



The Upper Tribunal
(Immigration and Asylum Chamber)

Appeal number: IA/38795/2014

THE IMMIGRATION ACTS

Heard at Field House
On July 22, 2015

Determination Promulgated
On July 27, 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR MD TOUFIQUL ALAM
(NO ANONYMITY DIRECTION)

Respondent

Representation:

For the Appellant: Mr Walker (Home Office Presenting Officer)
For the Respondent: Mr Sultan (Legal Representative)

DETERMINATION AND REASONS

1. Whereas the original respondent is the appealing party, I shall, in the interests of convenience and consistency, replicate the nomenclature of the decision at first instance.
2. The appellant is a citizen of Bangladesh and is now twenty-five years of age. He applied on July 31, 2014 for an extension of stay as the spouse of a

person settled in the United Kingdom. The respondent refused his application on September 18, 2014 on the grounds:

- a. He had failed to provide specified evidence to demonstrate compliance with Appendix FM-SE of the Immigration Rules.
 - b. He had failed to demonstrate he came within Section EX.1 of Appendix FM.
 - c. He did not satisfy paragraph 276ADE HC 395.
 - d. There were no exceptional circumstances.
3. At the same time took a decision to remove pursuant to section 47 of the Immigration, Asylum and Nationality Act 2006.
 4. The appellant appealed that decision on September 30, 2014 under section 82(1) of the Nationality, Immigration and Asylum Act 2002.
 5. The matter came before Judge of the First-tier Tribunal Cooper on March 4, 2015 and in a decision promulgated on March 30, 2015 she allowed the appellant's appeal under both the Immigration Rules and on the face of it article 8 ECHR.
 6. The respondent applied for permission to appeal on April 13, 2015 submitting the Tribunal had erred by allowing the appeal under the Immigration Rules. No challenge was made to the purported decision on under article 8.
 7. Judge of the First-tier Tribunal Andrew gave permission to appeal on June 1, 2015 finding it arguable the Tribunal had arguably erred by allowing the appeal having made its decision based on the sponsor's credibility instead of applying the Immigration Rules and in particular Appendix FM-SE.
 8. The First-tier Tribunal did not make an anonymity direction and pursuant to Rule 14 of The Tribunal Procedure (Upper Tribunal) Rules 2008 I see no reason to make an order now.

ERROR OF LAW SUBMISSIONS

9. Mr Walker submitted that the Tribunal had materially erred in allowing the appeal under the Immigration Rules. The refusal letter clearly set out the requirements that had to be met and the appellant had failed to satisfy Appendix FM-SE A1(n) which specifically required the appellant to demonstrate wages being paid into a bank account. The sponsor had two jobs according to the evidence but had only demonstrated, for the relevant period, that the income for one of her jobs was being paid into her bank account. This was a specified requirement of the Rules and by failing to submit evidence of her wages being paid into her account the appellant was unable to satisfy the Rules. The Tribunal materially erred by allowing the appeal under the Rules.

10. Mr Sultan submitted that the Tribunal was entitled to make the decision it had bearing in mind section 85 (5) of the 2002 Act and having regard to the evidential flexibility policy contained within the Rules. He produced a document that he referred to as an extract from the Rules which enabled decision-makers to grant an application despite minor evidential problems. He accepted that the appellant could not produce evidence to show wages being paid into her account but argued that the Tribunal exercised its discretion correctly in paragraph [17] of its decision.

ERROR OF LAW DECISION

11. When this matter came before the Tribunal the respondent opposed the application under the Immigration Rules because Appendix FM-SE had not been met. Whilst the Tribunal found the sponsor to be an honest and credible witness the Rules make clear that for wages to be taken into account for the purposes of calculating whether the appellant has met the £18,600 threshold, the appellant had to produce documentary evidence confirming the sponsor was employed, evidence of wage slips and evidence of those wages being paid to her.
12. I am satisfied the sponsor did not satisfy this final requirement. It is not optional but mandatory. The Rule (Appendix FM-SE A1(n)) is quite clear. If a person is paid in cash and the net payment on the wage slip is reflected in the bank statement, then the gross figure on the wage slips can be taken into consideration. However, if the amount on the wage slip is not reflected on the bank statement then only the amount paid in can be taken into account. In this case there was no evidence of any wages from this particular employer being paid into the bank account and consequently the Tribunal should have refused the appellant's appeal under the Immigration Rules. Mr Sultan's argument on evidential flexibility or Section 85(5) of the 2002 Act has absolutely no bearing for the simple reason that the appellant was unable to produce this evidence at the hearing.
13. Accordingly, unless the appellant could demonstrate that he could succeed under either Section EX.1 of Appendix FM or paragraph 276ADE HC 395 his appeal under the Immigration Rules must fail.
14. The Tribunal's decision is incomplete because having erroneously decided to allow the appeal for meeting the financial requirements of the Rules the Tribunal then failed to go on to consider Section EX.1 of Appendix FM or paragraph 276ADE HC 395.
15. I therefore find that in so far as the Immigration Rules are concerned there was a material error.
16. I indicated to the representatives but I would need to remake that decision and in remaking it I would have regard to Section EX.1 and paragraph 276ADE HC 395.

17. I also raised with Mr Walker the fact that it seemed the Tribunal had allowed the appellant's appeal under article 8 although that grant was not included in its "notice of decision".
18. Mr Walker agreed that anyone reading paragraph [18] of the Tribunal's decision would have concluded that the Tribunal allowed the appeal on the principles set out in Chikwamba v SSHD [2008] UKHL 40. Mr Walker indicated to me that the respondent had not appealed that part of the decision and he accepted that the Tribunal had allowed the appeal under article 8.
19. I indicated to both parties that in light of that concession I would deal with the outstanding issue under the Immigration Rules based on the documents that were currently before me.
20. Mr Sultan asked if a short statement from the sponsor could be admitted as it set out why she felt there would be "very significant difficulties" or "very significant obstacles" to her joining her husband in Bangladesh. Mr Walker was content for this document to be admitted and he stated he did not have any questions for the witness. The witness signed the document and I admitted this in as evidence.

SUBMISSIONS ON IMMIGRATION RULES

21. Mr Walker submitted that whilst the sponsor faced difficulties these were neither "very significant difficulties" nor "very significant obstacles". With regard to section EX.1 he submitted that this was not a case where the sponsor had to accompany the appellant to Bangladesh because the Tribunal had already allowed him leave to remain under article 8. In any event, the appellant's whole family lived in Bangladesh and family life was entirely possible there especially as the appellant had been in the United Kingdom for less than two years. Removal therefore would not breach their right to family life. He also submitted there were no "very significant difficulties" facing the appellant because although she understood limited Bengali the appellant did speak Bengali fluently. Whilst her family resided in this country she was an adult and had demonstrated she was not dependent on them. Whilst she claimed she looked after her parents there were other siblings, if necessary, who could carry out that role. With regard to private life Mr Walker submitted there were no "very significant obstacles" facing the sponsor and appellant. Mr Walker adopted the same arguments he had put forward in respect of family life and submitted that ultimately the sponsor would have to make a decision whether to remain in the United Kingdom, if the appellant wanted to pursue an application under the Immigration Rules, or alternatively she could accompany him for a short time whilst he made his application. Whilst the sponsor would have difficulties relocating these difficulties were the same any person relocating

to foreign country would face. None of the reasons put forward were “very significant obstacles”.

22. Mr Sultan relied on the bundle of documents that had previously been submitted and argued that as the sponsor had lived here for twenty-six years (since she was three years of age) and lived in the same area as all her family and siblings there would be either “very significant difficulties” or “very significant obstacles” to her going to live in Bangladesh. The difficulties/obstacles included:
 - a. She did not understand Bengali fluently.
 - b. She had her own accommodation to pay for.
 - c. She earned over £20,000 per annum.
 - d. As the eldest child she was responsible for her parents and she had to take her father for regular check ups at the hospital.
 - e. It would be both financially and practically difficult for her to go and live in Bangladesh and find employment.
 - f. The sponsor was undertaking a course at university with a view to furthering her career.
 - g. This was a genuine case and it was too heavy punishment to require the appellant to leave the United Kingdom.
 - h. It was very harsh for the sponsor to relocate to Bangladesh.
23. Mr Sultan concluded his submissions by stating that whilst individually the sponsor’s problems may not amount to either “very significant difficulties” or “very significant obstacles”, collectively they did. He invited me to allow the appeal.
24. I reserved my decision.

FINDINGS ON APPLICATION UNDER THE IMMIGRATION RULES

25. I am dealing with an application under either Section EX.1 of Appendix FM or paragraph 276ADE HC 395. For the reasons set out above the appellant failed to satisfy the financial requirements of Appendix FM but succeeded before the Tribunal under article 8.
26. Section EX.1 allows the appellant to extend his stay without meeting some of the other requirements but to succeed the appellant has to demonstrate he is in a genuine and subsisting relationship and there are “insurmountable obstacles to family life with that partner continuing outside the UK.” Section EX.2 defines “insurmountable obstacles” to mean “very significant difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner.”

27. The Court of Appeal in Agyarko [2015] EWCA Civ 440 considered “insurmountable obstacles and stated at paragraph [21]-
- “The phrase “insurmountable obstacles” as used in this paragraph of the Rules clearly imposes a high hurdle to be overcome by an applicant for leave to remain under the Rules. The test is significantly more demanding than a mere test of whether it would be reasonable to expect a couple to continue their family life outside the United Kingdom.”
28. The Court of Appeal went on to state that although it involved a stringent test, it was obviously intended in both the case-law and the Rules to be interpreted in a sensible and practical rather than a purely literal way but it was nevertheless a pre-condition that had to be met. However, being a British citizen, living all of one’s life in the United Kingdom and having a job would make life difficult for the sponsor to relocate to Bangladesh to continue their family life but as the Court made clear in Agyarko these factors could not constitute insurmountable obstacles.
29. I have considered the sponsor’s recent statement in which she helpfully set out why she believed there would be insurmountable obstacles but none of those factors set her apart from the facts as considered in Agyarko and whilst each case is fact sensitive there is nothing that raises her case above the threshold test set out in Section EX.1. On her own admission she and her siblings all live here. If she is unable to assist with her father’s medical trips then the responsibility would fall on one of her siblings-just as it would if she happened to be ill herself or away on holiday. She may well be studying but in light of the fact the respondent accepted the Tribunal had allowed the appeal under article 8 on Chikwamba factors it seems to me that there would be no obstacle to the appellant and sponsor being apart.
30. I am satisfied there are no insurmountable obstacles that would merit allowing this appeal under Section EX.1 of Appendix FM.
31. I have also considered the appeal under paragraph 276ADE HC 395. The appellant has only been in the United Kingdom since August 2013 and in light of his age he can only succeed if he can demonstrate there would be very significant obstacles to his or the sponsor’s integration into the country to which they would have to go, if required to leave the United Kingdom. In Bossadi (paragraph 276ADE; suitability; ties) [2015] UKUT 42 (IAC) it was held this assessment required a rounded assessment as to whether a person’s familial ties could result in support.
32. The observations made above in relation Section EX.1 equally apply in this assessment although the test now is whether those factors amounted to very significant obstacles that would prevent the sponsor’s integration into Bangladesh. The sponsor understands Bengali albeit it is not her first language and if they chose to return to Bangladesh there is nothing to

prevent them returning to live with the appellant's own family bearing in mind this was an arranged marriage. There would be problems over her work but sometimes choices have to be made when it comes to marriage and I repeat the respondent has accepted the appellant has leave to remain under article 8 ECHR.

33. Although I have considered all of the above matters I am not satisfied the appellant is entitled to remain under either Section EX.1 or paragraph 276ADE HC 395.

DECISION

34. There was a material error. I set aside the decision to allow the appeal under the Immigration Rules.
35. The Tribunal, for the reasons set out above, allowed the appellant's appeal under article 8 ECHR and in the circumstances I merely affirm the Tribunal's decision as it was not wholly clear from the decision itself.

Signed:



Deputy Upper Tribunal Judge Alis

TO THE RESPONDENT FEE AWARD

I make no fee award.

Signed:



Deputy Upper Tribunal Judge Alis