



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/10200/2014

THE IMMIGRATION ACTS

Heard at Field House
On 10 September 2015

Decision & Reasons Promulgated
On 16 September 2015

Before
UPPER TRIBUNAL JUDGE PITT
DEPUTY UPPER TRIBUNAL JUDGE O'RYAN

Between

Mrs NWEJAT POUR MAZAL
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr N Ahmed of Counsel instructed by Syeds Solicitors.

For the Respondent: Mr Richards, Senior Home Office Presenting Officer

DECISION AND REASONS

- 1 This is an appeal brought by the Appellant against the decision of the First tier Tribunal (First tier Tribunal Judge O'Hagan), heard on 31 of March 2015, and promulgated on 13 April 2015. The Appellant had appealed against the decision of an entry clearance officer dated 3 July 2014 to refuse her entry clearance under EC-P.1.1(d) of Appendix FM of the Immigration Rules for entry clearance to join her husband, Mr Reza Torabi ('the Sponsor').

- 2 The Appellant is a national of Iran born on 20 December 1974 and 39 years old at the date of decision. The Sponsor was born on 16 October 1951 and was 62 at that time. The Sponsor is a British national of Iranian origin. They married in Iran on 21st of March 2013.
- 3 On or around 21 May 2014 the Appellant applied for entry clearance to join the Sponsor in the UK. Prior to that she had in fact twice visited the Sponsor in the UK and had properly observed the conditions of her leave.
- 4 The Sponsor has autosomal dominant polycystic kidney disease, and is maintained on long-term regular haemodialysis. According to a letter from the University Hospital Birmingham dated 16 August 2013, summarised in an Entry Clearance Manager's decision of 14 December 2014, the Sponsor already had advanced kidney failure at the time of the hospital letter in 2013.
- 5 On 3 July 2014 the Respondent made a decision refusing entry clearance to the Appellant on the grounds, in summary, that there was insufficient evidence to establish that the Appellant and Sponsor were in a genuine and subsisting relationship, or that they intended to live together permanently in the United Kingdom, and that thus E-ECP 2.6 and 2.10 of appendix FM were not met. The entry clearance officer was also not satisfied that the documentary evidence provided with the application established that the appellant and Sponsor had available to them an income of at least £18,600 per annum, and also that the evidence provided did not satisfy the evidential requirements of Appendix FM SE.
- 6 The Appellant appealed against that decision, the appeal coming before Judge O'Hagan. The Sponsor was present and gave evidence at the hearing. The appeal was dismissed for reasons contained within the decision dated 13 April 2015. Judge O'Hagan considered the evidence available about the existence of the relationship between the Appellant and Sponsor, and observed that the evidence was not as comprehensive as he would have expected in an appeal such as the present, but gave the Appellant the benefit of the doubt and proceeded on the basis that the marriage was valid and subsisting and that there was an intention between the parties to live permanently together in the United Kingdom [15].
- 7 However, in relation to the financial eligibility requirements of Appendix FM, Judge O'Hagan found that the Respondent was correct in finding that the Sponsor's income was less than the prescribed amount at £18,600; nor did the evidence provided satisfy the evidential requirements of Appendix FM SE. He dismissed the appeal under the Immigration Rules.
- 8 Judge O'Hagan then proceeded to consider whether entry clearance ought to have been granted outside of the immigration rules, in order to avoid a disproportionate and therefore unlawful interference with the Appellant's right to family life Article 8 ECHR. He held that family life was engaged in the present appeal, and the refusal of entry clearance to the Appellant would amount to an interference with such family life.

- 9 He proceeded at [20]-[22] to consider whether the decision to refuse entry clearance was proportionate. The Judge directed himself as follows at [20]:

“I had to balance the public interest imperative of maintaining immigration control, weighty as that is, with the private interests of the Appellant.”

At [21], he held:

“In weighing up the proportionality of the Respondent's decision, it seems to me that the failure to meet the requirements of Appendix FM SE was a significant consideration. I did not treat it as being a determinative consideration. I recognised that there are cases in which countervailing factors that may exist which properly lead to the conclusion that the Article 8 considerations overwhelm the normal importance of maintaining the integrity of the rules.”

- 10 The judge held at [22] that:

"I was not persuaded, having considered all of the circumstances of the present case, that the factors in playing on the Appellant's side of the balance was such as to outweigh the importance attached to the maintenance of the integrity of the rules. The only factor that sets this case apart from other case(es) of this kind is the fact that the Sponsor is experiencing significant renal problems such that he is on dialysis. That is I accept, a difficult circumstance for the Sponsor. However, the medical evidence is that his condition is being managed through dialysis and that he is self-caring. Whilst I recognise that the current situation cannot be easy for him, I do not think it is sufficient in and of itself to outweigh the factors in support of the Respondent in the balancing exercise. I am also mindful of the fact that the Respondent's decision does not mean that the Appellant and the Sponsor must forever live apart. It is open to them to renew the application, ensuring that they comply fully with the rules when they do so. In the event that the Sponsor begins to receive the personal independence payment (PIP), then he will no longer be required to satisfy the usual financial requirements of the rules."

- 11 The appeal was dismissed. The Appellant applied for permission to appeal to the Upper Tribunal in grounds dated 5 May 2015. These grounds are with respect are rather unfocused but we distill from them that the Appellant's challenge to the decision is that the Judge erred in law in:

- (i) misdirecting himself in law when performing the proportionality balancing exercise as set out at step 5 of *Razgar* [2004] 3 All ER 821, by directing himself by reference to a passage at para 43 of *Heritage, R(on the application of) v SSHD and First-tier Tribunal (IJR)* [2014] UKUT 441 (IAC), as follows:

“It is clear that even under pre-9 July 2012 case law on Article 8, for an immigration decision to give rise to a breach of a third country national's right to respect for family life, it would be necessary to show compelling circumstances, the expectation being that only a small minority of cases would succeed: see *Huang v Secretary of State for the Home Department* [2007] UKHL 11”;

- (ii) giving weight to immaterial matters, having given more importance to the immigration rules rather than the Appellant's right to family life: “Far too

much weight has been given to the Appellant's partner's financial position and very less weight (*sic*) has been given to the disruption which will result if the Appellant is refused and the effect it will have on both Appellant's and her partner's family life"; and

- (iii) failing to consider the consequences of the Sponsor having to leave the United Kingdom in his medical state, or the period of time in making another application.

- 12 Permission was granted by Designated Judge the First tier Tribunal JM Lewis, in a decision dated 22 June 2015. The Judge observes that at paragraph 20 to 22 of the decision, the FTT Judge:

"... attaches significant weight to the fact that the Appellant was unable to comply with the immigration rules. That degree of weight was inappropriate, because an article 8 proportionality assessment does not replicate the provisions of the immigration rules but moves outside them. The judge discusses the Sponsor's medical situation identifying it as the only factor setting this case apart from others. What the Judge does not do, however, is to identify, discuss and balance all of the factors of relevance to a proportionality assessment, including the statutory considerations under section 117 of the 2002 Act. This omission to conduct a balanced article 8 assessment is an arguable error of law."

The hearing

- 13 We heard submissions from the parties. Mr Ahmed, for Appellant, relied on the grounds of appeal and argued that the findings within the proportionality assessment had not been adequate. The scope of the immigration rules was *a* relevant factor to take into account, but the FTTJ had to perform a full assessment of the merits of the Appellant's rights under Article 8 ECHR. There was also a failure to have regard to the considerations set out in s.117B Nationality, Immigration and Asylum Act 2002 ('NIAA 2002'). Mr Ahmed argued, in relation to s.117B(3) NIAA 2002 that the Appellant and Sponsor were clearly financially independent, the Sponsor having a number of investment properties and receiving an income from them. He was obliged to agree with us however that no challenge had been made within the grounds of appeal to the FTTJ's decision that the Appellant did not satisfy the financial eligibility requirements of Appendix FM, and also that even if no point adverse to an appellant arose in the context of s.117B NIAA 2002, this did not result in a positive entitlement to leave to enter or remain in the United Kingdom.
- 14 Mr Ahmed made reference to paragraph 40 of *SS (Congo) v SSHD* [2015] EWCA Civ 387 and argued that the Sponsor's health problems represented the necessary 'compelling circumstances', and the Sponsor's disabilities were not being taken into account by the immigration rules.
- 15 Mr Richards for the Respondent relied on the Rule 24 Response dated 1 July 2015 and argued that the FTTJ's decision was sustainable in law. The Appellant's non-satisfaction of the immigration rules was of significant relevance, and the FTTJ was entitled to attach weight to that. Article 8 was not a mechanism to enable an

appellant to succeed in the absence of exceptional circumstances rendering refusal disproportionate. The Judge had not treated that non-satisfaction as determinative - see decision, [21]. The Judge took account of the Sponsor's health problems and directed himself in law appropriately in relation to Part 5A of NIAA 2002 at [19]. The FTTJ's conclusion was open to him on the facts before him, and the decision was sustainable.

Discussion

- 16 We ruled at the hearing that there was no material error of law in the FTTJ's decision, which we uphold. Our reasons for doing so are set out below.
- 17 The degree to which a failure to meet the immigration rules is relevant to the assessment of the proportionately of a refusal of entry clearance was the subject of recent detailed consideration in the case of *SS (Congo) v SSHD* [2015] EWCA Civ 387. We understand the following points to have been made within the Court's single judgment (emphasis added):
- (i) If there was a wide gap between the way in which immigration rules were framed, and the protection that was rightfully afforded under Article 8 ECHR, then the practical guidance from the rules as to public policy considerations in a proportionality balancing exercised was reduced [17].
 - (ii) On the other hand, if the rules were fashioned so as to strike an appropriate balance under Article 8, and any gap between the rules and what Article 8 required was narrow, the court will give weight to the Secretary of State's formulation of the Rules as an assessment of what public interest required [17].
 - (iii) Following *MM v SSHD* [2014] EWCA Civ 985, there will generally be no or only a relatively small gap between the new LTE Rules as promulgated by the Secretary of State and the requirements of Article 8 in individual cases, including those involving Sponsors who are British citizens or refugees located in the United Kingdom [24]. Further, outside of the context of precarious family life or deportation: '...if the Secretary of State has sought to formulate Immigration Rules to reflect a fair balance of interests under Article 8 in the general run of cases falling within their scope, then, as explained above, **the Rules themselves will provide significant evidence about the relevant public interest considerations which should be brought into account when a court or tribunal seeks to strike the proper balance of interests under Article 8 in making its own decision.**' [32].
 - (iv) Where the immigration rules were not satisfied, different types of cases required the presence of different factors to outweigh the public interest in the maintenance of immigration control:
 - * precarious in-country cases not involving children: exceptional factors [29];
 - * deportation: very compelling reasons [30];

* **refusal of leave to remain or leave to enter cases: compelling circumstances** [33], [40].

- (v) The state has a wider margin of appreciation in determining the conditions to be satisfied before LTE is granted, by contrast with the position in relation to decisions regarding LTR for persons with a (non-precarious) family life already established in the United Kingdom. The Secretary of State has already, in effect, made some use of this wider margin of appreciation by excluding section EX.1 as a basis for grant of LTE, although it is available as a basis for grant of LTR. [40].
- (vi) **'The LTE Rules therefore maintain, in general terms, a reasonable relationship with the requirements of Article 8 in the ordinary run of cases'** [40].
- (vii) 'However, it remains possible to imagine cases where the individual interests at stake are of a particularly pressing nature so that a good claim for LTE can be established outside the Rules. In our view, the appropriate general formulation for this category is that such cases will arise where an applicant for LTE can show that compelling circumstances exist (which are not sufficiently recognised under the new Rules) to require the grant of such leave' [40].
- (viii) The approach to Article 8 in the light of the Rules in Appendix FM-SE should be the same as in respect of the substantive LTE and LTR Rules in Appendix FM. In other words, the same general position applies, that compelling circumstances would have to apply to justify a grant of LTE or LTR where the evidence Rules are not complied with [51].

18 Having carefully considered the FTTJ's decision, we are of the view that there was no misdirection in law as to how the proportionality balancing exercise was to be performed. His directions in law were that:

- (i) the public interest imperative of maintaining immigration control was a 'weighty' matter [20],
- (ii) the Appellant's non-compliance with the immigration rules was a significant, but not determinative consideration [21]; and
- (iii) it was necessary, outside of the rules, to show compelling circumstances [21] (by reference to *Heritage*).

These directions are, we find, consistent with the guidance given by the Court of Appeal in *SS (Congo)* a short time after the FTTJ's decision was promulgated, as per the passages of the Court of Appeal's judgment that we refer to in paragraph 16 above. The suggestion within the Respondent's Rule 24 notice that the Appellant needed to show exceptional features within her case is not a submission which is correct in law, but the Judge did not impose such a threshold in any event.

19 The Appellant's reference in submissions to Part 5A of NIAA 2002 does not materially assist her. The FTTJ referred to ss.117A-D NIAA 2002 at [19]. Although he

did not further particularise the terms of those provisions, we find that if he had done so, this would not have assisted the Appellant.

- 20 Section s.117B(1) serves only to emphasise the point taken by the FTTJ in his decision, that the maintenance of effective immigration control is in the public interest. As this is an entry clearance appeal, and the Appellant is outside the UK, then the remaining sub-sections which are relevant are s.117B(2) (ability to speak English) and 117B(3) (being financially independent.) However, even if the Appellant speaks English, and is financially independent (which is in doubt, given that the Appellant was unable to satisfy the financial eligibility requirements of Appendix FM), then it is relevant to note that AM (S.117B) [2015] UKUT 260 (IAC) provides at [18] that:

“The Respondent would only be prevented from (relying upon fluency or financial independence as public interest factors weighing against the claimant) if a claimant could demonstrate fluency, or financial independence, to the level of the requirements set out in the Immigration Rules.

and gave guidance at headnote 2 that:

“2. An appellant can obtain no positive right to a grant of leave to remain from either s117B (2) or (3), whatever the degree of his fluency in English, or the strength of his financial resources.”

- 21 The Appellant would therefore have gained no positive benefit if the FTTJ had considered Part 5A in more detail; indeed, he would have been likely to find that the Appellant’s non-satisfaction of the financial eligibility requirements of Appendix FM to have been a factor militating against her under s.117B(3).
- 22 There was no failure to properly consider the Sponsor’s ill-health. The FTTJ acknowledged that that represented a difficult circumstance for the Sponsor and that the current situation cannot be easy for him. However, it is to be noted that the Sponsor’s kidney failure is something he has been experiencing since at least August 2013, and there is no challenge from the Appellant against the FTTJ’s description that the Sponsor’s condition is currently properly managed [22].
- 23 Further, it seems to us that there was in fact little evidence before the First tier of any adverse effect on either the Appellant or Sponsor of the refusal of entry clearance, or if the appeal were unsuccessful, other than a bare assertion in a letter of representations dated 15.5.14 accompanying the application, asserting that it would not be reasonable for the Sponsor to leave the United Kingdom to enjoy his family life, and the Sponsor’s suggestion in oral evidence [8] that the Appellant would be ‘upset’ if the appeal failed. The FTTJ expressed the view that the present refusal of entry clearance does not mean that the Appellant and Sponsor must forever live apart; the Appellant may make a renewed application, ensuring that she fully complies with the requirements of the rules.
- 24 Finally, in relation to the submission of the Appellant that the rules do not accommodate any disability experienced by a sponsor; we find that this submission overlooks the exemptions from satisfying the income requirements, provided within

E-ECP.3.3 (receipt by an applicant's partner of various disability benefits). The Sponsor was not in receipt of any such benefit at the date of decision or the FTT hearing. If that changes in future, the Appellant and Sponsor could consider making a further application, if they wish.

Decision

- 25 The decision of the First tier Tribunal did not involve the making of any material error of law.
- 26 We do not set aside the First-tier decision.
- 27 We dismiss the Appellant's appeal against the First-tier decision.

Signed:

A handwritten signature in blue ink, appearing to read 'Ray O'Ryan', written in a cursive style.

Deputy Upper Tribunal Judge O'Ryan

Date: 13 September 2015