Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA172042015

THE IMMIGRATION ACTS

Heard at Field House
On July 24, 2017

Decision & Reasons Promulgated
On July 27, 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

Between

MR SAJID LATIF
(NO ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Karim, Counsel, instructed by MA Consultants
For the Respondent: Mr Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. I do not make an anonymity direction under Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

2. The appellant is a Pakistani national. The appellant entered this country as a visitor on June 6, 2001. He applied for asylum on June 18, 2001 but this was refused on

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August 15, 2001. He has lived here unlawfully since that date despite a failed application to be granted status under the Legacy provisions in 2010.

3. The appellant applied for leave to remain on February 15, 2015 on the grounds of private and family life with his "wife", Fatima Dar. The respondent refused this application on April 22, 2015.

4. The appellant lodged grounds of appeal against that decision on May 5, 2015 under Section 82(1) of the Nationality, Immigration and Asylum Act 2002. His appeal came before Judge of the First-tier Tribunal Goodrich (hereinafter called "the Judge") on October 19, 2016 and in a decision promulgated on November 15, 2016 the Judge refused his appeal.

5. The appellant appealed this decision on November 23, 2016. Permission to appeal was given by Judge of the First-tier Tribunal Hollingsworth on May 26, 2017.

6. The matter came before me on the above date. The appellant was present.

Submissions

7. Mr Karim adopted his grounds of appeal and the views of Judge of the First-tier Tribunal Hollingsworth and submitted the Judge had erred in her approach. He accepted that this was an appeal that could never have been considered under Section EX.1 of Appendix FM because at the relevant time the appellant and his "wife" did not satisfy the requirements of paragraph Gen 1.2 of Appendix FM of the Immigration Rules because the appellant and his "wife" were not married under English law and at the date of application they had only been living together for three months. However, he submitted in assessing proportionality the Judge had erred because:

    (a) She had departed from the previous decision of Judge of the First-tier Tribunal Sweet who had previously found it would be disproportionate to require Mrs Dar to leave the country due to her role with her niece and nephew who were, at the date of hearing, aged 7 and 6 respectively. The Judge had departed from that decision without any evidence to support such a departure and based purely on speculation.

    (b) The Judge had applied both a test of insurmountable obstacles and undue hardship instead of reasonableness.

    (c) The Judge's finding in paragraph [34] on page 7 of the Judge's decision was contrary to the approach that should have been taken.

8. Mr Tufan adopted the Rule 24 response dated June 23, 2017 and submitted that there had been no material error. The decision was both detailed and thorough and the finding that she believed the appellant and Mrs Dar placed the interests of the nephew and niece secondary to their own wishes to remain in this country was open to the Judge based on the evidence she heard.

9. The Judge commenced her consideration of the evidence with Judge of the First-tier Tribunal Sweet's decision but then gave reasons why this decision was of limited use in this appeal. Whilst this was the starting point the Judge was concerned with an application by this appellant-a person who had an appalling immigration history. His family life with Mrs Dar was established whilst he was here unlawfully and she was here precariously.

10. The Judge was entitled to consider the application as a change in circumstances facing Judge of the First-tier Tribunal Sweet but was entitled to make the findings she did. There was also no error in applying a test of undue hardship following the decision of SSHD v SS (Congo) and others [2015] EWCA Civ 387.

11. This was an appeal where if anything the Judge attached no weight to the fact that the appellant could not satisfy the entry clearance requirements as an unmarried partner. The fact they had a child by the time of the hearing did not alter the situation as that child was neither British nor had he established seven years residence. He invited me to dismiss the appeal.

12. Mr Karim accepted that Section 117B(6) of the 2002 Act did not personally cover the appellant because he did not have a genuine and subsisting relationship with a British child bearing in mind the children's father cared for them although he submitted that as Mrs Dar did this was something to be taken into account. The circumstances of this case were unique as evidenced by the fact Mrs Dar had been given leave to remain by Judge of the First-tier Tribunal Sweet - a decision upheld by the Upper Tribunal.

13. Having heard submissions and discussed matters generally with the representatives I reserved my decision.

FINDINGS

14. The Judge in a detailed decision dismissed the appeal but it is the Judge's approach that has been raised in this appeal to me. In considering this appeal I remind the parties that I am concerned with the situation as it faced the Judge and I can only have regard to evidence placed before the Judge.

15. The Judge had the respondent's bundle and documents of relevance contained therein included the application form, the decision letter and the grounds of appeal.

16. The decision letter made it clear that that Section EX.1 of Appendix FM could not apply because the appellant and his "wife" were not married under English law and as they had only been together for a short period when the application was submitted the appellant could not satisfy paragraph GEN 1.2 of Appendix FM. The decision letter considered paragraph 276ADE but the respondent refused the application because she concluded there were no significant obstacles to their integration into the country. Exceptional circumstances were considered because Mrs Dar had limited leave to remain until May 3, 2017 and was expecting their child but the respondent concluded there were no exceptional circumstances.

17. The appellant's bundle included statements from the appellant and Mrs Dar, medical documents for the appellant and their child who had, by the time of the hearing, been born, a letter from the Mrs Dar's brother and one page from the Mrs Dar's Upper Tribunal decision.

18. In addition to this the appellant and Mrs Dar gave oral evidence at the hearing.

19. Mr Karim raised a number of points concerning the Judge's consideration of the claim and in particular the appellant's possible appeal under the Rules but as Mr Karim accepted the appellant could not meet the Rules at all this could only ever be an appeal outside of the Rules.

20. The numbering in the Judge's decision unfortunately went from paragraphs 1-37 (page 7) and when article 8 was considered the numbering restarted with paragraph 15 and ended on 41.

21. Paragraphs 1-22 concern the evidence taken, the decision letter and the appellant's immigration history.

22. The Judge's finding on compliance with the Rules was addressed between paragraphs 23 and 37 but I find that most of those findings are irrelevant because it was accepted today that the Rules could not be met. However, there were some findings of fact that would be relevant and these were:

    (a) Mrs Dar had no current health issues although she may suffer from diabetes.

    (b) The appellant underwent a laparotomy and colostomy in September 2015 and there were plans to reverse the stoma in November 2016.

    (c) The appellant's son was diagnosed with transposition of the great arteries, ventricular septal defect and coarctation of the aorta. However, according to the appellant and Mrs Dar he was doing well and there was no evidence that ongoing monitoring was necessary or that the treatment was not available in Pakistan.

    (d) The Judge found that the best interests of Mrs Dar's nephew and niece were secondary to the fact that the appellant and Mrs Dar do not want to live in Pakistan.

23. Mr Karim argued the Judge erred by only considering the applicability of the Rules to the higher test of "insurmountable obstacles". I am satisfied that if the appellant had met the mandatory requirements of the Rules and Section EX.1 could have applied then there may have been an error in this approach but as Mr Karim accepted the Rules could not be met any erroneous findings made in this part of the decision would not automatically mean the article 8 assessment is flawed. The Judge's consideration of article 8 must be considered in its own right.

24. At paragraph 15 (article 8 paragraph 15) the Judge reminded herself of the appellant's argument namely that he felt it would be "disproportionate and unreasonable that he and his wife and child will be separated". It seems accepted that the appellant knew he would not meet the entry clearance requirement either in the short or long term. The Judge reminded herself of the relevance of Mrs Dar's nephew and niece and the appellant's own child.

25. At paragraph 17 the Judge repeated his reference to insurmountable obstacles but only for the purposes of finding that it would be appropriate to consider the appeal outside of the Rules.

26. Paragraph 20 of her decision set out the reality of the situation namely that the appellant and Mrs Dar would be separated if the appellant was removed unless Mrs Dar and their son accompanied him. The Judge considered the cases of Azimi-Moayed and others (decisions affecting children; onward appeals) [2013] UKUT 197 (IAC), Zoumbas v Secretary of State for the Home Department [2013] UKSC 74, EV (Phillipines) v SSHD [2014] EWCA Civ 874 and R (on the application of MA(Pakistan) and others) v UT (IAC) & Anor [2016] EWCA Civ 705 and she concluded, quite properly, that Ibrahim's (their son) best interest were with the appellant and Mrs Dar but in light of his age he would be able to adjust relatively easily if he had to leave this country. She concluded there was nothing in Ibrahim's medical condition that would specifically engage article 8 ECHR.

27. The Judge's assessment was clear that Ibrahim should remain with his parents and the issue she had to decide was where they would all live. The Judge was aware the child was a Pakistani national, the appellant did not satisfy the Rules and Mrs Dar had limited leave to remain.

28. The Judge then touched on the position of Mrs Dar's nephew and niece. The Judge noted there was little evidence over and above a brief letter from the Mrs Dar's brother which states they all live together and Mrs Dar took care of them.

29. Mr Karim submitted that the situation had not changed when the Judge heard this appeal and therefore the Judge should have started from the position that Mrs Dar had leave to remain based on the approach in Devaseelan (Second Appeals - ECHR - Extra-Territorial Effect) Sri Lanka * [2002] UKIAT 00702.

30. The Judge noted the following at paragraphs 27 and 28:

    (a) Life had moved on since Mrs Dar was granted leave to remain.

    (b) She was now married.

    (c) She had her own child to care for.

    (d) The nephew and niece were now in full-time education.

    (e) The children's mother saw them regularly and took them out.

(f) Mrs Dar still lived with and cared for her nephew and niece.

(g) It remains in their best interests that Mrs Dar continues to do so and their relationship to Mrs Dar would continue to be important.

31. Mr Karim submits the Judge's findings at paragraph 29 were speculative but the Judge noted the size of the house and that it was a three-bedroom home and that now the appellant and another young child were living there. The Judge commented on the lack of evidence about their financial circumstances and then went onto find that article 8 was engaged for the purposes of family life. Mr Karim viewed the findings in paragraph 29 as speculative but having considered everything the Judge concluded that article 8 family life was engaged and went onto consider the remaining questions set out in Razgar [2004] UKHL 00027.

32. If there is to be an error it would only be in the content of paragraphs 32 and 41 as up until then I find the Judge has said nothing that materially flawed her decision.

33. The requirements of a proportionality assessment are set out correctly in paragraph 32 of the decision. At paragraph 34 the Judge reminded herself of the importance of the proportionality assessment and the impact of Section 117B of the 2002 Act. Her findings on Section 117B of the 2002 Act, in paragraph 35, were clearly open to her as was her assessment of the relevant case law.

34. Mr Karim argued that Section 117B(6) of the 2002 Act should have been approached differently. I disagree and find the Judge's findings in paragraph 38 correct namely the appellant did not have parental relationship with his wife's nephew and niece because their father was not only alive but lived with his children and also cared for them. The appellant's own son could not be a qualifying child because he was neither British nor had he lived here for seven years,.

35. At paragraph 39 the Judge remineds herself that the appellant sought to rely on a life he built whilst here unlawfully. That is a factor the Judge had to have regard to when considering proportionality because it is one of the factors in Section 117B of the 2002 Act.

36. The only submission that may have merit was the Judge's approach to the previous finding of Judge of the First-tier Tribunal Sweet in respect of Mrs Dar and her niece and nephew. However, at paragraph 39 of her decision the Judge tackles this very issue and reminded herself that this was the strongest part of the claim. The Judge stated that it was in Mrs Dar's nephew and niece's best interest for the status quo to remain but concluded that their best interests whilst a primary consideration were capable of being outweighed by the public interest.

37. That balancing act is concluded in paragraph 40 of her decision. There is nothing in that assessment which was not open to the Judge. The Judge had already given reasons why the situation was different to when she was originally granted discretionary leave. The situation is different because not only had she now

embarked on a new life with the appellant but she also had her own child and the children were older.

38. I was made aware at the hearing that Mrs Dar and her son have been given discretionary leave but this is all post-dates the Judge's decision. It cannot have a bearing on the FTT Judge's decision.

39. Based on the evidence that was presented to her I am satisfied the judge made findings on the article 8 claim that were properly reasoned and applied the correct standard of proof and legal tests.

40. There was no error in law on any of the grounds argued by Mr Karim at the hearing before me.

DECISION

41. The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law. I uphold the original decision.

Signed Date 25.07.2017

Deputy Upper Tribunal Judge Alis

FEE AWARD
TO THE RESPONDENT

No fee award is made because I have dismissed the appeal.

Signed Date 25.07.2017

Deputy Upper Tribunal Judge Alis