



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/13476/2013

THE IMMIGRATION ACTS

Heard at Manchester
On 19th November 2014

Decision & Reasons Promulgated
On 19th January 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

MR MAZHER MAHMOOD
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Zahoor

For the Respondent: Mrs R Petterson, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Pakistan born on 9th June 1968. The Appellant applied for entry clearance as a partner under Appendix FM of the Immigration Rules. The Appellant's application was refused for reasons set out in a Notice of Refusal dated

20th May 2013. The Appellant appealed and the appeal came before Judge of the First-tier Tribunal Chambers sitting at Manchester on 9th May 2014. In a determination promulgated on 23rd May 2014 the Appellant's appeal under the Immigration Rules was refused. However the Appellant's appeal was allowed pursuant to Article 8 of the European Convention of Human Rights.

2. The Secretary of State lodged Grounds of Appeal to the Upper Tribunal on 5th June 2014. Those grounds contended that the Immigration Judge had allowed the appeal on the basis of exceptional circumstances as the Appellant and his wife "*cannot get the private medical assistance they seek in Pakistan.*" The Secretary of State noted that this referred to IVF treatment. The grounds contend the Sponsor had given oral evidence that she had sought treatment in Pakistan but was told that her best prospects of success were in the UK and that there was no other medical or objective evidence showing that treatment was unavailable in Pakistan. The grounds submitted that the Immigration Judge had erred in law coming to a conclusion that was not supported by evidence and in finding that the fact that the couple were seeking medical treatment constituted exceptional circumstances.
3. On 17th July 2014 Judge of the First-tier Tribunal Grant-Hutchison granted permission to appeal and that it was an arguable error of law that the judge had come to the conclusion that the fact that the couple were seeking medical treatment for IVF constituted "exceptional circumstances" when the judge's conclusion was not supported by medical or objective evidence showing that treatment was unavailable in Pakistan.
4. No Rule 24 response appears to have been filed by the Appellant's solicitors. It is on that basis that the appeal comes before me to determine whether or not there is a material error of law in the decision of the First-tier Tribunal Judge. For the purpose of continuity within the appeal proceedings the Secretary of State is referred to herein as the Respondent and Mr Mahmood as the Appellant. The Appellant appears by his instructed solicitor Ms Zahoor. The Secretary of State appears by her Home Office Presenting Officer Mrs Petterson.

Submission/Discussions

5. Mrs Petterson submits that there is no issue taken by the Secretary of State. The Sponsor Naeem Kouser, who is a British national present and settled in the UK is the Appellant's spouse and in a genuine and subsisting relationship. Mrs Petterson submits that the issue would have been dealt with far more quickly if the Appellant had passed the appropriate English language course. She submits that it is always open to the Appellant to make a further application under the Rules. She takes me to page 6 of the bundle provided in support of the Appellant's application. This is a letter from Dr Saleem at New Bank Health Centre, Longsight, Manchester. The letter states

"She tried to get IVF treatment in Pakistan but due to her age and poor results she was advised in Pakistan to have IVF in UK."

Mrs Petterson submits that that letter does not provide sufficient evidence treatment is not available. She acknowledges that it may be difficult because of the Sponsor's age (I note she was born in 1968) but that the letter merely recites what the Sponsor has advised Dr Saleem but provides no evidence to say that IVF is not available to the Sponsor in Pakistan. She submits therefore that there is a material error in law in the finding by the First-tier Tribunal Judge that the circumstances were exceptional. She submits that it is open to the Appellant to make a fresh application under the Immigration Rules. She asked me to dismiss the appeal as there are no exceptional circumstances.

6. Ms Zahoor opposes the appeal. She submits that it is well thought out and balanced and that the First-tier Tribunal Judge has looked at both sides of the argument and has come to a fair decision. She seeks to admit in evidence correspondence from the Islamabad Hospital dated 8th November 2013 and an Article from Nadkarni's Assisted Conception Unit and Research Centre. Mrs Petterson does not object to this additional evidence. Ms Zahoor submits that the Sponsor's evidence was that she was told by the medical providers that the Appellant would not be in a position to get the medical assistance she requires in Pakistan. Further Ms Zahoor reminds me that the Appellant meets the financial Rules. She contends that there is no material error of law in the decision of the First-tier Tribunal and asked me to dismiss the appeal.

The Law

7. Areas of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial consideration, reaching irrational conclusions on fact or evaluation or to give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.
8. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue of argument. Disagreement with an Immigration Judge's factual conclusion, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence which was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because an Immigration Judge concludes that the story is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

Findings

9. This case turns entirely on whether the judge was entitled to conclude that this was an appeal that should be allowed on the basis of exceptional circumstances. The judge has given due consideration to the authorities of *Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 640 (IAC)*. The law has of course moved on substantially since then. However the starting point has to be whether or not the judge was entitled to conclude that the inability to obtain IVF in Pakistan constituted exceptional circumstances. It is important to note that this is not just a question of disagreement by the Secretary of State. If that were the issue providing the determination is not perverse and is properly set out and reasoned then just because a different Immigration Judge may have come to a different conclusion does not mean that there is a material error of law. However in this instance it is not evidenced that it was not possible to obtain IVF treatment in Pakistan. All that is available, even allowing in the additional letter, is a letter from the medical officer of Islamabad Hospital stating that his hospital could not treat the Sponsor and in addition there is a letter from the Sponsor's GP which does no more than recite what the Sponsor told him. There is absolutely no objective evidence before the Tribunal to state that the Sponsor cannot obtain IVF treatment in Pakistan. In such circumstances there is a material error of law and the First-tier Tribunal Judge erred in the lack of such evidence in finding that there were exceptional circumstances by which the appeal should be allowed under Article 8.
10. The authorities now show that it is inappropriate to consider a threshold test as opposed to making it clear that there is a need to look at the evidence to see if there was anything which had not already been adequately considered in the context of the Immigration Rules which could lead to a successful Article 8 claim. And there is no utility in imposing a further intermediate test as a preliminary to a consideration of an Article 8 claim beyond the relevant criterion-based Rule.
11. In all the circumstances the decision of the First-tier Tribunal contained a material error of law and I set aside the decision of the First-tier Tribunal and remake the decision allowing the Secretary of State's appeal.
12. I am advised the basis upon which the Appellant was unable to satisfy the Immigration Rules has now been met. It has been urged upon me throughout these proceedings by the representative of the Secretary of State that the appeal should be allowed and that the correct approach thereafter is for the Appellant to submit a further application under the Immigration Rules. I agree with that course of action. It is of course for the Secretary of State to thereafter determine whether she is now satisfied that the Appellant meets the Immigration Rules.

Notice of Decision

The decision of the First-tier Tribunal contains a material error of law and is set aside and the decision is remade allowing the appeal of the Secretary of State.

The First-tier Tribunal did not make an order pursuant to Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. No application is made to vary that order and none is made.

Signed

Date

Deputy Upper Tribunal Judge D N Harris

TO THE RESPONDENT
FEE AWARD

No fee is paid or payable and therefore there can be no fee award.

Signed

Date

Deputy Upper Tribunal Judge D N Harris