



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/09903/2013

THE IMMIGRATION ACTS

Heard at Field House
On 27 May 2014

Determination Promulgated
On 7th July 2014

Before

UPPER TRIBUNAL JUDGE ALLEN

Between

SUMAN WASEEM

Appellant

and

ENTRY CLEARANCE OFFICER - ISLAMABAD

Respondent

Representation:

For the Appellant: Mr A Haq of Harris & Green Solicitors
For the Respondent: Mr A McVeety, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is an appeal against a decision of a First-tier Judge promulgated on 13 February 2014. It is an appeal brought by the respondent, the Entry Clearance Officer Islamabad against that decision. The original decision, which was made by the Entry Clearance Officer, was made on 30 March 2013.

2. The appellant, as I will continue to refer to her and to the Entry Clearance Officer as the respondent as that was how they were before the judge, had applied, for entry clearance as a partner under ECP.1.1 of Appendix FM. The issue as it has developed is that of first the ability to meet the financial requirements of the Immigration Rules and thereafter Article 8 of the European Convention on Human Rights.
3. The judge accepted that the couple had shown on balance that they were in a genuine and subsisting marriage, which was a matter of dispute by the respondent initially. The judge went on to note that the correct documentation had not been filed with the application and therefore it had not been shown that the sponsor was earning over £18,600 and the appeal therefore had to fail under the Rules but she went on to consider the situation under Article 8.
4. She said at paragraph 19 having considered authorities such as Gulshan and Patel that the term 'compelling' in Gulshan was saying no more than that consideration outside the Rules was only relevant where there were private and family life considerations which were strong enough to reach the high Article 8 threshold and which tipped the Huang test on proportionality in favour of the appellant so as to make refusing their appeal a disproportionate response in all the circumstances. She went on to say that the appellant and his spouse could now meet the financial threshold had they applied under the Rules.
5. They were a genuine couple who wished to live as man and wife and she said she found their circumstances compelling, going on to note that they did not intentionally send the wrong documents but simply made a mistake. She said thereafter that she therefore considered proportionality, noting the interests of the economic wellbeing of the United Kingdom to ensure that those residing here could meet the financial requirements and that the need to comply with immigration control including meeting the Rules and balanced those matters and noted what had been said by Mr Justice Blake in MM about the appropriate level to be met.
6. She said it was clear from the evidence before her, in particular the payslips, that the income would equate to just under £22,500 by the end of the tax year and considered it would be disproportionate to require the appellant to apply under the Rules again or apply from abroad and allowed the appeal on the basis that it would be disproportionate to do otherwise
7. The respondent sought permission to appeal against this decision on the basis that the judge erred in allowing the appeal under Article 8 because it was clear from Gulshan that the Article 8 assessment should only be carried out when there were compelling circumstances not recognised by the Rules, contrary to the judge's findings at paragraph 19 and no such compelling circumstances had been identified and reference was made also in the grounds to Mr Justice Sales' decision in Nagre very much to the same effect as that in Gulshan and noting what the judge said about the relevance of MM.

8. Permission was refused initially by a First-tier Judge and then subsequently granted by an Upper Tribunal Judge, and I have had helpful submissions from Mr McVeety and Mr Haq in relation to the question of whether or not there is an error of law in this case.
9. It is necessary I think to turn back particularly to Gulshan and what was said there since Gulshan came after Nagre and so there was the opportunity to comment on that as well as other authorities. It was said for example at paragraph 21 in Gulshan to show that despite the absence of insurmountable obstacles to removal, it would be disproportionate, it would be necessary to show other non-standard and particular features of the case of a compelling nature demonstrating that removal would be unjustifiably harsh, and the judge went on to say that in the majority of cases where the Secretary of State concluded that if the family member applying for leave to remain, and of course this is an entry case, not a leave to remain case, could not satisfy the insurmountable obstacles test it was unlikely that that would be a good arguable case, let alone a case ultimately found to establish that Article 8 would require that leave to remain should be granted outside the Rules, and then at paragraph 24, the Tribunal drew together the principles to be derived from the relevant authorities.

10. It was said that:

“After applying the requirements of the Rules only if there may arguably be good grounds for granting leave to remain outside is it necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under them”,

and I think it is in any event common ground that compelling circumstances is the relevant test here.

11. The judge spoke in terms of compelling circumstances in this case at paragraph 20, which I have quoted from above, and essentially her reasoning for finding that the circumstances were compelling was that the appellant and his spouse were now able to meet the minimum financial threshold. There was evidence that they met the English language requirement in the papers, and the point is made in the grounds that this does not amount to identifying compelling factors. The only reasons given seem to be that the appellant might meet the requirements if she applied now, which was said to be clearly speculative and that they had not deliberately provided inadequate documents.
12. So this is essentially a reasons challenge. It is a question of whether the judge’s reasoning in this case in finding the circumstances to be compelling is such as to amount to reasons which no reasonable judge could come to on the facts of the case and the evidence, and having read the determination and the authorities and heard the submissions I have concluded that the judge did err in finding the circumstances

compelling. They are relatively standard circumstances, if it is the case that the requirements of the Rules can now be met and I think it is right to say as the respondent does in the grounds that that is a matter of speculation and there is no reason why a further application should not be made if the necessary income level is met. Everything is satisfied under the Rules it seems and I can see no particular reason why on further application that would not remain to be the case but as things stand therefore I conclude that there is an error of law in this case and the judge erred in finding the circumstances compelling. So her decision allowing the appeal is therefore substituted by a decision dismissing it.

Signed

Date

Upper Tribunal Judge Allen