Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/08434/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 22 December 2017	**On 17 January 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE SHERIDAN

Between

SADIA FURQAN
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellants: Mr A Gondal, Berkshire Law Chambers
For the Respondent: Mr S Kandola, Home Office Presenting Officer

DECISION AND REASONS

The appellant is a citizen of Pakistan born on 28 May 1976. She is married to a British national born on 18 May 1977. The marriage took place on 12 February 2014 in Pakistan.

On 8 June 2015 the appellant submitted an application for entry clearance to enter the UK as the spouse of her husband, under Appendix FM of the Immigration Rules.

On 7 September 2015 the application was refused. Two reasons were given by the respondent refusing the application under the Immigration Rules.

Firstly, it was not accepted that the marriage was valid as documentation to show that the appellant's sponsor had lawfully divorced his previous wife had not been provided.

Secondly, it was not accepted that the financial requirements under appendix FM had been satisfied as required documentation had not been submitted.

The respondent also stated that the circumstances did not warrant a grant of entry clearance under Article 8 ECHR outside the Immigration Rules.

The appellant appealed to the First-tier Tribunal where her appeal was heard by Judge Chudleigh. In a decision promulgated on 27 June 2017, the judge dismissed the appeal. The appellant is now appealing against that decision.

Decision of the First-tier Tribunal

The judge directed herself that it was for her to consider the claim under Article 8 ECHR, rather than under the Immigration Rules, as pursuant to section 82 of the Nationality, Immigration and Asylum Act 2002 an appeal can only be brought against the decision to refuse a human rights claim.

Before addressing Article 8, the judge considered whether the respondent had correctly applied the Immigration Rules. She accepted the appellant's argument that the marriage was legitimate as appropriate documentation to establish the sponsor's divorce had been submitted with the application.

However, the judge did not accept that the financial threshold requirement had been met. Under Appendix FM-SE, an applicant seeking to demonstrate income from self-employment must submit, inter alia, the latest Statement of Account (SA300 or SA302). The appellant submitted a tax calculation by his accountant on HMRC software for the purposes of obtaining the SA302, but not the actual SA302. The reason for this was that at the time of the application being made the SA302 was not yet available. But for this deficiency in the documentation, the appellant would have satisfied the financial requirements under Appendix FM.

In evaluating the appeal under Article 8 ECHR, the judge first considered whether the operation of Article 8 was engaged. At paragraph 26, the judge found there to be "very little evidence about the appellant's marriage and family life with the sponsor."

The judge concluded at paragraph 27 that:

> *"... in the absence of a witness statement from the appellant, and because these matters were not included in the sponsor's witness statement I have reservations about the quality of the evidence, and I consider that the appellant has not proved her case in relation to family life on the balance of probabilities"*

Having found that Article 8 was not engaged the judge considered, in the alternative, whether refusing entry to the appellant would be proportionate. The judge found that there was no reason advanced as to why the appellant and sponsor could not enjoy family life together in Pakistan.

In finding that refusing the appellant entry to the UK would be proportionate, the judge stated at paragraph 30 that:

> *"Article 8 does not confer an automatic right of entry, and does not oblige the state to facilitate a married couple's preference for living in the UK. There are no compelling circumstances to justify entry clearance under article 8, no obstacles the family life outside the UK and it would not be unduly harsh to refuse the appeal".*

Grounds of appeal and submissions

The first submission made in the grounds of appeal is that the judge erred by applying a "much higher standard of proof than is required" because she only considered the claim under Article 8 ECHR outside the rules and did not consider the "totality of the evidence". Permission to appeal was not granted on this ground and Mr Gondal did not seek to pursue it at the error of law hearing. He was right to not do so. As observed by First-tier Tribunal Judge Brunnen when granting permission to appeal, the applicable standard of proof is the balance of probabilities and there is nothing in the decision that indicates this standard was not applied. On the contrary, at paragraph 27 the judge made clear that the decision was made on the balance of probabilities.

The second argument advanced in the grounds of appeal (in respect of which permission to appeal was granted) is that the judge erred in her assessment of Article 8 ECHR. Within this ground a number of points are raised:

(a) It is argued that the judge improperly treated as damaging to the appellant's case the absence of a witness statement addressing her family life with the sponsor when there is no requirement in the Immigration Rules or elsewhere for this to be submitted.

(b) It is also argued that it was open to the judge to ask the sponsor, who attended the hearing, about any matter or documents she was unclear about.

(c) A further submission is that the judge failed to follow the five stage test in Razgar and had she done so she would have found that Article 8 was clearly engaged.

(d) The grounds also take issue with the judge's finding that the sponsor could relocate to Pakistan on the basis the consideration of the impact on him was inadequate.

Before me, Mr Gondal argued that there were only two issues in contention before the First-tier Tribunal: the validity of the appellant's marriage, and whether the financial requirements of the Immigration Rules had been satisfied. He argued that the judge accepted the appellant's marriage was valid and was wrong to find that the financial requirements were not met as it was

clear the appellant comfortably met them and the only shortcoming in his application for entry clearance was that, rather than submit a Statement of Account (SA302), he submitted a tax calculation by his accountant on HMRC software showing identical information.

Mr Gondal also argued that the judge erred by basing the decision on a lack of witness evidence when there is no requirement for such evidence to be submitted and the absence of family life had not been previously raised.

Mr Kandola's response was that there is no case law or policy saying it is permissible to rely on alternative evidence to that specified in the Immigration Rules where a self-employed person is seeking to show they meet the financial requirements under Appendix FM. He argued that it is fair to acquire everyone to submit the same documents and that the appellant could have waited a few months until he had the required documentation.

Mr Kandola submitted that the burden was on the appellant to establish family life. It was clear from the respondent's decision that family life was not accepted and therefore the onus was on the appellant to establish that there was family life within the meaning of Article 8(1) ECHR. He maintained that the fact that the judge had found the marriage between the appellant and sponsor to be "valid" did not mean it was genuine and engaged Article 8.

Consideration

As correctly noted by the judge, the only ground upon which the appeal could be brought to the First-tier Tribunal was that the decision to refuse the appellant entry was unlawful under Section 6 of the Human Rights Act 1998, i.e. that it was contrary to Article 8 ECHR.

The issue for the judge to decide was not therefore whether the Immigration Rules had been satisfied (although this is a matter of some weight in determining the proportionality of denying entry clearance – see, for example, Mostafa [2015] UKUT 112) but whether refusing entry clearance would be contrary to Article 8 ECHR. This required a consideration, firstly, of whether there was family life between the appellant and sponsor the interference with which was of sufficient gravity to engage the operation of Article 8(1) ECHR; and secondly, if (and only if) the answer to the first question was yes, whether refusing entry clearance to the appellant would be a disproportionate interference with the appellant's and sponsor's rights under Article 8(2) ECHR.

The judge's reason for finding Article 8(1) was not engaged was that although the appellant and sponsor were validly married they had not submitted evidence to show that they were in a genuine relationship and had a genuine desire to live together as a couple.

As the Upper Tribunal stated in Mostafa at [24], there are no particular kinds of relationship that always attract the protection of Article 8(1) just as there are no kind of relationship that would never come within its scope. Accordingly, the fact that the appellant and sponsor were in a legally valid marriage is not a

sufficient basis to conclude Article 8 was engaged. Whether Article 8 was engaged was a fact sensitive question for the judge which needed to be determined on the evidence.

The burden of proof was on the appellant to establish there was family life between her and the sponsor. In the absence of evidence being adduced about the relationship between them (whether in the form of witness statements or otherwise) it was not an error of law to find that the burden had not been discharged by the appellant to show that there was family life engaging Article 8(1) even though the marriage was valid.

Mr Gondal is correct that there is no legal requirement to submit a witness statement and that the absence of such a statement from the appellant is not of itself a reason to dismiss her appeal. But the judge did not find a witness statement was required. Rather, she explained that her decision was being made in the absence of evidence from the appellant. There is no error arising from the judge highlighting the absence of a witness statement when it is the way in which evidence from a party is ordinarily given in proceedings before the Tribunal.

The grounds argue that the judge failed to follow the five stage test of Lord Bingham in Razgar [2004] UK HL 27. In that case, Lord Bingham set out the following five questions to be considered where Article 8 is at issue:

> *1) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private life or (as the case may be) family life?*
>
> *(2) If so, will such interference have consequences of such gravity as potentially to engage the operation of article 8?*
>
> *(3) If so, is such interference in accordance with the law?*
>
> *(4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?*
>
> *(5) If so, is such interference proportionate to the legitimate public end sought to be achieved?*

The first two Razgar questions address whether Article 8 is engaged. If, as the judge found, the answer to the second question was in the negative (ie Article 8 is not engaged) then it was not necessary to proceed to the other questions. In other words, having found that Article 8 was not engaged, it was not necessary for the judge to proceed to assess the proportionality of refusing entry clearance to the appellant.

Mr Gondal submitted that whether there was a genuine relationship between the appellant and her sponsor had never been put in issue by the respondent, who had focused only the question of the validity of the marriage. I do not

agree. In the Entry Clearance Manager Appeal Review dated 26 July 2016 it is stated:

> *"Given the concerns raised in the refusal notice regarding the relationship and the fact that no additional evidence has been provided, I am not satisfied that the appellant has a family life with the sponsor. As this is the case, article 8 (1) does not apply to the appellant."*

This makes clear that the respondent did not accept Article 8(1) was engaged because of the absence of evidence about the "relationship". Indeed, it is apparent that not only did the Entry Clearance Manager make clear that Article 8(1) was at issue but also that the appellant had failed to provide adequate evidence to support the case under Article 8(1).

Although it was not necessary given her finding about Article 8 not being engaged, the judge considered the proportionality of refusing the appellant entry clearance, and found refusal would not be disproportionate.

At the hearing before me, the primary argument Mr Gondal advanced to challenge the judge's conclusion on proportionality was that the appellant satisfied the Immigration Rules and this should have been accorded significant weight in the proportionality assessment.

I agree that *if* the appellant satisfied the Immigration Rules this would be highly relevant to whether denying entry was proportionate. However, the appellant did not meet the Rules. The Rules stipulate that a self-employed applicant must submit their latest statement of account (SA300 or SA302). A document prepared by an accountant in order to obtain an SA302, which is what the appellant submitted, is not the same as, or the equivalent of, an SA302. As the appellant did not meet the requirements of Immigration Rules the judge did not err in law by failing to weigh in her favour that the Rules were satisfied.

The judge also did not make an error by finding the sponsor could relocate to Pakistan. The burden of proof lay with the appellant. Given the lack of evidence before her to establish reasons why the sponsor could not relocate, the judge was entitled to find that the burden had not been discharged.

I therefore find that:

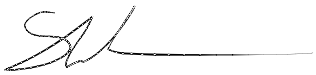
(e) The judge did not make an error of law in finding that Article 8(1) was not engaged. Therefore, there was no need for the judge to consider the proportionality of denying entry clearance or indeed whether or not the Immigration Rules were satisfied.

(f) If I am wrong, and the judge erred in respect of Article 8(1), I am satisfied, in the alternative, that the judge did not err in finding it would not be disproportionate to deny entry clearance to the appellant.

Notice of Decision

1. The appeal is dismissed.

2. The judge has not made a material error of law and the decision of the First-tier Tribunal stands



Deputy Upper Tribunal Judge Sheridan Dated: 14 January 2018