



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: OA/15410/2013
OA/09434/2013

THE IMMIGRATION ACTS

Heard at: Field House
On 20th October 2015

Decision and Reasons Promulgated
On 3rd December 2015

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

Bhupinder Kaur
Kiran Kiran
(no anonymity direction made)

Appellants

and

Entry Clearance Officer, New Delhi

Respondent

Representation:

For the Appellant: Mr Alim, Senior Home Office Presenting Officer

For the Respondent: Ms Isherwood, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellants are both nationals of India. They are respectively a mother, date of birth 20th May 1970 and a daughter date of birth 18th December 1994. They seek entry clearance to settle in the United Kingdom with Mr Manjir Kaur, a British national. Mr Kaur is the husband of the First Appellant and the father of the Second Appellant.

2. This determination concerns the Appellants' linked appeals against the decision of the First-tier Tribunal (Judge Miles) to dismiss their appeals against the decisions of the Respondent to refuse entry clearance. Permission to appeal was granted on the 7th September 2015 by Deputy Upper Tribunal Judge Archer.

Background and Matters in Issue

3. This is a matter with a complex chronology, and it is in part the timing of the various applications and decisions which give rise to the issues in this appeal.
4. Mr Kaur came to the United Kingdom in 2001. Having been refused asylum he overstayed for many years, finally being granted indefinite leave under the 'legacy' scheme in October 2011. He is now a British citizen.
5. On the 18th October 2012 both Appellants completed online applications for entry clearance to join the Sponsor Mr Kaur. They awaited the relevant documentary evidence to be sent from the Sponsor in the UK before attending the Visa Post in Jalandhar to attend a pre-arranged appointment to submit said evidence.
6. Before they went to the post, they realised that the First Appellant could not succeed in her application because she did not have the relevant English Language test certificate. However the Second Appellant could not delay in submitting her documents since she was due to turn 18 on the 18th December 2012. She therefore attended the post on the 1st November 2012 and submitted the documentary evidence to support her application for entry clearance as the child of a person present and settled in the United Kingdom.
7. The First Appellant's online application then lapsed. In the meantime she re-sat her English exam.
8. On the 12th March 2013 the Second Appellant's application was refused. The Respondent noted that at that time the Second Appellant was still living with her mother in India; absent there being any serious and compelling reasons why her exclusion would be undesirable, she therefore failed to qualify under paragraph 297 of the Immigration Rules. She lodged an appeal against the refusal.
9. On the 8th April 2013 the First Appellant made a second application. She completed the form online and again made an appointment to attend the post in order to give her biometric information and submit the relevant documents.
10. On the 1st July 2013 the First Appellant was refused entry clearance. She was refused with reference to Appendix FM, on the grounds that the marriage was not subsisting and that the maintenance requirements were not met. The First

Appellant lodged an appeal, which at her request was linked to that of her daughter¹.

11. The determination records that at the hearing before the First-tier Tribunal Mr Alim conceded that both appeals were pursued on Article 8 grounds only. At the hearing before me Mr Alim confirmed this to be the case. He said that was because in his view the Sponsor Mr Kaur would “never” be able to meet the requirements of the Rules in respect of maintenance; although he earned in excess of the income threshold², and had done for the year preceding the applications, the nature of his seasonal employment meant that he could never meet the ‘specified evidence’ requirements of the Rules.
12. The First-tier Tribunal found as fact that there is a family life between the Appellants and Mr Kaur. It was accepted that the marriage between Mr Kaur and the First Appellant is genuine and subsisting, and that he has a parental relationship with his daughter. It was not however accepted that the decision would have consequences of sufficient gravity to engage Article 8. Both Appellants had extensive family in India, including Mr Kaur’s two elder children who were still living in the family home with the Appellants. Mr Kaur had chosen to remain in the United Kingdom rather than returning to India after his asylum claim was rejected and this went to the strength of his relationship with his daughter. Family life had been maintained notwithstanding the physical separation of Mr Kaur from his wife and daughter and it could be continued in this way. It was suggested on behalf of the Appellants that the prolonged separation was the fault of the Secretary of State who had taken “too long” to grant Mr Kaur leave. The Tribunal rejected that, finding that the decision to remain in the United Kingdom illegally was his, and that he bore responsibility for any interference with his family life during this period. There are no obstacles to him visiting India to returning to live there permanently.

Grounds of Appeal and Response

13. Mr Alim relies on his detailed written grounds and oral submissions to contend that the decision of the First-tier Tribunal is flawed and must be set aside for the following reasons:
 - i) The timing of the applications had been relevant to the decisions made under the Rules but not under Article 8: when assessing Article 8 the Tribunal should have approached the matter from the starting point that both Appellants intended to travel together.
 - ii) The Tribunal erred in including in its reasoning the fact that the Sponsor Mr Kaur was a failed asylum seeker who spent a long time

¹ The linked appeals were dismissed by First-tier Tribunal Judge D Ross on the 29th April 2014 but this decision was set aside by Upper Tribunal Judge JG MacDonald on the 21st August 2014. The matter was remitted to the First-tier Tribunal for remaking.

² This is accepted at paragraph 23 of the determination

living in the United Kingdom illegally. The fact was that now he was a British citizen. He should not have been “blamed” for his previous conduct in the context of these appeals and the determination errs in seeking to “go behind” the grant of nationality.

- iii) The determination fails to recognise, or give sufficient weight to, the positive obligation on the United Kingdom to respect Article 8 rights of its citizens.
- iv) There was a failure to recognise that the Appellants met the spirit if not the letter of the Rules in respect of maintenance. The Sponsor could not produce the specified evidence set out at paragraph 2 of Appendix FM-SE because a good proportion of his income comes from seasonal employment (fruit picking). He is given a P45 at the end of each season so there would be an interruption in his employment. This was relevant in two ways. First it produced a “near miss” situation (although Mr Alim distanced himself from that terminology) and secondly it went to whether there was any Article 8(2) legitimate aim in refusing entry clearance.

14. For the Entry Clearance Officer Ms Isherwood submitted that the decision was justified on the evidence. The Sponsor had chosen to live separately from his family for over a decade. He had no international protection needs and there had never been any obstacles to him returning to India. His separation from his wife and child was the result of these actions. The Appellants had failed to identify any compelling reasons why entry clearance should be granted outside of the Rules. The Entry Clearance Officer relies on SS (Congo) v SSHD [2015] EWCA Civ 387.
15. In reply Mr Alim submitted that the compelling reason was that the Second Appellant would never be able to be with her father. He is now a British national and it would be perverse to take away that benefit from him.

Findings on Error of Law

Preliminary Observations

16. These linked appeals had, as I note above, a complex history. The determination does not assist the reader in understanding that history, since it refers throughout to “the appellant” without identifying which appellant is being discussed. I am grateful to Mr Alim and Ms Isherwood for assisting me in navigating through the facts.
17. Mr Alim was correct to concede that the appeals could not succeed with reference to the Rules. At the date that the decision was taken in respect of the Second Appellant she could not qualify under paragraph 297(1) since she was living with her mother in India, and her mother had not, at that time, made an application for entry clearance. Further, neither application had been supported by the ‘specified evidence’ required to show Mr Kaur’s income. Mr

Alim was not however correct in his submission that Mr Kaur would *never* be able to produce such evidence. Had the nature of his employment placed him in some peculiar position so that he simply could not rely on his income, that would clearly be relevant to the Article 8 consideration. That is not however the case. Paragraph 2 of Appendix FM – SE states that the maintenance requirements in Appendix FM must be evidenced by the production of:

- (a) Payslips covering
 - (i) a period of 6 months prior to the date of application if the person has been employed by their current employer for at least 6 months (and where paragraph 13(b) of this Appendix does not apply); or
 - (ii) any period of salaried employment in the period of 12 months prior to the date of application if the person has been employed by their current employer for less than 6 months (or at least 6 months but the person does not rely on paragraph 13(a) of this Appendix), or in the financial year(s) relied upon by a self-employed person.
- (b) A letter from the employer(s) who issued the payslips at paragraph 2(a) confirming:
 - (i) the person's employment and gross annual salary;
 - (ii) the length of their employment;
 - (iii) the period over which they have been or were paid the level of salary relied upon in the application; and
 - (iv) the type of employment (permanent, fixed-term contract or agency).
- (c) Personal bank statements corresponding to the same period(s) as the payslips at paragraph 2(a), showing that the salary has been paid into an account in the name of the person or in the name of the person and their partner jointly.

18. Mr Alim told me that the Sponsor has three jobs, one of which consists of seasonal work. Although he does the same job each year to supplement his income, his employer always issues a P45 at the end of the period. Mr Alim believed that this would mean that the Appellants could not satisfy the requirements set out above. I do not agree, and nor did Ms Isherwood for the Entry Clearance Officer. She agreed with my assessment that all the Sponsor need do is a) produce a years worth of payslips from all of his employments, letters from each employer as specified in the Rule, and bank statements showing that all of his income had been deposited. In these cases these requirements had simply not been met. That did not mean that there was any lacuna in the Rules.

19. These appeals could only be allowed with reference to Article 8 if there was some compelling reason to do so: SS (Congo).
20. Against that background I make the following findings in respect of the grounds of appeal.

The Chronology

21. As I set out above the timing of the applications was fatal to the application of the Second Appellant under 297(1). She could not show, at the date of decision, that she was seeking entry with her mother. That was because at the date that the application was decided her mother did not have an outstanding application. I have some sympathy with Mr Alim's position that this was not of any great relevance to the Article 8 consideration. It was quite apparent from the facts that the two Appellants wished to come to the United Kingdom together and regardless of the timing, that was the substantive fact which should have been considered. Any error in approach here is however not such that the decision should be set aside. That is because the presence of her mother in India was not the only relevant factor. The determination expressly recognises that for both these women 'family life' has existed for the past 11 years on the basis of a family unit consisting of the Appellants and two other children of the family all living in the family home together. That was a factor that the Tribunal was entitled to take into account regardless of when the applications were made and refused.

The British Sponsor

22. Mr Kaur is British and no-one is suggesting otherwise. Mr Alim was vociferous in his attack on the determination and its alleged attempt to "go behind" the grant of nationality. It is submitted that in referring as it did to the Sponsor's immigration history the Tribunal took irrelevant facts into account and/or diminished the positive weight to be attached to the right of a British citizen to live with his wife and child.
23. This submission is wholly misconceived. The Tribunal addressed the history of the Sponsor because it went to the nature and quality of his family relationships. Had he been, for instance, an asylum seeker who had waited a long time for a positive decision in his international protection claim, that would clearly be relevant to the ongoing interference and why he had suffered such a long separation from his family in the first place. In this case, the First-tier Tribunal observes, there is no obstacle to family life continuing in India, or in the manner that the Sponsor and Appellants have chosen to continue it thus far, by long-distance communication and when possible, visits. It cannot be said to be an error of law that these matters were taken into account.
24. Mr Alim sought in his submissions to emphasise that in an entry clearance case, the decision-maker should be concerned with the positive obligation on the contracting state to respect family life. I do not perceive that the First-tier

Tribunal misunderstood that this was an entry, as opposed to a removal, case. Nor am I satisfied that there was somehow a failure to recognise that family life was important. There is no error of law identified here. The 'positive obligation' on the state is not to be understood as a positive obligation to grant entry clearance in any circumstances. That positive obligation is reflected and expressed in the Immigration Rules: SS (Congo).

The Legitimate Aims set out in Article 8(2)

25. In his oral submissions (I could not identify the point in the written grounds) Mr Alim relied on the fact that the Sponsor was earning in excess of £22,400 per year and that both Appellants were willing to take "any job" once in the UK to contend that there was nothing weighing on the Entry Clearance Officer's side of the scales. He submitted that there being no criminality in this case (save perhaps the illegal entry and decade of overstaying by the Sponsor) the only Article 8(2) aims that could be said to be pursued by the decision were the protection of the economy and/or the rights and freedoms of others. Since this family were going to be self-sufficient the Respondent could show neither was engaged.
26. It is established principle that the Respondent does not need, in each and every case, to identify in what manner the presence of an individual claimant in the United Kingdom will impact upon the economy: Shahzad (Art 8: legitimate aim) [2014] UKUT 00085 (IAC). That is because it is *a matter of fact* that there will be some impact. Whether or not the family are financially self-sufficient for the foreseeable future that it so, for the reasons Stanley Burnton LJ sets out in FK and OK (Botswana) [2013] EWCA Civ 238:
- "The maintenance of immigration control is not an aim that is implied for the purposes of article 8.2. Its maintenance is necessary in order to preserve or to foster the economic well-being of the country, in order to protect health and morals, and for the protection of the rights and freedoms of others. If there were no immigration control, enormous numbers of persons would be able to enter this country, and would be entitled to claim social security benefits, the benefits of the National Health Service, to be housed (or to compete for housing with those in this country) and to compete for employment with those already here. Their children would be entitled to be educated at the taxpayers' expense...All such matters (and I do not suggest that they are the only matters) go to the economic well-being of the country. That the individuals concerned in the present case are law-abiding (other than in respect of immigration controls) does not detract from the fact that the maintenance of a generally applicable immigration policy is, albeit indirectly, a legitimate aim for the purposes of article 8".
27. There is therefore absolutely no merit in this ground.

The 'Near Miss'

28. Although Mr Alim declined to refer to his point on maintenance as a 'near miss' this is in fact what it was. A near failure to meet the requirements of the Rules is not capable in and of itself of justifying entry outside of the Rules, but it may be relevant where there are already compelling circumstances: per Richards LJ in SS (Congo) [at 56]. Where such circumstances exist it might tip the balance. It is submitted that the determination of the First-tier Tribunal is flawed for a failure to give sufficient weight to its own findings that, in substance, the Sponsor was earning enough money. I reject that submission for two reasons. Firstly, as I note above, Mr Alim was simply wrong in his analysis that the Sponsor could "never" meet the evidential requirements of the Rules. He had just failed to do so on this occasion. Secondly the applications, the grounds of appeal to the First-tier Tribunal, and indeed to this Tribunal, had completely failed to identify what if any 'compelling circumstances' there might be so as to justify departure from the Rules. Driven to identify such a feature by Ms Isherwood's submissions Mr Alim said that the result of this refusal would be that the Second Appellant can "never be with her father". The First-tier Tribunal found that she has not been with her father for the past decade. That was their - or in all probability his - choice. If they now wish to change that arrangement it remains open to Mr Kaur to go and live with her in India. Alternatively she could make an application under the Immigration Rules for entry clearance to come to the UK in some other capacity. It is not therefore correct to suggest that she will never see her father again. The Appellants have not identified what feature of their circumstances would justify a grant of leave to enter outside of the Rules and it cannot be said that the First-tier Tribunal erred in failing to treat the financial 'near miss' as determinative.

Decisions

29. The decision of the First-tier Tribunal contains no error of law and it is upheld.
30. I was not asked to make a direction for anonymity and in the circumstances I see no reason to do so.

Upper Tribunal Judge Bruce
21st October 2015