



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/04812/2014

THE IMMIGRATION ACTS

Heard at Field House
On 26 February 2015

Determination Promulgated
On 13 March 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE SHAERF

Between

THE ENTRY CLEARANCE OFFICER - NEW DELHI

Appellant

and

MANTINDER KAUR
(ANONYMITY DIRECTON NOT MADE)

Respondent

Representation:

For the Appellant: Mr L Tarlow of the Specialist Appeals Team
For the Respondent: Mr S Jaisri of Counsel instructed by Gills Immigration Law

DECISION AND REASONS

The Respondent

1. The Respondent to whom I shall refer as the Applicant, is a citizen of India born on 3 January 1991. On 28 October 2013 in India she married Ajit Singh, a British citizen born on 21 February 1977, who is her Sponsor.

2. On 7 December 2013 she applied to the Appellant (the ECO) for entry clearance under paragraph 284 of the Immigration Rules as the wife of her Sponsor.

The Decision and Appeal

3. On 5 March 2014 the ECO refused the Applicant entry clearance. He noted the age difference between the Applicant and her husband and referred to the lack of evidence of any contact between their first meeting and their wedding some nine months later. He also noted the lack of evidence of contact between the Applicant and the Sponsor during the month between the wedding and her application for entry clearance. There was no challenge to the wedding but the ECO doubted the marriage relationship was subsisting or that they intended to live together permanently as husband and wife. He also referred to the lack of evidence that the Sponsor was supporting the Applicant or that they had shared finances.
4. The ECO considered the Sponsor's claimed income had been "contrived for the purpose of meeting the financial requirement" and found the Applicant had not shown the Sponsor met the requisite income threshold requirement under Appendix FM and referred to the then outstanding appeal in *R (MM Lebanon and others) v SSHD[2014] EWCA Civ.985*.
5. On 3 April 2014 the Applicant lodged notice of appeal under Section 82 of the Nationality, Immigration and Asylum Act 2002 as amended (the 2002 Act). The grounds of appeal address the ECO's concerns about the inaccuracy or inadequacy of information about the Sponsor.
6. On 7 August 2014 the Entry Clearance Manager reviewed the decision of the ECO and upheld it. He did not doubt the validity of the marriage but referred to the lack of contact between the Applicant and her Sponsor. He detailed the ECO's attempts to contact the Sponsor at his place of employment and the failure of the Sponsor to provide evidence that he had been in India between February and March 2014. He upheld the decision to refuse entry clearance.

The First-tier Tribunal's Decision

7. By a decision promulgated on 30 November 2014 a panel of the First-tier Tribunal (the FTT) comprising Judges N J Osborne and A Barcello dismissed the Applicant's appeal under the Immigration Rules but allowed it on human rights grounds by way of reference to Article 8 of the European Convention. The FTT found that the evidence which he had provided included bank statements that did not reflect or show his monthly income because until October 2014 he had been paid in cash. The FTT also noted that the Sponsor had not been paid during the time he had been in India. Nevertheless at paragraphs 18-21 of its decision the FTT found the Sponsor did in fact earn in excess of the threshold minimum of £18,600, had savings in excess of £18,500 and was in secure, well-established gainful employment which it said made it "wholly disproportionate to expect the Appellant to make a further application".

8. On 16 January 2015 Judge of the First-tier Tribunal Pooler granted the ECO permission to appeal on the basis that the FTT had failed to give adequate reasons for concluding the decision was unjustifiably harsh, in particular why the Sponsor should not join the Applicant in India or the Applicant should not submit a fresh application. The FTT arguably had mis-directed itself by referring to the judgment in *Chikwamba v SSHD [2008] UKHL 40* which was not relevant to an out of country spouse reunion appeal.

The Upper Tribunal Error of Law Hearing

9. The Sponsor was present at the hearing although he took no active part in it. For the ECO Mr Tarlow relied on the grounds for appeal in the ECO's permission application. It was not disputed the Applicant could not succeed under the Immigration Rules; the only issue was Article 8 and initially whether the FTT's consideration of the Article 8 claim contained a material error of law.
10. The FTT had erred in using Article 8 as a means to circumvent the requirements of the Immigration Rules. It had not considered why the Sponsor could not live in India where he had been born or why the decision of the ECO was disproportionate to the need to maintain proper immigration control. As had been stated in the permission to appeal of 16 January 2015 the judgment in *Chikwamba* was not relevant. The upshot was that the FTT's findings were unsafe and the decision should be set aside and remade.
11. For the Applicant Mr Jaisri submitted the grounds for permission to appeal predated the judgment in *MM (Lebanon)* which the FTT had referred to at paragraph 5(iv) of its decision. The core reason for the grant of permission to appeal appeared at paragraph 4 of the permission which stated:-

It is arguable that the Tribunal failed to give adequate reasons for that finding and failed to consider whether the for that finding (that the Sponsor had earnings in excess of the minimum threshold required by the Rules) and failed to consider whether the Sponsor could join the Appellant in India. It is less likely that the Tribunal misdirected itself by referring to *Chikwamba*; but since permission is to be granted all grounds may be argued.

The FTT had before it the evidence of the Applicant and the Sponsor. The validity of their marriage had been conceded. The FTT had at paragraph 17 properly addressed the Kafkaesque suggestion that having made findings in favour of the Applicant in relation to the Sponsor's income and savings it was not appropriate to require the Applicant to make a fresh application to the ECO supported by the documentary evidence required by Appendix FM-SE. References to the need for an Applicant to show some degree of exceptionality before the FTT might consider a claim under Article 8 of the European Convention as suggested by the determination in *Gulshan [2013] UKUT 640* or in *R (Nagre) v SSHD [2014] EWHC 720 (Admin)* were no longer necessary following the judgment in *MM (Lebanon)*.

12. Mr Jaisri concluded the FTT had dealt adequately with the other issues and that the decision contained no material error of law.
13. In response Mr Tarlow properly accepted that those grounds of the application for permission to appeal based on learning from *R (Nagre)* were no longer appropriate but nevertheless the FTT had failed to give adequate reasons to support its conclusion that the refusal of entry clearance was disproportionate to the need to maintain proper immigration control and why the Sponsor could not settle with the Applicant in India or the Applicant make a further application now that she had the documentation to meet the requirements of Appendix FM-SE.

Consideration of the Error of Law Appeal

14. I took time to consider whether the FTT's decision disclosed a material error of law such that it should be set aside in whole or in part. At paragraph 7 of its decision the FTT had incorrectly stated that "The point in time which we had to consider the relevant facts for issues under Article 8 of the ECHR in relation to human rights is the date of the hearing". This is a material error of law. Section 85A(2) remained in force at the date of the decision under appeal, 5 March 2014. Thus the FTT had considered the evidence at the wrong date when it had made its findings at paragraph 21 of its decision.
15. Both *Chikwamba* and *R (Razgar) v SSHD [2004] UKHL 27* were expulsion cases and the FTT did not consider the proportionality of the refusal of entry clearance to whatever might be the State's obligation to foster family life: see *Shamim Box [2002] UKIAT 02212* and also to the legitimate public objective of the maintenance of proper immigration control.
16. The FTT had stated at paragraph 20 of its decision that it did not consider the appeal to have merited consideration under Article 8 because it was a "near miss" and had not taken account of the need to have a set of Rules governing immigration control and the maintenance of such Rules even if it caused hardship in certain cases and why any hardship caused to the Applicant remained disproportionate to the need to maintain immigration control. For these reasons I found the FTT's decision contained a material error of law such that it should be set aside.

The Upper Tribunal Substantive Reconsideration

17. Both parties confirmed that the substantive reconsideration could proceed immediately since it would consist only of submissions.
18. Mr Jaisri submitted there was family life at the date of the decision so that Article 8 was engaged. The issue of the disproportionality of the ECO's refusal of entry clearance had to be considered in the light of the delay and cost in the event that the Applicant had to make a fresh application leading to a new decision and the appeal should therefore be allowed.

19. Mr Tarlow relied on the reasons given by the ECO subject to the concessions contained in the Entry Clearance Manager's review. The ECO had been right to refuse entry clearance because there was a responsibility to maintain immigration control and the State in part sought to achieve this by requiring Applicants to meet the relevant provisions of the Immigration Rules including Appendices FM and FM-SE. Paragraph 11(iii) of the decision appeared not to have taken any of this into account. The Sponsor needed to have sorted out and provided the requisite records to establish that he met the minimum earnings requirement of the Immigration Rules in accordance with those Rules and these requirements could not be circumvented by relying on Article 8 of the European Convention.
20. It was accepted that the marriage of the Applicant and the Sponsor was genuine and subsisting but nevertheless there was no reason why the Sponsor could not settle in India or the Applicant make a further application now that it would appear the Sponsor is in a position to provide the requisite documentary evidence to support his earnings in compliance with the Immigration Rules. Mr Jaisri had nothing to add by way of further submissions.

Findings and Consideration

21. The Applicant had no legitimate expectation she would be able to establish her private and family life with the Sponsor in the United Kingdom unless she could satisfy the requirements of the Immigration Rules. Article 8 of the European Convention does not impose on the State an obligation to recognise a non-national's choice of where she might establish her matrimonial home. Although there is a duty on the State to foster family life the ECO's decision does not constitute any interference with the manner in which the Applicant and the Sponsor had conducted their private and family life prior to the decision. In such circumstances I do not find that the obligation of the State under Article 8(1) has been engaged by the circumstances of the Applicant and the Sponsor.
22. The Applicant has accepted she cannot succeed under the Immigration Rules. The Rules are in place to enable the State to maintain proper immigration control. Inability to comply with the requirements of the Rules does mean that applications like that of the Applicant leading to the decision under appeal will fail for minor or non-substantial reasons and may result in the Applicant having to make a further application which will necessarily result in the payment of additional fees and delay. There was no evidence before me to show that the delay which a further application would occasion would be substantial or have any seriously deleterious effect on the Applicant or the Sponsor other than requiring them to continue their married life in the same manner as heretofore when they had, doubtless, expected to be able to share their married life in the United Kingdom at an earlier date.
23. Notwithstanding the FTT's assertion at paragraph 20 of its decision that they were not treating the Article 8 appeal as a "near miss" appeal, in the light of the absence of any other evidence to show hardship or unreasonableness, the FTT's treatment of the

claim under Article 8 is in effect allowing the use of Article 8 to allow a “near miss” appeal.

24. For these reasons the ECO’s appeal is allowed with the effect that the appeal of the Applicant against refusal of entry clearance is dismissed.

Anonymity

25. There was no request for an anonymity direction and having considered the appeal I find none is warranted.

Notice of Decision

26. The decision of the First-tier Tribunal contained an error of law such that it is set aside and the following decision is substituted:-

The appeal of the Applicant against the ECO’s refusal of entry clearance is dismissed under the Immigration Rules and on human rights grounds.

Signed/Official Crest

Date 13. iii. 2015

Designated Judge Shaerf
A Deputy Judge of the Upper Tribunal

TO THE ECO: FEE AWARD

The appeal has been dismissed so there can be no fee award.

Signed/Official Crest

Date 13. iii. 2015

Designated Judge Shaerf
A Deputy Judge of the Upper Tribunal