



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

Appeal Number: OA/14808/2013

THE IMMIGRATION ACTS

Heard at Field House

On 5 May 2015

**Determination
Promulgated**

On 8 May 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS

Between

ENTRY CLEARANCE OFFICER - DHAKA

and

**MST MOMOTA AKTER
(ANONYMITY ORDER NOT MADE)**

Appellant

Respondent

Representation:

For the Appellant: Mr A Melvin, Home Office Presenting Officer

For the Respondent: Mr N Ahmed, Lincoln's Chambers Solicitors

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Lingam promulgated on 21 January 2015 allowing the appeal of Ms Akter against a decision of the Entry Clearance Officer dated 16 June 2013 to refuse entry clearance to join her husband in the United Kingdom.
2. Although before me the Entry Clearance Officer is the Appellant and Ms Akter is the Respondent, for the sake of consistency with the proceedings

before the First-tier Tribunal I shall hereafter refer to Ms Akter as the Appellant and the Entry Clearance Officer as the Respondent.

3. The Appellant is a national of Bangladesh, born on 7 January 1991. An application was made for entry clearance as the spouse of Mr Shah Alom, which application was refused for the reasons set out in the Notice of Immigration Decision of 16 June 2013. That refusal was taken both in respect of the financial requirements of the Immigration Rules and also the English language requirements. By the time the matter was before the First-tier Tribunal it seems that it was only the financial aspect of the Rules that was a live issue.
4. The Appellant appealed against the Respondent's refusal to the IAC. The First-tier Tribunal Judge dismissed the Appellant's appeal under the Immigration Rules but allowed the appeal under Article 8 of the ECHR for reasons set out in her Decision.
5. The Respondent sought permission to appeal which was granted by First-tier Tribunal Judge Ransley on 2 March 2015.

Consideration: Error of Law

6. I have little hesitation in concluding that the First-tier Tribunal Judge erred in law. It is clear that the Judge determined the appeal under Article 8 by reference to post-decision circumstances.
7. The Judge misdirects herself at paragraph 12 of the Decision. Under the heading 'Legal Burden and Standard of Proof' the Judge states:

"The burden of proof is on the appellant: the standard of proof is the civil standard; that is on the balance of probabilities. By reason of section 85(4) of the 2002 Act evidence of matters subsequent to the date of the decision under appeal may be taken into account. In regard to an Article 8 claim the burden and standard of proof is the same on the Appellant as an appeal under the Immigration Rules."
8. The Judge was in error in stating that matters subsequent to the date of the decision under the appeal could be taken into account in the context of an entry clearance case. The requirement pursuant to section 85A(2) of the Nationality, Immigration and Asylum Act 2002 to evaluate matters as of the date of the Respondent's decision to refuse entry clearance applies both in respect of matters under the Immigration Rules and matters under the ECHR. In this context, whilst post-decision evidence is admissible, it is only admissible insofar as it pertains to matters that existed at the date of the relevant immigration decision.
9. It is evident that this was a material misdirection in the context of the Judge's consideration of Article 8 given what the Judge has set out at paragraph 24 of her decision. The Judge plainly takes into account evidence relating to the sponsor's earnings in the most recent tax year, that is to say the tax year that would have ended in April 2014 which was not the relevant tax year for the purposes of the application and decision.

It is also clear that the Judge in the concluding sentence of paragraph 24 was having regard to the more recent circumstances of the sponsor rather than the matters as they pertained at the date of the Respondent's decision.

10. In those circumstances I find that the decision under Article 8 was in material error of law and must be set aside.

Remaking the Decision

11. It is necessary therefore to consider whether the decision in respect of Article 8 can be remade today by the Upper Tribunal or requires an opportunity to file further evidence or otherwise to be remitted to the First-tier Tribunal.
12. No further relevant evidence has been filed in this case and I invited Mr Ahmed to sum up the basis upon which any Article 8 case might be advanced. He indicated that the matters put to the First-tier Tribunal were again relied upon: essentially that the sponsor now could show that his earnings exceeded the threshold required under the Rules. It was also emphasised by Mr Ahmed that the original refusal in respect of the financial requirements was essentially a refusal based on a failure to submit specified evidence and to that extent the Appellant had, as it were, only just failed to demonstrate that she met the requirements of the Rules in circumstances where it continues to be asserted that the factual situation was that the sponsor did indeed earn at a rate that would have satisfied the Rules, even at the date of the Respondent's decision.
13. It seems to me that that submission in respect of Article 8 does not require this case to be remitted to the First-tier Tribunal or indeed the filing of any further evidence. Accordingly I remake the decision in respect of Article 8 today. Neither party wished to advance any submissions that amplified matters beyond their submissions in respect of error of law with regard to the remaking of Article 8.
14. It is the position of the Entry Clearance Officer advanced by Mr Melvin today essentially that the Appellant has not demonstrated anything exceptional about her circumstances that would warrant treating her more generously outside the Rules by reference to Article 8 of the ECHR or otherwise, and to that extent the decision under the Rules is itself a matter that strikes the appropriate proportionality balance. As I have indicated, the Appellant's case is not put on any basis other than that she only just failed to meet the requirements of the Rules at the date of the Respondent's decision because of a failure to submit specified evidence, and was by the time of the hearing before the First-tier Tribunal and is now in a position to demonstrate that the requirements of the Rules were, and are, satisfied.
15. In my judgement the matter as put by the Appellant does not constitute relevant compelling circumstances that justifies a favourable consideration

beyond the wording of Appendix FM - an Appendix that is itself generally Article 8 compliant and designed to give effect to the United Kingdom's obligations under Article 8. It seems to me that where a defective application - that is to say an application defective for a failure to meet the requirements with regard to specified evidence - is made and rejected it is not the proper solution to seek remedy by pursuing the matter through the appeal process but rather simply to re-apply. Whilst that may be a more expensive option, it is more than likely a much quicker option; further it is to be borne in mind that the option of pursuing a remedy through the Tribunal in a case that it is admitted fails under the Rules is a risky option in that it will only be in exceptional circumstances that it will be possible to succeed by reference to Article 8.

16. Whilst it is not doubted that a family life exists between the Appellant and the sponsor by virtue of their marriage, there is nothing to suggest that a decision taken in accordance with the Rules was a disproportionate decision in circumstances where nothing exceptional is advanced about the nature of the family life that exists between this husband and wife.
17. Accordingly in the circumstances I dismiss the appeal under Article 8.

Notice of Decision

18. The decision of the First-tier Tribunal in respect of the approach to Article 8 was in material error of law, and accordingly the decision is set aside in this regard. The decision of the First-tier Tribunal under the Immigration Rules however stands.
19. I remake the decision under Article 8. The appeal on human rights grounds is dismissed.
20. Accordingly Ms Akter's appeal is dismissed on all grounds.
21. No anonymity direction is sought or made.

Signed:

Date: **6 May 2015**

Deputy Upper Tribunal Judge I A Lewis