IAC-AH-DP-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/16345/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 9 January 2015	**On 20 January 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

MR RAJA AHSAN RAJA AHSAN ALI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER - ISLAMABAD

Respondent

Representation:
For the Appellant: Ms Fisher, Counsel instructed by Maliks & Khan Solicitors
For the Respondent: Mr Nash, Specialist Appeals Team

DECISION AND REASONS

1. The appellant appeals to the Upper Tribunal from the decision of the First-tier Tribunal dismissing his appeal against the refusal of entry clearance as a spouse under Appendix FM on the ground that his spouse is not a person present and settled here, but whose status is that of a dependant family member of an EEA national. The First-tier Tribunal did not make an anonymity direction, and I do not consider that such a direction is warranted for these proceedings in the Upper Tribunal.

2. The appellant is a national of Pakistan, whose date of birth is 3 March 1987. He applied for entry clearance as the spouse of Ms Ireana Habib, a Pakistani national who had been born in Sargodha, Pakistan on 26 November 1991.

3. Her father acquired German citizenship, and first entered the United Kingdom in 2001. In 2005 Ms Habib came to join him as a dependant family member of an EEA national exercising treaty rights here. She applied for a five year residence card, and she was issued with one in 2007. Having accrued five years continuous residence in the UK, Ms Habib was issued with a permanent residence card in July 2010. In the meantime, she had married the appellant in Sargodha in Pakistan on 2 April 2009.

4. The appellant applied for entry clearance under the Immigration Rules, asserting that his wife was earning in excess of £18,600 per annum through a combination of self-employment and salaried employment. The Entry Clearance Officer did not address himself to the question of whether the financial requirements of Appendix FM were met. On 23 July 2013 he refused the application on the sole ground that Ms Habib was not present and settled in the UK, in that her current immigration status was that she was holding a residence card as a dependant of an EEA national. So he was refusing the application under paragraph EC-P.1.1(d) of Appendix FM of the Rules i.e. on the basis that his wife was not present and settled in the UK.

The Hearing Before, and the Decision of, the First-tier Tribunal

5. The appellant's appeal came before Judge O'Garro sitting at Hatton Cross in the First-tier Tribunal on 2 September 2014. Both parties were legally represented. The appellant's case on appeal was that he had submitted with his application relevant pages from his wife's two Pakistani passports. Page 20 of passport number KF884615 contained an endorsement clearly stating that his wife had a permanent residence card, which meant that she had no conditions on her stay in the United Kingdom, and was thus present and settled in the UK for the purposes of the Immigration Rules.

6. In his subsequent determination, the judge dismissed the appeal, as he was satisfied that the appellant could not succeed under the Rules. This is because paragraph 5 of the Immigration Rules said:

> "Save where expressly indicated, these Rules do not apply to those persons who are entitled to enter or remain in the United Kingdom by virtue of the provisions of the 2006 EEA Regulations. But any person who is not entitled to rely on the provisions of those Regulations is covered by these Rules."

7. The judge went on to hold that the sponsor's right to remain in the United Kingdom was governed by the EEA Regulations. She was a person who was given the right to remain as a family member by virtue of the EEA Regulations. The judge noted Regulation 18 which provided that a permanent residence card shall be valid for ten years from the date of issue and must be renewed on application.

8. The judge also noted that although she had a permanent right to reside in the United Kingdom, her right of residency was subject to paragraph 19(3)(b), 20(1) or 20A(1), which gave the Secretary of State the right to remove an EEA national family member from the United Kingdom. The judge drew the conclusion that until the sponsor became a naturalised British citizen, her right to reside in the United Kingdom was governed by the EEA Regulations and paragraph 5 of the Rules. This prevented her from using the Immigration Rules to allow her partner enter into the United Kingdom. Unfortunately the EEA Regulations made no provisions for non-EEA nationals to bring their family members into the UK. So his application under the Rules must therefore fail.

The Grant of Permission to Appeal

9. On 19 November 2014 First-tier Tribunal Judge Nicholson granted the appellant permission to appeal for the following reason:

> "Since paragraph 5 of the Immigration Rules only excludes reliance on Immigration Rules by those who would be entitled to rely on the EEA Regulations and since the evidence indicates the appellant would not be entitled to rely on those Regulations, it follows the decision by the judge to dismiss the appeal on the basis of paragraph 5 of the Immigration Rules was arguably an error. Permission is therefore granted."

The Hearing in the Upper Tribunal

10. At the hearing in the Upper Tribunal, I received submissions from both parties as to whether the decision of the First-tier Tribunal was erroneous in law. I was persuaded that it was, for reasons which I give below.

Reasons for Finding an Error of Law

11. The judge made contradictory findings. On the one hand, he recognised the sponsor could not avail herself of the Regulations 2006 in order to enable her husband to join her in the UK. But paradoxically he accepted the submission of the respondent that paragraph 5 of the Immigration Rules applied to the appellant. This was illogical, as paragraph 5 only excludes applicants from relying on the Rules where they are entitled to enter or remain in the United Kingdom by virtue of the provisions of the 2006 EEA Regulations. If the sponsor could not sponsor the appellant to join her under the Regulations 2006, it followed that the appellant was not entitled to enter or remain in the United Kingdom by virtue of the provisions of the Regulations 2006.

12. Moreover, the reductio ad absurdum is that a sponsor with permanent residence status under the Regulations 2006 has less rights than, for example, a student who has only entered for a temporary purpose under the Rules. Whereas the student can bring in a third country national spouse as a student dependant, a person in the appellant's position could never bring in a third country national spouse despite having lived in the UK for decades with permanent residency status.

13. Contrary to what the judge found, it is not necessary for the sponsor to become naturalised as a British citizen before she can sponsor her husband to join her in the

UK under the Rules. The sponsor meets the definition of "settled in the United Kingdom" which is contained in paragraph 6 of the Immigration Rules. Paragraph 6 provides:

> "Settled in the United Kingdom" means that the person concerned:
>
> (a) is free from any restriction on the period for which she may remain ...; and
>
> (b) is either:
>
> (i) ordinarily resident in the United Kingdom without having entered or remained in breach of the immigration laws; or
>
> (ii) despite having entered or remained in breach of the Immigration laws, has subsequently entered lawfully or has been granted leave to remain and is ordinarily resident."

14. Paragraph 2 of the Immigration (European Economic Area) Regulations 2006 provides:

> "Persons not subject to restriction on the period for which they remain
>
> 2(i) for the purposes of the 1971 Act and the British Nationality Act 1981, a person who has a permanent right of residence under Regulation 15 shall be regarded as a person who is in the United Kingdom without being subject under the immigration laws to any restriction on the period for which he may remain.
>
> (ii) but a qualified person, the family member of a qualified person and a family member who has retained the right of residence shall not, by virtue of that status be so regarded for those purposes."

15. Paragraph 7 of the Rules provides:

> "A person who is neither a British citizen nor a Commonwealth citizen with a right of abode nor a person who is entitled to enter or remain in the United Kingdom by virtue of the provisions of the 2006 EEA Regulations requires leave to enter the United Kingdom."

16. It is apparent from the provisions which I have cited above that the sponsor is settled in the United Kingdom for the purposes of the Immigration Rules, and also (insofar as it is material) for the purposes of the Regulations 2006. As Judge O'Garro rightly found, the appellant is not entitled to enter or remain in the United Kingdom by virtue of the provisions of the Regulations 2006, and therefore he requires leave to enter the United Kingdom, which he can only seek under the Rules.

17. While it is true that a person with permanent residence under the Regulations 2006 can lose that right in the extreme circumstances envisaged in Regulations 19 and 20, that person's status is no more fragile (indeed it is arguably stronger) than a person who has ILR under the Rules.

18. In short, the First-tier Tribunal was wrong to dismiss the appeal against refusal of entry clearance on the ground that the sponsor was not present and settled in the United Kingdom as required by Appendix FM. As this was the sole issue on which the appeal was decided, the decision of the First-tier Tribunal was vitiated by a material error of law and must be set aside.

The Remaking of the Decision

19. The appellant succeeds in his appeal on the issue raised by the Entry Clearance Officer. The decision of the Entry Clearance Officer refusing his application on the ground of ineligibility was not in accordance with the Rules, and was otherwise not in accordance with the law.

20. As the Entry Clearance Officer refused the application on this preliminary ground, he did not make a decision on whether the appellant met the financial requirements specified in Appendix FM. For reasons of both pragmatism and principle, I consider that the appropriate course is to remit this issue for decision by the Entry Clearance Officer as the primary decision maker. As a considerable amount of time has elapsed since the application was made, I urge the Entry Clearance Officer to make a decision on the financial requirements within three months of the date of the promulgation of this decision.

Notice of Decision

The decision of the First-tier Tribunal contained an error of law, and accordingly the decision is set aside and the following decision is substituted: the refusal of entry clearance to the appellant was not in accordance with the law, and accordingly the application is remitted to the Entry Clearance Officer for a lawful decision. In view of the delay, for which the appellant is not responsible, I direct that the Entry Clearance Officer should use best endeavours to make a decision on the application within twelve weeks of the promulgation of this decision.

Signed Date **20 January 2015**

Deputy Upper Tribunal Judge Monson

TO THE RESPONDENT
FEE AWARD

In the light of my decision to re-make the decision in the appeal by allowing it, I have considered whether to make a fee award (rule 23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007).

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make a whole fee award.

Reasons: the appeal was necessitated by a legal error on the part of the ECO and so the appellant should not bear the cost of appealing.

Signed Date **20 January 2015**

Deputy Upper Tribunal Judge Monson