



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: OA/10343/2013

THE IMMIGRATION ACTS

Heard at Field House
On 20 May 2014

Determination Promulgated
On 17 July 2014

Before

UPPER TRIBUNAL JUDGE PITT

Between

ENTRY CLEARANCE OFFICER - MANILA

Appellant

and

HUI ZOE FU

Respondent

Representation:

For the Appellant: Mr P Nath
For the Respondent: Mr P Turner

REFUSAL TO ADMIT APPLICATION TO APPEAL TO THE UPPER TRIBUNAL

and

UPPER TRIBUNAL DETERMINATION AND REASONS

The Appeal

1. This is an appeal by the Entry Clearance Officer against a determination promulgated on 7 March 2014 of First-tier Tribunal Judge N J Osborne which allowed the Article 8 appeal of the respondent.

2. For the purposes of this determination, I refer to Hui Zoe Fu as the claimant and to the Entry Clearance Officer as the respondent, reflecting their positions as they were before the First-tier Tribunal.

Background

3. The claimant is a Chinese national born on 22 January 1976 who applied for entry clearance to join her British husband, Dr Brian Wilshire, the sponsor.
4. The application was refused on 10 April 2013. The respondent did not accept that the marriage was genuine or that the financial requirements were met.
5. It was common ground before me that the first reason for refusal was not correct, Judge Osborne having found the marriage to be entirely genuine and subsisting and that finding not being subject to any challenge.
6. As indicated in the refusal notice, the financial evidence originally submitted comprised a copy of a letter to the sponsor from HMRC regarding his tax return and overpayment of tax and a tax assessment prepared by the sponsor stating his income to be £27,150.

The grounds of appeal to the First-tier Tribunal

7. The grounds of appeal to the First-tier Tribunal accepted that there were shortcomings in the financial evidence of the sponsor's income. Those grounds, which appear to have been drafted by the sponsor, addressed the shortcomings in the financial documentation, thus:

"We believe that this refusal was the result of a combination of mistakes on our part and also on the part of the ECO. We address this issue in bundles at #11 and 12, where we outline the mistakes in completing the form in detail.

However, the advice my wife received regarding the proof of my income was at odds with the advice that I received from the Home office by phone. I was assured that the proof of the PAYE income shown on an original Tax Calculation form from HMRC was sufficient proof IN ITSELF for visa purposes.

Since the exact figure was plainly stated on the Tax Calculation form, my wife apparently believed that an estimate on the form would suffice, which we now recognise was also a mistake. However, the official dealing with her must have been aware that there was incontrovertible proof in front of their eyes of my PAYE income, and they could surely have rendered my wife the proper assistance in completing the form rather than in effect setting her up to fail."

8. The grounds of appeal to the First-tier Tribunal were accompanied by additional evidence which was considered in a review by an Entry Clearance Manager on 25 September 2013. The bank statements and payslips that were submitted with the appeal covered the period April to June 2011, however, so still did not meet the documentary requirements of Appendix FM-SE.
9. The materials submitted with the appeal also included a document entitled "Additional Financial Information", also apparently drafted by the sponsor. This

accepts that “a few details” in the financial section of the application “may have escaped my attention”. It goes on to concede that some responsibility lay with the claimant and sponsor, thus:

“Due to an accidental misunderstanding between us this section of the application form was completed incorrectly. We acknowledge, and apologise for, this mistake. We now request that my PAYE income detailed below **and this income alone**, is considered as a means to prove that our income exceeds the threshold. We do not wish my small profit from self employment (£1,192) to be considered. We also do not wish for Zoe’s savings to be considered as this is not necessary according to the criteria as we understand them.”

The case put to the First-tier Tribunal

10. Further financial evidence showing the sponsor’s varied sources of income was submitted in support of the appeal to the First-tier Tribunal. It was considered at [10] of the determination. Judge Osborne accepted at [10(xi)] that the documentation before him showed an income in 2011/12 of £25,958.
11. He did not find that the Immigration Rules were met, however. Firstly, the additional bank statements provided for the appeal covered only the 5 month period prior to the application not the 6 month period as required. The wage slips provided also did not cover the required 6 month period. There was no letter from the employers who issued the payslips relied upon. The tax assessment form was based on information from the sponsor not from HMRC. These matters are set out at [10(xii) – (xvi)] of the First-tier Tribunal determination.
12. Judge Osborne then found no insurmountable obstacles to the sponsor exercising family life with the claimant outside the UK at [10(xv)] and at [11] refused the appeal under Appendix FM of the Immigration Rules. As above, however, he went on to allow the appeal after conducting a second stage Article 8 assessment and it is that decision that the Entry Clearance Office challenges now.

Application for Permission to Appeal to the First-tier Tribunal

13. At the hearing, I was informed that the claimant also wished to challenge the decision of Judge Osborne.
14. Mr Turner explained that on either 15 or 16 May 2014 he had faxed an application to the First-tier Tribunal for permission to appeal the decision of Judge Osborne to the Upper Tribunal. The challenge was against the decision under Appendix FM.
15. The Tribunal database confirmed that application as logged onto the system on 19 May 2014 and I accepted that there was an outstanding application before the First-tier Tribunal for permission to cross-appeal the decision of Judge Osborne to the Upper Tribunal.
16. Mr Turner submitted that I should make a decision on that application, sitting as First-tier Tribunal judge. I agreed to do so.

17. The first aspect of the application that I had to consider was whether to admit it as it was made over a month out of time. The decision of Judge Osborne was issued on 7 March 2014. The decision was served on the UK sponsor was named on the appeal forms as a representative. Allowing 2 days for deemed service, good service was took place on 9 March 2014. A period of 28 days is allowed for lodging an appeal when the claimant is not in the UK. The deadline for appealing was therefore 6 April 2014.
18. I should perhaps indicate that I had some hesitation as to whether the sponsor was formally eligible to be a representative in this matter but Mr Turner took no issue on that point and accepted at [7] of his grounds that the application was lodged late.
19. Rule 24(4) of the First-tier Tribunal Procedure Rules allows for the Tribunal to extend time for appealing if satisfied that by reason of special circumstances it would be unjust not to do so.
20. The reasons given at [7] of the grounds to explain the lateness of the application are somewhat difficult to follow as they state both that the sponsor “contacted Counsel for advice ... on 28 April 2014” but also that “an appointment was made for a conference on 2 April 2014”.
21. Be that as it may, the grounds go on to indicate that it became apparent during the conference, that:

“... the sponsor had as at the date of the decision all the relevant specified documentation required by the Immigration Rules. The sponsor provided all the relevant documentation on 15 May 2014 and these grounds were prepared on 15 May 2014.”
22. The grounds on timeliness go on at [8]:

“It is submitted that this is a case where there is a genuine relationship and a very strong case. It is submitted that the Secretary of State’s appeal is tainted by the telephone advice given by the Home Office to the sponsor where he was told that his tax assessment would suffice in respect of the required documentary evidence. In all the circumstances of this case it is submitted that time should be extended.”
23. I did not find the grounds and materials before me showed special circumstances such that I should extend time and admit the application for permission to appeal to the First-tier Tribunal.
24. Firstly, as above, the sponsor was served with the decision of the First-tier Tribunal on 9 March 2014. There is no explanation of the delay until either 2 April 2014 or 28 April 2014 in seeking legal advice or doing anything else about appealing the decision.
25. Secondly, there is no explanation as to why, if the sponsor received advice on either 2 April 2014 or 28 April 2014 that he had, after all, had in his possession all of the documents needed to show compliance with the Immigration Rules as of the date of the decision, the application for permission to appeal was not submitted until 15 May 2014.

26. Thirdly, the grounds seek to rely on the submission that the sponsor was materially misled by the Home Office who told him he only needed to provide his HMRC tax assessment.
27. If it was the sponsor's case that the decision as to which documents to provide with the entry clearance was made solely in reliance on incorrect information provided by the Home Office, this was a point that he could be expected to have made to the First-tier Tribunal judge.
28. That was not the case put to the First-tier Tribunal. The extracts above from the grounds and Additional Financial Information statement before the First-tier Tribunal statements show that the claimant and sponsor did not argue before the First-tier Tribunal that they had acted in sole reliance on information from the Home Office.
29. The grounds of appeal stated that the shortcomings in the financial documents arose "as a result of a combination of mistakes on our part and also on the part of the ECO", that the claimant had received other "advice" that was "at odds with the advice I received from the Home Office by phone", that the couple recognised that they had made "a mistake" in making assumptions about the probative value of the tax calculation form.
30. The Additional Financial Information statement indicated that "a few details" in the financial section of the application "may have escaped my attention" and that:

"Due to an accidental misunderstanding between us this section of the application form was completed incorrectly. We acknowledge, and apologise for, this mistake."
31. Fourthly, the grounds seek to suggest that the sponsor would be able to show that he had, finally, acquired all of the financial documents required by Appendix FM to show the necessary income. He has not done so. As set out by Judge Osborne at [10(vi)] of his decision, the letter from the employer had to show gross annual salary, the length of the employment, the period over which they had been paid at the level relied upon in the application and the type of employment (whether permanent, fixed term contract or agency). The letter dated 15 May 2014 from Worcestershire County Council at page 26 of the bundle submitted in support of the cross-appeal does not meet these requirements. It merely confirms the genuine nature of the wage slips from August 2012 to February 2013. There is also the matter of the requirement for a signed contract of employment which has also, even now, not been provided. The appeal as it stood before me, taking in account all of the evidence from the sponsor whenever submitted, could not succeed under the Immigration Rules, therefore.
32. Mr Turner's "strong" case for admitting the application in time relies on the argument that the claimant and sponsor were materially misled by the Home Office about the documents to be submitted and on the submission that all of the correct documents for the case to succeed under the Immigration Rules are now available. Neither argument has merit. It did not appear to me that a case for admitting the application which had been made over a month out of time without a reasonable explanation for that being so, was made out, therefore.

33. Mr Turner also referred me to the overriding objective in Rule 4 of The Asylum and Immigration Tribunal (Procedure) Rules 2005 which states that proceedings before the Tribunal should be “handled as fairly” as possible. It did not appear to me that, given the issues above, that fairness required me to admit the application for permission to appeal to the First-tier Tribunal as in time. I declined to do so.
34. For all of these reasons I found the application for permission to appeal to the First-tier Tribunal to be out of time and it was not admitted.

Error of Law

35. I then resumed sitting as an Upper Tribunal judge and considered the respondent’s error of law application for which permission was granted by the First-tier Tribunal on 16 April 2014. I heard argument from both parties.
36. As is clear from the discussion above, a number of the specified documents for evidencing the sponsor’s income were not provided to First-tier Tribunal Judge Osborne and the appeal under the substantive Immigration Rules contained in Appendix FM was therefore refused. Those findings stand.
37. Judge Osborne carried out a second stage Article 8 assessment at [12] to [20].
38. The respondent accepts that the First-tier Tribunal was entitled to proceed to that assessment following Gulshan (Article 8 – new rules – correct approach) [2013] UKUT 00640, R (Nagre) v SSHD [2013] EWHC 720 (Admin). The Entry Clearance Officer’s position is that Judge Osborne did not apply the correct test, that the claimant had to show “compelling” circumstances in order to succeed under Article 8 and that there were no such circumstances in this appeal.
39. The First-tier Tribunal’s reasoning on the second stage Article 8 assessment is at [17] to [20]. Judge Osborne found at [17] that even though the specified evidence had not been provided, the sponsor did earn over £18,600, the required income threshold. Judge Osborne also referred to MM and Others v SSHD [2013] EWHC 1900 (Admin) at [17] but I did not see the relevance of that case to the situation here where the issue was not the lawfulness of the required income threshold but the failure to provide specified documents.
40. At [18] weight is placed on the couple wishing to start a family, the claimant being 37 years old. At [19] the judge referred to the sponsor visiting the claimant prior to the hearing.
41. Those points are summarised at [20] and the Article 8 appeal allowed.
42. There is no reference at any point in the decision to the need for there to be compelling circumstances. The nearest the determination comes is at [12] where Judge Osborne refers to MF (Nigeria) v SSHD [2013] EWCA Civ 1192 but the reference to that case is to the general proposition that a second stage assessment can take place rather than the test to be used in that assessment.

43. I considered whether Judge Osborne had, nevertheless, identified in substance matters that were compelling, such that his decision to allow the Article 8 appeal was justified. It appeared to me that the only matter at all capable of being characterised was the wish of the couple to start a family at [18]. Judge Osborne does not describe this issue in terms that might suggest that he considered it to be compelling or exceptional, however. It did not appear to me that it could legitimately be considered to be a compelling factor where the entry clearance application here was decided in only 3 months, a new application being expected to take the same, relatively short amount of time.
44. There is the further issue of the proper role played by the Immigration Rules and failure to meet them in the proportionality assessment; see Haleemudeen v SSHD [2014] EWCA Civ 558. Here that failure is not weighed in the Article 8 second stage assessment at all.
45. It was my judgement that for these reasons the Article 8 assessment could not be read as having been properly conducted and therefore contained an error on a point of law such that it had to be re-made.

Re-Making

46. Having announced my decision on error of law, Mr Turner sought to persuade me to admit the evidence provided with the application for permission to appeal to the First-tier Tribunal and a written submission of the sponsor when re-making the application.
47. I considered his submission under the provisions of Rule 15 (2A) of the Upper Tribunal Procedure Rules. That Rule states that if a party wishes to the Upper Tribunal to consider evidence that was not before the First-tier Tribunal, notice should be given to the Tribunal and any other party indicating the nature of the evidence and explaining why it was not submitted to the First-tier Tribunal and when considering whether to admit the evidence the Upper Tribunal must have regard to whether there has been unreasonable delay in producing that evidence.
48. No notice was given of the materials on which Mr Turner sought to rely. There was no explanation of why those materials were not before the First-tier Tribunal other than that the claimant and sponsor had not been legally represented at that time.
49. Mr Turner also argued that the claimant and sponsor could not be expected to submit further evidence unless and until an error of law was found. On the contrary, the direction issued on 17 April 2014 specifically indicated to the parties that they should submit in advance any evidence on which they wished to rely in the event of any re-making.
50. Mr Turner sought support from the overriding objective set out in Rule 2 of the Upper Tribunal Procedure Rules for a case to be dealt with fairly and justly, relying in particular on the principles of flexibility, ensuring so far as practicable that parties are able to participate fully. It was not my view that where the materials were submitted only at the hearing itself without any notice to the Tribunal or respondent and could have been before the First-tier Tribunal but were not, even applying the

principles of the overriding objective to Rule 15 (2A), it was not appropriate to admit the new materials.

51. Mr Turner also sought to persuade me that I should hear oral evidence from the sponsor. Again, no notice of this intention was given prior to the hearing. No statement of evidence was provided prior to the hearing. It was also the case that the sponsor had not chosen to give evidence before the First-tier Tribunal, that decision being made on the papers. It was not clarified how any oral evidence added to the other evidence already before me. Also, the relevant date for assessing evidence in this entry clearance appeal is the date of decision which was April 2013 so it was not that any update was appropriate. I declined to hear oral evidence from the sponsor.
52. I proceeded to hear submissions from Mr Tuner and Mr Nath on the re-making of the Article 8 appeal.
53. There was no dispute as to the first four of the questions laid down in Razgar [2004] UKHL 27 being answered in the claimant's favour. This couple are in a genuine and subsisting marriage and have a family life together.
54. In the proportionality assessment, however, as in Haleemudeen, the failure to meet the Immigration Rules regarding the documentation required to show the sponsor's income is the starting point in the assessment of whether the decision can be considered to be disproportionate.
55. In order to outweigh that failure to meet the Immigration Rules, the claimant must show that there are compelling circumstances.
56. I accept that as of the date of the decision, the sponsor was earning around £25,000 so in excess of the minimum income requirement, and that, notwithstanding the failure to meet the Immigration Rules, the public finances would not have been prejudiced had the claimant come to join her husband. I accept that this shifts the balance back towards the claimant's side of the balance to some degree but did not consider that it could approach the threshold of compelling or exceptional circumstances.
57. I accept that the claimant and sponsor wish to start a family together and are anxious about this where the claimant is 37 years old. The respondent decided the application for entry clearance within 3 months, however. It was open to the claimant to reapply for entry clearance with the correct financial evidence and it did not appear to me that a period of 3 months could be considered to be a period of time that significantly impacted on the couple's wish and ability to have children.
58. I have indicated above why I find no force in the arguments concerning information given to the sponsor by the Home Office about his HMRC tax documents and do not find that they can attract weight to the claimant's side of the balance now.
59. Without more than the matters set out above, it was not my view that where the Immigration Rules were not met, this appeal showed compelling circumstances or a result that could be characterised as unduly harsh or disproportionate such that the second stage Article 8 assessment could succeed.

60. I dismissed the appeal under Article 8.


Decision sitting as a First-tier Tribunal Judge

16. I do not admit the application made by the claimant for permission to appeal against the decision of the First-tier Tribunal.

Decision sitting as an Upper Tribunal Judge

17. The decision of the First-tier Tribunal discloses an error on a point of law and is set aside.

18. I re-make the appeal, refusing it under Article 8 of the ECHR.

Signed: 
Upper Tribunal Judge Pitt

Date: 23 June 2014