



**Upper Tribunal
(Immigration and Asylum Chamber)**

**Appeal Number:
OA/12990/2013**

THE IMMIGRATION ACTS

**Heard at Field House
and Reasons Promulgated
On 14 August 2015
August 2015**

Decision

On 19

Before

DEPUTY UPPER TRIBUNAL JUDGE KAMARA

Between

THE ENTRY CLEARANCE OFFICER (DHAKA)

Appellant

and

**MRS SHIPA BEGUM
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr M K Hasan, Kalam Solicitors
For the Respondent: Mr C Avery, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Entry Clearance Officer (ECO) appeals the decision of First-tier Tribunal Judge C Newberry, promulgated on 16 December 2014, allowing an appeal against a decision to refuse the respondent leave to enter the United Kingdom as a partner.

Background

2. The respondent married Mr Mohamed Ala Miah (the sponsor), on 16 December 2011. The first wife of the sponsor died of a brain tumour on 14 June 2011. The sponsor has two children from his first marriage, who were aged 3 and 8 at the time of the ECO's decision. The sponsor gave up employment in order to care for his children following the deaths of his late wife and mother-in-law in July 2012.
3. The respondent's application was refused on 23 April 2013 under paragraph EC-P.1.1(d), with reference to E-ECP.3.1. In essence, it was not accepted that the sponsor was exempt from the financial requirements as defined in E-ECP.3.3. The ECO noted that the sponsor was unemployed and in receipt of Income Support, bereavement benefits, Child Benefit and Tax Credits but commented that these could not be taken into account to assess his financial circumstances and they did not exempt him from the said requirements.
4. In appealing the ECO's decision the respondent stressed that the sponsor used to be employed but had now become the carer of two minor children; that the ECO ought to have exercised discretion in the respondent's favour given that others in receipt of benefits were exempted from the financial requirements; the decision was not therefore in accordance with the law and under Article 8 ECHR it was disproportionate to expect the sponsor and his children to go to Bangladesh to continue family life. In addition, it was said that the ECO ought to have considered section 55 of the Borders, Citizenship and Immigration Act 2009 in relation to the sponsor's children.
5. An Entry Clearance Manager (ECM) reviewed the decision to refuse entry on 14 May 2014, however the original decision was maintained. The ECM remarked that the sponsor was not in receipt of Carers Allowance or any other applicable benefit, which would qualify him for exemption from the financial requirements. The ECM was not satisfied that discretion was applicable in this case. In relation to Article 8 ECHR, the ECM considered that this was incorporated into the Rules. It was said that the parties would have been aware, when they entered into the marriage, that the respondent would not have had an automatic right to settle in the United Kingdom. The ECM considered that family life could continue with the sponsor travelling to Bangladesh, as he had previously, through modern methods of communication or the sponsor joining the respondent in Bangladesh. With regard to section 55 of the 2009 Act, the ECM remarked that the ECHR could not be used to cure defects when a claim could not succeed under the Rules.
6. At the hearing before the FTTJ, the sponsor gave evidence and in adopting his witness statement, it emerged that his mother-in-law, who had assisted him with the children, died on 29 July 2012 and his father-in-law on 5 June 2014. There was also documentary evidence before the FTTJ, which stated that the sponsor was "*going into depression*" and was in receipt of substantial assistance from Coventry City Council's Children and Young Peoples Directorate.
7. The FTTJ considered there to be arguably good grounds for granting leave outside the Rules on the basis that the sponsor's children were British citizens who were therefore entitled to the benefits this brought; the sponsor was in receipt of public funds because he was unable to work while caring for his children; that the family had suffered misfortune and that the presence of the respondent would enable the sponsor to resume work.

Error of law

8. The grounds of application argue that the FTTJ made speculative findings regarding whether the sponsor would no longer be on benefits if the respondent were in the United Kingdom. Reference was made to the *ratio* in MM (Lebanon) [2014] EWCA Civ 985 and section 117B(3) of the Nationality, Immigration and Asylum Act 2002 (as amended). It was submitted that the FTTJ had attempted to impose his own view on the income threshold and this was the kind of free-wheeling Article 8 assessment error criticised in Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 640 (IAC). It was also said that the FTTJ had failed to engage with the seriousness test identified in VW (Uganda) [2009] EWCA Civ 5.
9. An issue of timeliness arose because the FTTJ's decision was sent to the Entry Clearance Officer on 16 December 2014, however the application was not received until 2 January 2015. FTTJ De Haney, who refused permission on 13 February 2015, decided that the application was in time.
10. Upper Tribunal Judge Storey granted permission to appeal on the basis that it was arguable that the FTTJ's assessment failed to have regard to the public interest reflected in the Rules and that failure to be able to meet the financial requirements was a relevant factor to be taken into account on the side of the public interest. It was arguably not for a judge to substitute his or her own notion of what is the "net" economic effect of a grant of entry clearance on the benefit system. On the issue of timeliness, the UTJ commented that the issue may need to be looked at more closely in light of recent guidance in SSHD v SS (Congo) & Ors [2015] EWCA Civ 387.
11. The respondent sent a response to the grant of permission in which it was argued that the grounds of application were merely a disagreement with the findings of the FTTJ and that his conclusions were properly open to him.
12. At the hearing before me, Mr Avery began to address the timeliness issue, however I indicated my view that the application was in time as indicated by the FTTJ who refused permission. Mr Hasan indicated that he was not going to take the point and even it was out of time, the delay was minimal.
13. The ECO's appeal was received on 2 January 2015 and were it not for the definitions contained in paragraph 1(4) of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 it would have been out of time by 3 days. However the said Rule states as follows;

"working day" means any day except—
(a) a Saturday or Sunday, Christmas Day, Good Friday or a bank holiday under section 1 of the Banking and Financial Dealings Act 1971; and
(b) 27th to 31st December inclusive.
14. As 27 to 31 December 2014 were not working days and the 1 January 2015 was a bank holiday, the deadline for submitting the application was 5 January 2015 and therefore it was in time.
15. Mr Avery expanded on the grounds of application with reference to SS (Congo) & Ors. In addition, he asked me to note [25] of the FTTJ's decision where he remarks on the sponsor's misfortune, with Mr Avery submitting that sympathy

was not a relevant factor in an Article 8 consideration. In essence, he submitted that the conclusions of the FTTJ on the sponsor being able to work, were he to be joined by the respondent, were speculative and unsustainable on the evidence.

16. Mr Avery asked me to note, from the form P60's in the respondent's bundle, the very low level of the sponsor's earnings before he gave up work to care for his children. Furthermore, Mr Avery argued that the FTTJ failed to take into account the income requirements of the Rules in his proportionality assessment.
17. Mr Hasan submitted that the FTTJ had the opportunity to look at evidence and hear oral evidence of sponsor. He had given a well-reasoned judgment. At [3] of the decision, there was mention of the failure to meet the income requirements and at [4] a summary of the evidence heard by the FTTJ. Mr Hasan argued that the FTTJ had not fallen into speculation because at [8] he had set out the sponsor's evidence that he could not work. The low earnings history was before the FTTJ. Mr Hasan informed me that when the sponsor's wife was ill he was claiming Carers Allowance and was not permitted to work more than 16 hours per week. He did not refer me to any documentary evidence to support this claim. Mr Hasan asked me to note that the issue of the sponsor's previous income was not a ground in the permission application or grant. It was argued that there was family life between the respondent and the sponsor's children and that at [21-22] the FTTJ had found that to be the case. Mr Hasan argued that there were "*exceptional circumstances*" in this case and if the respondent could not succeed nobody could. The sponsor had no prospect of resuming employment until the children were 18 as a sole parent.
18. In reply, Mr Avery argued that being a single parent should not be sufficient to amount to exceptional circumstances and that children are not a trump card.
19. After hearing submissions, I announced that I had found a material error of law in the FTTJ's decision. While the FTTJ set out the ECO's decision at [3] in the decision and it was not in dispute that the sponsor was not exempt from the financial requirements, he did not attach any weight to the public interest considerations which are reflected in the Rules in reaching his proportionality findings at [24] onwards. I have had regard to what was said in SS (Congo) & Ors at [32];

"Accordingly, a court or tribunal is required to give the new Rules "greater weight than as merely as a starting point for the consideration of the proportionality of an interference with Article 8 rights."

20. Furthermore, the FTTJ was not entitled to speculate as to the reduction of the burden on United Kingdom taxpayers were the respondent to be granted entry in the absence of any evidence that this would be the case. In this, I have had regard to the sponsor's very modest income when he was last in work.
21. In addition, it was not for the FTTJ to substitute his own view of the effect of a grant of entry clearance in this case, in view of what was held in MM v others at [151], as follows;

"the Secretary of State's judgment cannot be impugned. She has discharged the burden of demonstrating that the interference was both the minimum necessary and strikes a fair balance between the interests of the groups concerned and the community in general. Individuals will have different views on what constitutes the minimum income requirements needed to accomplish the stated policy aims. In my judgment it is not the court's job to impose its own view unless, objectively judged, the levels chosen are to be characterised as irrational, or inherently unjust or inherently unfair. In my view they cannot be. "

22. Accordingly, I find that the FTTJ was not entitled to conclude at [24] that the entry of the respondent would result in "*a net gain to the State.*"
23. The decision of the FTTJ is therefore set aside.
24. Mr Hasan told me that he had no objection to my proceeding to remake the decision, as there was no further evidence to be adduced. I accordingly heard brief further submissions from the representatives, which were in the same vein as their earlier arguments and I reserved my decision on the substantive appeal and now give my reason.
25. For clarity, I will now refer to the parties by their original designations in the First-tier Tribunal.
26. There was no significant dispute of fact in this appeal and those facts are as set out in [2] above. In addition, as of 11 December 2012, the sponsor had been assessed by the council, following which referrals had been made to Relate for bereavement counselling for the sponsor's daughter, Coventry City Council for help with employment and finances and Orbit housing with regard to repairs to the sponsor's home. While evidence before the First-tier Tribunal referred to depression, there was no medical evidence, which indicated that the sponsor had been diagnosed with any form of mental illness.
27. It is non-contentious that the appellant did not meet the financial requirements of the Immigration Rules because the sponsor was not exempt from the requirements and he was in receipt of state benefits. The appellant argues that an exception should be made so that she could be granted leave to enter outside the Immigration Rules. Indeed, this was the basis of the application to the ECO and the appeal before the First-tier Tribunal.
28. I therefore consider the appellant's human rights claim in line with the test in Razgar. The appellant had been married to the sponsor for around a year at the time the application was made. The sponsor and his children travelled to Bangladesh during November 2011 and returned to the United Kingdom in January 2012. The appellant is step-mother to the sponsor's children. The sponsor told the previous judge that he married so that he could have support and his children "*could get a mother.*" I therefore accept that there is a family life between the respondent, the sponsor and his children that is deserving of respect. However, the appellant has spent very little time with the children overall, no more than two months out of their lives and there was little evidence before me of any strong bond between her and the sponsor's children. The respondent's decision does amount to interference in the proposed family life being carried out in the United Kingdom. I accept that it is not reasonable to expect the sponsor's British children to permanently relocate to Bangladesh in order for family life to be carried out there and consequently the only realistic venue for this family to be reunited is the United Kingdom. It is not in question that the ECO's decision was in accordance with the law. I also find that it was necessary, in that the interference was in pursuit of one of the legitimate aims set out in Article 8(2).
29. In accordance with section 55 of the Borders, Citizenship and Immigration Act 2009, I have considered the best interests of the sponsor's children. Those children are British citizens and were aged 3 and 8 at the time of the decision. Therefore they were of nursery and school age and thus had embarked upon the early stages of their education in the United Kingdom. The children lost their mother to cancer in 2011 and the sponsor married the appellant later that year. It appears likely that they met the appellant during the 2-month period when

they were visiting Bangladesh between 2011 and 2012. I consider that it is in the best interests of the sponsor's children to continue to reside in the United Kingdom, the country of their birth with their father who has consistently cared for them alone since June 2011. There was little evidence before me regarding whether it is in the children's best interests for the appellant to be granted entry clearance given their limited contact with her since the sponsor married her; however, in view of the practical care she might render to the sponsor and the children, I am prepared to accept that it is.

30. In determining the proportionality of the ECO's decision, I have had regard to the public interest considerations set out in section 117B of the 2002 Act. In terms of section 117B(1), I have attached weight to the fact that the appellant could not meet the requirements of the Rules in considering that the maintenance of effective immigration controls is in the public interest. The appellant has produced an English language certificate with her application and therefore I accept that she is able to speak English. With regard to financial independence in (3), I have attached significant weight to the fact that the sponsor was not working and that the financial requirements of the Rules were not met. In MM & Ors it was held that "*appropriate weight had to be given to the judgment of the Secretary of State*" in relation to the level of the income requirements.
31. I have carefully considered the arguments put on the appellant's behalf regarding the possibility that her arrival was likely to reduce reliance on public funds for the family unit because she could look after the sponsor's children. However, there was no evidence before me to indicate that the sponsor had ever earned sufficient sums to support the family unit without recourse to public funds, which he is of course entitled to and the sponsor would be under no obligation to begin work were leave to enter to be granted to the appellant outside the Rules.
32. I have attached significant weight to the sponsor's circumstances and the best interests of his children. I accept that they are deserving of sympathy, however I find that these circumstances and interests do not lead to the conclusion that the appellant should be exempted from the need to meet the requirements of the Rules. The relationship between the appellant and sponsor together with his children did not commence until the marriage, which took place in late 2011. The appellant has applied to come to the United Kingdom in order to take up family life. The family life which was established following the marriage between the appellant and sponsor took place at a time when it was known that the appellant did not have a right to come here that is under conditions of "*known precariousness*" as said in [37] of SS (Congo) & Ors. The sponsor, who only came to live in the United Kingdom in 2000 himself, would also have been aware that he was not working and therefore was not in a position to maintain the appellant. I take into consideration the fact that Article 8 does not confer an automatic right of entry and that the said Article imposes no general obligation on a state to facilitate the choice made by a couple to reside in it. As indicated above, the sponsor is not financially independent and the arrival of the appellant is unlikely to change that situation. While it is in the best interests of the sponsor's children to remain in the United Kingdom and possibly for the appellant to join them here, their best interests do not amount to a trump card. I accept that family life could not take place elsewhere owing to the best interests of the children, however the fact that family life involving the appellant could not realistically be carried out elsewhere does not entitle the appellant to be granted leave to enter the United Kingdom.
33. Considering all the relevant issues, I do not accept that the interests of the parties in this case are of such a pressing nature that a good claim for leave to enter can be established outside the Rules. I do not consider that the assistance,

which could be provided by the appellant in assisting the sponsor in caring for his children amounts to compelling circumstances, which require the grant of leave to enter. I have had regard to the fact that the sponsor is effectively a single parent. The sponsor's evidence, set out at [8] of the FTTJ's decision was that it was "impossible" for him to work, as there was no one to care for the children while he did. However at the time of the ECO's decision the eldest child was in school and I do not accept that it is impossible for lone parents to work and care for their children simultaneously, without family assistance. It remains open to the sponsor to find employment and arrange paid-for care for the children so that he may be in a position to sponsor the appellant at a future time.

34. I therefore consider that the obstacles to the family being reunited in the United Kingdom amount to no more than mere difficulties which resulted from their choice to marry at a time when the sponsor could not financially maintain the appellant. I therefore conclude that the refusal of entry to the appellant was not a disproportionate decision.
35. I accordingly allow the Secretary of State's appeal.
36. The decision of the FTTJ is set aside and I substitute a fresh decision to dismiss the appellant's appeal against the refusal of her application under Appendix FM, on human rights grounds.

Decision

- (1) The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law
- (2) The decision of the FTTJ to allow the appeal is set aside.
- (3) I substitute a fresh decision to dismiss the respondent's appeal against the refusal of her application for entry clearance to the United Kingdom as a partner.

No application for anonymity was made and I could see no reason to make such a direction.

Signed

Date: 16 August 2015

Deputy Upper Tribunal Judge Kamara