IAC-FH-NL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/00327/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 7 September 2015	**On 11 September 2015**

Before

UPPER TRIBUNAL JUDGE WARR

Between

ENTRY CLEARANCE OFFICER – NEW DELHI

Appellant

and

BINDU MOKTAN TAMANG
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Ms A Brocklesby-Weller, Home Office Presenting Officer
For the Respondent: Mr G Lee of Counsel instructed by Howe & Co Solicitors

DECISION AND REASONS

1. This is the appeal of the Entry Clearance Officer but I will refer to the original appellant, a citizen of Nepal born on 16 July 1992, as the appellant herein.

2. She applied to join her husband in the United Kingdom on 16 September 2013. Her husband is Nepalese and was granted settlement as a minor dependant of his father who was a former Gurkha veteran.

3. The application was refused by the Entry Clearance Officer on 20 November 2013 on the ground that the relationship between the parties was neither genuine nor subsisting and that the parties did not intend to live together permanently in the UK. The application was also refused because the sponsor did not meet the financial requirements of the Rules.

4. The appellant appealed and her appeal came before a First-tier Judge on 21 April 2015. The judge resolved the issue of the parties being in a genuine and subsisting relationship in their favour and there has been no challenge to that aspect of the decision.

5. Having noted that it was conceded that the appellant could not meet the relevant requirements of the Rules the judge continued:

> "34. The Entry Clearance Officer ought to have considered Section FM 1.0 and exceptional circumstances. It is stated under Appendix 4 of the Immigration Directorate instructions that:
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> > '*Where an applicant for entry clearance as a partner fails to meet the requirements of the Rules under Appendix FM and/or Appendix FM-SC the Entry Clearance Officer must go on to consider whether there may be exceptional circumstances. If the Entry Clearance Officer is of the view that there may be exceptional circumstances in line with his guidance then he must refer the application to RCU. Consideration of exceptional circumstances must include consideration of any factors relevant to the best interest of the child in the UK*'.
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> 35. The Entry Clearance Officer should have set out clear reasons as to whether a grant of entry clearance outside of the Rules is appropriate taken into account the guidance and exceptional circumstances. It is clear the Entry Clearance Officer in this decision did not and effectively refused the matter without having regard to those issues.
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> 36. I have therefore had to have regard to Article 8 and recognise that the code of Immigration Rules are not a complete code circumcising consideration of Article 8 [sic]. The question at the first stage is whether the appellant has arguable grounds for establishing @8 grounds notwithstanding the fact that she fails under the rules. I find that there are arguable grounds following the two stage approach due to the genuine and subsisting nature of the marriage, the vulnerability and needs of her husband in the UK and the impossibility of him leaving the UK to join her in Nepal without his parents who are both UK citizens.
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> 37. The legal position summarised at paragraph 10 to 35 of the administrative court case of **R (Ganesabalan) v SSHD [2014] EWHC 2712 (Admin)** that is now confirmed that it is necessary for a careful proportionality exercise to be conducted even if it is considered that an Appellant does not meet the Rules.
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> 38. Furthermore Section 117B of the Nationality, Immigration and Asylum Act 2002 states that the Tribunal must have regard to whether the Appellant speaks English and whether she is financially independent. The Act also enshrines the controversial concept that there is a public interest in immigration control.
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> 39. I therefore go on to consider the Article 8 test and the questions which I must ask myself under **R (Razgar) v SSHD [2004] 2AC 368** per Lord Bingham:

'(i) Will the decision be an interference by a public authority with the exercise of the appellant's right to respect for his private or (as the case may be) family life?

(ii) If so, will the decision have consequences of such gravity as potentially to engage the operation of Article 8?

(iii) If so, is such interference in accordance with the law?

(iv) If so, is such interference necessary in a Democratic society in the interests of the public policy of maintaining immigration control?

(v) If so, is such interference proportionate to the legitimate public end sought to be achieved?'

40. There is no test of exceptionality in these circumstances and the first stage approach is to see whether or not the Appellant could be granted under the Immigration Rules which on the evidence before me cannot.

41. I find that there is an arguable case that the Appellant's circumstances notwithstanding the fact that she fails to meet the Immigration Rules in relation to financial provision for her in the circumstances are somewhat unusual given the vulnerability of the Appellant's spouse as a person with learning disabilities who is effectively unable to work.

42. I find that going through the five stage test as set out by Lord Bingham therefore having been satisfied that there are arguable grounds because of the health and welfare needs of the UK Sponsor and the fact that this is a genuine and subsisting relationship.

43. I find that there would clearly be a substantial interest in interference by the immigration authority with the exercise of the Appellant's right to respect for her private and family life with her husband. I find that it would be impossible for that relationship to continue as a long distance relationship between the United Kingdom and Nepal and that therefore it would effectively have grave consequences of removing the very nature of this marriage which simply cannot be conducted by the odd visit and by electronic means of communication or telephone.

44. I find that the Respondent's decision could be said to be in accordance with the law and necessary in a Democratic society for the maintenance of immigration control as a public policy but the key question is whether or not it is proportionate.

45. In considering the Appellant's wife lives on her own in Nepal and that this is a genuine and subsisting relationship with a UK husband who is suffering from learning disabilities and clearly has the need for her companionship and love.

46. He has visited Nepal on three occasions but that simply cannot be maintained at this level of regularity given the cost and distance involved. The key question here is that this is a genuine and subsisting relationship with a person who is clearly in need with a family history from the UK Sponsor's of extensive service for the United Kingdom government as the context in which this decision is taken.

47. That is a very background factor but this is a young man who but for him having suffered from meningitis would undoubtedly have been in a position to provide

for the welfare of his wife and would have almost certainly had no problems with the financial considerations under the Immigration Rules.

48. This case does not clearly fall under the Immigration Rules and as the Entry Clearance Officer did not address his mind to the exceptional circumstances, provision of the Immigration Rules he is clearly at a disadvantage again because of that.

49. The Appellant and her husband have had to wait a significant period of time since they first applied for this matter to be heard which is a further exacerbating feature of this case.

50. I find that the Appellant's right as a UK citizen to marry the person of his choice is a fundamental principle which he must be able to enjoy in the current circumstances of his overwhelming need and that of his wife who is the Appellant.

51. I find therefore that the balancing act to be conducted falls clearly in favour of the Appellant and not with the maintenance of immigration control on the peculiar facts of this case.

52. I therefore allow this appeal on a balance of probabilities under the Immigration Rules as it is clearly in my view an exceptional case but primarily under Article 8 of the ECHR for the reasons set out above."

6. The Entry Clearance Officer appealed on the following grounds:

"Ground One: Failing to give adequate Reasons for Findings on a Material Matter

2. The rules concerning Specified Evidence are comprehensively set out in Appendix FM-SE to the Immigration Rules.

3. The Sponsor is in receipt of benefits, but is not exempt from the financial requirements as defined paragraph E-ECP.3.3. because his benefits are not those specified by the aforementioned paragraph. In order to meet the financial requirements of the Rules the appellant's sponsor needed to demonstrate a gross income of at least £18,600 per annum, or savings of £62,500.

4. The Judge finds that the ECO should have referred the case to the Referred Casework Unit in line with the guidance cited at [34]. It is submitted that in allowing the appeal under the Immigration Rules at [51] that the Judge has taken on the role of primary decision-maker and that the correct course to action would have been to remit the case back to the ECO for reconsideration.

5. The Judge has also allowed the appeal on Article 8 grounds at [51]. It is respectfully submitted that the Tribunal has erred in law in its approach to the Article 8 assessment in this case.

6. **Gulshan [2013] UKUT 00640 (IAC)** establishes that the Article 8 assessment shall only be carried out when there are compelling circumstances not recognised by these Rules. In this case the Tribunal did not identify such compelling circumstances and its findings are therefore unsustainable.

7. **Gulshan** also makes clear that at this stage an appeal should only be allowed where there are exceptional circumstances. **Nagre [2013] EWHC 720 Admin** endorsed the Secretary of State's guidance on the meaning of exceptional circumstances, namely ones where refusal would lead to an unjustifiably harsh

outcome. In this case the Tribunal has not followed this approach and thereby has erred. The Judge has regard to the Sponsor's learning difficulties caused by meningitis, however there are no findings that the Sponsor would be unable to enjoy family life with the Appellant in Nepal, it is therefore submitted that the outcome would not be unduly harsh.

8. It is respectfully submitted that the Tribunal has failed to provide adequate reasons why the appellant's circumstances are either compelling or exceptional, neither is the outcome unduly harsh, or disproportionate.

9. It is submitted that the Judge has erred in law, such that the decision should be set aside.

10. Permission to appeal is respectfully sought, an oral hearing is requested."

7. Mr Lee filed a response on 17 August 2015 in which it was argued that the grounds had no merit either individually or cumulatively and continued:

"Remittal

3. It is submitted that it was open to the Judge to consider whether there were exceptional circumstances as described within Appendix 4 of the Immigration Directorate Instructions as this did not about to an exercise of a discretion but rather a factual and legal finding as to whether there existed, in this case, exceptional circumstances. That is different from the exercise of a discretion.

4. In those circumstances the principles in Secretary of State for the Home Department v Abdi [1996] Imm AR 148 and Ukus (discretion: when reviewable) [2012] UKUT 00307 (IAC) does not apply but the broader jurisdiction of the Tribunal described in KF (removal directions and statelessness (Iran) [2005] UKIAT 00109, AS (Afghanistan) v SSHD [2009] EWCA Civ 1076 and AQ (Pakistan) v SSHD [2011] EWCA Civ 833.

5. In any event it is clear that the Judge's principal decision was to allow the Appellant's appeal under Article 8 of the ECHR.

Failure to Follow Gulshan

6. The Respondent alleges that the Judge erred in law by failing to follow the 'gateway' test in Gulshan and that therefore his Article 8 conclusions are 'unsustainable'. As Aitkens LJ stated in MM (Lebanon) v SSHD [2014] EWCA Civ 985 [ς129]:

> 'The *Nagre* case does not add anything to the debate, save for the statement that if a particular person is outside the rule then he has to demonstrate, as a preliminary to a consideration outside the rule, that he has an arguable case that there may be good grounds for granting leave to remain outside the rules. I cannot see much utility in imposing this further, intermediary test. If the applicant cannot satisfy the rule, then there either is or there is not a further article 8 claim. That will have to be determined by the relevant decision-maker'.

7. In any event it is clear that the Judge did seek to identify exceptional or compelling circumstances and described a legally sustainable approach at paragraph 36 of his determination and correctly cited R (Ganesabalan) v SSHD [2014] EWHC 2712 (Admin) as reflective of the correct legal approach at paragraph 37.

Family Life in Nepal

8. The Judge did examine whether family life between the Appellant and her husband could continue in Nepal. However, he concluded that this was impossible as the Sponsor was reliant on his parents who cared for him and who as UK citizens would remain here [ş36] taking into account his particular vulnerabilities [ş41].

Compelling and Exceptional Circumstances

9. In R (Devindra Sunasse) v SSHD [2015] EWHC 1604 (Admin) Edis J summarised the leading cases on this point and concluded: [ş36]:

> 'The law is, as I have said, that the decision maker is entitled to decide that Article 8 considerations have been fully addressed in the Rules when dealing with ;stage two'. If they have, it is enough to say so. This will necessarily involve deciding whether there is a 'gap' between the Rules and Article 8, and then whether there are circumstances in the case under consideration which take it outside the class of cases which the Rules properly provide for. Whether these circumstances are described as 'compelling' or 'exceptional' is not a matter of substance. They must be relevant, weighty, and not fully provided for within the Rules. In practice they are likely to be both compelling and exceptional, but this is not a legal requirement.'

10. It is submitted, as stated above, that the Judge correctly identified a number of factors, not provided for in the Rules, including the Sponsor's vulnerabilities, that could properly be described as relevant and weighty. In these circumstances there is no error of law in his decision.

8. Ms Brocklesby-Weller submitted that the judge's observations at paragraphs 35 to 35 were unclear and did not add or detract weight from the determination. The judge could have remitted it.

9. However the main aspect of the appeal was that the financial requirements were severely lacking and this was a weighty consideration. She referred to **SS (Congo) [2015] EWCA Civ 387**. She accepted that the decision had been given two days after the judge had signed the determination. He had found unusual rather than compelling circumstances.

10. The appellant failed to comply with the financial requirements of the Rules. The Rules did provide for those in receipt of allowances such as severe disablement allowance.

11. There were issues about whether the sponsor was indeed unable to work and reference was made to the bundle before the Entry Clearance Officer. Section 117B had not been referred to. This was a leave to enter case rather than a leave to remain case. Family life could be maintained in Nepal although the sponsor was vulnerable. If he was not working in the United Kingdom he would not be disadvantaged by not working in Nepal.

12. Mr Lee relied on his Rule 24 response. He submitted that there was no error or no material error in what the judge had said at paragraphs 34 to 35 of the decision and he was not required to make a decision to remit in the circumstances. Paragraph 36 of the determination was in effect an analysis of whether there were compelling grounds. He had referred to Section 117B in paragraph 38. He had then gone through the steps in **Razgar** and had identified grave consequences for the relationship if the refusal was maintained in paragraph 43. He referred to the extract from **Devindra Sunassee** at paragraph 9 of his Rule 24 response. The judge had found the sponsor to be vulnerable and the points made by Ms Brocklesby-Weller in argument about his ability to work had not featured in the pleaded grounds.

13. At the conclusion of the submissions I reserved my decision. I remind myself that I can only interfere with the decision if it was materially flawed in law. As I have said there has been no challenge to the findings made by the First-tier Tribunal about the relationship between the parties.

14. In relation to the first point based on paragraphs 34 to 35 of the determination as Ms Brocklesby-Weller submitted they neither add nor detract to the decision. As Counsel points out in his response the judge allowed the appeal under Article 8 in any event. Insofar as the judge was in error in criticising the Entry Clearance Officer in these paragraphs I do not find that the error was material. I should also mention that Ms Brocklesby-Weller sought to raise an argument based on the sponsor's ability to work but as Counsel points out this did not feature in the pleaded grounds. Further, a point was not taken in relation to Section 117B and indeed the judge dealt with Section 117B at paragraph 38 of the determination. In relation to the argument based on **Gulshan** and **Nagre** Counsel refers to paragraph 37 where the judge cites **Ganesabalan**. I note that the judge refers to the legal position summarised at paragraphs 10 to 35 of that case where reference is made to many of the reported cases including **Nagre** and **MF (Nigeria)**. It was not necessary for the judge to refer to all of the case law which was properly summarised by Michael Fordham QC sitting as a Deputy High Court Judge. As is accepted the judge signed the determination very shortly before the case of **SS (Congo)** was handed down. I am not satisfied that the judge failed to give adequate weight to the public interest to which he makes reference in paragraph 38 and indeed in paragraph 43 he refers to the substantial interest in interference by the immigration authority with the appellant's protected rights. The judge found the case to be an exceptional one and I am not satisfied that the failure to refer to compelling circumstances raises a material error on the facts of the case. As is argued in paragraph 7 of the response it is clear that the judge did seek to identify such exceptional or compelling circumstances. While not every judge might have reached the same conclusion by the same route as this judge did I am not satisfied that the determination is materially flawed in law on the points as pleaded in the grounds settled on behalf of the Entry Clearance Officer.

Notice of Decision

15. For the reasons I have given I find no material error of law in the decision of the First-tier Judge and I direct that that decision shall stand.

16. I make no anonymity direction.

FEE AWARD

The fee award made by the First-tier Tribunal shall stand.

Signed Date 10 September 2015

Upper Tribunal Judge Warr