



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/23206/2012

THE IMMIGRATION ACTS

Heard at Field House
On 28th May 2014 by VIDEO LINK
with Sheldon Court Birmingham

Determination Promulgated
On 5th June 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE RIMINGTON

Between

Mrs Sumbal Sumbal
(NO Anonymity Direction Made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms A White instructed by J R Jones (Birmingham)
For the Respondent: Mr J Richards, Home Office Presenting Officer

DECISION AND REASONS

The Appellant

1. The application for permission to appeal was made by the Secretary of State although I will refer to the parties as they were described in the First Tier Tribunal.

2. The appellant is a citizen of Pakistan born on 6th January 1990 who applied on 28th September 2012 for leave to enter with a view to settlement as the spouse of Sayyar Mohammad, who is settled in the UK. The application was refused on 7th November 2012.
3. First Tier Tribunal Judge Pacey allowed the appeal under the Immigration Rules and allowed the appeal on human rights grounds.

Application for Permission to Appeal

4. An application for permission to appeal stated that the Immigration Rules set out the requirements to be satisfied in Appendix FM and Appendix FM -SE. It was argued the judge failed to follow these requirements. The evidence must demonstrate income 6 and 12 months prior to the date of application. The judge took into account evidence considerably after that date.
5. Further, as the sponsor's income could not be assessed in accordance with the Rules the findings with regards **MM and Others** [2013] EWHC 1900 (Admin), at paragraph 12, of the determination were not relevant to the case. As at the date of the application the income did not reach the threshold and the income for a couple with a child were more than that considered in **MM**.
6. Further the Tribunal assessment had erred in its assessment of the case.
7. An application for permission to appeal was granted by First Tier Tribunal Judge Kamara in the following terms

'the judge arguably erred in law in considering evidence which did not form part of the application'.

The Hearing

8. At the hearing Mr Richards essentially relied on the grounds of appeal.
9. Ms White submitted that there was no child born at the date of the decision of the Entry Clearance Officer and the judge had mistakenly assessed the facts as at the date of the hearing. The appellant did reach the threshold for income at the relevant time. The document missing was, the judge found, not important. The documents were found by the ECO to be genuine. Even if that were wrong it was necessary to look at Article 8. It was not an absolute requirement to set out the law and principles in relation to Article 8. The judge had essentially looked at the Immigration Rules and the Article 8 findings were good enough.
10. The matter was listed for an error of law hearing.

Conclusions

11. The appellant needed to show that the sponsor earned £18,600 per annum and to provide the relevant documentation. The fact is that the judge accepted that the

appellant could only show salaried income of £8,600 per annum whether or not the evidential requirements were satisfied. The judge then proceeded to consider the self employed income. Whatever the level of income the rules require with regard self employment status the accountant must be a member of an accredited body further to paragraph 19(g) (ii) of Appendix A of the Rules. There was no evidence that Tufail Associates Ltd who prepared the accounts for his income as a taxi driver were members of a recognised supervisory body as required by the Immigration Rules.

12. The judge found at paragraph 11 of his determination that the appellant did not comply with paragraph 19(g) (ii) of Appendix A to the Rules. The 'de minimis' rule does not apply in these circumstances. As stated in **Nasim and others (Raju: reasons not to follow?)** [2013] UKUT 00610(IAC) '*The Court's conclusion, as set out in the judgment of Stanley Burnton LJ, with whom Lewison and Maurice Kay LJ agreed, was that there was no "near-miss" principle applicable to the Immigration Rules. At [12] Stanley Burnton LJ pointed out that the "near-miss" principle contended for was not the same as the de minimis principle. He went on to say that if a departure from a rule was truly de minimis, the rule was considered to have been complied with*'. It is clear that the rule with regards paragraph 19(g) (ii) has not been complied with.
13. Not least the requirement to produce evidence with regards the accountants status is important because it verifies the accounts and thus the income claimed by the appellant. This is not a minor consideration and a rule is a rule. As the judge states the 'he has, this factor [the accountant's letter] apart, *substantially* met the requirements of the Rules'. However he did not meet the rules and the application for permission to appeal was correct in that the judge did not follow the requirements of the immigration rules. I find that the judge erred in allowing the appeal under the immigration rules on this basis.
14. I do not accept the argument put forward that because the HMRC accepted the figures put forward by the sponsor, that the Secretary of State should accept them. HMRC is not administering the immigration rules; that is the function of the respondent.
15. The judge did not follow **Shahzad (Art 8: legitimate aim)** [2014] UKUT 00085 (IAC) which stated

Where an area of the rules does not have such an express mechanism, the approach in R (Nagre) v Secretary of State for the Home Department [2013] EWHC 720 (Admin) ([29]-[31] in particular) and Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 640 (IAC) should be followed: i.e. after applying the requirements of the rules, only if there may be arguably good grounds for granting leave to remain outside them is it necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under them.

The judge found that the immigration rules should not bear weight because there was no public interest in requiring the sponsor to go back to Pakistan. This was because he found the lack of audited accounts and evidence to show that the accountant was a member of an accredited accounting body were 'de minimis'. The

judge appeared to dismiss the immigration rules and failed to give them sufficient weight in the balancing exercise with regards proportionality. As identified above this is an error and a rule is a rule. Much of his reasoning was based on the child who might be entitled to British citizenship but at the date of the decision *no child* had been born to the appellant and sponsor. The basis of at least part of his reasoning which I find will have affected his findings was based on a misconception of the facts at the relevant date and proceeding on a misconception of the law. As a consequence he failed to identify arguably good grounds for granting leave to remain outside the rules.

16. As such there were errors of law in addressing and engaging with the evidence which would affect a fundamental issue of the appeal, and I find the matter should be remitted to the First Tier Tribunal for a hearing de novo. This is in relation to Article 8 only. The findings and determination in respect of the Immigration Rules should stand.

Signed

Date 28th May 2014

Deputy Upper Tribunal Judge Rimington