IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/16557/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 12 March 2015	**On 20th March 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE GIBB

Between

MICHAEL NAPOLEAN ROWE
(NO ANONYMITY ORDER MADE)

Appellant

and

ENTRY CLEARANCE OFFICER, KINGSTON, JAMAICA

Respondent

Representation:
For the Appellant: Ms K Wass, Counsel, instructed by Michael René Immigration Services
For the Respondent: Mr T Wilding, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant was refused entry clearance to settle in the UK with his British wife, the sponsor Dennica Jones. The appeal against the entry clearance refusal was dismissed by First-tier Tribunal Judge Kainth, in a decision promulgated on 17 June 2014. The sponsor appeared at the hearing, but was not legally represented.

2. The appellant, again without legal representation, applied for permission to appeal. This was granted on 7 October 2014 by First-tier Tribunal Judge Pooler. Having

noted that there was no representation at the hearing, or for the grounds, Judge Pooler indicated that he had read the determination with particular care. Permission to appeal was granted on the basis that the judge had arguably failed to determine the appeal on Article 8 grounds, which had been raised in the notice of appeal.

3. The hearing was originally listed in the Upper Tribunal on 18 November 2014, but was adjourned following receipt of an application, with supporting medical evidence, from the sponsor.

4. At the hearing on 12 March 2015 the sponsor was present, and the appellant was, for the first time, legally represented. A bundle of documents under cover of a letter dated 6 March 2015 had been submitted in advance of the hearing.

5. The debate at the hearing was not about whether there had been an error of law in the judge's decision, but rather about whether the error in not considering Article 8 at all was a material one. Mr Wilding accepted that Article 8 had been raised in the grounds of appeal to the First-tier, although he noted that no particulars had been provided. He also accepted that the judge had considered a statement from the sponsor, which was mentioned at paragraph 13 of the judge's determination. His submission, however, was that this could not have amounted to evidence capable of showing very compelling circumstances outside the Immigration Rules. The evidence was therefore not present for a positive Article 8 case to be put.

6. Ms Wass submitted that the error in not dealing with Article 8 was material. She pointed to the circumstances set out in the witness statement, some of which predated the Entry Clearance Officer's refusal in May 2013.

Error of Law

7. As I indicated at the hearing I have decided that the error in not considering Article 8 was material. It is certainly the case that it is very difficult for an Article 8 argument to succeed in an entry clearance appeal, but it cannot be said that the door has been closed to the possibility of arguments of this sort succeeding in certain cases, depending on the facts.

8. The Article 8 assessment, had it been conducted, would have been concerned with the circumstances at the date of decision. The essence of the sponsor's statement prepared for the hearing was that the continuing separation of the couple had a significant impact not only on the sponsor, but also on her son, the appellant's stepson. The statement described his emotional distress at the separation. It then referred to the sponsor discovering that she was pregnant on returning from one of her visits to the appellant in Jamaica. She subsequently had a miscarriage. She described the significant emotional impact of this on her, and her belief that it was connected to the level of stress that she was under, which was in turn connected to her separation from the appellant, and to her overworking in her attempts to meet the financial requirements. She then went on to mention in the statement that she was pregnant again, and was anxious about the possibility of suffering another miscarriage. (A happy postscript to this is that the sponsor attended the hearing in March with her baby, her son with the appellant, who was born on 1 December 2014.)

9. For an error of law to be material there must have been the potential for it to alter the outcome of the appeal. In my view the matters raised in the statement were significant matters of substance that required, in fairness, a proper examination. This was therefore a situation where Article 8 had been formally raised in the grounds of appeal, and there were matters of substance, concerned with the physical and emotional wellbeing of the appellant's wife and stepson, which deserved full and proper consideration. On that basis it appears to me that the agreed error of law in not considering Article 8 cannot be properly characterised, in this particular appeal, as one that was not a material error.

Remittal

10. There was a reference in the more recent statement, at paragraph 7, to an issue of whether the sponsor's second job had accurately reported the correct hours and tax to HMRC, as reflected in the P60. Despite this it was confirmed by Ms Wass that the Article 8 point was the only one being pursued. The judge's findings in relation to the Immigration Rules, that the sponsor's earnings fell short of the required £18,600 level at the date of decision, is therefore preserved.

11. It was agreed between the parties that the appropriate course was for the appeal to be remitted to the First-tier Tribunal for a fresh hearing, restricted to Article 8. It was noted that this would be concerned with what the circumstances were when the decision was taken by the Entry Clearance Officer, in May 2013. There was also reference to a recent Court of Appeal case, in which judgement has not yet been delivered, dealing with a number of Article 8 challenges in cases where couples were unable to meet the financial requirements. It may be that the Court of Appeal's judgment in these cases will be of assistance in framing the approach to be taken to Article 8.

12. It was not suggested that there was any need for anonymity in the appeal, and I make no such order. No mention was made of the fee award, and in particular there was no application for this. In the circumstances I can see no reason to interfere with the judge's approach not to make a fee award. The issue could be reopened at the remitted hearing.

Notice of Decision

The appeal to the Upper Tribunal is allowed. The appeal is remitted to the First-tier Tribunal for a hearing to consider Article 8 only, with the judge's findings in relation to the Immigration Rules preserved.

No anonymity direction is made.

Signed Date **12 March 2015**

Deputy Upper Tribunal Judge Gibb