Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/33437/2014

THE IMMIGRATION ACTS

Heard at Birmingham Employment Centre
On 10 November 2015

Decision and Reasons Promulgated
On 25 November 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE McCARTHY

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MUHAMMAD MUDASSAR
(NO ANONYMITY ORDER)

Respondent

Representation:
For the Appellant: Ms R Pettersen, Senior Home Office Presenting Officer
For the Respondent: Ms E Rutherford, instructed by Fountain Solicitors

DECISION AND REASONS

1. The Secretary of State appeals with good reason to the Upper Tribunal against the decision and reasons statement of First-tier Tribunal Judge Stokes that was promulgated on 17 November 2014. I say there is good reason for the appeal because as Ms Rutherford accepted Judge Stokes's decision contains legal errors which mean it must be set aside.

© CROWN COPYRIGHT 2015

2. Because of the agreement of the parties there is no need to set out the legal errors in detail. There were two issues for Judge Stokes to determine: (i) did Mr Mudassar meet the financial requirements of appendix FM to the immigration rules, and (ii) if not, did he succeed under paragraph EX.1 of appendix FM. The grounds of appeal argue, in essence, that Judge Stokes failed to apply relevant legal principles in relation to the first ground and that he failed to make relevant findings in relation to the second.

The first issue

3. Ms Rutherford conceded the first issue. It is enough to say that Judge Stokes failed to engage with the evidential requirements of paragraph 13 of appendix FM-SE. Mr Mudassar was only able to rely on the evidence submitted with the application with the exception that the Home Office gave him additional time to submit his wife's SA300 or SA302 for the 2012/2013 tax year (see Home Office letter of 18 March 2014). Although Mr Mudassar did not comply with that request, at paragraphs 18 and 21 Judge Stokes found that the law entitled him to take account of evidence not submitted with the application or prior to the date of decision. He had no power in law to do so.

The second issue

4. Before looking at the second issue, it is appropriate to set out the relevant legal provisions.

Relevant legal provisions

5. On 10 July 2014, the Secretary of State published the Statement of Changes in Immigration Rules (HC532) in which she announced the insertion of paragraph EX.2 to appendix FM. The implementation provisions of HC532 confirmed that paragraph EX.2 applied to any decision made on or after 28 July 2014.

6. Paragraphs EX.1 and EX.2 provide exceptions to various requirements of appendix FM and thereby an alternative path to a grant of leave to remain (the ten year route as opposed to the five year route). As can be seen from the text below, paragraph EX.2 identifies how paragraph EX.1.(b) is to be interpreted.

> EX.1. This paragraph applies if
>
> (a) (i) the applicant has a genuine and subsisting parental relationship with a child who-
>
> > (aa) is under the age of 18 years, or was under the age of 18 years when the applicant was first granted leave on the basis that this paragraph applied;
> >
> > (bb) is in the UK;
> >
> > (cc) is a British Citizen or has lived in the UK continuously for at least the 7 years immediately preceding the date of application; and

(ii) it would not be reasonable to expect the child to leave the UK; or

(b) the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen, settled in the UK or in the UK with refugee leave or humanitarian protection, and there are insurmountable obstacles to family life with that partner continuing outside the UK.

EX.2. For the purposes of paragraph EX.1.(b) "insurmountable obstacles" means the very significant difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner.

7. Prior to the coming into force of paragraph EX.2, the Tribunal was bound by the interpretation of "insurmountable obstacles" by the Court of Appeal's judgment in R (Agyarko & Ors) v SSHD [2015] EWCA Civ 440. The Court of Appeal did not consider the contents of paragraph EX.2 because it did not apply to the case it was deciding. The Court of Appeal had recourse to the article 8 ECHR jurisprudence regarding "insurmountable obstacles" and in so doing it examined a much broader understanding of the phrase than is found in paragraph EX.2.

8. The Tribunal was also previously guided by R (Chen) v SSHD ((Appendix FM – Chikwamba – temporary separation – proportionality) (IJR) [2015] UKUT 189 (IAC) but, as with the Court of Appeal's judgment, that case turned on a meaning of "insurmountable obstacle" not contained in paragraph EX.2, which was not in force at the relevant time.

9. In each of the above cases the decision turned on whether it was proportionate to expect the foreign national partner to leave the UK and apply from overseas if the UK settled partner was not prepared to relocate family life overseas. Paragraph EX.2 does not include such alternatives and requires consideration of whether family life can continue overseas, subject to the demonstration of very significant obstacles that cannot be overcome or very significant hardship that would otherwise result for the appellant or partner.

Consideration

10. In this appeal I am concerned with the application of paragraph EX.1.(b) because it is accepted that the appellant cannot meet the financial requirement of appendix FM because he failed to comply with the evidential requirements of appendix FM-SE. As such he cannot succeed under the five year route for settlement as a partner. If he can show, however, that he falls within the stated exceptions, his leave can be varied in country although under the ten year route for settlement.

11. As the decision in this appeal was made on 8 August 2014, the parties agree that paragraph EX.2 applies to this appeal.

12. Ms Rutherford did not concede the second issue but made no submissions. She accepted that Judge Stokes was required to consider the provisions of EX.1 and that required consideration of EX.2.

13. It is evident from paragraph 23 of his decision that Judge Stokes did not make any relevant findings regarding insurmountable obstacles whatsoever. Although he found that the Mr Mudassar's wife is a British citizen, that she has lived all her life in the UK, that her family were here, that she had been in permanent employment for the previous 19 months and that she had established a business in the UK, he made no finding as to why leaving these behind would amount to very significant difficulties to the couple continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship.

14. Of course, the failure to make relevant findings amounts to legal error.

15. Because these legal errors go to the heart of the appeal I have no choice but to set the decision aside. I was able to inform Ms Pettersen and Ms Rutherford of this decision and invited their views on how I should proceed to remake the decision.

Remaking the decision

16. Although the appeal before the First-tier Tribunal had proceeded without a hearing because the lower appeal fee had been paid, both representatives recognised they had requested an oral hearing in the Upper Tribunal. Ms Pettersen said the Home Office file contained a copy of PRJ Southern's standard directions that indicated that the Upper Tribunal would proceed immediately to remake the decision if an error on a point of law was found. Ms Rutherford was content to proceed and called Mr Mudassar and his wife, Mrs Parveen.

17. After giving them time to read their witness statements of 21 August 2014, each adopted their statement. They were questioned in turn about the requirements of paragraphs EX.1 and EX.2. I have recorded the questions and answers in the record of proceeding and it is unnecessary to rehearse them here other that to indicate that the only evidence which touches on the provisions of paragraph EX.2 relate to Mrs Parveen. Her evidence reminded me that she is a British citizen, that she has lived in the UK all her life, that she is very westernised and enjoys the freedom of being a British citizen woman in terms of equality. As a result she works, is free to go out on her own, she is free to drive and she has been free to set up her own business. She views going to Pakistan as restricting those freedoms because of the patriarchal nature of Pakistani society.

18. Before considering the submissions made, I mention the following. When considering the meaning of insurmountable obstacles in paragraphs EX.1 I am restricted to the meaning given to that phrase in EX.2. It is not appropriate to view the wording through the prism of earlier case law either from the UK or from the European Court of Human Rights because the immigration rules include their own interpretation.

19. In light of the documentary evidence which supports the account given by Mrs Parveen and bearing in mind that Ms Pettersen did not make any submission questioning the reliability of Mrs Parveen's evidence, I accept her account and recognise that moving to Pakistan would restrict significantly the freedoms she enjoys by right as a British citizen woman.

20. Recalling that the wording of paragraphs EX.1(b) and EX.2 specifically refer to whether family life could continue outside the UK, I invited Ms Pettersen to focus on whether the significant impact relocation to Pakistan would have on Mrs Parveen would amount to an insurmountable obstacle within the meaning of EX.2. Ms Pettersen submitted that Mrs Parveen was in this predicament because she chose to marry someone from Pakistan. She also submitted that it was open to Mrs Parveen to remain in the UK whilst Mr Mudassar applies from overseas if he could not make another application in the UK.

21. With regard to the last submission, Ms Pettersen and Ms Rutherford clarified that they understood that Mr Mudassar would be entitled to make a fresh application whilst in the UK as long as he applied within 28 days from his appeal rights ending. This was a result of his leave continuing by operation of s.3C of the Immigration Act 1971 and paragraph E-LTRP.2.2(b) of appendix FM. Whether that is correct is not a matter for me.

22. In light of this clarification, I understand this submission as suggesting that if the appeal were dismissed then there would be other options for Mr Mudassar to secure a relevant immigration status in the UK. In effect, this is merely a version of the other submission which argues that Mr Mudassar could return on his own to Pakistan to make an entry clearance application. Although these factors would be relevant to a proportionality exercised under article 8(2) of the human rights convention, I remember that I am not considering article 8 directly. As I reminded Ms Pettersen, paragraphs EX.1 and EX.2 do not contain such alternatives and focus on whether there are insurmountable obstacles to family life together continuing outside the UK.

23. I asked Ms Pettersen to address me on whether expecting Mrs Parveen to give up her rights as a British citizen woman, which she would have to do if she were to go to Pakistan with her husband to continue their family life there, would amount to insurmountable obstacles as described in paragraph EX.2.

24. I reminded Ms Pettersen of the importance citizenship rights have to migration law. This principle was developed in the case of McCarthy (European citizenship) case no C-434/09 [2011] Imm AR 586 wherein the Court advised in paragraphs 53 and 54:

> 53 Thus, in *Ruiz Zambrano* and *García Avello*, the national measure at issue had the effect of depriving Union citizens of the genuine enjoyment of the substance of the rights conferred by virtue of that status or of impeding the exercise of their right of free movement and residence within the territory of the Member States.
>
> 54 As stated in paragraph 49 of the present judgment, in the context of the main proceedings in this case, the fact that Mrs McCarthy, in addition to being a national of the United Kingdom, is also a national of Ireland does not mean that a Member State

has applied measures that have the effect of depriving her of the genuine enjoyment of the substance of the rights conferred by virtue of her status as a Union citizen or of impeding the exercise of her right of free movement and residence within the territory of the Member States. Accordingly, in such a context, such a factor is not sufficient, in itself, for a finding that the situation of the person concerned is covered by Article 21 TFEU.

25. That case involved a dual British-Irish citizen (who had not exercised any EU law rights relating to freedom of movement) who wanted her non-EU citizen husband to remain in the UK.

26. The Court of Justice concluded in essence that although it is reasonable to expect family life to continue overseas if such action will not deprive a Union citizen of the genuine substance of the rights they have in their member state of their nationality and alternatively although it is reasonable to expect a married couple to be separated for immigration purposes where such separation will not result in the Union citizen being deprived of the genuine enjoyment of their citizenship rights, it is wrong in law to expect a Union citizen to leave the UK in order to continue family life overseas when to do so would be to deprive her of the genuine enjoyment of her citizenship rights.

27. These provisions have been discussed on a number of occasions by the Courts here, perhaps most recently in Pham v SSHD [2015] UKSC 19 (see paragraph 55 in particular). Much of the domestic jurisprudence has addressed cases of deportation, which it should be remembered is not the case here. Of course, the European Court of Human Rights has reached similar conclusions in a number of cases as discussed by the Court of Appeal in Agyarko and more recently in SSHD v SS (Congo) & Ors [2015] EWCA Civ 387.

28. I return to the wording of paragraphs EX.1 and EX.2 and recall once again that they require only consideration of whether there are insurmountable obstacles to family life continuing outside the UK. There is no space within the wording of these provisions to consider the possibility that a temporary separation for immigration purposes might be reasonable.

29. In this case, as I have indicated, I am satisfied that expecting Mrs Parveen to move to Pakistan to continue her family life with her husband in that country would deprive her of the genuine enjoyment of her citizenship rights. She would not be in a position to enjoy the freedoms she has as a Union citizen, including those she has as a British citizen, because of the discrimination of women in Pakistan. In reaching this decision I have drawn on the binding guidance of the Court of Justice, that an expectation, whether actual or implied, for a Union citizen to give up the genuine enjoyment of their citizenship rights (and I recall that equality is a fundamental principle of EU law just as it is fundamental to UK law), is wrong in law because it would impose very serious hardship on Mrs Parveen. She would have to choose between the family life with her husband – which is not in dispute – or her private life because of her rights as a British citizen (which, of course, makes her a citizen of the EU).

Article 8

30. For the sake of clarity, I should record that if paragraph EX.2 were not in place, then I would have come to a different decision under paragraph EX.1 as it was previously understood by the Courts and Tribunal or under article 8 applied directly.

31. Although there is no dispute that article 8(1) is engaged in this appeal, and thereby the first two Razgar steps are answered positively, following the guidance in Agyarko and Chen I would be bound to find that the available evidence did not show that it was not proportionate to expect the appellant to return to Pakistan to make an entry clearance application. Any separation would be proportionate in all the circumstances. I would have reached the same conclusion in respect of EX.1 without EX.2 because the case law confirmed that the phrase "insurmountable obstacles" was the same in both contexts.

32. This is a case where the wording of EX.2 creates a more favourable immigration outcome for the appellant. I very much doubt this was intended but it is trite law that the immigration rules have to be read and interpreted as they are and not restricted by other legal measures however authoritative.

Decision

The decision and reasons statement of First-tier Tribunal Judge Stokes contains errors on points of law and is set aside.

I remake the decision and allow the appellant's appeal against the immigration decision of 8 August 2014.

Signed Date

Judge McCarthy
Deputy Judge of the Upper Tribunal