



The Upper Tribunal
(Immigration and Asylum Chamber)

Appeal number: IA/46908/2014

THE IMMIGRATION ACTS

Heard at Field House
On 27 October 2015

Decision & Reasons Promulgated
On 3 November 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR TOUSIFHYE CHOWDHURY
(NO ANONYMITY DIRECTION)

Respondent

Representation:

Appellant

Mr Nath (Home Office Presenting Officer)

Respondent

Mr Biggs, Counsel, instructed by MQ Hassan Solicitors

DETERMINATION AND REASONS

1. Whereas the original respondent is the appealing party, I shall, in the interests of convenience and consistency, replicate the nomenclature of the decision at first instance.
2. The appellant is a national of Bangladesh and he applied for limited leave to remain as the partner of a person present and settled in the United Kingdom.

3. The respondent refused the appellant's application on November 6, 2014 and the appellant appealed against that decision under section 82(1) of the Nationality, Immigration and Asylum Act 2002 on November 19, 2014.
4. The matter was heard by Judge of the First-tier Tribunal Nolan on June 2, 2015 and in a decision promulgated on June 19, 2015 the Tribunal allowed his appeal under Immigration Rules.
5. The respondent applied for permission to appeal on June 23, 2015 submitting the Tribunal had erred by allowing the appeal under the Immigration Rules because at the date of application the appellant could not satisfy Section E-LTRP of Appendix FM with particular reference to Appendix FM-SE.
6. Permission to appeal was granted by Judge of the First-tier Tribunal Holmes on September 11, 2015 on the basis the grounds were arguable and he also commented that the Tribunal had given no consideration to Article 8 outside of the Rules.
7. The First-tier Tribunal did not make an anonymity direction and pursuant to Rule 14 of The Tribunal Procedure (Upper Tribunal) Rules 2008 I see no reason to make an order now.

SUBMISSIONS

8. Mr Nath relied on the grounds of appeal and submitted that when the application was made on August 26, 2014 it was accepted the appellant did not meet the Immigration Rules and that he had only been able to meet the Rules in November 2014 when his partner had taken a second job. Section 2 of Appendix FM-SE makes clear what mandatory evidence is required and section 120 of the 2002 Act does not restart the clock as was claimed by the appellant's representative in his recently submitted skeleton argument
9. Mr Biggs relied on his recently submitted skeleton argument and submitted that in light of paragraph GEN 1.9(a)(iii) of Appendix FM the validate for such an application was when the additional grounds in section 120 of the 2002 Act was lodged because otherwise Appendix FM and Appendix FM-SE would be incoherent. He therefore submitted that the findings made by the Tribunal were open to it and there was no error of law.

DISCUSSION AND FINDINGS

10. Permission to appeal had been granted to the respondent on the basis it was arguable that the Tribunal had erred in finding evidence submitted after the date of application was sufficient to satisfy the maintenance requirements under appendix FM and appendix FM-SE.
11. There was no dispute between the parties that when this application was submitted the appellant could not satisfy the financial requirements set out in section E-LTRP 3.1 of Appendix FM.

12. Mr Biggs submitted that the submission of a section 120 notice reset the date of application to the date that the notice was served and his argument for that is based on the content of paragraph GEN 1.9(a)(iii) which states that the requirement to make a valid application will not apply when the Article 8 claim is raised in an appeal.
13. Section 2 of Appendix FM-SE sets out what documentation must be supplied with the application. The appellant was obliged to provide his partner's payslips for either a period of six months, where her employment had lasted for at least six months, or twelve months where her employment was for less than six months.
14. When the application was submitted his partner only had one of her jobs and could therefore not meet the financial requirements of the Immigration Rules which required him to show that his partner earned a specified gross annual income of at least £18,600 when his application was lodged. Section E-LTRC 2.2 makes clear that only certain income can satisfy that requirement.
15. Mr Biggs has sought to persuade that paragraph GEN 1.9 must be interpreted to refer to the date when the additional grounds in his section 120 notice were raised but I do not find his argument persuasive.
16. In Ali v SSHD [2013] EWCA Civ 1198 the Court of Appeal held that a fresh ground of appeal or statement in response to a section 120 notice was not an application within the meaning of Appendix A 4th row of Table 9. So, an applicant who first applied as a Tier 1 (General) Migrant, who obtained an MBA 6 days before refusal, and then who sought to rely on that MBA in a response to a section 120 notice claiming a right to remain as a Tier 1 (Post Study Work) migrant could not do so. The date of application remained the date of the original application and the MBA had to be issued before then.
17. The principle set out in the above authority has equal application in this appeal. Appendix FM-SE makes it abundantly clear that the specified evidence has to be submitted and must demonstrate that the Rules were met prior to the application being submitted. The appellant in this case did not satisfy the Rules and I reject the submission that section 120 notice reset the clock.
18. I therefore accept the Tribunal materially erred when finding in paragraph [45] that the financial requirements were satisfied. I therefore set aside that decision.
19. When this matter came before the first Tier Tribunal it concluded it was unnecessary to consider a freestanding Article 8 analysis or whether there were insurmountable obstacles under section EX.1 of Appendix FM.
20. Mr Biggs has not suggested in his skeleton argument that the appellant satisfied section EX.1 but he has raised Article 8 ECHR. In giving permission to appeal Judge of the First-tier Tribunal Holmes highlighted the failure to deal with Article 8 ECHR and with the consent of both parties I propose to deal with that within this decision.

21. When this matter came before the Tribunal made the following findings:
 - a. The appellant came to the United Kingdom as a Tier 4 students in January 2010 with leave valid until August 26, 2014. Prior to his leave being curtailed he made an application to remain as the partner of person settled and they married on August 26, 2014.
 - b. The tribunal was satisfied that his relationship was genuine and subsisting in that they intended to live together as husband and wife permanently.
 - c. Both the appellant and his partner were credible witnesses.
 - d. The evidence submitted satisfied with the tribunal that all of the requirements of section E-LTRP were met.
22. For the sake of completeness, I find that there were no insurmountable obstacles that would merit granting the application under section EX.1 of Appendix FM because the appellant is almost 28 years of age and has lived the 23 years in Bangladesh. Nothing in the papers before me suggests there are any insurmountable obstacles apart from the inconvenience by the separation potentially would give.
23. I have therefore considered the Article 8 claim as a freestanding claim, outside of Appendix FM. The Tribunal in Forman (ss.117A-C considerations) [2015] UKUT 00412 (IAC) made clear that the list of considerations contained in section 117B and section 117C of 2002 Act is not exhaustive. A court or tribunal is entitled to take into account additional considerations, provided that they are relevant in the sense that they properly bear on the public interest question.
24. Section 117B(1) of the 2002 Act emphasises that the maintenance of effective immigration control is in the public interest. Other factors to take into account when considering the maintenance of effective immigration control is the fact the appellant spoke English and there was no evidence that the appellant would be a financial burden on the taxpayer. These two factors would also suggest that the appellant would be better able to integrate into society. There is also no suggestion that the appellant formed his relationship whilst he was here unlawfully although clearly his relationship was formed when his immigration status was precarious although this is not a specific factor set out in section 117B albeit the Tribunal in Forman made clear a Tribunal can have regard to additional factors when considering proportionality.
25. Mr Biggs invited me to find that removal would be disproportionate whereas Mr Nath submitted that if the appellant was able to meet the Immigration Rules then the correct application should be made.
26. This application was an application made in the full knowledge that the Rules were not met. The fact that the Rules were subsequently met did not undermine the force of the argument that the maintenance of effective immigration control was in the public interest. I am being asked to allow his appeal under Article 8 because he did not meet the Immigration Rules.

27. I have had regard to the factors set out in section 117B but the mere fact positive answers are given to parts of section 117B does not alter the starting point that the maintenance of effective immigration control is in the public interest.
28. Mr Nath argued there was nothing to prevent this appellant making the correct application and satisfying the Immigration Rules.
29. Although the appellant can speak English and his partner is able to financially support them I have to have regard to the fact the parties married in the knowledge firstly, the appellant did not meet the financial requirements of the Immigration Rules and secondly, in the knowledge that his leave had been curtailed and was due to expire.
30. I have noted the authorities referred to by Mr Biggs in his skeleton argument but I am satisfied that refusing the appellant's application under Article 8 ECHR is proportionate for the reasons given above and I therefore refuse this appeal under Article 8.

DECISION

31. There was a material error.
32. I set aside the original decision and remake the decision.
33. I dismiss the appeal under both the Immigration Rules and Article 8 ECHR.

Signed:

Dated:



Deputy Upper Tribunal Judge Alis

TO THE RESPONDENT FEE AWARD

I make no fee award as the appeal has been dismissed.

Signed:

Dated:



Deputy Upper Tribunal Judge Alis