Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/21061/2014

THE IMMIGRATION ACTS

Heard at Newport	**Decision & Reasons Promulgated**
On 2 June 2015	**On 26 June 2015**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MUHAMMAD ALI QURESHI

Respondent

Representation:

For the Appellant: Mr I Richards, Home Office Presenting Officer
For the Respondent: Ms P Yong instructed by Burney Legal Solicitors

DETERMINATION AND REASONS

1. The appellant is a citizen of Pakistan who was born on 1 March 1986. He came to the UK as a student on 27 September 2008 with leave valid until 31 October 2009. His leave was subsequently extended to 2 March 2011. On 3 August 2011, the appellant made an application based upon human rights grounds which was refused on 13 September 2011. On 19 September 2011 the appellant made a request for the respondent to reconsider her decision on the basis that he had married a British

citizen, "EB"(the sponsor) on 2 September 2011. On 25 April 2014, the respondent confirmed her decision not to grant the appellant leave to remain under the Rules or Art 8 of the ECHR. On that date also, the respondent made a decision to remove the appellant under s.10 of the Immigration and Asylum Act 1999 to Pakistan.

2. The appellant appealed to the First-tier Tribunal. In a determination promulgated on 6 January 2015, Judge A E Walker allowed the appellant's appeal under Art 8 of the ECHR.

3. The Secretary of State sought permission to appeal. On 26 February 2015, the First-tier Tribunal (Judge Andrew) granted the Secretary of State permission to appeal.

4. On 18 March 2015, the appellant filed by facsimile a Rule 24 response seeking to uphold the First-tier Tribunal Judge's decision.

5. Thus, the appeal came before me on 2 June 2015.

The Judge's Decision

6. Judge Walker heard oral evidence from the appellant and sponsor and accepted that evidence. The appellant met the sponsor in May 2010 and their relationship developed. The appellant is 28 years old and the sponsor is 57 years old and is a British citizen. The judge accepted that the appellant applied for a Certificate of Approval to marry the sponsor on 26 October 2010 whilst he had leave to remain. However, the respondent did not deal with the application until 14 June 2011 by which time the appellant's leave had expired on 2 March 2011. The judge accepted that the appellant had not been advised to seek to extend his leave and had:

> "not [been] told that he would have to regularise his immigration status by making an application for leave to remain notwithstanding the application for a Certificate of Approval."

7. The judge considered that it would have been:

> "illogical to seek a Certificate of Approval and then when necessary fail to make a further application if the appellant had been advised that this is what he needed to do. It is not as if he was ignoring the issue of immigration and marital status – he had very clearly sought advice from a solicitor as is evident from the papers filed in connection with the application for Certificate of Approval."

8. Further the judge accepted that the sponsor suffered from a number of health problems. She is a diabetic and requires insulin which she injects twice a day. She has to check her own blood daily and she has frequent checkups at three monthly intervals. She required a regular check up for her eyesight. In addition, she suffers from depression and is prescribed mirtazapine. In addition, recently the sponsor has suffered from "severe weight loss" the cause of which remains undiagnosed. Tests for cancer of the stomach and bowel have been negative.

9. In relation to the sponsor's need for medical care, the judge set out in detail the *Country of Origin Information Report* for Pakistan at para 38 of her determination. Having done so, the judge concluded that:

"only wealthy people are able to afford private medical care are able to access the sorts of drugs that the sponsor would need."

10. At para 39, the judge went on to state:

"It is apparent that the reason that the appellant cannot meet the requirements of the Rules, either as they were cast before July 2012 or since, is because the sponsor lives on benefits. It is clear from the evidence that I heard that [t]his is in part because of her health problems. It follows that it would be highly unlikely that she would be able to afford medical treatment in Pakistan."

11. In addition, the judge took into account that the sponsor would:

"face particular difficulties as a white woman in a highly patriarchal [country] and according to the COR corrupt system."

12. At para 40, the judge stated:

"It follows from these findings and I accept the evidence that the sponsor as a British white woman of impoverished means would not be able to access the medical treatment and facilities necessary for her to maintain her health. I also accept the evidence that I heard from both the sponsor and the appellant that they both fear what their situation would be in Pakistan as it would be apparent that they are of different ethnicity and of different religions".

13. At para 40, the judge noted that:

"the appellant and the sponsor do not have the financial means to enable them to be able to maintain their relationships by means of visits."

14. Having made these findings of fact, the judge said this at paras 42 – 43:

"42. It was argued by the respondent that there should be reference to para 276ADE of the rules in deciding this case whereas the appellant urged me to decide the case on the basis of the rules as they were before the implementation of the rule change on 09.07.2012 and that this is the ratio of the case of **Edgehill & Another v SSHD [2014] EWCA Civ 407**. However because of the case of **Ganesabalan, R (on the application of) v Secretary of State for the Home Department [2014] EWHC 2712 (Admin) (16 July 2014)** and the proposition deriving from that case that a failure to considerer whether to exercise discretion outside the Rules will, in itself, be unlawful unless the decision would have inevitably been the same, I consider that this is a distinction that I need not make. This is because I am satisfied as will be apparent from my findings above that had the respondent considered the appellant's case even in accordance with the evidence to which the respondent herself referred in the refusal letter then the refusal would not have been maintained by the respondent. It is clear that the respondent only considered the appellant's family life in connection with para 276ADE. The refusal letter of the respondent only considers the sponsor's diabetic condition with reference to 'insurmountable obstacles' under the rules. It is clear that the appellant cannot meet the long residence rules of para 276ADE but the respondent has completely failed to consider the appellant's family life. The consideration by the respondent of the possible exceptional circumstances made no reference to the appellant's family life with the sponsor. In any even although the appellant's application was made in 2011 the refusal was made some 30 months after the application was made and it ill behoves the respondent to rely on this delay to assert that the appellant should not have accumulated a family life in the UK in this time especially in circumstances where the letter referring to the abolition of the certificate of

approval system advised the appellant with regard to marriage so that at the point in time when the appellant made the application for that certificate it must have been apparent to the respondent that the appellant had by then already established a family life with the sponsor in the UK.

43. I conclude that the respondent failed to consider the appellant's position outside the rule and limited herself to consideration only of para 276ADE and it therefore follows that the decision by the respondent was unlawful. Consideration should have been made with regard to the appellant's position under Article 8."

15. This reasoning is, in the context of an appeal, somewhat unusual as it does not seek to apply Art 8 itself but rather conclude that the "decision by the respondent was unlawful".

16. That said, however, the judge at para 44 went on to find that the respondent's decision breached Art 8:

"44. I am satisfied and it was not contested to the contrary by the respondent, that the appellant and the sponsor have a family life together. Over the period of time that they have been together that family life has consolidated not least because they have met various bereavement and health issues as a couple. I am satisfied that the removal of the appellant from the UK would be an interference in that family life. I am satisfied that in the particular circumstances of the sponsor and her health issues in the light of my findings above that the sponsor will not be able to relocate to Pakistan and maintain her health and safety and that she would not be able to visit Pakistan because of her health and because she could not afford to do so and accordingly I am satisfied that the family life of the appellant with the sponsor cannot be enjoyed elsewhere other than the UK. I also note that the respondent did undertake steps to regularise his immigration status as I have set out above and it follows that I conclude that the interference in the appellant's family life is not proportionate to the legitimate aim of effective immigration control."

Discussion

17. The grounds of appeal and Mr Richard's submissions on behalf of the Secretary of State focussed on two matters.

18. First, although the judge had set out at para 8, ss.117A and 117B of the Nationality, Immigration and Asylum Act 2002 ("NIA Act 2002"), she had failed to "have regard" to the factors set out in s.117B in particular that the appellant's family and private life was "established" at a time when his immigration status was at best precarious and at worst unlawful. Further, the judge had failed to take into account that the sponsor (and through her the appellant) could not succeed under the financial requirements in Appendix FM and was not, therefore, "financially independent". That was a relevant matter to which the judge was required to "have regard" under s.117B(3).

19. Secondly, Mr Richards submitted that the judge was wrong to find that the appellant had "done all he could to regularise his stay" since he had not applied for leave although he had applied for a Certificate of Approval which was not the same as regularising his status.

20. Ms Yong relied upon the rule 24 reply which she developed in her oral submissions. She submitted that the judge was entitled to reach the findings that she did in

relation to the appellant seeking to regularise his stay and she had taken into account his financial position, including the evidence that he would be offered a position as a taxi driver with an annual salary of "£13,124 together with overtime" (see para 23 of the determination). The judge was also entitled to take into account the significant delay in responding to the appellant's application for a certificate of approval made in October 2010 but not dealt with by the respondent until June 2011. The judge had been entitled to take into account that the appellant had between four and five months of his leave left when the application was made and it was because of the delay in resolving that application that led to his leave expiring. Ms Yong relied upon the case of Dube (ss.117A – 117D) [2015] UKUT 00090 (IAC) that the obligation under s.117A to "have regard" to the factors in s.117B such that "what matters is substance, not form". She submitted that the judge's findings that the sponsor could not be expected to go to Pakistan because of the health implications to her was one properly open to the judge. The judge was also entitled to take into account the position of a white Christian woman in Pakistan who did not speak Urdu.

21. The respondent's grounds and Mr Richard's submissions were narrowly focussed. Apart from the challenge to the judge's finding that the appellant had sought to regularise his stay, none of the judge's factual findings are challenged in the grounds and nor were they challenged by Mr Richards in his submissions.

22. As regards the finding challenged, it is at para 35 of the judge's determination which is in these terms:

> "35. I do not accept the assertion made by the respondent in the original letter of refusal dated 13.09.2011 that the appellant had remained in the UK without seeking to legalise his position because the appellant had made an application for a certificate of approval of marriage so that he could marry the sponsor on 26.10.2010 at which time he still had extant leave to remain. It is a feature of this case that there have been significant delays in dealing with the appellant's application and this is the case with regard to his application for a certificate of approval which was not dealt with by the respondent until 14.06.2011 and by then the appellant's leave had expired on 02.03.2011. The appellant did attempt to follow the immigration rules by seeking the certificate of approval and delayed his marriage in order to obtain this document. Having been told it was not necessary any longer I am satisfied that he then sought to marry the sponsor as soon as possible but they experienced some difficulties with the registrars initially. I note that the solicitors that he used to obtain his certificate of approval were not the same solicitors who represented him at the appeal. I accept that he was not told that he would have to regularise his immigration status by making an application for leave to remain notwithstanding the outstanding application for a certificate of approval. Aside from the fact that I considered the appellant, and for that matter the sponsor, to be truthful and through witnesses, it would be illogical to seek a certificate of approval and then when necessary fail to take a further application if the appellant had been advised that this is what he needed to do. It is not as if he was ignoring the issue of his immigration and marital status – he had very clearly sought advice from a solicitor as is evident from the papers filed in connection with that application for certificate of approval."

In my judgment, the judge was entitled to accept the evidence and explanation of the appellant that he had not understood that he was required to seek leave as well as obtain a certificate of approval. That, of course, did not displace the fact that in March 2011 he became an overstayer but it does explain why that happened. I see

nothing irrational in the judge's finding based upon the evidence which she was perfectly properly entitled to accept.

23. The only other challenge in the grounds and Mr Richard's submissions was that the judge had failed to "have regard" to relevant factors under s.117B. The only matter relied on the ground is as follows:

> "The FTTJ does not explain why it has placed great weight on relationship formed when the appellant had a precarious immigration status, nor does the Tribunal consider any of s.117B(3), which is of course relevant when the FTTJ found that the sponsor does not work and is reliant on public funds."

24. Leaving aside the grammatical infelicities in that ground, Mr Richards also in his submissions relied on the fact that the judge had failed to have "regard" to the appellant's family life having been formed when he was unlawfully in the UK. Dealing with that latter matter first, the appellant's family life was not "established" when he was unlawfully in the UK. His family life was "established" after he met the sponsor in May 2010 and by 26 October 2010 they had decided to marry and the appellant sought a certificate of approval for the marriage. Section 117B(4) states that:

> "Little weight should be given to – ...
>
> (b) a relationship formed with a qualified partner,
>
> that is established by a person at a time when the person in the United Kingdom unlawfully."

25. Here, the relationship was established prior to the appellant's leave expiring from 2 March 2011. This was not a case where the relationship began and was "established" where, from the beginning, one of the parties to that relationship was unlawfully in the UK. I do not consider that the judge erred in law, contrary to s.117B(4), in giving the appellant's relationship with the sponsor "weight" given its establishment at a time when he was lawfully in the UK.

26. The only other matter relied upon in the grounds and by Mr Richard concerned the judge's failure to take into account that the appellant would not be "financially independent" under s.117B(3). That provides:

> "It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons –
>
> (a) are not a burden on tax payers, and
>
> (b) are better able to integrate into society."

27. In this case, the evidence was, and it has not been challenged by the Secretary of State, that the appellant would be employed as a taxi driver on a salary of £13,124 plus overtime. The judge did not doubt this evidence and, of course, she reached positive credibility finding in relation to both the appellant and sponsor. Even though, therefore, the appellant could not meet the requirements of Appendix FM, the judge was entitled, in my judgment, to take into account this evidence as

establishing the financial independence of the appellant. There was no evidence before the judge that the appellant was "a burden on taxpayers" in any event. It has not been suggested that the benefits received by the sponsor were received other than as a matter of personal entitlement to her and had nothing to do with the fact that the appellant was in the UK and her spouse.

28. As I have said, and I reiterate the point, both the grounds and the submissions made on behalf of the respondent were very narrowly focussed in this appeal challenging the judge's decision. Apart from the "regularisation point", none of the factual findings were challenged including that the sponsor could not be expected to live in Pakistan taking into account all the circumstances including her health needs and the position of a Christian woman aged 57 living with the appellant in that country.

29. Further, it is not suggested in the grounds that the decision of the judge is irrational or that he judge failed to identify "exceptional circumstances" such as to outweigh the public interest. It is clear that the judge correctly directed herself that only "compelling circumstances" would be sufficient to outweigh the public interest (see para 9 of the determination). Whilst it may well be that the judge's reasoning at paras 42–43 concerned with the legality of the respondent's decision was somewhat tangential to the task she had to perform of applying Art 8, the judge nevertheless turns to that latter issue correctly in para 44.

30. The grounds do not directly challenge what is said by the judge in para 44 which I have set out above. That reasoning is brief but has to be read together with the totality of the judge's discussion of the evidence and her finding in relation to the circumstances of the sponsor and appellant. As I have said, it is not suggested that the judge's finding in para 44 is irrational or that her reasoning is inadequate. In any event, I see no proper basis on which it could be challenged.

31. In the light of that, I am not satisfied that the respondent has in the grounds or submissions made identified a material error of law in the judge's decision to allow the appellant's appeal under Art 8 of the ECHR. That decision, therefore, stands.

Decision

32. The First-tier Tribunal's decision to allow the appellant's appeal under Art 8 did not involve the making of a material error of law. That decision stands.

33. Accordingly, the Secretary of State's appeal to the Upper Tribunal is dismissed.

Signed

A Grubb
Judge of the Upper Tribunal

TO THE RESPONDENT
FEE AWARD

The appellant having succeeded in his appeal, I see no basis for disagreeing with the judge's fee award, namely that a fee award of any fee which has been paid or may be payable is made against the respondent.

Signed

A Grubb
Judge of the Upper Tribunal