



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/34130/2014

THE IMMIGRATION ACTS

**Heard at Bradford
On 13th May 2015**

**Decision & Reasons Promulgated
On 28th May 2015**

Before

UPPER TRIBUNAL JUDGE D E TAYLOR

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**BIBI GULALAI SAFIY
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr M Diwnycz, Home Office Presenting Officer

For the Respondent: In person

DECISION AND REASONS

1. This is the Secretary of State's appeal against the decision of Judge Ince made following a hearing at Bradford on 3rd November 2014.

Background

2. The claimant is a citizen of Afghanistan born on 2nd May 1989. She applied for leave to remain in the UK as a spouse under paragraph 284 of HC 395 but was refused on 15th July 2014 under paragraphs 284 and 322(9). The Secretary of State was not satisfied that she met the requirements of the rules for an extension of stay as a spouse or civil partner and, additionally,

argued that she had failed to respond to a request to submit evidence that she had been residing with her husband throughout her probationary period, and that she had an English language certificate and had failed to produce an original birth certificate for her child born on 30th December 2012.

3. The sponsor has refugee status and is now a British citizen.
4. It was conceded at the hearing that the claimant could not succeed under paragraph 284 since she had not successfully passed an English language test.
5. The couple have three children, a daughter, who is entitled to British citizenship but who is in the care of relatives in Peshawar whilst her UK passport is being issued, a son born in the UK in December 2012, again a British citizen and another baby daughter also born in the UK. The couple started the process for applying for a UK passport for their older daughter as long ago as 2011 and, until it is issued the couple remain apart from her.
6. The couple married in September 2008 and the application to come to the UK was refused but subsequently allowed on appeal. The claimant travelled to the UK on 26th November 2012 and lived with her husband in the UK but of course has spent a considerable amount of time in the interim with her daughter who is not yet able to join her here.
7. The judge said there was overwhelming evidence that this was a genuine marriage but the couple could not succeed under paragraph 284.
8. With respect to paragraph 322(9) he said, after a considerable analysis of the evidence, that in reality the claimant had only failed to submit one document which was the original birth certificate for their son. She did supply evidence of co-habitation in the form of letters addressed to them at their addresses in common. So far as the English language certificate was concerned she could not produce it because she had not taken the test.
9. He said that refusing the application on the basis of a document that she could not produce was manifestly unfair and that a refusal under paragraph 322(9) should be for those applicants who were not willing to supply appropriate documents or who deliberately did not do so and not in relation to applicants who had made the efforts that the claimant and sponsor had here.
10. So far as Article 8 within the rules was concerned he found unhesitatingly that the claimant had a genuine and subsisting parental relationship with a British citizen child and with her British citizen partner. In the short-term it would be reasonable for her son to accompany her to Afghanistan but, so far as her husband was concerned, there were insurmountable obstacles to his returning there with her, since he is a refugee. Although he has at least transited through Afghanistan in the recent past there must be some residual risk in him residing permanently there. None of the family are Pakistani citizens and there is nothing to suggest that the family would be

allowed to live there permanently. He concluded that paragraph EX.1 was satisfied in relation to the partner route.

11. He then went on to consider Article 8 outside the Rules taking into account Sections 117A and 117B which he said were neutral and not adverse to the claimant. He wrote as follows:

“I have found that the marriage is genuine and that the couple have the intention of living permanently as a couple; they have a child who is definitely a UK citizen and another child who (on the basis that the DNA test will be conclusive) is likely to be a UK citizen – this would mean that both children would have the right to remain permanently in the UK and as such it would be in their best interests for them to do so, under Section 55; in addition a third child is on the way and this would also be a UK citizen; at the time the appellant first applied for a spouse visa there was no requirement for her to have any English language ability and she was not required to demonstrate such when she won her appeal and was given a visa to come here; but for this it appears that otherwise she would have come within the provisions of paragraph 284; I have also found that she now falls into the requirements of paragraph EX.1 in consideration of which I have concluded that it would not be reasonable for the Sponsor to either (i) sell his business for a second time in order to live permanently with his family abroad or (ii) remain in the UK living apart from his family in order to preserve that source of income for compliance with the Rules; there is no persuasive evidence before me to demonstrate that the Sponsor would be able to live permanently or safely in either Afghanistan or Pakistan; the appellant is not otherwise a burden on the taxpayer; and she has always been here with leave to enter/remain.”

12. He concluded that it would be unjustifiably harsh for the claimant to have to return to Afghanistan/Pakistan and live there for an indeterminate time while she obtained an English language qualification with her and the children living apart from the sponsor save for short visits, and for the sponsor having to live apart from his family for an indeterminate time.

The Grounds of Application

13. The Secretary of State sought permission to appeal on two grounds. First, the Tribunal had failed to provide adequate reasons for their findings that the Secretary of State should have exercised her discretion under Rule 322(9) in the claimant’s favour. She had failed to provide any evidence that she had the required English language skills and the onus was on her to ensure that the requirements of the rules were met.
14. Second, he had erred in his approach to Article 8. The Tribunal had given no consideration to the 2014 Act and had misdirected itself in law. It had considered EX.1 as freestanding which was wrong (Sabir (Appendix FM-EX.1 not free standing) [2014] UKUT 00063). If the claimant does not meet the requirements of the Immigration Rules (in relation to her English language skills) then compelling circumstances have to be established for the purpose of Article 8.
15. The Tribunal had failed to demonstrate that her circumstances were compelling or exceptional. She provided no evidence that her children would need to relocate with her if removed and there is no reason why the

sponsor could not care for them in the UK. It is the choice for the claimant and her husband to make as to whether their children relocate with her or remain here. In either case they can maintain contact with the absent parent. There is no evidence that they could not relocate to Pakistan and the onus is on them to prove that they cannot. There is nothing exceptional about her circumstances which merely amount to an ordinary family life claim.

Submissions

16. Mr Diwnycz somewhat unhappily relied on his grounds. He left the decision in my hands so far as paragraph 322(9) was concerned and frankly accepted that this family's circumstances could not be described as run of the mill.

Findings and Conclusions

17. Paragraph 322(9) states that leave to remain should normally be refused where there has been a failure by an applicant to produce within a reasonable time information, documents or other evidence required by the Secretary of State to establish his claim to remain under the rules.
18. On the unchallenged findings of the Immigration Judge the claimant sent to the Secretary of State copies of her marriage certificate, their son's full birth certificate, a copy of the tenancy agreement, the sponsor's bank statements and letters addressed to both of them at the couple's address. The judge was entitled to conclude in these circumstances that the claimant's production of a copy birth certificate rather than an original should not, in all of the circumstances, have led to a refusal on this ground. So far as the English language certificate was concerned she could not produce it because she had not taken the test. Clearly that meant that she could not meet the requirements of paragraph 284 but it was open to the judge to conclude that an additional refusal under paragraph 322(9) was not appropriate, and discretion should have been exercised in the claimant's favour, when the paragraph was clearly designed to address wilful failure to co-operate with the process and not in circumstances such as these.
19. With respect to Article 8, the first ground alleges that the new Immigration Act 2014 was not taken into account and is plainly wrong. The judge cited the new Act in full, said that he had taken it into account and at paragraph 73 of the determination addressed each of the public interest considerations set out in paragraph 117B in turn. He concluded that the overall effect was neutral.
20. Second, the Secretary of State challenges the judge's conclusions with respect to paragraph EX.1, but not on the basis that the judge was not entitled to find that there were insurmountable obstacles to the couple living in Afghanistan. Given that the sponsor is a refugee that was a decision open to him to make. She rests her challenge on the basis that the claimant cannot successfully navigate herself through to a consideration of EX.1 and relies on the case of Sabir (Appendix FM-EX.1

not free standing) [2014] UKUT 00063, which concerned the immigration status of the applicant who was in the UK as a visitor and therefore could not meet the requirements of E-LTRP.2.1.

21. However the section dealing with the English language requirement specifically states as follows:

“If the applicant has not met the requirement in the previous application for leave as a partner, the applicant must provide specified evidence that they –

- (a) are a national of a majority English speaking country listed in paragraph GEN.1.6;
- (b) have passed an English language test in speaking and listening at a minimum of level A1 of the Common European Framework of References for Languages with a provider approved by the UK Border Agency;
- (c) have an academic qualification recognised by NARIC-UK to be the equivalent of the standard of a bachelors or masters degree or PhD in the UK which was taught in English, or
- (d) are exempt from the English language requirement under paragraph E-LTRP.4.2;

unless paragraph EX.1 applies.”

22. The final sentence cannot logically refer to the exemption provision. Since the paragraph specifically allows for EX.1 to be applied there can be no error in the judge doing so.
23. Finally the challenge to the judge’s reasoning in respect of Article 8 outside the Rules amounts to a mere re-statement of the Secretary of State’s case and in any event is misplaced. This is not a case where the family can simply choose to live elsewhere. The judge’s conclusion that, given that he had at one time had refugee status, there must be a residual risk to the sponsor in Afghanistan is unchallenged. The claimant is not a Pakistani national, albeit that she has relatives who are looking after her young daughter there. It was open to the judge to reject the submission that the family could live together in a third country where none of them are nationals.
24. No issue is taken with any of the primary findings of fact made by the judge. This is a very detailed, thoughtful and well-reasoned determination, and the judge’s conclusions were plainly open to him.

Notice of Decision

25. The original judge’s decision shall stand. The claimant’s appeal is allowed.
26. No anonymity direction is made.

Signed

Date

Upper Tribunal Judge Taylor