



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/18876/2013

THE IMMIGRATION ACTS

Heard at Field House
On 2 September 2014

Determination promulgated
On 3 September 2014

Before

Deputy Judge of the Upper Tribunal I. A. Lewis

Between

Secretary of State for the Home Department

Appellant

and

Md. Wahid Ussin Ludhi
(Anonymity direction not made)

Respondent

Representation

For the Appellant:

Ms A Holmes, Home Office Presenting Officer.

For the Respondent:

Mr R Sharma of Counsel instructed by Charles
Simmons Immigration Solicitors.

DETERMINATION: ERROR OF LAW

1. This is an appeal against the decision of First-tier Tribunal Judge Raymond promulgated on 16 June 2014, allowing Mr Ludhi's appeal against the Secretary of State's decision dated 14 May 2013 to refuse to vary leave to remain as a spouse and to remove him from the UK.
2. Although before me the Secretary of State is the appellant and Mr Ludhi is the respondent, for the sake of consistency with the proceedings before the First-tier Tribunal I shall hereafter refer to Mr Ludhi as the Appellant and the Secretary of State as the Respondent.

Background

3. The Appellant is a national of Bangladesh born on 11 March 1990. He entered the UK on 26 January 2010, pursuant to entry clearance as a Tier 4 Student valid from 6 January 2010 until 28 March 2011. He was granted further leave to remain in this capacity, valid to 30 October 2012. On 11 October 2012 the Appellant applied for variation of leave to remain on the basis of his marriage to Ms Hasina Khanom, a British citizen.
4. The Appellant's application was refused for reasons set out in a 'reasons for refusal' letter ('RFRL') dated 14 May 2013. A Notice of Immigration Decision was issued on the same date.
5. The Appellant appealed to the IAC.
6. The Appellant's appeal was allowed by the First-tier Tribunal for reasons set out in the determination promulgated on 16 June 2014.
7. The Respondent applied for permission to appeal to the Upper Tribunal which was granted by First-tier Tribunal Judge Cheales on 10 July 2014.

Error of Law

8. The Respondent had not been satisfied that the Appellant met the financial requirements of the Immigration Rules pursuant to paragraph E-LTRP.3.1. The Respondent had also not been satisfied in respect of paragraph EX.1 and 276ADE.
9. In respect of the financial requirements it is to be noted that the Appellant had declared on his application form a combined income with his wife of approximately £18,400 - which was below the required level. Moreover, the supporting materials did not in all respects meet the requirements of Appendix FM-SE. Before me Mr Sharma does not seek to dispute this. Moreover, subject to a submission on discretion, Mr Sharma did not seek to argue before me that the Appellant could succeed in his appeal under the Rules.

10. The submission in respect of discretion is set out at paragraphs 6–9 of the Skeleton Argument prepared by Mr Sharma for the hearing before the Upper Tribunal. It is submitted that because the Rules contain a flexibility policy applicable where there is a valid reason that a specified document cannot be supplied, that there is a general discretion to dispense with the requirements laid out within the Rules. I do not accept that the inclusion of a specific flexible approach in respect of specified documentary material points towards a wider discretion within the Rules to disregard the specified requirements of the Rules – and more particularly, does not for a moment indicate that there is a general discretion at large within the Rules to disregard the specified gross annual income figure, and apply some lower figure.
11. In fairness, Mr Sharma did not push this submission with any vigour and indeed recognised in his written submission that the flexibility provision on its own was “*not very helpful*”.
12. Mr Sharma’s ‘discretion’ submission having been rejected, he acknowledged that he could not support the conclusion of the First-tier Tribunal Judge that the Appellant’s appeal succeeded under the Immigration Rules.
13. In this context it is clear that the Judge’s decision was reached without any reference to the requirements of Appendix FM-SE. The Judge made extensive reference to, and placed reliance upon, materials that were not submitted with the application, and indeed to circumstances that did not exist at the date of the application with regard, in particular, to the increased earnings of the Appellant. There are repeated references in the determination to the provision of supplementary materials in the appeal that were not submitted to the Respondent as part of the application: e.g. “*The supporting evidence for these earnings, which were supplemented with the appeal grounds with a view to the appeal hearing...*” (paragraph 12); and “*But for the appeal these [bank] statements were made available...*” (paragraph 15). Moreover, there is no attempt to relate the materials that were submitted with the application to the ‘specified evidence’ requirements of paragraph 2 of Appendix FM-SE. As noted above, Mr Sharma acknowledges that those requirements were not met in some material respects.
14. It follows that the Judge materially erred in law, and his decision must be set aside.

15. Because the Judge was satisfied – wrongly – in respect of the financial requirements of the Rules, he did not give any consideration in the alternative to paragraph EX.1 of Appendix FM, or yet further in the alternative Article 8 of the ECHR beyond the express wording of the Rules. Indeed the Judge did not hear any oral evidence, but dealt with the case on the basis of submissions in respect of the financial circumstances of the Appellant and his wife. In all the circumstances it was common ground that the appeal should be remitted to the First-tier Tribunal, to a Judge other than Judge Raymond, for the decision in the appeal to be remade.
16. The representatives before me were in agreement that the Respondent had not taken issue with the suitability requirements under section 5-LTR or the relationship requirements under paragraphs E-LTRP.1.2-1.12 and E-LTRP.2.1, and accordingly there was still scope for the Appellant to succeed under the Rules pursuant to paragraph R-LTRP.1.1(d) – which would necessitate a consideration of whether or not there are insurmountable obstacles to the Appellant and his wife continuing family life outside the UK.
17. That said, I do not seek to limit the scope of the rehearing before the First-tier Tribunal, and in particular I did not accede to Mr Sharma’s suggestion that the findings of Judge Raymond in respect of the Appellant and his wife’s earnings should be preserved. I consider there is some weight to Ms Holmes’ observation that there is a lack of clarity in respect of specific earnings at specific times, bearing in mind in particular that the Appellant’s wife had a sustained period away from one of her two jobs, and where her hours were said to vary as much as between 4 and 16 hours per week. Further, where on rehearing the next judge will likely hear oral evidence, it seems artificial to restrict him or her to findings made without the benefit of such evidence. In the event, bearing in mind that under paragraph R-LTRP.1.1(d) there is no financial requirement to be met, the non-preservation of Judge Raymond’s findings may be of little consequence. If, nonetheless, the Appellant does wish to emphasise his ability to meet the threshold of the financial requirements under the Rules, it would be helpful if the financial information was presented in a more readily accessible format – perhaps in a schedule cross-referenced to supporting evidence rather than mere presentation of a bundle of disparate documents.
18. It is otherwise not necessary to make any specific directions in respect of the rehearing: standard directions will suffice whereby any further materials must be filed and served within seven days of the new hearing.

Decision

19. The decision of the First-tier Tribunal Judge contained an error of law and is set aside.

20. The decision in the appeal is to be remade before the First-tier Tribunal by any judge other than First-tier Tribunal Judge Raymond.

Deputy Judge of the Upper Tribunal I. A. Lewis 2 September 2014