



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/51010/2014

THE IMMIGRATION ACTS

At: Manchester Piccadilly
On: 21st March 2018

Decision & Reasons Promulgated
On: 27th July 2018

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

Zile Husanain
(no anonymity direction made)

Appellant

And

The Secretary of State for the Home Department

Respondent

For the Appellant: Ms G. Brown, Counsel instructed by Farani-Javid Taylor
For the Respondent: Mr G. Harrison, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of Pakistan born on the 16th October 1986. He appeals with permission a decision of the First-tier Tribunal (Judge Brunnen) dated 20th July 2017.
2. The decision that the Appellant had appealed to the First-tier Tribunal was taken on the 2nd December 2014, before the changes introduced by the Immigration Act 2014 took effect. The Secretary of State for the Home Department had refused to vary his leave to remain so as to grant him leave as a spouse under Appendix

FM. The Appellant challenged that decision on two grounds under s84 of the Nationality Immigration and Asylum Act 2002 as it then read: he submitted that the decision was not in accordance with the applicable immigration rule (s84(1)(a)), and in the alternative that the decision was a disproportionate interference with his Article 8 rights (s84(1)(c)). It is common ground that these two grounds of appeal gave rise to three sequential questions for the Tribunal to address.

Issue 1: The Five Year Route to Settlement

3. The First-tier Tribunal first considers whether the Appellant qualified for leave to remain as a partner under the 'five-year route to settlement' under Appendix FM. This 'route' required him to demonstrate that he met the 'minimum income requirement' of £18,600 at the date of decision.
4. The determination begins by noting that at least one of the matters placed in issue by the Respondent on this point was resolved in the Appellant's favour. The Appellant's representatives had made a mistake on the application form in that they had provided information about the Sponsor's income but erroneously indicated that it was the Appellant's. That this was an administrative error was evident from the fact that all of the supporting payslips etc referred to his wife. This was important because the Respondent had ignored all of that income on the basis that the Appellant was not in fact permitted to work under the terms of his Tier 4 (General) Student Migrant visa.
5. That finding did not however assist the Appellant, since the appeal fell to be dismissed under this heading for another reason. Appendix FM-SE sets out the 'specified evidence' that needed to be submitted with the application. At the time this included six months of payslips, and corresponding bank statements. Since the Appellant's wife had only been in her employment for 4 months at the date of the application, there was no way that this requirement could be met. The Respondent's decision to refuse leave on this basis was therefore upheld.
6. The written grounds of appeal challenge the Tribunal's approach. It is pointed out that the missing two months' worth of 'specified evidence' had been submitted to the Respondent prior to the decision being taken. The application had been made in August, the additional payslips etc had been submitted in October, and the decision had been made in December. The grounds argue that the new material had formed part of the 'application' and as such should have been considered.
7. Permission was granted on this ground by Designated Judge of the First-tier Tribunal Shaerf, who considered it arguable that the new material should have been treated as a variation of the August application. Had that been done the

Appellant would have qualified under Appendix FM on the 'five year route to settlement'.

8. In granting permission Judge Shaerf had made reference to paragraph 42 of Patel and Ors [2013] UKSC 72, where the court considers the scope for 'varying' applications that have been made within the window of leave statutorily extended by s3C of the Immigration Act 1971. The court notes that the conflicting conclusions reached by the Court of Appeal in AS (Afghanistan) v Secretary of State for the Home Department [2011] 1 WLR 385 were perhaps an inevitable consequence of the poor drafting of the provisions being scrutinised, but in the end agreed with the broader approach advocated by Sullivan LJ: if an appellant is served with a 's120 notice' ordering him to disclose all possible grounds that he wishes to advance, complaint can hardly be made when he advances them.
9. As Ms Brown accepted after some discussion, the Patel ratio was not, with due respect to Judge Shaerf, in fact apposite here. In Patel the question before the Supreme Court had been the operation of the 'one-stop' procedure and in what manner applicants might be permitted to perfect or vary applications already lodged so that all relevant issues could be considered on appeal. Here the outcome did not depend on the statutory scheme, but on the fact that the rule being applied had an internal temporal requirement, that evidence be adduced covering the six months prior to *the application being made*. The Tribunal could consider any evidence it liked but if the material had not been supplied at the point that the application was made, it was not relevant to whether the requirements of the rule were met in the formal sense required to place the Appellant on the 'five year route'. This ground of appeal therefore depended on the Appellant demonstrating that the payslips etc submitted in October had been part of his 'application'.
10. That was a possibility considered by the Tribunal in Khatel (s85A; effect of continuing application) [2013] UKUT 00044 (IAC) when the Tribunal was asked to consider the position of applicants under the Points Based System who had submitted English Language test pass certificates after the initial application but before decisions were reached. The Tribunal held that these late submissions could be said to be part of a 'continuing application' in circumstances where the tests themselves had been taken prior to the applications being lodged. The Court of Appeal rejected that construction in Raju and Ors [2013] EWCA Civ 754, holding simply that an application is 'made' when paragraph 34G of the Immigration Rules says it is made, that is to say the date it is submitted (or if by post, the day of posting).
11. It follows that this limb of the Appellant's challenge to the First-tier Tribunal's conclusions is not made out. The rule itself requires that six months' worth of requisite financial information be supplied at the date of application. The date of application is determined by paragraph 34G, and in this case it fell in August 2014 when only four payslips plus supporting material were available. The

requirement of the rule was not therefore met and the Tribunal was correct to have dismissed the appeal under this heading.

Issue 2: the EX.1 'Ten Year Route to Settlement'

12. The second question for the First-tier Tribunal was whether the Appellant should have been granted leave to remain under the 'ten year route' in Appendix FM. Materially this required him to demonstrate that one of the 'exceptions' at paragraph EX.1 were met. Since the Appellant does not have a child the relevant test was whether there were "insurmountable obstacles" to family life with his wife continuing outside of the UK. The couple submitted that there were. Although the Appellant's wife is of Pakistani origin herself she was born in this country and last visited Pakistan when she was 9 years old. All of her extended family members live here; she regards the UK as her home. She has a house and a good job here and would not find the same opportunities in Pakistan. She is currently receiving fertility treatment on the NHS. None of those reasons were found, even considered cumulatively, to amount to an 'insurmountable obstacle' to family life continuing in Pakistan and the appeal was therefore dismissed under this head. There has been no challenge to that decision.

Issue 3: Article 8 Outside of the Rules

13. The Tribunal accepted that the first four *Razgar* questions were answered in the affirmative and proceeded to consider proportionality with reference to section 117B of the 2002 Act. It reminds itself that the maintenance of immigration control is in the public interest; it finds that the Appellant speaks English sufficiently well to aid his integration; it accepts that the household income, at the date of the appeal, is well above the 'minimum income requirement' set in Appendix FM and so it can be said that the Appellant is financially independent; the Appellant's relationship with his wife is given some weight but that is lessened by the fact that it was established when his status in this country was 'precarious' (he had been a Tier 4 (General) Student Migrant when they met).
14. The Tribunal then directs itself to the judgments in *Agyarko* [2017] UKSC 11 and the surviving dicta in *SS (Congo)* [2015] EWCA Civ 387. It then says this:

"44. On the Appellant's behalf it is argued that he can now satisfy the financial requirement in E-LTRP.3.1 and so qualify for leave to remain under the 5 year route. It is submitted that it is disproportionate to require him to make a fresh application. I do not agree. In *SS (Congo)* at paragraph 38 (*sic* – the passage cited is at 58) , the Court said:

'An applicant is not entitled to apply for LTE at a time when the requirements of the Rules are not satisfied, in the hope that by the time the appellate process

has been exhausted those requirements will be satisfied and LTE will be granted by the appellate tribunal or court. This would be an illegitimate way of trying to jump the queue for consideration of the applicant's case and would represent an improper attempt to subvert the operation of the Rules. Sections 85 and 85A(2) prevent consideration of an application for LTE in this way''

15. Returning to its earlier finding that there are no insurmountable obstacles in this case the Tribunal finds that there are no compelling circumstances such that would justify allowing the appeal on Article 8 grounds. The question of the Appellant returning to Pakistan in order to make an application for entry clearance does not arise since he would be able to make an 'in-country' application without falling foul of the immigration status requirements in E-LTRP.2.2 "provided he make a fresh application within 28 days of the expiry of appeal rights in the present proceedings". It would not be unjustifiably harsh to expect this. On that basis the decision to refuse leave is found to be proportionate and the appeal is dismissed.
16. Before me Ms Brown submitted that the determination of the First-tier Tribunal does not contain a lawful assessment of proportionality. She submitted that the Tribunal failed to identify what the public interest actually was in refusing the Appellant leave. This is a man who has always had lawful leave to be in this country, and who, it was expressly accepted by Mr Harrison, has now demonstrated that he has been consistently able to meet the minimum income requirement since 2014. It was further submitted that the Tribunal had misdirected itself in respect of the '28 day grace period' which no longer exists. The Tribunal failed to ask itself: what was the public interest in making this man an overstayer?
17. This was a human rights appeal. As such the appeal could only be allowed, if at the date of the decision in the appeal the Applicant could show that the decision to refuse him leave was unlawful under section 6(1) of the Human Rights Act 1998. Since he relied on Article 8 the appropriate legal framework was that set out in Razgar [2004] UKHL 27.
18. There was no dispute that there was a family life between the Appellant and his wife. Nor was there any dispute that a decision to refuse him leave would result in some interference in that family life so as to engage Article 8. The legality of the decision was not challenged. In its assessment of proportionality the Tribunal quite properly had regard to s117B of the Nationality, Immigration and Asylum Act 2002. What then was the error in approach?
19. Having heard the submissions of the parties I am satisfied that there are three significant errors in the proportionality reasoning.

20. The first is the reliance on the passage in SS (Congo). In that passage their Lordships were considering the position of an applicant for entry clearance who, unable to meet the rules at the date that he made his application, had managed to do so by the time that the appeal was heard. The court rejected that as a legitimate route to success having regard to the then provisions (now repealed¹) in the 2002 Act relating to entry clearance appeals: in such cases the Tribunal was bound to consider only the position at the date of the ECOs decision. This passage had no application to this in-country human rights appeal. The only question to be decided was whether it was proportionate to continue to refuse the Applicant leave to remain with his wife as of the date of appeal.
21. The second was the reliance on the '28 day grace period'. The Tribunal dismissed the Applicant's concerns about becoming an overstayer - or having to be separated from his wife - in the event that he was required to make a new application. As Mr Harrison confirmed, the Tribunal was mistaken since the 'grace period' no longer exists. The effect of the dismissed appeal was indeed to leave the Applicant without leave.
22. The third error was that identified by Ms Brown in her submissions. The determination does not identify what the possible public interest would be in continuing to refuse the Appellant leave. The accepted facts were that this was a genuine and subsisting marriage entered into when the Applicant had lawful leave; the household income comfortably exceeded the 'minimum income requirement' and had done since 2014; the Appellant spoke English to a reasonable degree. His application under the rules had failed not on any substantive issue, but because the Respondent was not bound to have regard to the additional payslips that had been submitted because they had not been in the original envelope that had contained the application. That was the extent of the failure. In *R (on the application of MM (Lebanon) v Secretary of State for the Home Department* [2017] UKSC 10 the Supreme Court considered not just the principle of the 'minimum income requirement' but the extent to which requirements as to 'specified evidence' might be relevant to a proportionality assessment. Following discussing of the margin of appreciation to be granted to specialist decision-makers the court says this (emphasis added):

76. As Lord Reed explains (*Agyarko*, para 47), this approach is consistent with the margin of appreciation permitted by the Strasbourg court on an "intensely political" issue, such as immigration control. However, this important principle should not be taken too far. Not everything in the rules need be treated as high policy or peculiarly within the province of the Secretary of State, nor as necessarily entitled to the same weight. **The tribunal is entitled to see a difference in principle between the underlying public interest considerations, as set by the Secretary of State with the approval of Parliament, and the working out of that policy through the detailed machinery of the rules and its application to individual cases.** The former naturally include issues such as the seriousness of levels of offending sufficient to require deportation in the public interest (*Hesham Ali*, para 46). Similar considerations would

¹ s85A(2) was repealed by Schedule 9, paragraph 35 of the Immigration Act 2014

apply to rules reflecting the Secretary of State's assessment of levels of income required to avoid a burden on public resources, informed as it is by the specialist expertise of the Migration Advisory Committee. **By contrast rules as to the quality of evidence necessary to satisfy that test in a particular case are, as the committee acknowledged, matters of practicality rather than principle; and as such matters on which the tribunal may more readily draw on its own experience and expertise.**

...

98. It is apparent from the MAC report, and the evidence of Mr Peckover, that the reasons for adopting a stricter approach in the new rules were matters of practicality rather than wider policy, reflecting what the MAC acknowledged to be the relative uncertainty and difficulty of verification of such sources. That did not make it unreasonable or irrational for the Secretary of State to take them into account in formulating the rules. The MAC recognised the strength of the case for taking account of other sources, but it did not in terms advise against the approach ultimately adopted by the Secretary of State. **In considering the legality of that approach, for the reasons already discussed (para 59 above) it is necessary to distinguish between two aspects: first, the rationality of this aspect of the rules or instructions under common law principles, and secondly the compatibility with the HRA of similar restrictions as part of consideration outside the rules.** As to the first, while the application of these restrictions may seem harsh and even capricious in some cases, the matter was given careful consideration by both the MAC and the Secretary of State. As Aikens LJ said (para 154), the decision was "not taken on a whim". In our view, it was not irrational in the common law sense for the Secretary of State to give priority in the rules to simplicity of operation and ease of verification.

99. Operation of the same restrictive approach outside the rules is a different matter, and in our view is much more difficult to justify under the HRA. This is not because "less intrusive" methods might be devised (as Blake J attempted to do: para 147), but because it is inconsistent with the character of evaluation which article 8 requires. As has been seen, avoiding a financial burden on the state can be relevant to the fair balance required by the article. But that judgment cannot properly be constrained by a rigid restriction in the rules. Certainly, nothing that is said in the instructions to case officers can prevent the tribunal on appeal from looking at the matter more broadly. These are not matters of policy on which special weight has to be accorded to the judgment of the Secretary of State. There is nothing to prevent the tribunal, in the context of the HRA appeal, from judging for itself the reliability of any alternative sources of finance in the light of the evidence before it. In doing so, it will no doubt take account of such considerations as those discussed by Lord Brown and Lord Kerr in *Mahad*, including the difficulties of proof highlighted in the quotation from Collins J. That being the position before the tribunal, it would make little sense for decision-makers at the earlier stages to be forced to take a narrower approach which they might be unable to defend on appeal.

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103. The only criticism which might be made of this passage is the reliance on the figure of £13,400 adopted as a guide by Blake J (see para 33 above), but not ultimately upheld by the Court of Appeal. The tribunal's reliance on that part of Blake J's judgment was erroneous, though of course entirely proper at the time. However, in considering after this long delay whether the error is such as to require remission to the tribunal, fairness requires that that we should also take account of the more recent guidance of the Strasbourg court in *Jeunesse*. The issue is not whether there has been a "near miss" from the figure in the rules, but the weight to be given to any factors weighing against the policy reasons relied on by the Secretary of State to justify an extreme interference with family life. **One such factor may be the extent**

to which the family, while not complying with the MIR, would in practice be a burden on the state. The other *Jeunesse* factors pointed strongly in favour of the applicants.

...

23. I am not satisfied that the Tribunal here undertook its own evaluation of the extent to which this family would be a burden on the state, or on the extent of the Appellant's compliance with the 'practical' requirements of the rules. This was not a case where the Appellant fell short of the minimum income requirements; nor was it even a case where he fell short of the 'specified evidence'. It was a case where he had, for a few short weeks in Autumn 2014, not been able to supply all of that specified evidence, but had managed to rectify the omission two months before the Secretary of State for the Home Department even came to look at the application. That was the extent of the public interest weighing against him. In those circumstances it is very difficult to see how the significant interference that would result from refusing him leave could be justified. For those reasons I set aside the reasoning of the First-tier Tribunal and substitute the decision in the appeal by allowing it on human rights grounds.

Decisions

24. The decision of the First-tier Tribunal contains an error of law such that the decision must be set aside to the extent identified above.
25. The decision in the appeal is remade as follows: the appeal is allowed on human rights grounds.
26. There is no order for anonymity.

Upper Tribunal Judge Bruce
3rd July 2018