



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/02735/2013

THE IMMIGRATION ACTS

Heard at Birmingham
on 15th December 2014

Determination Promulgated
On 7th January 2015

Before

UPPER TRIBUNAL JUDGE HANSON

Between

ENTRY CLEARANCE OFFICER - ISLAMABAD

Appellant

and

Ms TAZEEM KOUSAR
(Anonymity direction not made)

Respondent

Representation:

For the Appellant: Mr Mills – Senior Home Office Presenting Officer.

For the Respondent: No appearance.

ERROR OF LAW FINDING AND NOTICE OF WITHDRAWAL

1. This is an appeal by the Entry Clearance Officer against a determination of First-tier Tribunal Judge Ford promulgated on 18 March 2014, following a hearing at Birmingham, in which the Judge allowed the appeal on Article 8 human rights grounds only.
2. Mrs Kousar is a national of Pakistan born on 29 June 1989. She applied for spousal entry clearance on 6 October 2012 which was refused on 26 November 2012 because it was said she had not submitted all the required documents to demonstrate her sponsor's income was as claimed. The application was refused under paragraph EC-P.1.1 (d) of Appendix FM of the Immigration Rules.
3. The Judge considered the evidence made available to her. In paragraph 11 she finds that she was not satisfied that prior to 1 August 2012 the sponsor was

either in salaried employment or self-employment for the purposes of the Immigration Rules. As a result it was not possible for Mrs Kousar to show that the sponsor was earning a gross annual income in excess of the required level of £18,600. It is said that this was as a result of the way in which the sponsor's employment was structured by his employer, although at the date of decision it was found the sponsor was working a guaranteed 60 hours a week at £8 per hour which equates to a gross annual income of £24,960.

4. The Judge notes in paragraph 8 that it was conceded before her that Mrs Kousar could only proceed on the basis of her Article 8 human rights indicating it was accepted that she could not meet the requirements of the Rules relating to demonstrating the required level of minimum income being available by the method specified in the Rules.
5. In relation to Article 8 the Judge considered that family life existed between Mrs Kousar and her sponsor. The Judge states in paragraph 12 that although it will be possible for Mrs Kousar to apply again for spousal entry clearance it would, in her view, be wholly unreasonable and unduly harsh to expect her to do so. The Judge refers to the will of Parliament being to ensure the protection of the public purse that she finds cannot be relied upon to justify the decision on the basis Mrs Kousar's sponsor was clearly earning more than the barrier set by Parliament of £18,600 at the date the decision. The Judge states that the refusal was not justified on the facts of the case on any public interest and was unduly harsh. It is also suggested the decision did not involve the balancing the competing public interests. The sponsor was working for the same employer and there was no risk to the public purse in granted entry clearance or that the parties would be forced to live below the minimum level set by Parliament. The Judge therefore found the decision to be disproportionate.
6. The challenge by the Entry Clearance Officer is made on the basis the Judge made a material misdirection of law. It is accepted Mrs Kousar could not satisfy the requirements of the Immigration Rules and Article 8 is not intended to allow an individual to bypass the Rules. Exceptional circumstances had not been established. It is submitted the Judge erred in relation to the assessment of the date when she was required to consider the sponsor's income too.

Discussion

7. There was no attendance on behalf of Mrs Kousar for, notwithstanding the Judges personal feelings regarding the reasonableness of making a further application, the Upper Tribunal received a letter from Khirri Solicitors dated 15 December 2014 stating:

“ The up-to-date position is that Mrs Kousar has re-applied for a partner (spouse) entry clearance under paragraph E.C-P.1.1 of Appendix FM therefore our instructions are to withdraw this appeal case from the Upper Tribunal Court list“

8. Although Mrs Kousar no longer wishes to pursue this appeal the application before the Upper Tribunal was in fact an application made by the Entry Clearance Officer. There is therefore an application the Tribunal needs to deal with although if the determination is set aside Mrs Kousar's request to withdraw can be considered at that stage.
9. It is not disputed that Mrs Kousar is unable to meet the requirements of the Immigration Rules. Not only do the Rules set out the minimal level of income an individual is required to demonstrate to prevent reliance upon public funds, it also sets out the method by which the availability of such income is to be established.
10. Article 8 does not permit an individual to choose where they wish to live although it is accepted that it does contain a positive obligation upon states not to interfere with established family and private life recognised and protected by Article 8 without good reason. Even though Article 8 also contains a positive obligation to promote and permit family life to develop, the test when assessing proportionality remains the same. Article 8 also affords a margin of appreciation upon the Higher Contracting States under which the Secretary of State has set out both in relation to the Rules and more recently in statutory provisions how the United Kingdom Parliament believe such competing interests should be assessed.
11. The Grounds refer to the requirement for there to be exceptional circumstances as per Gulshan [2013] UKUT 00640 before an appeal can be allowed under Article 8 outside the Rules. The term 'exceptional' has been held to mean circumstances in which refusal would result in unjustifiably harsh consequences for the individual such that refusal of the application would not be proportionate. In determining whether there are exceptional circumstances, the Judge was required to consider all relevant factors.
12. The Judge was required to consider the Article 8 assessment at the date of decision not the date of application which is the relevant period under the Rules. The finding by the Judge that it was wholly unreasonable and unduly harsh to expect Mrs Kousar to make a fresh application is not adequately reasoned in relation to a person who cannot satisfy the requirements of the Rules. The Judge refers to evidence which she finds satisfied a certain level of income but also notes specific evidence could not be provided as required by Appendix FM-SE. As this appears to be the key finding and the basis on which the Article 8 appeal is allowed and the decision found to be unduly harsh, this element has not been adequately reasoned and nor has there been an adequate analysis of the weight to be given to the fact Mrs Kousar is unable to satisfy the requirements of the Rules, both in relation to establishing the requirements of the relevant income level and being able to corroborate such a claim by the specified documents. The Judge refers to the purpose behind the Rules being to prevent persons from coming to the United Kingdom without seeking recourse

to public funds yet the purpose is also to ensure that any claimed income is proved to be genuine and sustainable by specified methods.

- 13. There have been a number of authorities relevant to the issue of Article 8 and the ‘new’ Immigration Rules which must not be read as seeking to qualify or fetter the assessment of Article 8. It is, however, necessary to consider such domestic as well as Strasbourg jurisprudence when assessing an Article 8 claim, including cases such as Gulshan and MM (Lebanon). There is also a need to look at the evidence to see if there was anything which has not already been adequately considered in the context of the Immigration Rules and which could lead to a successful Article 8 claim. The determinative factor in the Judges decision is the fact Mrs Kousar was found to have demonstrated that it is unlikely she will be a burden on the public purse but in ZY (Turkey) v Secretary of State for the Home Department [2011] EWCA Civ 65 the Court of Appeal said that, amongst other things, the fact that the Claimant was not a burden on the state was not capable of carrying any weight; not needing to have recourse to public funds was a pre-condition imposed by the Immigration Rules but it was not sufficient for entry, and it was impossible to understand how it could outweigh the need for effective immigration control.
- 14. The determination is set aside.
- 15. In light of Mrs Kousar’s request to withdrawal her challenge to the original decision on the basis of her making a fresh application, for which permission is granted, there is no longer any appeal extant before the Upper Tribunal upon which a decision can be made.

Decision

- 16. **The First-tier Tribunal Judge materially erred in law. I set aside the decision of the original Judge. Following the withdrawal of the appeal by Mrs Kousar there is no longer an extant application before the Upper Tribunal.**

Anonymity.

- 17. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed.....
Upper Tribunal Judge Hanson

Dated the 6th January 2015