



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number OA/06322/2013

THE IMMIGRATION ACTS

Heard at Field House
On 14th November 2014
Prepared 21st November 2014

Determination Promulgated
On 25th November 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE PARKES

Between

DILBER YILMAZ
(ANONYMITY DIRECTION NOT MADE)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr E Fripp (Counsel, instructed by Kinas Solicitors)

For the Respondent: Mr A Armstrong (Home Office Presenting Officer)

DETERMINATION AND REASONS

1. The Appellant applied for entry clearance to the UK as a spouse on the 10th of November 2012. The application was refused by the ECO for the reasons given in the Refusal Notice of the 4th of February 2013, the reasons included a failure by the Appellant to provide the specified documents in support of the Sponsor's claimed income. The Appellant appealed.
2. The appeal was heard by First-tier Tribunal Judge Malone on the 24th of March 2014 at Taylor House. Having heard from the Sponsor the appeal was allowed under the Immigration Rules as the Judge found that the Sponsor met the earnings requirement and that the failure to provide the specified evidence was de minimis. The appeal was also allowed under article 8.

3. The Secretary of State sought permission to appeal in grounds dated the 30th of April 2014. The grounds proceed on the basis that the Sponsor was not exempt from the financial requirements and it had been conceded at the hearing the Sponsor did not meet the requirements of appendix FM-SE, in the period before the application his income was insufficient.
4. In addition not all the specified documents had been provided and the Tribunal had not had regard to the relevant date, the date of the application. It was also submitted that the approach taken to article 8 was flawed. There were no exceptional circumstances and family life could be continued in Turkey.
5. Permission was initially refused but the application was renewed and permission was granted by Upper Tribunal Judge O'Connor on the 7th of October 2014. He indicated that it was arguable that the Tribunal erred in paragraph 24 in disregarding the financial requirements in Appendix FM-SE as de minimis. It was also arguable that the decision under article 8 was flawed in failing to take account of the public interest in not allowing entry to those who do not meet the requirements of the Immigration Rules.
6. At the hearing Mr Fripp accepted that the Appellant failed under the Immigration Rules and he was clearly right to do so. The Judge appears to have overlooked the 2 stage process involved in assessing whether the maintenance requirements are met. The first is whether the required specified documents have been supplied, if not that is the end of the matter, and then to assess whether, at the date of the application, the Sponsor's earnings discharged the requirements of the rules.
7. The appeal could not succeed under the Immigration Rules and the Judge clearly erred in allowing it on that basis. The Judge was obliged to consider whether the specified evidence had been provided, it had not, and had to find whether on the basis of evidence admissible under the Immigration Rules whether the Sponsor's earnings exceeded £18,6000 at the date of the application. In the absence of the required evidence that finding could not be made. The finding in paragraph 24 was an error as the Judge considered the finances at the date of the decision and not that of the application and on the basis of inadmissible evidence.
8. Ordinarily in out of country appeals the facts are to be assessed at the date of the decision under appeal and that applies to considerations under article 8 as well as the rules, As (Somalia) [2009] UKHL 32. In this case the relevant date was the date of the application for consideration under the Immigration Rules and the date of the decision for the application of article 8. In any event the submission of post decision evidence would be subject to the provisions of section 85 of the Nationality, Immigration and Asylum Act 2002 and DR (Morocco).
9. In considering the position under article 8 the Judge set out his considerations at paragraph 27. These too disclose clear errors. The relevant date was that of the decision, the 4th of February 2013. I am not unsympathetic to the Appellant's and Sponsor's loss of their twins but this was legally irrelevant, I am told that they died on the 4th of January 2014. The Appellant might have been pregnant at the date of the decision but this was not in evidence, and so subsequent events, however heartbreaking, could not be said to appertain to the date of the decision.
10. It was not open to the Judge to find that the Appellant and Sponsor were being kept apart by the unlawful decision of the ECO, for the reasons given above that was wrong. The decision under the Immigration Rules was the only one open to the ECO and at the date of the decision

the later events that moved the Judge could not have been in contemplation and should have not informed the decision.

11. The Appellant and Sponsor could live together in Turkey, it is their choice that they would prefer to live in the UK. There was nothing in the circumstances of the Appellant and Sponsor at the date of the decision that would have justified considering the case outside the Immigration Rules under article 8 and still less to justify allowing the appeal under that heading.
12. In summary the determination of Judge Malone contained a number of errors of law in relation to the Immigration Rules and article 8. The decision is flawed for the reasons given and cannot be sustained. I have considered the Appellant's case and having set aside the determination I remake the decision and am obliged to dismiss the appeal.

CONCLUSIONS

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

I set aside the decision.

I re-make the decision in the appeal dismissing the appeal of Dilber Yilmaz.

Anonymity

The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and I make no order.

Fee Award

In dismissing the appeal I make no fee award.

Signed:

Deputy Judge of the Upper Tribunal (IAC)

Dated: 24th November 2014