



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/22508/2014
IA/22510/2014

THE IMMIGRATION ACTS

Heard at Field House
On 21 August 2015

Decision promulgated
On 4 September 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE KAMARA

Between

MR PATHMANATHAN INDRARAJ
MS ROHINI SUBRAMANIAN
(ANONYMITY DIRECTION NOT MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr P Lingajorthy, legal representative, Linga & Co Solicitors
For the Respondent: Mr P Duffy, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is an appeal against the decision, promulgated on 15 April 2015, of First-tier Tribunal Judge SD Lloyd (hereinafter referred to as the FTTJ).

Background

2. The appellants, who are husband and wife, both entered the United Kingdom as Tier 4 migrants during 2010 and married in the United Kingdom on 23 November 2012. On 31 March 2014 they sought residence cards as confirmation of a right to reside in the United Kingdom as the extended family members of Mrs Kunaniji Athithan, who is a French national to whom the appellants are unrelated. Mrs Athithan (hereinafter referred to as the sponsor) is married to the first appellant's cousin Mr Athithan Kanesu. In refusing the applications on 9 May 2014, the Secretary of State commented that there was no evidence that the appellants were dependent upon or residing with their sponsor prior to entering the United Kingdom and insufficient evidence that since entering the United Kingdom they have continued to be dependent upon or residing with the sponsor.
3. In the grounds of appeal, the appellants asserted that they were related as claimed to the sponsor; that they were previously residing with and dependent upon the sponsor and that they continued to be dependent on the sponsor and reside with her in the United Kingdom. Reference was also made to the first appellant's private life, which he had established in the United Kingdom.
4. At the hearing before the FTTJ, an attempt was made to serve an appellant's bundle, which contained the witness statements of six witnesses. The FTTJ excluded that item but, after discussion with the parties, agreed to hear evidence from four of the six witnesses. The FTTJ heard from both appellants, the sponsor and the first appellant's cousin. The FTTJ noted that there was no challenge to the relationship between the parties. It was not accepted that the first appellant was previously dependent upon his cousin or the sponsor or that he was previously part of his cousin's household. Nor was it accepted that the appellants were dependent on the sponsor. The FTTJ referred to evidence indicating that the appellants had been living with the sponsor from approximately 4 months prior to the EEA application having been made and accepted that they formed part of the sponsor's household. The appellants' Article 8 claim was also dismissed, outside the Rules.
5. The grounds of application argue, in the main, that the FTTJ made a procedural error in excluding part of the appellants' evidence from his consideration. Criticism was also made regarding the FTTJ's conclusion that the appellants were not extended family members and the decision on Article 8.
6. FTTJ Levin granted permission solely on the basis that the FTTJ arguably erred in refusing the application to admit late evidence or adjourning the hearing.
6. The Secretary of State lodged a Rule 24 response on 6 July 2015. In opposing the appeal, the respondent noted that the evidence in question was available for 5 months prior to the hearing date; referred to [7] of the decision where reference was made to the FTTJ hearing evidence from both appellants and their sponsors in order to ensure fairness and it was noted that the FTTJ considered both the position of dependency and household but did not accept the evidence. It was said that the FTTJ directed himself appropriately.

Error of law

7. At the hearing before me, Mr Lingajorthy told me that he was the representative at the hearing before the FTTJ. He proceeded to give evidence regarding that hearing, despite not having produced a witness statement, which set out his account of matters. I noted that there was no attempt by Mr Lingajorthy to engage with the decision in BW(Witness statements by advocates) Afghanistan [2014] 00568 (IAC) however I considered that the decision of the FTTJ spoke for itself regarding the alleged procedural impropriety and therefore decided to proceed with the hearing.
8. Mr Lingajorthy confirmed that he was relying only on the basis of the grant of permission, in that that there was evidential unfairness in the FTTJ refusing to accept the additional evidence. He argued that the appellants had been severely handicapped because the FTTJ had found that there was nothing to show that the appellants were dependent upon the sponsor. Mr Lingajorthy told me that the additional 2 witnesses, namely Mr Sivakumar and Mr Kunaseelan had attended the hearing and indeed were present at the hearing before me. He argued that the decision could not be cured and that the matter would have to be re-litigated. I invited submissions as to whether any potential error of law was material in view of the judgment in Soares [2013] EWCA Civ 575 at [4(ii)];

“Regulation 8(2)(a) and (c) do not extend to dependence on or household membership of a spouse or partner of the EEA national.”
9. Mr Lingajorthy, who expressed his unfamiliarity with the Soares, had nothing to say regarding that judgment.
10. Mr Duffy submitted that there was no evidence that the additional bundle was submitted in advance of the hearing; it was not on the case file and the Secretary of State had not had sight of it. He argued that it was open to the FTTJ to exclude it and that any prejudice to the appellants was limited as they could make another application.
11. In response, Mr Lingajorthy agreed that the appellants could make a further application but argued that they had not been given a proper opportunity to state their case.
12. The appellants’ appeal before the FTTJ was initially listed for a hearing on 13 October 2014, as shown by the notice of hearing posted to the parties on 12 June 2014. Included on the said notice were directions in which the parties were directed to send a bundle of all documents upon which they wished to rely within three weeks of the date of that notice. On 1 July 2014 Linga & Co Solicitors sent a 110-page bundle of documents, which consisted of documentary evidence relating to the appellants and sponsors, but no statements from any witnesses.
13. Linga & Co Solicitors prepared witness statements for Mr Sivakumar and Mr Kunaseelan, as well as the other four witnesses, which were signed on 8 October 2014. It was common ground that they were not sent to the tribunal or the respondent in line with directions.
14. The hearing of the appeal at the First-tier did not proceed on 13 October 2014. On 10 October 2014, notification was sent to the parties advising them that a new hearing date would be forthcoming. On 13 October 2014, the parties were sent a notice of hearing giving a new date for the appeal of 2 March 2015. On that notice, the parties were directed to provide *“witness statements of the evidence to be called at the hearing”* as well as all other documents relied on no later than 5 days before the date of hearing.

15. As indicated above, Mr Lingajorthy handed the FTTJ a 48-page bundle, which included the witness statements of Mr Sivakumar and Mr Kunaseelan. Also included were signed witness statements from both appellants and the two sponsors also dated 8 October 2014
16. The same bundle had been sent by facsimile to the Tribunal at 8pm on the last working day before the 2 March 2015 and did not reach the file in time. The Secretary of State was never served with these documents and accordingly did not have the opportunity to carry out checks against Mr Sivakumar and Mr Kunaseelan or to prepare cross-examination in relation to any of the six witnesses.
17. After some discussions, at [7] the FTTJ agreed to hear from four of the witnesses, that is the appellants and sponsors.
18. The FTTJ had regard to the overriding objective in the 2014 Procedure Rules, referring in particular to his case management powers and also his duty to deal with the case fairly and justly. I consider it would have been unfair to the respondent for the FTTJ to admit this evidence at such a late stage. At the same time the FTTJ showed awareness of the importance of avoiding delay at [6] where he noted the earlier vacated hearing and the delay in Linga & Co submitting evidence, which had been in their possession for 5 months. These were decisions the FTTJ was entitled to make.
19. I find that had the FTTJ considered the statements and oral evidence of Mr Sivakumar and Mr Kunaseelan, it would have made no difference to the outcome of the appeal. The evidence of these gentlemen was that they carried cash to India on behalf of the sponsors for the first appellant's benefit. The reason why the FTTJ did not accept that the appellants had been dependent previously on the sponsors, is found at [29], as follows;

"Despite what is claimed to be a significant and regular remittance of funds to the First Appellant, both to his father and to pay for his degree education in India, there is no documentary evidence of this whatsoever. Whilst I take account of the Appellant's contention that at the time they did not know receipts would need to be produced, I find it highly unlikely that there would be no evidence at all of this substantial financial commitment. Particularly as it would seem that since 2007 the Sponsor was involved in those payments and it is stated that, at least now, that was being funded from a business account."
20. There was no reasoned challenge to those findings in the appellants' application for permission to appeal or the submissions made on their behalf. Therefore even had the FTTJ heard the evidence of Mr Sivakumar and Mr Kunaseelan, the position with regard to the complete absence of documentary evidence of the remittance of funds would be unchanged.
21. There is also the matter of the judgment in Soares to which the FTTJ was not referred but which concludes that Regulation 8 does not apply to those claiming to be dependent upon the spouse of an EEA national, as in this case.
22. There is no material error of law in the FTTJ's decision.
23. There is no justification for making an anonymity direction in this matter.

Conclusions

- (1) The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.
- (2) I uphold the decision of the FTTJ.

Signed:

Date: 30 August 2015

Deputy Upper Tribunal Judge Kamara