



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/09245/2013

THE IMMIGRATION ACTS

Heard at Field House
On 21 March 2014
Prepared 21 March 2014

Determination Promulgated
On 27th March 2014

Before

UPPER TRIBUNAL JUDGE MCGEACHY

Between

ENTRY CLEARANCE OFFICER - ISLAMABAD

Appellant

and

MRS PALWASHA ARGHANDIWAL

Respondent

Representation:

For the Appellant: Mr S Whitwell, Senior Home Office Presenting Officer
For the Respondent: The sponsor, Mr Davood Arghandiwal

DETERMINATION AND REASONS

1. The Entry clearance Officer, Islamabad appeals, with permission, against a decision of Judge of the First-tier Tribunal Pirota who in a decision dated 29 January 2014 dismissed the appeal of Mrs Palwasha Arghandiwal against a decision of the Entry Clearance Officer to refuse her entry clearance as a spouse on immigration grounds but allowed the appeal on human rights grounds under Article 8 of the ECHR.

2. Although the Entry Clearance Officer is the appellant before me I will for ease of reference refer to him as the respondent as he was the respondent in the First-tier. Similarly I will refer to Mrs Palwasha Arghandiwal as the appellant as she was the appellant before the First-tier Judge.
3. The appellant is a citizen of Afghanistan born on 27 April 1992. She applied for leave to enter as a spouse in December 2012. Her application was refused on the basis that it was not accepted that her husband's earnings were sufficient to meet the financial requirements of the Rules. It appears to have been accepted that this is a genuine and subsisting marriage and that the accommodation requirements of the Rules were met.
4. Judge Pirotta heard the appeal and in a brief determination concluded that the correct documentation relating to the sponsor's business had not been produced and had not covered the correct period of the application.
5. From paragraph 16 through to 20 of the determination the judge set out her findings of facts and law as follows:-

"16. The Appellant submitted some of the Sponsor's business documents in the application but she and the Sponsor did not submit the correct documents, sufficient of them or cover the correct period of the application. The Sponsor acknowledged that he had not had the documents at the date of the application. As the Appellant made the application when accurate and complete documentary evidence to meet the criteria of the mandatory specified documents were not available, it is not surprising that the ECO refused the application. There is no discretion to overlook the absence of specified documents listed in the FM-SE Appendix. The ECO had not refused the application because the Appellant and Sponsor had not shown that he had income, but because he had not met the criteria and could never have hoped to succeed on the documents submitted. The ECO had considered the documents submitted but they did not meet the Rules. The submission of documents is the responsibility of the Appellant and as she chose not to submit the correct evidence of bank statements, employment or income, certified trading accounts, profit and loss accounts, business bank statements, tax return, NI contributions or tax paid, the Secretary of State had to refuse the application. Any other decision would have been unlawful and the Decision made was the only one available to the Secretary of State.

17. The Appellant and Sponsor now have submitted documents which would have complied with the specified evidence for the year 2012-2013, had that been the period for the application. But still have not submitted all the mandatory documents for the year covered in the application (2011-2012).

18. The Appellant and Sponsor have shown that they are in a genuine and subsisting marriage, have recently had a child together and have demonstrated that they intend to live together permanently as husband and wife. There was evidence that they have maintained contact and that the Appellant has suffered poor

health during her pregnancy and that the child was delivered by caesarean section before the due date.

19. The Sponsor showed appropriate concern about the delay in the appeal being listed, intended date was 15.4.2013, almost 13 months since the date of decision, and caused the hearing to be brought forward
 20. I conclude that the delay has caused avoidable complications in the private and family lives of the Appellant and Sponsor, which could have been avoided by a more efficient management of the appeal. I consider this is material to the consideration of the balance of proportionality when assessing the rights of the Appellant and Sponsor to Article 8 rights to private and family life. I conclude that the Appellant and Sponsor have established a family life which engages Article 8 and that a further refusal and requirement that they make a fresh application to enter supported by the current financial evidence, which would succeed, would be disproportionate and unnecessarily onerous to them.”
6. The Entry Clearance Officer appealed arguing that the determination **Gulshan [2013] UKUT 00640 (IAC)** made it clear that the Article 8 assessment should only be carried out when there are compelling circumstances not recognised by the Rules. No such compelling circumstances had been identified and therefore the decision was unsustainable. Moreover, the determination in **Gulshan** had made it clear that an appeal should only be allowed where there are exceptional circumstances. It was argued there was nothing to stop the appellant making a fresh application and there was nothing to suggest therefore that the decision to refuse the application had been unjustifiably harsh.
 7. I put to the sponsor that there were complicated issues of law which would have to be considered in the appeal before me but he stated that he had to fly out to Pakistan to see his wife who had recently given birth, in the next two weeks and therefore he did not wish me to adjourn the proceedings to a further hearing when he would have legal representation.
 8. Mr Whitwell then made submissions relying on the grounds of appeal and stating that the judge had identified no compelling circumstances to indicate that this was a case which should succeed under Article 8 rather than under the Rules. Moreover, the judge had taken into account factors which had arisen after the date of decision which was clearly contrary to the judgment of the House of Lords in **AS (Somalia) [2009] UKHL 32**. The reality was that the appellant’s child had been born after the date of decision. Moreover he pointed out that there was no indication that there would be any delay in making a fresh application – this application had been made in December 2012 and the decision had been made three months later. Delay had only been caused because of listing before the Tribunal. He asked me to find there was an error of law in the determination and to go on then to dismiss the appeal on Article 8 as well as immigration grounds.

9. I explained to the sponsor the various issues. He indicated that he did not now have documentation that was for the relevant period and emphasised the importance to him of seeing his wife now.
10. I find that there are material errors of law in the determination of the First-tier Judge. She dealt with the appeal superficially but was correct to find that the necessary documentation was not before the Entry Clearance Officer. Indeed, she found that the application had had to have been refused. Indeed she found that she still did not have before her the mandatory documents for the year covered in the application. The reality is that relevant case law, and in particular the determination in **Gulshan (Article 8 - new Rules - correct approach) [2013] UKUT 00640 (IAC)** make it clear that the Immigration Rules should certainly be the starting point in any consideration of the issue of the rights of the appellant under Article 8 of the ECHR. Moreover, for an Article 8 application to succeed there must be compelling reason which would mean that an appellant could succeed outside the Rules on Article 8 grounds. No such compelling reasons have been found. The judge does not identify the "avoidable complications" in the private and family lives of the appellant or the sponsor let alone considered the issue of insurmountable obstacles. She has simply given no adequate reasons for her conclusion that the application of this Rule in this case is a disproportionate interference with the rights of the appellant.
11. For these reasons I have set aside the determination of the First-tier Judge and I go on to re-make the decision and dismiss this appeal on human rights grounds, the judge having already dismissed the appeal on immigration grounds.
12. The reality is that if the application is submitted quickly and that it is properly prepared with all the relevant documents then there appears to be no reason why the application should not succeed. However, it is important that the sponsor ensures that all relevant documents are submitted in the appropriate format and therefore care will need to be applied when the documentary evidence is collated and submitted with the application.

Signed

Date

Upper Tribunal Judge McGeachy