



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/11824/2013

THE IMMIGRATION ACTS

Heard at Field House
On 14th November 2014

Determination Promulgated
On 20th November 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE LINDSLEY

Between

ENTRY CLEARANCE OFFICER - DHAKA

Appellant

and

**MRS HALIMA KHATUN
(NO ANONYMITY DIRECTION MADE)**

Respondent

Representation:

For the Appellant: Mr I Jarvis, Senior Home Office Presenting Officer

For the Respondent: Mr M Bhuiyan of Universal Solicitors

DETERMINATION AND REASONS

Introduction

1. Although this is an appeal by the Secretary of State I will refer to the parties as they were before the First-tier Tribunal.
2. The appellant is a citizen of Bangladesh born on 28th December 1989. She applied for entry clearance to come to the UK as the spouse of Mr Shamim Chowdhury a British citizen on 28th January 2013. This application was refused on 24th April

2013 and she appealed. Her appeal against the decision was allowed by First-tier Tribunal Judge Roopnarine-Davies in a determination promulgated on the 1st September 2014.

3. Permission to appeal was granted by Judge of the First-tier Tribunal Ford on 9th October 2014 on the basis it was arguable that Judge Roopnarine-Davies had erred in law in not applying post-decision evidence correctly to the date of decision and in failing to look at whether there were factors which made it unduly harsh before considering Article 8 ECHR outside of the Immigration Rules.
4. The matter came before me to determine whether the First-tier Tribunal had erred in law.

Submissions – Error of Law

5. Mr Jarvis relied upon the grounds of appeal and his skeleton argument, and also made oral submissions. In summary he contends as follows.
6. Judge Roopnarine-Davies needed to look at the totality of evidence provided by the sponsor with respect to his financial situation in relation to the six month period prior to application which started on 28th July 2012 and finished on 28th January 2013.
7. When assessing whether the financial documents submitted by the appellant met the requirements of Appendix FM-SE it could be seen that there was no evidence before her that in relation to the sponsor's employment with Big Saving that money was paid into his bank account corresponding to the amounts shown on the payslips prior to 29th October 2012. Thus evidence of such payments in failed for the period 28th July 2012 to 29th October 2012 and the appellant could not meet the requirements of the Immigration Rules. It was also argued that the letters from the employers could not meet the requirements of the Immigration Rules with respect to their content.
8. Mr Jarvis conceded that he could not show there was a problem with the appellant's English certificate and so this point was not pursued.
9. It was also submitted that it was not appropriate for Article 8 ECHR to be used to circumvent the Immigration Rules as there was no unjustifiably harsh outcome and there were no compelling circumstances relating to why family life could not continue in Bangladesh.
10. Mr Bhuiyan accepted, when I put it to him, that the appellant could not show payment in to his bank account of income from Big Saving during the period 28th July 2012 and 29th October 2012. He therefore conceded that the appellant could not succeed under the Immigration Rules because Appendix FM-SE paragraph A1 2(c) made this was a mandatory requirement. He therefore accepted that Judge Roopnarine-Davies had erred in law in allowing the appeal on this basis.

11. I informed the parties that I found that the First-tier Tribunal had erred in law for the reasons set out below. The decision of Judge Roopnarine-Davies was therefore set aside.

Conclusions – Error of law

12. Judge of the First-tier Tribunal Roopnarine-Davies erred in law at paragraph 8 of her determination in finding that the appellant had provided evidence which met all the requirements of the Immigration Rules to come to the UK as a spouse.
13. The refusal notice set out that the appellant had not met the requirements of the Appendix FM-SE. Judge Roopnarine-Davies was entitled to take all evidence submitted by the appellant into account but it had to relate to the six month period prior to application.
14. Mr Jarvis has identified, and Mr Bhuiyan agrees, that there was no evidence to meet the requirements of Appendix FM-SE paragraph A1 2 (c) showing payments in of salary for Big Saving into the sponsor's bank account before Judge Roopnarine-Davies. This was understandable as the sponsor was paid in cash and did not realise this was going to be a necessary requirement at that point in time to bring his wife to the UK. However the appellant was still unable to meet the requirements of the Immigration Rules at the time of decision.
15. As a consequence of the above error of law Judge Roopnarine-Davies has also erred in law when determining and allowing the appeal under Article 8 ECHR, as it could not be said that the decision to refuse entry clearance under the Immigration Rules was not in accordance with the law as is done at paragraph 9 of the determination. Clearly further reasoning was required given that the appellant could not succeed under the Immigration Rules and the decision to refuse was in accordance with the law.

Evidence & Submissions - Remaking

16. Mr Shamim Chowdhury adopted his witness statement and confirmed it was true and correct to the best of his knowledge and belief. In brief summary the statement says that the appellant married the sponsor in Bangladesh, and they continue to speak to each other on a daily basis via Skype and the telephone. He has two jobs: one with Big Saving Energy Market and the other with Jaipur, and Indian restaurant. He had supplied bank statements, payslips, employment contracts, P60s regarding these employments. He earned £7725 per annum from Jaipur and £10,920 per annum from Big Saving. In addition the sponsor also had income from a property he owned in Cardiff which paid him £500 a month rent. His wife had passed the approved English test. He had been living in the UK since 1997 and worked hard all his life here: he does not want to live in Bangladesh due to his work and investments in this country. He does not wish to live apart from his wife and cannot visit her as much as he would like given his level of earnings.

17. In cross-examination he added that he accepted his full wages had only been paid into his account from Big Saving since approximately 28th October 2012. He had had a solicitor in the UK when he made his application and his wife had taken advice from the outsourced agent where she made her application in Sylhet Bangladesh.
18. Mr Jarvis submitted that he relied upon the refusal notice dated 24th April 2013 and the reasons in the entry clearance manager's review. The date of the decision remained 24th April 2013 however as the ECM review was not a new decision. In order to succeed under the Immigration Rules the appellant had to show three types of evidence to corroborate the sponsor's income from UK employment: six months of wage slips, six months of bank statements showing money from those wages going into a bank account and employer letters. He submitted that the appellant could not show the wages going into the bank account for Big Savings (as set out in the error of law decision). He also submitted that the letters from the employers also did not meet all the requirements of the Immigration Rules as they did not specify the amount of pay given over the six month period in accordance with Appendix FM-SE paragraph A1 2 (b)(iii) in respect of the work for Jaipur Restaurant.
19. I asked Mr Jarvis to consider whether the income from the sponsor renting his property in Cardiff could be used instead of the employed income from Big Savings. We identified that Appendix FM-SE paragraph 2A 10 (a) sets out the documentation required to show rental income. At paragraph 2A 10 (a)(ii) 12 months of bank statements were required for the period prior to the date of application (i.e. January 2012 to January 2013) showing payment in of the rental income. The appellant had not included bank statements for this entire period so could not rely upon his rental income to succeed under the Immigration Rules.
20. Mr Jarvis submitted that I could not allow the appeal outside of the Immigration Rules under Article 8 ECHR as there was no good reason to consider the matter beyond the Immigration Rules. It was conceded by the respondent that the appellant and sponsor had a genuine, subsisting marriage and intended to live together permanently as husband and wife. There would be some cost in making a new application but this was required so that the Secretary of State could be absolutely sure that the sponsor was in a position to support the appellant financially in the UK. Due to the lack of the specified documentary evidence the sponsor had failed to show this. The Rules at Appendix FM-SE are very detailed but ultimately they are also very clear. He did not pursue any issue of failure to comply with the requirements with respect to the English language certificate, although it may be that the entry clearance officer might raise further issues about this if the appeal was allowed.
21. Mr Bhuiyan pointed out that the appellant had taken a new English language test due to a request from the entry clearance officer and it had been accepted by the respondent at paragraph 3 of the determination of the First-tier Tribunal that the appellant met this requirement. He accepted that whilst the sponsor did earn over

the amount set by the Immigration Rules that he had not produced all the documents required by the Immigration Rules to support the appellant's application and appeal. However the appellant had supplied additional documents not required by the Immigration Rules such as P60s so I should find that the sponsor did earn over £18,600 to the standard of proof I must assess this factor, i.e. the balance of probabilities. This was a matter that should properly be considered in relation to the appeal under Article 8 ECHR.

22. It would be wrong to expect the appellant and Mr Chowdhury to have their family life in Bangladesh. Mr Chowdhury had lived in the UK for 17 years; he is a British citizen; he had two jobs in this country; he owns a property in the UK; he is of good character and at his age (43 years) it would be unduly harsh to require him to relocate to Bangladesh.
23. It would also wrong to require the appellant to make a new application. It would cost a further large fee; it might be refused again; it would take two or three months to be processed and this application had been going on now for nearly two years.
24. At the end of the hearing I reserved my determination.

Conclusions – Remaking

25. The appellant cannot meet the requirements of the Immigration Rules with respect to showing payments in of wages from his job at Big Saving into his bank account for the full six month requirement as set out under Appendix FM-SE at paragraph A1 2 (c). The application also fails under the Immigration Rules as before me there were not bank statements showing payment in of rent for the twelve month period from the sponsor's rental property, which could comply with Appendix FM-SE paragraph 2A 10 (a)(ii). I do not agree that the letter of employment from Jaipur failed to meet the requirements of paragraph A1 2 (b)(iii) of Appendix FM-SE. The salary paid during the period relevant to the application was specified in the letter.
26. As a result the sponsor had only shown sufficient evidence in accordance with Appendix FM to verify his employment with Jaipur, and thus to show a gross salary of £7725. Even if he had produced his bank statements for the full twelve month period for his rental income (which he did not give any reasons why he could not have done) this would only have evidence income of £440 per month (as per bank statements for the relevant period which were before me) or a further £5280, and thus this would not have brought the sponsor's gross annual income to £18,600 as required by Appendix FM. It was clear at the time of application the appellant could not have produced the necessary six months of bank statements showing payment in of income for his work for Big Saving Energy Market prior to October 2012 as he had not paid his cash wages into his bank account in total each month before this time.

27. Mr Jarvis argues I am not permitted to go on and consider the matter in accordance with Article 8 ECHR at large. He says that in accordance with Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 00640 I should not go on to examine Article 8 ECHR unless there are arguably good grounds for granting leave outside of the Rules. I do not accept that this is what Gulshan means. I find that it is appropriate to conduct an Article 8 ECHR analysis outside of the Immigration Rules in this case. As was said in MM (Lebanon) v SSHD [2014] EWCA Civ 985 at paragraph 128: “I cannot see much utility in imposing this further, intermediary test. If the applicant cannot satisfy the rule, then there either is or there is not a further Article 8 claim. That will have to be determined by the relevant decision-maker.”
28. I find that the correct approach in the circumstances of this case where the appellant could not succeed under the Immigration Rules relating to marriage as set out at Appendix FM due to the manner of his payment for his work and his perfectly lawful practice of not paying all of his funds in to his bank account on payment of his cash salary for the full period prior to his application is to conduct a full fact specific analysis under Article 8 ECHR.
29. It is accepted by me and all parties that the appellant is lawfully married to the sponsor, and that they have a genuine and subsisting marriage and intended to live together permanently. Refusal of entry clearance significantly interferes with their family life as the sponsor is working full time in the UK and does not have the time or funds to visit his spouse as much as he would like. Although the appellant and sponsor are in daily contact via Skype and telephone this is clearly not sufficient to maintain a full married relationship.
30. I note what was said by the Supreme Court in Quila v SSHD [2011] UKSC 45 by Lord Wilson at paragraph 43 about not following the old authority of Abdulaziz v UK 7 EHRR 471, and that issues of the possible reasonableness of family life being exercised elsewhere should be dealt with in consideration of whether the decision to refuse entry clearance is justified. The Supreme Court also clarified that no difference should be made between family life in an entry case as opposed to an expulsion case, as there was no different standard in relation to positive or negative obligations.
31. The refusal of entry clearance is in accordance with the law as the appellant could not meet the Immigration Rules as detailed above. The respondent justifies the interference with the appellant’s private life in the interests of the maintenance of economic order by applying a consistent system of immigration control. The evidence before me shows the appellant has no criminal record and is of good character.
32. I have finally to consider whether the significant interference with the appellant’s family life rights that refusal of entry clearance represents is justified as proportionate, and a fair balance between the competing considerations of the

appellant's family life and the respondent's desire to maintain economic order by applying a consistent system of immigration control.

33. In favour of the respondent is the fact that weight must be given to the refusal under the Immigration Rules as special consideration has been given to making these compliant with the UK's obligations under Article 8 ECHR. I also note that a narrow failure to meet the Rules, in this case by virtue of having insufficient documentation, is not to be seen as a matter which can be cured in an Article 8 ECHR balancing exercise, see Patel and others v SSHD [2013] UKSC 72. I therefore give no weight to any argument that a near miss under the Immigration Rules assists the appellant to succeed in this balancing exercise. In this case I also consider the fact that the sponsor is of Bangladeshi origin and speaks the language of that country, and so would find relocation to Bangladesh easier by reason of his background, as a matter supportive of the respondent's decision.
34. When considering the public interest s.117A of the Nationality, Immigration and Asylum Act 2002 requires me to have regard to the factors at s.117B of that Act. I take consideration of the fact that effective immigration control is in the public interest.
35. I also note that it is in the public interest that persons seeking to enter the UK should speak English and the fact that this appellant has shown her ability to do this through provision of ESOL A1 certificates from City & Guilds which show she has passed spoken and listening tests. The appellant was asked to re-take these qualifications by the entry clearance post in May 2014 as a result of some problems with City & Guilds prior to that time, and duly did so in June 2014 again obtaining pass results.
36. I also note the public interest in the appellant being financially independent. I am satisfied that the appellant can show that she will be financially independent and not a burden on taxpayers at the date of decision. The sponsor has satisfied me that at the date of decision he had a gross income of £10,916 from his work at Big Saving Energy Market. He has provided a P60 for the year ending April 2013 showing this to be his gross annual salary, he also provided six months of payslips to the entry clearance officer some of which were also before me, I have seen his contract of employment and it is accepted that he provided 4 months of bank statements showing his income entering his personal bank account with Barclays directly prior to the decision.
37. I am also satisfied that the sponsor earned a gross amount of £5280 from rental income for his property in Cardiff at the time of decision: in support of this I have seen six payments into his Barclays bank account from his managing agent in the six months prior to the decision, the title deeds for the property, and the terms of letting from his managing agent Mr Homes.
38. I am also satisfied that the sponsor earned a gross amount of £9094 from his employment with Jaipur restaurant at the time of decision. In support of this I

have seen his P60 for the year ending April 2013 giving this as his gross annual income, I have also seen his statement of terms and conditions for his employment with Jaipur Restaurant, a letter relating to his employment with Jaipur Restaurant, and the respondent is satisfied that there are payments in of salary for the six months prior to the date of decision into his Barclays bank account and has seen his payslips for this employment some of which were also before me.

39. The appellant may not have met the precise requirements of Appendix FM but I must assess whether I am satisfied on the balance of probabilities that the sponsor is working and earning money by renting a property as he claims so as to assess whether the appellant will be financially independent in accordance with s.117B of the Nationality, Immigration and Asylum Act 2002. I am more than satisfied that the total gross income of the sponsor was £25,290 at the time of decision given the documentation set out in the paragraph above. I find that this means the sponsor could show she would be financially independent.
40. In favour of the appellant is the fact that the sponsor cannot be reasonably be expected to relocate to Bangladesh by virtue of his British citizenship which he has held since 2009. In Sanade & Others (British Children -Zambrano - Dereci) [2012] UKUT 48 at point 5 of the head note it says as follows: "Case C-34/09 Ruiz Zambrano now makes it clear that where the child or indeed the remaining spouse is a British citizen and therefore a citizen of the European Union, as a matter of EU law it is not possible to require the family as a unit to relocate outside of the European Union or for the Secretary of State to submit that it would be reasonable for them to do so." Further as Blake J said in MM, agreeing with Sedley LJ: "in the generality of ordinary cases, the abandonment of the citizen's right of residence in order to enjoy family life with his or her spouse is an unacceptable choice, and a disproportionately high price to pay for choosing a foreign spouse in an increasingly international world." This appellant has lived in the UK for 17 years; has a property he owns in this country; has two employed jobs and thus I find has an extensive private life in the UK.
41. Ultimately I find that it would not be proportionate under Article 8 ECHR for the appellant to be refused entry clearance despite the weight to be given the public interest in immigration control given the strength of her family life with the sponsor; her English language skills; the financial and accommodation provision available to her in the UK and the sponsor's citizenship and private life ties to the UK.
42. I do not find the possibility of a further application (which may or may not be successful - it is clearly not for me to speculate on the outcome of any such application) under the Immigration Rules relevant to this exercise. This appellant has complied with the procedure laid down to enter the UK and applied for entry clearance abroad. I must assess and decide whether refusal of entry clearance was a breach of Article 8 ECHR at the date of decision and this I have done.

Decision

43. The decision of the First-tier Tribunal involved the making of an error on a point of law.
44. The decision of the First-tier Tribunal is set-aside with no findings preserved.
45. The decision of the First-tier Tribunal is re-made dismissing the appeal under the Immigration Rules but allowing it under Article 8 ECHR.

Deputy Upper Tribunal Judge Lindsley
17th November 2014

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award. I have decided to make no fee award for the following reasons. The appeal was allowed on the basis of evidence which was produced during the appeal process. I was not asked to make, or given any reasons to make, a fee award by the appellant's representative.

Deputy Upper Tribunal Judge Lindsley
17th November 2014