



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/02852/2014
OA/02855/2014

THE IMMIGRATION ACTS

Heard at Birmingham
on 30th June 2015

Determination Promulgated
On 27th July 2015

Before

UPPER TRIBUNAL JUDGE J PERKINS
UPPER TRIBUNAL JUDGE HANSON
DEPUTY UPPER TRIBUNAL JUDGE McGINTY

Between

ENTRY CLEARANCE OFFICER - NEW DELHI

Appellant

and

JASWINDER KAUR
GAGANDEEP SINGH
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr Smart – Senior Home Office Presenting Officer
For the Respondent: Mrs V James instructed by Braitch Solicitors

DECISION

1. This is an appeal by the Secretary of State against a decision of First-tier Tribunal Judge J S Law promulgated on the 7th November 2014 in which the

Judge allowed the appeals under both the Immigration Rules and Article 8 ECHR.

2. The appellants, born 5th May 1974 and 17th May 1996 respectively, applied for entry clearance as the partner and child of their sponsor under Appendix FM of the Immigration Rules. The refusals are dated 24th January 2014. In relation to Mrs Kaur, it was said the evidence provided with the application failed to establish that the relationship with her sponsor was genuine and subsisting or that they intended to live together permanently in the UK leading to a refusal under paragraph EC-P.1.1(d) (E-ECP.2.6 & 2.10) of Appendix FM. The failure to provide all the specified documents relating to her sponsors income led to a refusal under paragraph EC-P.1.1(d) (E-ECP.3.1) The application of Gandeep Singh was refused as the information provided with the application was said not to prove the relationship with the sponsor or the fact Gandeep Singh was under the age of 18, EC-C.1.1(d) (E-ECC.1.2), the application of his mother had been refused leading to a refusal under EC-C.1.1(d) of Appendix FM (E-ECC.1.6), and by reference to the financial aspects referred to above in relation to his mother's application.
3. Judge Law considered the evidence made available and set out the findings and reasons at paragraphs 15 - 25 of the decision. In relation to the appeal under the Immigration Rules the judge found the relationship between the second appellant and sponsor proved by DNA evidence, which is not contested by the Entry Clearance Officer (ECO). The judge also accepted that the first appellant and sponsor were married and that although there was no explanation for the failure to provide details of contact between the parties, the same was accepted. In relation to the financial aspects of the Rules it was found:
 16. The Respondent had rejected the Appellants' claims on the basis that they did not comply with the financial requirements set down in the Immigration Rules. This is regrettably correct as whilst at the time of the application the Appellant had been working but now because of ill-health this was no longer the case. The Respondent submitted that there was inadequate details of his employment prior to the application and this must be accepted. It is to be noted that the wage slips for the six months had been provided post decision and I do give some weight to the same even though it should have been necessary for the wage slips to be made available at the date of decision.
 17. In looking at the refusal at the date of decision the Appellant has not been fully open with the information that they provided and therefore the refusal was in accordance with the Immigration Rules.
 18. I have found that there had been major non-compliance with the Immigration Rules which would have prevented the Appellants entry. If I am wrong in that respect I still have to consider the matter under Article 8 of the European Convention on Human Rights (ECHR).....
4. The clear indication from the above text is that the judge found the decision to refuse under the Immigration Rules was lawfully correct yet in paragraph 23 the judge states that the appeals under the Immigration Rules are allowed.

5. We have considered the decision as a whole to ascertain whether sufficient reasons have been given to support such a conclusion and reconcile the apparent contradictory findings.
6. In relation to the maintenance requirements of Appendix FM, in R(on the application of MM (Lebanon), AM (Pakistan) & SJ (Pakistan) v Secretary of State for the Home Department [2014] EWCA Civ 985 it was found that the statutory presumptions in the new paragraph 117B(3) of the 2002 Act, inserted by s.19 of the Immigration Act 2014 with effect from 28 July 2014, effectively closes the door on any argument either within or without the Rules that figures less than those set out in the Rules are acceptable.
7. The requirement is for an applicant to demonstrate they have a gross income of at least £18,600 per annum or if applying with one child £22,400 and an additional £2,400 for each additional child. Proof of the availability of such income is proved by the provision of 'specified documents' details of which are set out at Appendix FM-SE. It is accepted some evidence was provided but that specifically noted as missing by the ECO was the two payslips and bank statements from the sponsor to cover the months of October and November 2013. This is relevant as the appellants were required to provide pay slips for a period of six months prior to the date of application. The judge accepts these were not provided but claims six months payslips post decision were. These cannot satisfy the requirements of the Rules. It is also noted at page 129 of the bundle that the sponsor was issued with a P45 by All UK Express LTD dated 4th December 2013 and recording a date of leaving that employment on 30th November 2013. This also shows a tax code of 944L which must have been allocated to the sponsor whereas the payslips provided show an emergency code of BR, including those issued on the date the sponsor appears to have finished work and immediately thereafter. These differences undermine the evidence used to support the application but the judge does not appear to have considered them.
8. Other financial documents were provided for the purpose of the appeal hearing at pages 41-98 of the appellants' bundle. The sponsors Lloyds Bank statements are to be found at pages 41-56 and his wage slips at pages 57-60, pre decision, and post decision at pages 122-128. In relation to the missing documents, a bank statement dated 22nd October 2013 is to be found at page 56 but none for November 2013 at the above page references although the same does appear at page 131. The November bank statement shows a change in income pattern and an undated letter from the sponsors employer claims he was paid his November sick pay cash in hand although his wages were being accepted through his bank now, but for the second business run by the same employer, that he had received cash in hand for November, December and January 2014 and that this process would remain until any further changes were made. It has not been shown that the cash sums were paid in or identified in the statements as having been deposited as required by Appendix FM-SE. The claim to have been paid sick pay for November and beyond contradicts the P45 indicating the sponsor's employment terminated in November 2013.

9. Statements of Fitness to Work For Social Security or Statutory Sick Pay dated 21st October 2013, 6th February 2014 and 6th May 2014 have been provided in the bundle at pages 119 -212. There is a lack of clarity in relation to the sponsor's situation as the Fitness to Work Certificates declare him unfit to work as he is receiving dialysis yet he claims such employment continued.
10. There is a clear contradiction in the determination in relation to the ability of the appellant to satisfy the requirements of the Immigration Rules. The finding that the ECO's decision is correct and lawful appears to be supported by the evidence made available. The conclusion in the alternative is not explained or adequately reasoned which we find to be legal error. Whether that error is material depends upon whether the findings made by the judge in relation to Article 8 ECHR are sustainable.
11. The judge considered the Razgar questions and found the issue was that of the proportionality of the decision. It is clear from a reading of Mrs James' written submissions and skeleton argument that the medical situation of the sponsor was the core matter upon which she relied in her attempts to persuade the judge the decision was not proportionate. Whilst the sponsors need for a kidney transplant is accepted, mere sympathy is not a good reason for allowing an appeal on Article 8 grounds – see MG (Serbia and Montenegro) [2005] UKAIT 00113 in which the tribunal stated that sympathy for an individual did not enhance a person's rights under Article 8.
12. The judge noted the medical evidence made available which is to be found at paragraphs 157–217 of the appeal bundle. At page 193 is a letter from The Royal Wolverhampton NHS Trust dated 17th April 2014 to the sponsors GP following a meeting with the sponsor to discuss overseas live donations and the fact blood compatibility and tissue typing could be undertaken abroad and the results forwarded to the hospital in Wolverhampton for review. Other correspondence has been included referring to further visits and an issue of the sponsors non-compliance with recommended medication which appears not to be assisting his situation. The submission made by Mr Smart to the Upper Tribunal that there is nothing in the medical evidence stating it is essential for his wife and son to be permitted to enter the UK to enable them to donate a kidney is correct.
13. It was submitted by Mrs James both before the First-tier Tribunal and ourselves that the wife and particularly the son would be able to provide the necessary transplant if required and to provide medical care to the sponsor whilst at home. The sponsor in his oral evidence stated that he believes his wife and son will be able to provide a kidney for his use if necessary.
14. The judge found in paragraph 19 that the sponsor had produced documents to show he earned in excess of the figure quoted for the two appellants and that he had sufficient for the purposes of the Immigration Rules. As stated above, the initial finding was that the documentation provided did not show that the required income was available and that the Rules could not be met. Article 8 in an ECO decision has to be considered on the basis of the information and facts not available at the date of application but at the date of decision when it is clear the sponsor was ill and had been signed off as being unfit to work and had left his employment. His claims to have received sickness pay is not proved or

exhibited as required by Appendix FM-SE. The judge appears to have accepted that this is the case and that the Rules cannot be satisfied as a result of the sponsor's health condition. Evidence of the illness and inability to work predated the decision and was a situation appertaining at the date of decision.

15. The inability to work and earn the required income would leave the family dependent upon state benefits which would have to be increased beyond the level currently received by the sponsor if the appellants were permitted to enter the UK to join the family unit. The judge also fails to mention section 117 (as amended) of the Nationality, Immigration and Asylum Act 2002. The decision was made on the 7th November 2014. From 28 July 2014 section 19 of the Immigration Act 2014 is brought into force by the Immigration Act 2014 (Commencement No 1, Transitory and Saving Provisions) Order 2014 (SI 2014/1820). This amends the Nationality, Immigration and Asylum Act 2002 by introducing a new Part 5A which applies where the Tribunal considers article 8(2) ECHR directly i.e. outside of the Rules. These provisions bring in mandatory statutory requirements relating to the weight to be attached to the public interest under Article 8 which override existing case law. The First-tier Tribunal were considering Article 8 directly, after the commencement date.
16. By virtue of section 117A, in considering the public interest question, the tribunal must (in particular) have regard (a) in all cases, to the considerations listed in section 117B, and (b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C. Subsection (2) provides that "the public interest question" means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2). Section 117A (2) is mandatory. As the public interest provisions are contained in primary legislation they override existing case law. Section 117A (3) confirms that the Tribunal is required to carry out a balancing exercise. In other words, the Tribunal cannot just rely on the listed public interest factors as a basis for rejecting a claim but must carry out a balancing exercise where a person's circumstances engage Article 8(1) to decide whether the proposed interference is proportionate in all the circumstances. Section 117B sets out the public interest considerations applicable in all cases. Section 117C sets out additional considerations in cases involving foreign criminals. Section 117D is the interpretation section. Sections 117D (2), (3) and (4) reflect but are not identical to sections 33 and 38 of the UK Borders Act 2007.
17. Section 117B reads: Article 8: public interest considerations applicable in all cases: (1)The maintenance of effective immigration controls is in the public interest; (2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English— (a) are less of a burden on taxpayers, and (b) are better able to integrate into society; (3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons— (a) are not a burden on taxpayers, and (b) are better able to integrate into society; (4) Little weight should be given to— (a) a private life,

or (b) a relationship formed with a qualifying partner, that is established by a person at a time when the person is in the United Kingdom unlawfully; (5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious; (6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where— (a) the person has a genuine and subsisting parental relationship with a qualifying child, and (b) it would not be reasonable to expect the child to leave the United Kingdom.

18. In *Dube* (ss.117A-117D) [2015] UKUT 00090 (IAC) it was held that (i) Key features of ss.117A-117D of the Nationality, Immigration and Asylum Act 2002 include the following: (a) judges are required statutorily to take into account a number of enumerated considerations. Sections 117A-117D are not, therefore, an a la carte menu of considerations that it is at the discretion of the judge to apply or not apply. Judges are duty-bound to "have regard" to the specified considerations. (b) These provisions are only expressed as being binding on a "court or tribunal". It may be that the Secretary of State will consider it in the interests of good administration and consistency of decision-making on Article 8 claims at all levels to have express regard to ss.117A-117D considerations herself, but she is not directly bound to do so. (c) whilst expressed in mandatory terms, the considerations specified are not expressed as being exhaustive: note use of the phrase "in particular" in s.117A(2): "In considering the public interest question, the court or tribunal must (in particular) have regard – ". (d) Section 117B enumerates considerations that are applicable "in all cases", which must include foreign criminal cases. Thus when s.117C (which deals with foreign criminals) states that it sets out "additional" considerations that must mean considerations in addition to those set out in s.117B. (e) sections 117A-117D do not represent any kind of radical departure from or "override" of previous case law on Article 8 so far as concerns the need for a structured approach. In particular, they do not disturb the need for judges to ask themselves the five questions set out in *Razgar* [2004] UKHL 27. Sections 117A-117D are essentially a further elaboration of *Razgar's* question 5 which is essentially about proportionality and justifiability. (ii) It is not an error of law to fail to refer to ss.117A-117D considerations if the judge has applied the test he or she was supposed to apply according to its terms; what matters is substance, not form.
19. The judge erred in paragraph 21 by referring to the fact the sponsor was able to satisfy the requirements of the Immigration Rules at the date of application as if this was relevant when assessing the human rights situation at the date of decision. At that date the requirements of the Rules could not be met as the sponsor was too ill to work. There is also no mention of the ability of the appellants to speak English. It is noted the first appellant only speaks Punjabi and Hindi according to her application form (paragraph 1.22 - 1.22).
20. The judge in paragraph 22 states that if the appellants are unable to succeed under the Rules then Article 8 can be applied in connection with the application. The use of the term "Article 8 can be applied" is not clearly explained as Article 8 cannot be used to circumvent the requirements of the Rules. The judge further erred when finding in the same paragraph that "it is almost certain that the son

of the sponsor, one of the Appellants, would reach the compatibility sought for the transplant itself” which is not supported by the available evidence, as a range of tests will need to be undertaken to ascertain if a person is a suitable compatible donor to show the medical, psychological, logistical and financial considerations are satisfied. The statement by the judge that to deny the second appellant access to the United Kingdom would in effect deny the sponsor the opportunity to live is pure supposition, not adequately reasoned, and not supported by the evidence. Mr Smart also raised before us the fact a kidney could be taken in India and transported to the UK for the sponsor. We have seen no evidence to support this claim but we do not have to decide if it is right.

21. The sponsor is a British citizen who is receiving care within the NHS. There is a shortage of donors in the UK but he is on the transplant list and it has not been shown he will not receive a compatible organ if one becomes available and he is the next in line. There is no evidence confirming the suitability of either of the appellants as suitable donors and the medical evidence does not support the claim their admission to the UK is essential. The evidence does not show Articles 3 or 8 are engaged in relation to the sponsor. *N v UK* [2008] 47 EHRR 39 considered.
22. The basis of the finding that the decision is disproportionate is the ongoing effect it is claimed refusal will have on the sponsor, but this is a finding not supported to this extent on the available material.
23. We find the errors in relation to the Immigration Rules and Article 8 to be material and set the determination aside.
24. In remaking the decision we are constrained by considering the situation at the date of decision. It has not been shown the Immigration Rules could be met at that time and the appeals on this basis are dismissed.
25. Article 8 does not permit a person to circumvent the Rules, as stated above, and the Court of Appeal recently provided guidance in the case of Secretary of State for the Home Department v SS (Congo) [2015] EWCA Civ 387 in relation to the assessment of Article 8 claims. It has not been shown on the available evidence that sufficiently compelling circumstances exist (which are not sufficiently recognised under the new Rules) to require the grant of such leave. The requirements of section 117 cannot be met, in relation to financial independence and ability to speak English, which we have considered as part of the overall balancing exercise we are required to undertake. We also note the further guidance provided by the Court of Appeal in GS (India) [2015] EWCA Civ 40 regarding not being able to use simply Article 8 instead of Article 3 in health cases.
26. We dismiss the appeal of the first and second appellant under Article 8 ECHR. The Secretary of State has made out that the decision is proportionate by reference to the facts and law.
27. As an aside, and no more, if the appellants obtain evidence they are a suitable match for the purposes of donation and/or are willing to donate, the Immigration Rules were amended on 6th November 2014 to allow those seeking entry to be assessed as a potential donor or to donate an organ to apply for entry as a general visitor. This brings together the previous arrangements for all organ

donors. The requirements are set out at paragraph 41a of the Immigration Rules and guidance is provided in the Home Office Modernised Guidance for General Visitors which can be accessed on-line.

Decision

28. The First-tier Tribunal Judge materially erred in law. We set aside the decision of the original Judge. We remake the decision as follows. These appeals are dismissed

Anonymity.

29. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

We make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008).

Signed.....
Upper Tribunal Judge Hanson

Dated the 2nd July 2015