



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/09694/2014

THE IMMIGRATION ACTS

Heard at Bennett House, Stoke
On 9 September 2015

Decision & Reasons Promulgated
On 11 September 2015

Before

UPPER TRIBUNAL JUDGE PLIMMER

Between

ENTRY CLEARANCE OFFICER

Appellant

and

KHADIJA KUBRA

Respondent

Representation:

For the Appellant: Miss Johnstone (Senior Home Office Presenting Officer)

For the Respondent: Mrs Bhachu (Counsel)

DECISION AND REASONS

1. The appellant ('the SSHD') appeals against a decision of First-tier Tribunal Judge DJ Dickinson dated 12 May 2015 in which the respondent's appeal against the decision of the ECO was allowed under the Immigration Rules.
2. Judge Dickinson was satisfied that the sponsor had a gross income of at least £18600 at the date of his application. This was based upon a combination of an acceptance of the sponsor's oral and documentary evidence.

3. In grounds of appeal the ECO submitted that the Judge erred in law in allowing the appeal under the Immigration Rules when the necessary specified evidence was not available to the ECO. Judge Grant-Hutchinson granted permission to appeal on this basis.
4. The matter now comes before me to consider whether the decision contains an error of law.

Error of law

5. Mrs Bhachu accepted that the Judge erred in law in allowing the appeal under the Rules. She accepted that in order to succeed under the Rules the respondent needed to establish that that she had provided the specified evidence necessary for the sponsor's non-employment income as set out in Appendix FM-SE 10. Mrs Bhachu acknowledged that the specified evidence was not available to the ECO or the Judge and remains unavailable. It is clear that the Judge accepted the sponsor's claim to earn income in excess of the minimum financial threshold. That however is not sufficient to allow the appeal under the Rules. The Judge also needed to be satisfied that this was supported by specified evidence. In this case that included "*personal bank statements for the 12 month period prior to the date of application showing the income relied upon was paid into an account*". The Judge heard evidence from the sponsor that the rental income from properties was not paid directly into his bank account but was paid by way of cash and utilised by the sponsor for his personal expenses.
6. In allowing the appeal without specified evidence the Judge impermissibly disregarded mandatory requirements of the Rules that had to be met. As Mrs Bhachu correctly conceded this constitutes a clear error of law.
7. Mrs Bhachu also submitted that the Judge should have remitted the case to the ECO for a decision to be retaken 'on a discretionary basis' in light of the findings of fact made. There was no respondent's notice to support this submission, which was made for the first time at the hearing. I asked Mrs Bhachu whether she was able to provide any authority to support this submission but she was unable to do so. In the absence of the argument being put to the Judge or in a respondent's notice, and in the absence of any authority to support the submission I am not prepared to accept this submission.

Re-making the decision

8. Both representatives agreed that I should go on to remake the decision. By paragraph 7.2 of the relevant practice statement for appeals on or after 25 September 2012, I must be satisfied that:

"... the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2 it is appropriate to remit the case to the First-tier Tribunal."

9. I was satisfied that any further fact finding was likely to be minimal and decided that it was proportionate to remake the decision myself.
10. Mrs Bhachu acknowledged that the appeal was bound to fail under the Rules and accepted that the only issue in dispute was therefore Article 8.
11. I heard evidence from the sponsor. He confirmed his witness statement and was cross-examined by Miss Johnstone. He explained that he was still unable to demonstrate by way of specified evidence that the rental income was paid into his bank account but would be able to do so for a period of 12 months before May 2016 as he had begun to pay the rental income into his bank account from May 2015. He also explained that it was stressful and difficult being apart from his wife but that he could not join her even on a temporary basis (for more than a holiday of a few weeks duration) because he had to look after his ill mother in the UK as well as his properties.
12. Miss Johnstone asked me to find that there was insufficient evidence of compelling circumstances to support the grant of entry clearance outside the Rules. Mrs Bhachu invited me to find that there are a number of compelling reasons to support a finding that refusal of entry clearance in this case would amount to a breach of Article 8.
13. At the end of submissions I reserved my decision, which I now provide with reasons.
14. Mrs Bhachu accepted that the correct approach to whether or not entry clearance should be granted outside the Rules is set out in SSHD v SS Congo and others [2015] EWCA Civ 387 and I have approached this case with that guidance in mind.
15. The respondent cannot meet the requirements of the Rules. Although the respondent can meet the minimum financial threshold in Appendix FM, that does not diminish the simple and uncontested fact that the need for specified evidence within the Rules in Appendix FM-SE has not been met. As observed by Richards LJ in SS (Congo) at [52 and 53] the 'evidence rules' have the same general public interest objective as the 'substantive rules' - to limit the risk that someone becomes a burden on public resources by requiring more certain and objective evidence. Second, the application of standard evidence rules is an important means of minimising the risk of arbitrary unfairness between applicants, keeping the costs of administration within bounds and ensuring a prompt and fair application of the substantive rules.
16. In effect the respondent has asked to be given preferential treatment with respect to the evidential requirements than the Rules call for. In these circumstances it is necessary to give individualised consideration of the case to determine whether the interests of the individuals are of a particularly pressing nature and that good reasons have been put forward to justify this. The appropriate general formulation for this category is that such cases will arise

where an applicant for entry clearance can show that compelling circumstances exist (which are not sufficiently recognised under the new Rules) to require such a grant (see Richards LJ at [40 and 53] of SS (Congo)).

17. I have considered all the relevant considerations including the factors set out at section 117B of the Nationality, Immigration and Asylum Act 2002. I acknowledge that it is in the public interest that persons who seek to enter the UK are financially independent. I accept that on the Judge's findings the respondent will be financially independent. Mrs Bhachu did not draw my attention to any evidence on this but I am prepared to assume in the respondent's favour that she can speak English. However as pointed out in AM (S 117B) Malawi [2015] UKUT 0260 (IAC) an applicant can obtain no positive right to remain or enter from sections 117B (2) or (3), whatever the degree of her fluency in English or the strength of her financial resources. All the relevant circumstances must be viewed in the round - Dube (ss117A-D) [2015] UKUT 90 (IAC).
18. Having considered all the relevant evidence I make the following findings.
 - i. The respondent and the sponsor have a genuine and subsisting relationship. They are married and have a family life for the purposes of Article 8(1). They have a family life together and wish to develop that family life in the UK. The UK must act in a manner to allow ties between close family members to develop normally.
 - ii. However Article 8 imposes no general obligation on the UK to facilitate the choice made by a married couple to reside in the UK. I am satisfied that it would be reasonable for the sponsor to reside in Pakistan with his spouse. He has strong links to Pakistan. He told me that both he and his family members visit regularly. Whilst I accept the sponsor also has strong links to the UK I do not accept his evidence that his mother is dependent on him to care for her or that he cares for her in any substantial manner. The evidence on this was vague and unsupported by any medical evidence. In any event the sponsor's mother has a husband and two other children who can share any caring responsibilities. The sponsor told me that his brother has assisted him in collecting rent and looking after his properties when he has been away in the past. I am satisfied that the sponsor can make the appropriate arrangements for his properties to be looked after in his absence and in all the circumstances he could reasonably reside with his wife in Pakistan until any further application for entry clearance is successful. I do not therefore consider that in not granting entry clearance to the respondent the UK is interfering with the development of family life between the respondent and the sponsor. That family life can be reasonably developed in Pakistan.
 - iii. If I am wrong about this I have gone on to consider whether compassionate circumstances exist. This is a fairly demanding test (see Richards LJ at [41]). I am not satisfied this test is met in this case. The

only striking feature of this case is that the substantive rules are met and not the evidence rules. For the reasons outlined in paragraph 15 there is a general public interest objective in meeting the evidence rules. The fact that they are not met is not a compelling factor and compelling circumstances must exist to justify entry clearance where the evidence rules are not met (see Richards LJ at [51]). It might be said that this case is a 'near miss'. As observed by Richards LJ at [55] a near miss case in itself will by "*no means show that compelling circumstances exist*". I must consider whether there are any compelling circumstances, which when taken together with the fact that this is a 'near miss' case tips the balance under Article 8 in the respondent's favour. The respondent told me that he will be visiting Pakistan soon and intends to spend a number of weeks there. He also believes that he should be able to comply with the evidence Rules by May 2016 when a fresh application can be made. I do not accept the sponsor's evidence regarding his mother's illness or the care that he provides for her. I do not accept there are any compassionate circumstances in this case. There are simply no good reasons in this case to support giving this respondent and sponsor preferential treatment with respect to the evidence rules.

19. Having considered all relevant factors I do not accept there are compassionate circumstances in this case. I do not accept that Article 8(1) will be breached by not granting the respondent entry clearance as family life can exist in Pakistan. Even if I am wrong about this and family life cannot reasonably exist in Pakistan I have carried out the relevant balancing exercise and I am satisfied that the public interest in maintaining effective immigration control and the economic well-being of the UK and are not outweighed by all the relevant factors in this case, where as here there is an absence of compassionate circumstances.
20. I do not accept that the ECO's decision will breach Article 8 for the reasons set out above.

Decision

21. The decision of the First-tier Tribunal involved the making of a material error of law and I set it aside.
22. I have remade the decision and I dismiss the appeal under the Immigration Rules and under Article 8 of the ECHR.

Signed:

Ms M. Plimmer
Judge of the Upper Tribunal

Date: 11 September 2015