delay subsequently to list this before this appeal before the Tribunal which resulted in a further delay of nine months.
54. In the period that elapsed since the application was made the sponsor's employment situation has improved substantially. Details of her CareTech employment were produced at the hearing. They were not disputed by Mr Lenanton. Her employment was confirmed that since June 2013 she has now completed her provisional employment and is now on the permanent staff with an income in excess of £20,000. She continues to have her savings. Before me she stated and I accept that she has a house in London which she had conservatively valued at £250,000. Her neighbour is seeking to sell a similar house for £330,000. House prices in London are increasing at a very considerable rate. I have no reason to doubt that such was the case. I also note that this property is free of mortgage.
55. The sponsor has arranged her finances so that she has a prospect of retiring at the age of 55 in two years' time. She is not therefore a person scrapping around for funds. She is quite clearly highly regarded as an employee and financially sound, able to provide very well indeed for this appellant upon his arrival.
56. While the Presenting Officer maintains that another application should be made setting out the sponsor's present employment and her financial increments so as to comply with Appendix FM of the Rules I can see no reason why this couple should be obliged to do so. They have waited patiently for a decision so as to embark upon their marriage in their late years. They have spent a period of eighteen months waiting an opportunity to have their case heard. In all the circumstances of this case I conclude that they should not now be required to go back to the beginning again to make a further application and on this basis I found that there are compelling reasons why this appeal should be allowed."

Error of Law

4. The FtT erred in allowing the appeal under the rules. It is contrary to the findings at [49] and it is clear that the appellant could not meet the maintenance requirements of rules. However, in my view, the FtT intended to allow the appeal under Article 8 and this was conceded by Mr Melvin. The FtT found that there were compelling circumstances. The issue is whether the decision (to allow the appeal under Article 8) is lawful and sustainable. The reasons the FtT gave for finding compelling circumstances are that the parties are in middle age and their relationship is genuine. In addition there had been a delay in considering the application and the British citizen sponsor, at the date of the hearing, was found to earn sufficient funds in order to satisfy the rules. (She has savings, a pension and considerable equity in her home).
5. This is an application for leave to enter as opposed to leave to remain and EX.1. of the rules does not apply. However, it is still incumbent on the FtT to decide whether or not there is a further Article 8 claim. It is not necessary to use the words “exceptional” or “compelling” to describe the circumstances as long as that can be said from the substance of the decision. In my view, the FtT did not identify sufficiently compelling circumstances to grant leave outside the rules. There was no weight attached to the fact that the appellant was not able to meet the requirement of the rules and the legitimate aim (in this case which is the economic well-being of the country through the maintenance of immigration control). In addition the Judge attached weight to the fact that the appellant could, at the date of the hearing, meet the rules whilst because this is an entry clearance decision, it is the circumstances pertaining at the date of the decision and not the hearing which the Judge should have considered. In my view the reference to compelling circumstances was a reference to post-decision evidence and the application of the impermissible “near miss” test. This is a material error and I set aside the decision pursuant to Section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 (“the 2007 Act”) I remake the decision pursuant to Section 12(2)(b)(ii) of the 2007 Act. There was no further evidence relied on by either party.
6. The appellant cannot satisfy the rules and the issue is whether there is a further Article 8 claim. The application is for the appellant to join his partner here in the UK and there is an article 8 claim. The first three questions in the guidance in **Razgar, R (on the Application of) v. SSHD [2004] UKHL 27** should be answered in the affirmative. The decision in my view is necessary in the interests of the economic wellbeing of the country (the maintenance of immigration control).
7. The appellant cannot satisfy the rules. I accept that the appellant and the sponsor are now (at least at the date of the hearing before the FtT) self-supporting. The maintenance requirement of the rules is not disproportionate in this case and there are no exceptional or compelling circumstances. The delay by the ECM in reviewing the decision of the ECO does not in my view amount to compelling circumstances. The decision to refuse the application is proportionate, lawful and sustainable.

8. In the light of the fact that the appellant did not attend the hearing before me, it may be that he has decided to make a further application for entry clearance on the basis of his partner's present salary.

The Decision

9. The appeal is dismissed under the Immigration Rules.
10. The appeal is dismissed under Article 8 of the 1950 Convention on Human Rights.

Signed Joanna McWilliam

Date 21 July 2014

Deputy Upper Tribunal Judge McWilliam