IAC-BH-PMP-V1

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: VA/00234/2015

THE IMMIGRATION ACTS

Heard at Bennett House, Stoke
On 5th August 2015

Decision & Reasons Promulgated
On 1st September 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE GARRATT

Between

EL
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: No representation
For the Respondent: Mr A McVeety, Senior Home Office Presenting Officer

DECISION AND REASONS

1. At the hearing the appellant was unrepresented although his mother-in-law, GH, appeared to make submissions on his behalf and on behalf of the sponsor, ML. Ms GH explained that the sponsor was not present because she is suffering from depression. In these circumstances I treated Ms GH as a witness, assisting her to give evidence based upon the written submissions made to the Tribunal which have been incorporated into a ring binder which is attached to the Tribunal file.

Background

2. On 22nd April 2015 Judge of the First-tier Tribunal Page gave permission to the appellant to appeal against the decision of Judge of the First-tier Tribunal E M M

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Smith who dismissed the appeal on the papers on human rights grounds against the decision of the respondent to refuse entry clearance as a visitor in accordance with the provisions of paragraph 41 of HC 395 (as amended), the Immigration Rules. Judge Page observed that the judge had stated in his decision that he had very little information before him or evidence to show that the appellant was married or is the father of the children he wished to visit. The grounds of application argued that evidence was available to the judge particularly that attached to the notice of appeal which included a marriage certificate and a copy of the appellant's first born son's birth certificate. Both documents had been sent by Recorded Delivery. However, it appeared that none of the documents had been put before the judge. Judge Page therefore thought it arguable that there was a defect in the proceedings which might have vitiated the decision of the First-tier Tribunal.

Error on a Point of Law

3. I indicated, at the commencement of the hearing, that notes on the Tribunal file suggested that no notice of appeal against the respondent's refusal decision of 31st December 2014 had been received prior to the hearing before Judge Smith on 20th March 2015. The First-tier Tribunal had accepted the appeal on the basis of a letter written by the sponsor on about 23rd January 2015 when the file was opened. Further, no bundle of documents was ever received from the Entry Clearance Officer before the hearing or at any stage.

4. Mr McVeety helpfully conceded that it was possible that relevant documents had been sent to the Tribunal at its Arnhem Centre but had not been seen by the judge before the hearing on 20th March 2015. Ms GH asserted that the documents contained in the ring binder were those which should have been before the judge.

5. After considering the matter for a few moments and having regard to the nature of the documents said to have been submitted before the hearing, I announced that I was satisfied that the decision showed an error on a point of law arising from a procedural irregularity the results of which were capable of making a material difference to the outcome and fairness of the proceedings. My reasons for that conclusion, follows.

6. The respondent has failed to provide a bundle of documents as directed in this appeal although the decision of the First-tier Judge does not show that he made any investigation into the absence of that bundle which was likely to contain the documents which had been submitted with the application which was subsequently refused. It is likely that, if the judge had investigated that matter, then the whereabouts of the documentation (copies of which have now been produced) might have been revealed and disposal on the papers delayed. It is not unreasonable to conclude that relevant documentation about the appellant's children and the relationship between appellant and sponsor had been submitted in support of the application and should have been present in the respondent's bundle or attached to the notice of appeal. Clearly a procedural error occurred which means that the appeal proceeded with the documents supporting the appeal either overlooked or mislaid. The respondent's refusal decision of 31st December 2014 refers specifically to the submission of a birth certificate and marriage certificate which supports the appellant's claim that they should have been before the judge. I am therefore satisfied that there was an irregularity the results of which were capable of making a material difference to the outcome or fairness of the proceedings. This amounts to an error on a point of law such that the decision should be set aside and re-made.

Re-Making the Decision

7. I proceeded to re-make the decision by taking evidence from Ms GH and hearing submissions by the respondent's representative.

8. Ms GH referred to a skeleton argument which is in part C of the appellant's bundle. In this it is explained that the sponsor now has a second child by her marriage to the appellant. OL was born on 8th March 2015. His birth certificate records the appellant as his father.

9. Ms GH then summarised the appellant's family circumstances. She explained that her daughter had met the appellant in Greece in about 2012 whilst working there. Her daughter, the sponsor, then visited Albania from where the appellant comes. In 2013 the appellant and her daughter became engaged. Her daughter went to Tirana in Albania for about three months. This is where the appellant lives and they got married there on 23rd July 2013. Both sponsor and appellant were 23 years of age when they married. Both families were in agreement with the union.

10. Ms GH says that her daughter then stayed in Albania for another six weeks after the wedding and then returned home to UK. At that time she was pregnant. An application was made for a visit by the appellant in 2013 to enable him to attend the birth of the first child but that was refused. Ms GH explained that her daughter had come back to the United Kingdom because she is also her carer. Ms GH suffers from fibromyalgia and pulmonary difficulties. She said that her daughter has made about six visits to Albania since the marriage and became pregnant again. Both children were born in Albania although both are living with the sponsor in the United Kingdom. It is hoped that, in the future, it will be possible for the appellant to apply for a spouse visa.

11. As to the sponsor's state of health, Ms GH explained that her daughter is reluctant to seek treatment for the depression for which she suffers. However, she believed that a visit from her husband would improve her health and give her hope for the future. Her daughter feels that she has to be in the United Kingdom to care for her mother. Her depression would not receive the same level of treatment in Albania as in the United Kingdom.

12. Ms GH emphasised that there was a genuine relationship between her daughter and the appellant. The appellant is fully aware of the restrictions of a visit visa.

13. During cross-examination Ms GH said that the appellant was also aware of the requirement to leave the United Kingdom at the end of any visit visa granted. She confirmed that her daughter does not work full-time in UK at present and understood that, without the income required by the Immigration Rules, it would be a year before a spouse application could be made.

Submissions

14. Mr McVeety did not doubt the intentions of the parties but emphasised that the respondent's decision was not disproportionate. Family life would continue as it had before despite the refusal. He did not question the credibility of the evidence given by Ms Higgins.

15. I allowed Ms GH to make final comment. She said that the circumstances had now caused her daughter to be depressed but she firmly believed that if the appellant could be allowed to visit the United Kingdom her condition would improve.

Conclusions

16. This appeal is limited to human rights and race relations grounds by virtue of Section 52 of the Crime and Courts Act 2013. My approach to the appeal follows the guidance set out in *Adjei (Visit visas – Article 8)* [2015] UKUT 0261 (IAC). The burden of proof is on the appellant and the standard of proof is a balance of probabilities. I take into consideration the evidence as at the date of hearing.

17. The respondent does not take issue with the circumstances of this appeal as summarised by the sponsor's mother and accepts that the appellant and sponsor and their two children have a family life for the purpose of Article 8 of the 1950 Human Rights Convention. The issue is therefore whether or not the respondent's decision is disproportionate to the public interest involved of legitimate immigration control.

18. The circumstances of the parties invoke some sympathy. That is because the sponsor has strong ties to her mother for whom she is a carer in the United Kingdom but that creates a difficult situation for the enjoyment of family life which has, I accept, aggravated or given rise to the depression from which the sponsor suffers. Further, I take into consideration that the parties have conceded that, at present, a spouse application under Appendix FM of the Immigration Rules cannot be made as insufficient income is available for the maintenance of the family in the United Kingdom as required by the specific provision of the Rules.

19. However, I must point out that both appellant and sponsor knew or ought to have known of the immigration difficulties which their relationship would create particularly with their subsequent decision to have children. They have made the best of their circumstances by use of modern methods of communication and visits by the sponsor to Albania where she chose to give birth to both of her children. Unfortunately, there is no supporting evidence before me to confirm the precise nature of the sponsor's mental illness and she does not appear to be willing to seek treatment for this. I therefore have to conclude that such illness is not so serious as to inhibit any future visits to Albania and that suitable alternative care arrangements can be made for the sponsor's mother who has evidently survived in the past when the sponsor has gone to Albania.

20. The Immigration Rules cannot avail the appellant who seeks entry clearance. Applying the five stage approach recommended in *Razgar* [2004] UKHL 27 I have already identified the main issue as that of proportionality bearing in mind that the respondent's refusal decision is in accordance with the law. Taking into account the factors I have identified in the preceding paragraph, I am unable to conduct the proportionality balancing exercise so as to favour the appellant. The high threshold which has to be established in human rights cases has not been satisfied. The family life of the appellant and his family members is not prejudiced in a manner sufficiently serious to amount to a breach of the fundamental right protected by Article 8 (*Huang* [2007] UKHL 11).

21. Section 117B of the Nationality, Immigration and Asylum Act 2002 (as amended) cannot assist the appellant. His relationship to the sponsor and his British citizen children would only be relevant if he were at risk of removal from the United Kingdom.

22. In addition to the factors I have identified, I cannot discount the possibility that the appellant can make further applications to visit his family in the United Kingdom

which may be approved if the other objections to the application referred to in the refusal can be overcome.

Notice of Decision

The decision of the First-tier Tribunal shows an error on a point of law and is set aside. I re-make the decision on human rights grounds only by dismissing the appeal.

Anonymity

As this appeal involves the interests of young children I make the following anonymity direction:

DIRECTION REGARDING ANONYMITY – RULE 14 OF THE TRIBUNAL PROCEDURE (UPPER TRIBUNAL) RULES 2008

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original appellant or his family members. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.

Signed Date

Deputy Upper Tribunal Judge Garratt

TO THE RESPONDENT
FEE AWARD

As I have dismissed this appeal there can be no fee award.

Signed Date

Deputy Upper Tribunal Judge Garratt