IAC-FH-NL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/12901/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 8 January 2016	**On 27 January 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

ENTRY CLEARANCE OFFICER

Appellant

and

KHURRAM ZUBAIR QURESHI
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr C Avery, Senior Home Office Presenting Officer
For the Respondent: Mrs A Qureshi, Sponsor

DECISION AND REASONS

Introduction

1. For ease of reference, I will refer to the parties as they were before the First-tier Tribunal. Thus, the Entry Clearance Officer is the Respondent and Mr Qureshi is the Appellant.

2. This is an appeal by the Respondent against the decision of First-tier Tribunal Judge Morgan (hereafter, the judge) who allowed the Appellant's appeal under Article 8

outside of the Immigration Rules (the Rules). That appeal was in turn against the decision of the Respondent, dated 26 August 2014, refusing entry clearance under Appendix FM to the Rules, with reference to Appendix FM-SE. The refusal was based solely on the ground that the Appellant could not satisfy the financial requirements of the Rules.

The hearing before the judge.

3. The judge found the Appellant's wife's evidence to be wholly credible (see paragraph 6). He went on to find that because of their particular financial circumstances as at the date of application, and presumably date of decision, the Appellant was unable to satisfy the requirements of the Rules in respect of finances (see paragraph 10).

4. The judge then considered the case on Article 8 grounds outside of the Rules. In paragraph 12 he stated that the Appellant had been refused visit visas on three occasions with no right of appeal. At paragraph 22 the judge cited the case of Mostafa [2015] UKUT 00112 (IAC) and found that as at the date of hearing the Appellant was able to satisfy the financial requirements of the Rules. This, it was said, was capable of being a weighty factor in the Appellant's favour. At paragraph 23 the judge made reference to the fact that there were children involved in this case including one recently born to the Appellant's wife in this country. The judge found that the refusal of leave to enter was disproportionate. At paragraph 24 the judge made reference to part 5A of the 2002 Act as amended. He stated that the Appellant "is able to satisfy the requirements of entry clearance and this was foreseeable". The judge went on to state that the Appellant would not be a burden on the taxpayer and this weighed in his favour. Finally the judge stated that "the weight to be attached to effective immigration control is significantly reduced by the (Appellant's) ability to satisfy the income requirements of the Immigration Rules for those seeking to remain in the United Kingdom on the basis of marriage".

5. The Respondent sought permission to appeal on the basis of alleged misdirections in law, relating in particular to the cases of Mostafa and AM (Malawi) [2015] UKUT 0260 (IAC). Permission to appeal was granted by First-tier Tribunal Judge Landes in a detailed decision dated 25 September 2015.

The hearing before me

6. At the hearing before me the Appellant was represented by his wife, Mrs Qureshi (the sponsor). I took time to explain the proceedings to her and ensured that she understood what was being said at all material times.

7. Mr Avery submitted that there were no real factual disputes in respect of the judge's findings on particular issues. However, he had misdirected himself in material ways as to the relevant law as set out in the grounds of appeal. These errors were material. Mr Avery submitted that a fresh application could have been made and that it was possible that such an application might succeed in light of what appeared to be the Appellant's improved financial position. In respect of the best interests of children

these are of course relevant but the fact that a fresh application could readily be made and the failure to have met the Rules in this case rendered the decision under appeal proportionate.

8. The sponsor made certain observations to me. She appreciated that perhaps they had made some mistakes in respect of the original application regarding their financial position, but these proceedings had taken a long time to be resolved. She currently has savings of £103,648 held in accounts in the United Kingdom in her name and that of her husband. She remained working as a carer earning approximately £21,500 per annum gross. She also received rental income from an investment property. She did not believe that she could have made a fresh application before now because of the need to resolve the current case.

Error of law decision

9. I find that the judge did make material errors of law. First, at paragraph 22 he misdirected himself as to the case of Mostafa by finding that the Appellant's ability to satisfy the Rules has at the date of hearing was capable of being a weighty factor, in his favour. That is incorrect: in entry clearance cases, the relevant date is that of the decision under appeal.

10. Second, this error is effectively repeated in paragraph 24 of the decision.

11. Third, the judge has failed to take account of the decision in AM (Malawi) when considering the effect of the Appellant's ability to be maintained: this is not a factor which would weigh in his favour but rather one that would not count against him.

12. Finally, when seen in the context of the previous error on what was the relevant date, the judge was also wrong to have concluded that the weight to be attached to effective immigration control could be significantly reduced by the Appellant's ability to satisfy the income requirements of the Rules.

13. These errors were material to the outcome of the appeal because if the errors had not been made they could have affected the outcome in respect of Article 8 outside of the Rules. In light of the above I set aside the decision of the First-tier Tribunal.

Remaking the decision

14. There was no suggestion that I should do otherwise than re-make the decision myself on the basis of the evidence before me. This I proceed to do.

15. I make it very clear that the only issue in this case throughout has been the ability to meet the financial requirements of the Rules as at the date of decision. More particularly, it was the ability to satisfy the evidential requirement within Appendix FM-SE. I find that all requirements under Appendix FM, save for that relating to financial requirements were as at the date of decision and continue to be, satisfied by the Appellant.

16. However, I find, as did the judge below, that the financial requirements were not met as at the date of decision, with reference to the evidential requirements of Appendix FM-SE. That is no criticism of the Appellant or his wife. They had taken a particular course of action in respect of their financial arrangements, perhaps not quite knowing the relatively complex and particular requirements of Appendix FM-SE. Nonetheless it is a fact that a material and a mandatory element of the Rules has not been met. Therefore the appeal must fail under the Rules.

17. Given that there are, and were children involved in this case, I consider the At 8 claim outside of the Rules. It was and is in the children's best interests to be living with both of their parents, that their best interests is a primary consideration for me. I place significant weight upon those best interests. However they are not of course a 'trump card'. I take into account the important fact that the requirements of the Rules are not met. I take into account that in respect of the previous refusals of visit visas there would in fact have been a right of appeal attached to those refusals, albeit on human rights grounds only, and that again, not wishing to criticise the Appellant, he could have exercised that right of appeal in respect of seeking entry clearance to visit his wife and his children in this country prior to making the application for settlement.

18. I take into account the fairly lengthy period that it has taken to resolve the application. This was as a result of the Appellant's case being stacked up waiting for the decision of the Court of Appeal in MM (Lebanon) [2014] EWCA Civ 585. This was an unfortunate delay, but not one that in my view represents a compelling circumstance in this case.

19. Importantly, as Mr Avery has pointed out, it has always been open to the Appellant and sponsor to make a fresh application. Given that the only area of dispute has been that of the financial requirements, and given what I accept are the improved financial situation of the couple, there are as far as I can see no obstacles to a fresh application being made, both once the original refusal was made and at any time thereafter. This avenue is significant in that it gives effect to the important public interest in maintaining effective immigration control through operation of the Rules: those seeking entry to the United Kingdom ought to established that they can meet the requirements of those Rules unless there are compelling or exceptional circumstances. There are no such circumstances in this case.

20. With reference to the circumstances as at the date of decision and bearing in mind as I do the best interests of the children, I conclude that the Respondent's refusal of entry clearance was not a disproportionate interference with the Respondent's family life. In this case, the combined weighty factors of the failure to meet the Rules, the importance of effective immigration control through the Rules, and the ability of the Appellant to make a new application, all go to outweigh the best interests of the two children.

21. I add this. On the documentary evidence provided at the hearing, I find as a fact that as of 6 January 2016 the Appellant and his wife have savings of £103,648 held within

United Kingdom institutions. I accept that the Respondent's wife was and continues to be a carer with a gross annual income of about £21,500. I also find that she receives rental income. In my view it is likely (I put it no higher) that the financial requirements of Appendix FM (with reference to Appendix FM-SE) could now be met. However, there would have to be a fresh application by the Appellant, something that I mentioned to her at the hearing. This is an avenue that she needs to give careful consideration to.

Notice of Decision

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

I set aside the decision of the First-tier Tribunal.

I re-make the decision by dismissing the appeal under the Immigration Rules and on human rights grounds.

No anonymity direction is made.

Signed Date: 26 January 2016

Deputy Upper Tribunal Judge Norton-Taylor

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed Date: 26 January 2016

Deputy Upper Tribunal Judge Norton-Taylor