



Upper Tier Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/04525/2014

THE IMMIGRATION ACTS

Heard at Manchester
On 17 December 2014

Determination Promulgated
On 19 January 2015

Before

Deputy Upper Tribunal Judge Pickup

Between

The ENTRY CLEARANCE OFFICER Islamabad

Appellant

and

Makiyah Ozair

[No anonymity direction made]

Claimant

Representation:

For the claimant: Mr M Karnik, instructed by Adamsons Law Solicitors
For the respondent: Mr G Harrison, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, Makiyah Ozair, date of birth 18.11.92, is a citizen of Pakistan.
2. This is the appeal of the Secretary of State against the determination of First-tier Tribunal Judge Foudy, promulgated 9.9.14, allowing the claimant's appeal against the decision of the respondent, dated 12.9.13, to refuse entry clearance to the United Kingdom as the partner (spouse) of Mr Ozair Tayyib, a British citizen present and settled in the UK. The Judge heard the appeal on 4.9.14.
3. First-tier Tribunal Judge Easterman granted permission to appeal on 20.10.14.
4. Thus the matter came before me on 17.12.14 as an appeal in the Upper Tribunal.

Error of Law

5. In the first instance I have to determine whether or not there was an error of law in the making of the decision of the First-tier Tribunal such that the determination of Judge Foudy should be set aside.
6. The Entry Clearance Officer refused the application under Appendix FM, stating that he/she was not satisfied that the claimant's relationship with the sponsor is genuine or subsisting or that they intend to live together permanently in the UK.
7. The decision went on to address the financial threshold and the required evidence under Appendix FM-SE. It was stated that the appellant did not meet the threshold requirements and failed to submit the required documents. However, on the third page of the refusal decision, it is stated that no final determination had been made on whether the income threshold or the related evidential requirements had been met. That is because the Home Office was waiting for the outcome of the case now reported as R(MM (Lebanon)) v SSHD [2014] EWCA Civ 985, which held that the £18,600 threshold was not disproportionate. It was suggested in the refusal decision that if the appellant appealed, a final determination may be made at a later stage. Often that has taken place when the case is considered by the Entry Clearance Manager after receipt of the grounds of appeal. No such review took place in this case and there has been no reconsideration of the grounds for refusal.
8. It follows that the application of the appellant was refused on one ground only, the genuine and subsisting marriage requirement. Judge Foudy considered that only that issue was before the First-tier Tribunal. She considered the evidence and reached the conclusion, for the reasons given, that the relationship between the appellant and the sponsor is genuine and subsisting. The Entry Clearance Officer has not appealed that finding.
9. However, the grounds of appeal suggest that regardless as to whether a final decision had been made on the financial requirements, "in order to allow the appeal the Judge of the First-tier Tribunal needed to make his own findings on this and as per Kwok On Tong could not allow the appeal unless satisfied that the requirements of all the relevant Immigration Rules were met. This would involve making findings in relation to the financial requirements."
10. Permission to appeal was granted by Judge Easterman stating, "In my view, it was arguably not open to the Judge to conclude that the financial aspects were met or agreed and, as a result, before the appeal could be allowed it is certainly arguable that the Judge should have satisfied herself that all the elements required under the rules had been shown."
11. At the outset of the hearing before me, Mr Harrison sought to draw a distinction between the financial requirements and the evidential requirements of FM-SE, suggesting that the application had been refused on both the genuine and subsisting marriage requirement and the evidential requirement and that it was only the financial threshold in respect of which a final decision had been deferred. That submission could not stand on a consideration of the refusal decision, which makes

clear that both the financial threshold and evidential requirement issues were not finally determined.

12. The appeal to the First-tier Tribunal was against the decision of the Entry Clearance Officer. "No final determination" is to the same effect as no decision. There was no decision by the Entry Clearance Officer on either the financial threshold or the evidential requirement. The only decision that could be appealed was in relation to the issue of genuine and subsisting marriage.
13. It follows that the only issue before the First-tier Tribunal was in relation to genuine and subsisting marriage. The appeal process to the First-tier Tribunal does not carry the requirement of the First-tier Tribunal Judge to remake the decision that should have been made by the Entry Clearance Officer. The judge considered and decided the appeal against the decision. She could not have considered or decided the issues that were left undecided by the Entry Clearance Officer. In the circumstances, I find no error of law on the part of the First-tier Tribunal Judge.
14. It also follows that as the appeal only allows it on the issue of genuine and subsisting marriage, it remains open to the Entry Clearance Officer to make a decision on the issues of financial threshold and the evidential requirement; there is nothing in the appeal decision which could prevent that taking place. Mr Harrison suggested that the judge should have found the decision of the Entry Clearance Officer not in accordance with the law and allowed the appeal to that limited extent. However strange it may be for the representative of the Secretary of State to suggest that a decision made on her behalf was not in accordance with the law, when it was open to the Secretary of State to cure that by withdrawing the decision and remaking it, it is not for the judge to require the Entry Clearance Officer to make a final decision.
15. All of this is unfortunate, as it does not resolve the appellant's position. The Entry Clearance Officer may well now refuse to grant entry clearance and issue a fresh decision on the issues not appealed.

Conclusions:

16. The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law such that the decision should be set aside.

I do not set aside the decision.

The decision of the First-tier Tribunal stands and the appeal remains allowed.



Signed:

Date: 17 December 2014

Deputy Upper Tribunal Judge Pickup

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Given the circumstances, I make no anonymity order.

Fee Award

Note: this is not part of the determination.

In the light of my decision, I have considered whether to make a fee award (rule 23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007).

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make a full fee award.

Reasons: The appeal by the Entry Clearance Officer has been dismissed.



Signed:

Date: 17 December 2014

Deputy Upper Tribunal Judge Pickup