



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/21047/2013

THE IMMIGRATION ACTS

Heard at Bradford
On 7th October 2014

Determination Promulgated
On 16th October 2014

Before

UPPER TRIBUNAL JUDGE D E TAYLOR

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

AMAL SHAWQI AHMED ZAWQARI

Respondent

Representation:

For the Appellant: Mrs R Pettersen, Home Office Presenting Officer

For the Respondent: Mr T Hussain of Counsel instructed by Morgan Dias Immigration Consultants Ltd.

DETERMINATION AND REASONS

1. This is the Secretary of State's appeal against the decision of Judge Smith made following a hearing at Bradford on 24th July 2014.

Background

2. The claimant is a citizen of Yemen born on 25th January 1983. She applied to come to the UK as the spouse of a British citizen but was refused on 22nd April 2014.

3. The original refusal, on 6th October 2013, was on the basis that, whilst the sponsor was exempt from meeting the requirements of paragraph E-ECP.3.1, as he was in receipt of carers allowance, the claimant had to show that there was evidence of suitable accommodation and that she and her sponsor could maintain and accommodate themselves and any dependants adequately in the UK without recourse to public funds, and on the basis that she was not exempt from the English language requirement and had not passed an English language test with a provider approved by UKBA.
4. After the Entry Clearance Officer's decision the claimant gave birth to a child who is a British citizen.
5. On 22nd April 2014 the application was reviewed. The Entry Clearance Officer said that he was satisfied that there was suitable accommodation available for the claimant and that she had passed an English language test at the required level with a provider approved by the Secretary of State. However he maintained the refusal because he was not satisfied on the basis of the bank statement evidence provided that the funds available to the claimant would be adequate for her maintenance. The application was therefore refused under paragraph EC-P.1.1(d) of Appendix FM of the Immigration Rules.
6. The sole issue before the judge therefore was whether the claimant had demonstrated that she was able to maintain herself and any dependant adequately.
7. The judge allowed the appeal on the basis that there had been a material error of law and remitted the case back to the Entry Clearance Officer with a direction that a decision be made as to whether Section EX.1 of Appendix FM of the Immigration Rules applies.
8. The Secretary of State appealed on the grounds that it was clear from Appendix FM EX.(1)(a)(b) that the provisions only apply to people living in the UK and cannot apply in entry clearance cases.
9. Permission to appeal was granted by Judge Campbell on 28th August 2014.

The Hearing

10. It was accepted by all parties that the judge had erred in law. It is clear from the wording of Section EX.1 that it only applies where the applicant has a genuine and subsisting parental relationship with a child who is in the UK.
11. Accordingly the judge erred in law and the decision needs to be re-made.

Submissions

12. Mr Hussain did not seek to argue that as at the date of the decision, the claimant met the requirements of the Immigration Rules. However since that time there had been a significant change in circumstances. Not only was there a British child, but the sponsor was now working. Since he was the full-time carer for his mother ,he could

only work sixteen hours a week but he now did have a job which paid £104 per week. A letter from his employer and contract of employment was provided.

13. There was however another difficulty. The claimant had taken her English language test with a provider which was no longer recognised by the Secretary of State. In order to re-take the test she would have to go to Egypt as there were no English testing facilities in the Yemen. The embassy there is closed. The child had no passport and could not travel with her. This application had been made in Abu Dhabi but the Emirates were no longer issuing visas to Yemeni citizens.
14. Mrs Pettersen made no further submissions save to observe that the sponsor's earnings now exceeded the amount of income support to which he would be entitled.

Findings and Conclusions

15. Mr Hussain did not put his case on the basis that, as at the date of decision, the rules were met. Nor did he seek to argue that the appeal could be allowed on the basis of postdecision evidence. He did however submit that that evidence should be taken into account when considering the claimant's Article 8 rights.
16. Clearly the birth of the child and the sponsor's recent employment were not circumstances appertaining as at the date of decision nor reasonably foreseeable to the Entry Clearance Officer and cannot avail the claimant in terms of the rules.
17. Family life is assumed between the British sponsor, his wife and his daughter. Refusal of entry clearance is an interference with their right to enjoy family life in any meaningful sense, but is lawful since the sponsor, as at the date of decision did not meet the requirements of the Immigration Rules, and in pursuit of a legitimate aim, namely the maintenance of immigration control.
18. The usual answer to an entry clearance claim, such as this, where the facts have changed since the date of decision, is that the claimant should make a re-application. However in this case, on the basis of the information given to me by the sponsor, and verifiable by the Entry Clearance Officer, it seems that there are significant obstacles to the claimant making such a re-application.
19. She cannot do so in the Yemen, nor in Abu Dhabi. Her previous English language certificate is not recognised and she would have to undertake a three month course and take an exam in Egypt. That would entail separation from her young daughter who is not able to travel out of the Yemen since she has no passport or travel document.
20. I am satisfied, that if such an application were to be made, since the sole issue is adequacy, on the basis of the present evidence, the rules could be met. The amount of money earned by the sponsor exceeds that which he would be entitled to receive on income support. He used to receive £45.25 per week in income support and now has an income of £104. Before he managed to gain employment his unchallenged evidence was that he was able to send approximately £35 to £50 per month to his wife and had saved money for his wife's air fare.

21. In Nagre (R on the application of) v SSHD [2013] EWHC 720 counsel for the Secretary of State accepted that it was possible to envisage cases where the Rules would not cover every conceivable case in which a foreign national might have a good claim for leave to remain under Article 8. It was acknowledged that there may be individual cases where there are –

“particularly compelling reasons arising from the specific circumstances why leave to remain should be granted under Article 8, even though there may not be insurmountable obstacles or barriers to family life continuing outside the UK, in the applicant’s country of origin.”

22. The extreme practical difficulties which the claimant faces in making another application for entry clearance is a compelling factor acknowledged by the Secretary of State in Nagre.
23. In this case there is a significant barrier to the sponsor joining his wife in the Yemen because he is the sole carer for his mother in the UK.
24. This is an application which, on its facts, would succeed and therefore the weight which the Secretary of State attached to the maintenance of proper immigration control is diminished.
25. In these circumstances refusal of entry clearance is disproportionate and the appeal is allowed on Article 8 grounds.

Decision

26. The original judge erred in law. His decision is set aside. It is re-made as follows. The appeal is dismissed under the Immigration Rules but allowed on Article 8 grounds.

Signed

Date

Upper Tribunal Judge Taylor