



**Upper Tribunal
(Immigration and Asylum Chamber)
OA/08476/2013**

Appeal Number:

THE IMMIGRATION ACTS

**Heard at Birmingham
On 19 November 2018**

**Decision & Reasons given orally at
hearing
Sent out on 20 December 2018**

Before

MR C M G OCKELTON, VICE PRESIDENT

Between

MR MAZHAR SHAFIQ

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr T. Muman, instructed by J M Wilson Solicitors.
For the Respondent: Ms H. Aboni, Home Office Presenting Officer.

DECISION AND REASONS

1. This appeal falls for consideration by this Tribunal following the order of the Court of Appeal that it be reconsidered.
2. The decision under appeal is that of the Entry Clearance Officer dated 12 March 2013. That was a decision refusing the application of the appellant for entry clearance to the United Kingdom as a spouse. His wife is a British national and she has two children from a former relationship who attend today in court.
3. The appeal was allowed by Tribunal Judge Landes in the First-tier Tribunal in a decision of 14 February 2014. The Entry Clearance Officer appealed

to this Tribunal which dismissed the Entry Clearance Officer's appeal in a decision of 3 April 2014. The matter then came to a halt awaiting developments elsewhere. It is right to set out briefly why that was.

4. The judgment of Tribunal Judge Landes had been based on, or certainly in the Court of Appeal's view influenced by the decision of Blake J in a case called MM v Entry Clearance Officer in which he had held that the minimum income requirements of the Immigration Rules as they then were and as broadly speaking they have continued were contrary to Article 8. Mr Justice Blake's decision was overruled by the Court of Appeal MM [2014] EWCA Civ 985 and that decision was upheld by the Supreme Court in R (MM Lebanon) and Others v Secretary of State for the Home Department [2017] UKSC 10. It was thus not until 2017 and that judgment that it was clear beyond peradventure that basing a decision on the words of Blake J was erroneous in law.
5. This case had in fact been one of those originally programmed to take part in the MM litigation in the Supreme Court. It was detached from them and hence came to be heard separately by the Court of Appeal, whose judgment is available as [2018] EWCA Civ 1776. In that judgment, despite the eloquent submissions of Mr Muman who appeared before the Court of Appeal as he appears before me today on behalf of the appellant, the Court of Appeal took the view, as I have indicated, that Judge Landes' view was influenced by the erroneous interpretation of the law by Blake J and therefore took the view that the appeals would need to be reconsidered.
6. That presents a minor procedural difficulty because, as Mr Muman submitted to me, it was not entirely clear what the position was as related to the facts found by Judge Landes as distinct from the assessment and interpretation of them within the view she took of the meaning of the Rules; and also the extent to which it was necessary for the appellant to produce further evidence or to substantiate his case in any way.
7. It does seem to me, however, that bearing in mind that the decision of the Court of Appeal was at the end of July (even though the order was not effective until later), the appellant has, through his wife and the solicitors and Counsel who acted for him, had every opportunity to assemble whatever material he chose to assemble; and, as Mr Muman frankly acknowledges to me, there is no evidence of the current situation: although on instructions Mr Muman has been able to tell me what the current situation is and I shall refer to it in a moment.
8. The position therefore is that the decision of the Upper Tribunal and that of Judge Landes have both been quashed by the order of the Court of Appeal, and the appellant's appeal falls for reconsideration; the appellant awaits a first lawful decision on his appeal against the Entry Clearance Officer's decision.
9. The material put before the Entry Clearance Officer was material which was incapable of meeting the requirements of the Rules in respect of the minimum income requirement. It appears to be acknowledged that the

only problem was that the application was made at a time when it could not succeed because the sponsor's income had not been earned by her for a sufficiently long period. Everybody at every stage appears to have taken the view that if only the application had been made a few months later it would, far from failing, have been bound to succeed. Indeed, that is the subject of comments made by the Court of Appeal in paragraph 45 of the judgment on McCombe LJ, with which paragraph Lindblom LJ specifically agreed, to the following effect:

"I would not wish to leave the case without saying that I am surprised that in neither of these cases the Court of Appeal heard two cases together did the respondent submit fresh applications for entry clearance after the initial refusals when it appeared clear that both applications have been premature and that very shortly thereafter the minimum income requirement would have been satisfied."

10. It is of note that in this case at least the Secretary of State suggested such a course in May 2015, admittedly at the same time proposing that her appeal should be allowed and that the respondent should pay her costs; and McCombe LJ refers to further developments without any noticeable outcome.
11. That is, as I pointed out to Mr Muman today, a matter of some concern in relation to the grounds that he now raises, to which I must turn, starting from the position first that it is accepted that the appellant did not meet the requirements of the Immigration Rules at the date of the application; and secondly that there is no further evidence before me other than that which was before the Entry Clearance Officer.
12. The first ground argued by Mr Muman is that the Entry Clearance Officer erred in law: and that is to say the decision made was not in accordance with the law for failure to consider s 55 and the best interests of the sponsor's children (that is to say the appellant's stepchildren). That ground of appeal was available to the appellant because this appeal is an appeal unaffected by the Immigration Act 2014. But, first, it is perfectly clear that the ground was not raised before the First-tier Tribunal. Secondly, there was no argument about it before the First-tier Tribunal so far as anybody can tell. Thirdly, there has been no application to amend the grounds.
13. That is not a good basis upon which to raise the ground at this stage.
14. In any event, it is a ground which if it succeeded could succeed only in a purely formal way and would not be a basis upon which a Tribunal properly advised would allow an appeal. The reason for that is that the best interests of the sponsor's children had not been the subject of any submissions to either the Entry Clearance Officer or to the First-tier Tribunal. At the stage of entry clearance, the sponsor filled in the form, and as Mr Muman points out, there was at that stage no particular space for adding what the best interests of any children would be; but there was copious documentation put in to the First-tier Tribunal, and there was a

statutory declaration made by the sponsor in relation to the application to the Entry Clearance Officer.

15. Taking that material at its highest the sponsor's position was, just before her marriage to the appellant, that the children had formed a close bond with him and she was surprised that that had happened so quickly; but by the time the matter came to appeal she made a witness statement which does not mention the children at all, and so far as her oral evidence is concerned she gave evidence of the children's relationships with their natural father, not of any relationship with the appellant, and said that shortly after the hearing she was going to visit her husband the appellant, and the children were going to stay behind.
16. Even if there were some formal failure to take into account the interests of the children, and even if that had been a ground of appeal to the First-tier Tribunal, it would on that evidence, as it appears to me, have been bound to be rejected. There was simply no basis in the evidence for saying that the best interests of the children would be affected by the Entry Clearance Officer's decision. Further, as I noted in the course of the hearing, as the proposal was for the appellant to come to the United Kingdom and although he said he would work, there was no specific proposal for his employment. The immediate result of his arrival would have been a decrease in the family's finances because he would have had to be kept as well as his wife and stepchildren, thus reducing the resources available for the children. So far as ground 1 is concerned therefore there is simply nothing in it: but in any event, it was not argued before the First-tier Tribunal, and is not in the grounds of appeal available to the appellant today.
17. The second ground upon which Mr Muman seeks success today, is that the Entry Clearance Officer failed to take into account article 8 at all, and that the appeal should succeed on the basis that entry clearance should be granted outside the Rules - to the appellant who did not, at the date of his application, meet the requirements of the Rules. In conjunction with that, Mr Muman emphasises specifically, findings made by Judge Landes (whose decision has been set aside) in paragraph [30] in particular.
18. She had looked in the previous paragraph to what she regarded as the realistic financial situation and concluded that if the appellant was admitted to the United Kingdom in the medium term there would be sufficient money for the couple. She then found first that it was disproportionate for the family to be further separated and was not in the best interests of the children, who should be forming a relationship with their stepfather. I have already indicated the evidence on that, as I have on the next point upon which Mr Muman relies, that the children stand to directly benefit from having a father figure in their household and benefit indirectly from the support the appellant could give to their mother. Those, of course, are matters upon which there was no evidence so far as one can tell upon which the findings in favour of the appellant could have been made.

19. I therefore disregard those points argued by Mr Muman for the purposes of article 8. The next one is this: separation would not be in the order of a couple of months or a few months; finally, it was not reasonable to expect the sponsor and her British children to uproot themselves to Pakistan.
20. Nobody doubts the last. However, the position is as McCombe LJ noted, and as I have noted, that the case before the Tribunal was, and has always been, that if the application had been made a few months later it would have succeeded. It may be that if it had been made quite a lot later it would have succeeded. The argument outside the Rules has to be on the basis that refusal is disproportionate. When one considers whether refusal was disproportionate, one has to take into account what the consequences of refusal were. The consequences of refusal were simply that a new application would have to be made at a time when it could succeed. The consequences of refusal were not the long-term exclusion of the appellant from the United Kingdom. They were simply that a new application would have to be made.
21. I do not understand that it can coherently be argued as disproportionate to refuse an application when the only consequence is that a new application has to be made. This is not a case where anybody would have to go abroad to make the new application; it is not a case where anybody is capable of saying that the new application would not have succeeded; it is simply that the application made too early would have to be remedied by an application made at the proper time. For those reasons it seems to me that the article 8 argument is one which has no proper foundation.
22. There are characteristics of this appeal which have troubled me. In particular, it is important to note and regret the delay which has, as I understand it, now extended so long that circumstances have changed dramatically in the sponsor's family. In particular, I am told that the requirements of the Rules would not be met by an application today. That has a further consequence in relation to the outcome of the present appeal. As I observed to Mr Muman, and as I understand it, he accepted, even if today's appeal were to be allowed, that would be a victory which would be of no assistance to the appellant or the sponsor. The Entry Clearance Officer, faced with an allowed appeal, would nevertheless have to determine whether the requirements of the Rules meriting a visa were met at the present date, and I am told that they would not be.
23. All that makes the observations, made possibly even then too late by McCombe LJ, of considerable importance. I do not know why the appellant and those advising him were told to pursue this appeal rather than to see what could be done about getting the appellant to the United Kingdom by a properly supported application as soon as possible. It may be that further enquiries need to be made about that, but for the reasons I have given, this appeal cannot succeed and I dismiss it.

C. M. G. OCKELTON

VICE PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
Date: 7 December 2018