



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/07884/2014

THE IMMIGRATION ACTS

Heard at Field House
On 15 January 2016

Decision and Reasons Promulgated
On 19 January 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE KAMARA

Between

THE ENTRY CLEARANCE OFFICER (DHAKA)

Appellant

and

MRS REHANA AKTER
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr T Melvin, Senior Home Office Presenting Officer
For the Respondent: Mr R Singer, counsel instructed by Paul John & Co Solicitors

DECISION AND REASONS

1. The Entry Clearance Officer (ECO) appeals the decision of First-tier Tribunal Judge Samimi, promulgated on 24 July 2015, allowing an appeal against a decision to refuse the respondent leave to enter the United Kingdom as a partner.

Background

2. The respondent's application was refused on 12 May 2014 under paragraphs EC-P.1.1(d), with reference to E-ECP 2.7; S-EC.2.2(a) E-ECP.3.1 and E-ECP 4.1. In essence, it was said that the marriage in question was not valid because the sponsor

was not legally free to marry; that false representations had been made regarding the sponsor's employment; questions were raised as to the sponsor's actual employment during the 2013-14 financial year on account of HMRC checks; there had been a failure to supply specified evidence and it was not accepted that the respondent had passed an English language test at a minimum of level A1 of the CEF.

3. In appealing the ECO's decision the respondent stressed she was a partner within the definition set out in GEN 1.2(iv) of Appendix FM; that no false representations had been made; that the ECO ought to have used discretion under the evidential flexibility section of her own guidance; that there were only minor evidential problems with the sponsor's personal bank statements; that the ECO was irrational in rejecting the employment documents; that the respondent had erred in respect of the English language test and that there had been no consideration of Article 8 outside the Rules.
4. It is not apparent whether an Entry Clearance Manager (ECM) reviewed the decision to refuse entry as there was no respondent's evidence on the Tribunal case file when FTTJ Samimi decided this matter and this remains the case.
5. At the hearing before the FTTJ, only the sponsor gave evidence. The FTTJ accepted his explanation that he had misunderstood the significance of the Decree Nisi, which he thought was confirmation of his divorce from his first wife and accordingly concluded that there had been no false representations made. She considered the respondent to be a fiancée rather than spouse, a partner nonetheless. The FTTJ also found that the sponsor had adequately explained his employment history as well as the reasons why his wage slips did not correspond with the credits to his bank account and accordingly the minimum income threshold was met. She also accepted that the English language requirement had been met. The appeal was allowed under the Immigration Rules as well as under Article 8 outside the Rules, with the FTTJ particularly noting the best interests of the respondent's child with the sponsor.

Error of law

8. The grounds of application argue that the FTTJ erred in allowing the appeal on both bases. In particular, it was said that the FTTJ failed to assess whether any of the specified evidence had been supplied of the sponsor's salaried employment. Further, it was said that the FTTJ erred in relying on the case of Mostafa (Article 8 in entry clearance) [2015] UKUT 00112 (IAC) which concerned a proposed visit rather than entry as a partner. The FTTJ had failed to consider SS (Congo) [2015] EWCA Civ 387. Furthermore, there was said to have been no consideration of sections 117A and B of the Nationality, Immigration and Asylum Act 2002.
9. FTTJ PJM Hollingworth granted permission to appeal, stating that it was arguable that the FTTJ had failed provide reasons for finding there to be compelling circumstances; that the criteria in section 117B had not been applied to the facts and that it was arguable that there was an error of law in relation to the specified evidence requirements.

10. At the hearing before me, Mr Melvin expanded on the grounds of application with reference to the lack of consideration of Appendix FM-SE and his argument that the FTTJ did not consider Article 8 through the lens of the Rules. At this stage, Mr Singer interjected to concede that the FTTJ had erred regarding the first ground, in that she did not pose the question as to specified evidence. Mr Melvin advised me that he was in difficulty as he lacked a respondent's bundle and no Presenting Officer had attended the First-tier hearing. He argued that the FTTJ had treated the British citizen child of the appellant as if it was a trump card and had failed to consider the Rules. This was the wrong approach. The child in question was free to come and go between the United Kingdom and Bangladesh and family life could continue with the sponsor continuing to spend a couple of weeks a year in Bangladesh. He invited me to find a material error of law and re-decide the appeal.
11. Mr Singer concentrated on the second ground regarding the FTTJ's treatment of Article 8 outside the Rules. He argued that the FTTJ had raised compelling factors; she had considered the best interests of the child in question as well as the various requirements of the Rules, finding them to be met "in spirit." While the FTTJ had not expressly referred to section 117 of the 2002 Act and had the factors included in section 117B been explicitly addressed, they would have been resolved in the respondent's favour.
12. At the end of the hearing, I announced that while the FTTJ had erred in not addressing Appendix FM-SE, she had made no error in relation to her decision to allow the appeal outside the Rules and in the latter aspect, I upheld her decision. My reasons are as follows.
13. It was a matter of agreement between the representatives that the FTTJ had not considered Appendix FM-SE and Mr Singer did not argue that those specific requirements were met. I accordingly, set aside the decision of the FTTJ to allow the appeal under the Rules and substitute a decision dismissing the appeal on that basis.
14. With regard to the decision to allow the appeal on Article 8 grounds, outside the Rules, I find that the FTTJ applied SS (Congo), in that she clearly identified compelling reasons before going on to consider this aspect of the case. Indeed at [15] she employs the phrase, "*there are compelling factors.*" The FTTJ rightly identified that the best interests of the child in question was a primary consideration; that the child was a British citizen and that the child's best interests was to be cared for by both his parents. There is nothing perverse regarding the FTTJ's finding that the separation of the sponsor and his British child for a period of three years at the time, amounted to a compelling circumstance.
15. I find that it cannot be said that the FTTJ undertook a freestanding consideration of Article 8 without reference to the Rules. Before embarking on her Article 8 consideration, she had satisfied herself that there was no evidence of deception, that the sponsor's earnings exceeded the minimum income threshold, that there was a genuine and subsisting relationship between the parties, that the respondent could be considered as a partner notwithstanding that she and the sponsor had married

prior to his Decree Absolute being announced and that the English language requirement was met. The only aspect of the Rules not met was the required specified evidence showing the sponsor's income being credited to his bank account over a six-month period. As the sponsor advised the FTTJ, noted at [11] of the decision and reasons, he is paid in cash and therefore he was not in a position to provide that evidence.

16. It is the case that the FTTJ did not expressly refer to section 117 of the 2002 Act, however I find that she did not materially err in this. The only factors set out in section 117B relevant to this appeal are the interests of immigration control, the ability of an applicant to speak English and to be financially independent.
17. At [16] of the decision, the FTTJ considers all three of those matters; particularly noting that the English language requirements were met and the sponsor's earnings met the minimum income threshold. The FTTJ carried out a balancing exercise, but concluded that the interference with the respondent's family life is disproportionate to the interests of immigration control. There was nothing perverse in this finding.
18. I accordingly allow the Secretary of State's appeal only in part.

Decision

- (1) The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law
- (2) The decision of the FTTJ to allow the appeal under the Immigration Rules is set aside.
- (3) I substitute a fresh decision to dismiss the respondent's appeal against the refusal of her application for entry clearance to the United Kingdom as a partner under Appendix FM of the Immigration Rules.
- (4) The decision of the FTTJ to allow the appeal under Article 8 ECHR is upheld.

No application for anonymity was made and I could see no reason to make such a direction.

Signed

Date: 17 January 2016

Deputy Upper Tribunal Judge Kamara