



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/11844/2014

THE IMMIGRATION ACTS

Heard at Field House
On 10 February 2015

Decision & Reasons Promulgated
17 February 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE G A BLACK

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

T D

(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr J Parkinson, Home Office Presenting Officer
For the Respondent: Mr K Alim, Counsel instructed by Yaqub & Co Solicitors

DECISION AND REASONS

1. This is an appeal by the Secretary of State. For ease of convenience I shall refer to the parties as the Secretary of State and the appellant from the First-tier proceedings as the Claimant.
2. The Claimant is Mrs T D who is a citizen of Thailand born on 1 August 1979. In a decision promulgated on 4 November 2014 by the First-tier Tribunal (Judge Naphthine) the Claimant's application for leave to remain as a spouse was dismissed under the Rules but allowed under Article 8 ECHR.

3. The reasons for refusal were that the Claimant entered the UK as a visitor together with her daughter in 2013 and accordingly she was not “eligible” under the Rules E-LTRP 2.1 to make an application as a spouse. Further she failed to provide “specified evidence” required to show her husband’s income of £23,000 per annum (Appendix FM-SE). Further she failed to provide evidence to show that she met the English language requirements. The Secretary of State stated that no final determination of whether or not the relevant income threshold was met pending the outcome of a legal challenge to the income requirements. And in considering the language requirements, the test certificate had not been verified as genuine and the Claimant’s scores were insufficient. It was accepted that the Claimant had a subsisting relationship with her daughter who is a British citizen under the age of 7 years old. However, she did not meet the requirements of the Rules for eligibility nor under paragraph 276ADE.
4. In the decision and reasons the Tribunal found that the Claimant did not meet the Rules for the reasons relied on by the Secretary of State [15], namely eligibility. However, it found that the Claimant otherwise met the Rules at the date of hearing. The Tribunal considered the claim outside of the Rules having regard to “ the **Gulshan** test “ and considered Article 8 ECHR and thereafter Section 17 of the Nationality Immigration & Asylum Act 2002 (“2002 Act”) as amended. It concluded that there were compelling circumstances and that it was not reasonable for the claimant to have to return to Thailand which would result in separation from her daughter in order to make an out of country application, thus engaging Article 8.
5. Permission to appeal was granted to the Secretary of State on the basis of detailed grounds.

Grounds

6. Firstly, the Tribunal failed to properly assess the requirements for specified evidence of finance at the time of the application and as such the findings are not sustainable. Secondly, the Tribunal made findings concerning the English language requirements based on post-application evidence and at the time of the application the claimant did not meet the Rules. Thirdly, the Tribunal failed to consider the public interest in expecting applicants to apply under the correct and applicable Rules and allowed Article 8 to be used as the mechanism to circumvent the Rules. Fourthly, the Tribunal failed to consider if the circumstances of removal established that it was unjustifiably harsh for the entire family to be separated. There were inadequate reasons in this regard. There was no consideration of circumstances in Thailand where the couple had lived together and where the Claimant had lived with her daughter. There could be no legitimate expectation for them to live in the UK. The Tribunal considered the best interests of the child were to remain in the UK.

Submissions

7. This morning I have heard submissions. Mr Parkinson relies on the detailed grounds of appeal. In summary he argues that Article 8 has been used to circumvent the

Rules. The Tribunal failed to give adequate reasons why Article 8 was engaged. Mr Alim relies on his reply submitted under Rule 24 which is also very detailed. He submits that the Tribunal was able to make findings under Article 8 as to finance and English language as at the date of the hearing, in light of the fact that these matters had not been finally determined by the Secretary of State. The appeal was premised on Article 8 ECHR and the Tribunal relied on the principles established in Chikwamba which still apply. The interests of the child as a British citizen are for her to remain in the UK with her mother, the Claimant.

Discussion and conclusions

8. I have decided that there was a material error of law in the Tribunal's decision. The Tribunal erred in its consideration both of the Immigration Rules and Article 8 ECHR. I am satisfied that the grounds of appeal relied on by the Secretary of State are made out in their entirety. The Tribunal found that the Claimant and her husband married in the UK in 2010 and they have a child who is a British citizen. The Claimant entered as a visitor together with her child. The Claimant was not eligible under the Rules relating to private and family life (which include EX.1) because she entered with leave as a visitor. Further she has failed to meet the requirements in the Rules for specified evidence for finance and the English language requirements at the relevant time. Although reference is made in the refusal letter to a final determination not being made, this factor ought not to have detracted from the Tribunal's correct conclusion that the appeal under the Rules failed at the time the application was made and decided, the main reason being eligibility. However, even if the rules were met at the date of hearing the Claimant had not met the "Eligibility" requirement.
9. I am satisfied that the Tribunal's assessment and analysis of Article 8 is flawed. The Immigration Rules are intended to cover all circumstances of family and private life for entry and remaining in the UK. The grounds rely on Gulshan and Nagre however as held in Ganesabalan, R(On the application of) v SSHD[2014] EWHC 2712 (Admin) there is no prior threshold which dictates whether the exercise of discretion should be considered; rather the nature of the assessment and the reasoning which were called for were informed by threshold considerations. The Tribunal here failed to give adequate reasons for considering Article 8 outside of the Rules. In assessing Article 8 ECHR the Tribunal must take into account the degree to which the Rules have not been met rather than to reconsider the issues afresh under Article 8. The Immigration Rules are the important first stage and the focus of Article 8 assessments. It will be an error of law not to address Article 8 by reference to the Rules.
10. I am satisfied that the evidence failed to show any unjustifiably harsh consequences for the family and/or that the refusal was disproportionate by reference to its consequences under Article 8. I see no basis for concluding that the decision is contrary to the best interest of the child, which is a primary consideration. The Claimant and her daughter lived in Thailand for some time prior to their visit in 2013 and although the parties married in the UK, the Claimant has another daughter who also lives in Thailand. The evidence relied on to establish where the best interests of

the child lie was that the Claimant's daughter is now in school and her father at work, thus the Claimant is the main carer for the child. However, there was no exploration by the Tribunal of why the Claimant failed to make an application for entry clearance as a spouse in the first place. The Tribunal failed to consider the possibility of the family living in Thailand and the situation in that country for the child given that she previously lived there with her mother. I can see no reason why the Claimant cannot return with her daughter to Thailand to make the appropriate application for leave which can be properly considered by the decision maker having regard to the relevant Rules. Article 8 is not a mechanism to be used to circumvent the requirements of the Rules. In short the Tribunal failed to properly grapple with the main reason for refusal namely "Eligibility". Accordingly I allow the Secretary of State's appeal.

Notice of Decision

10. There is a material error of law in the decision. The decision is set aside. I substitute a decision that the Claimant's appeal is dismissed under the Immigration Rules and on human rights grounds.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings. There is a young child involved in the proceedings.

Signed

Date 12.2.2015

Deputy Upper Tribunal Judge G A Black

TO THE RESPONDENT **FEE AWARD**

I have dismissed the appeal and therefore there can be no fee award.

Signed

Date 12.2.2015

Deputy Upper Tribunal Judge G A Black