Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/14270/2015

THE IMMIGRATION ACTS

Heard at Liverpool	**Decision & Reasons Promulgated**
On 28 April 2017	**On 15 May 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

MR ABRAR RAFIQ
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Malik, Counsel instructed by Saj Law Chambers
For the Respondent: Mr McVeety, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals to the Upper Tribunal from the decision of the First-tier Tribunal (Judge Callow sitting at Taylor House on 26 August 2016) dismissing his appeal on human rights (Article 8 ECHR) grounds against the decision of the respondent made on 22 March 2014 to refuse to grant him leave to remain in the UK, and against her concomitant decision to remove him from the UK via directions

under section 47 of the Immigration, Asylum and Nationality Act 2006. The First-tier Tribunal did not make an anonymity direction, and I do not consider that the appellant requires anonymity for these proceedings in the Upper Tribunal.

Relevant Background Facts

2. The appellant is a national of Pakistan, whose date of birth is 3 April 1985. He came to the United Kingdom as a student on 13 March 2011, and his entry clearance as a student expired on 22 December 2014. Before the expiry of his student visa, the appellant applied for leave to remain on private life grounds, without furnishing any details to support a private life claim under Rule 276ADE. The appellant also did not identify any exceptional circumstances which could potentially lead to him being granted Article 8 relief outside the Rules.

3. As was entirely predictable in these circumstances, the appellant's application was refused, and the Secretary of State made a concomitant decision to remove him. However, by way of appeal, the appellant relied on the fact that he had now established family life in the UK with a British citizen.

The Hearing Before, and the Decision of, the First-tier Tribunal

4. The appellant was represented by Counsel at the hearing before Judge Callow. The respondent was not represented. The Judge received oral evidence from the appellant and his wife, and his attention was directed to the documentary evidence in the appellant's bundle pertaining, *inter alia*, to the couple's financial circumstances and the spouse's employment with Manchester City Council and with Manchester Car Audio and Security Limited.

5. In his subsequent decision, Judge Callow recorded at paragraph [6] that, in his closing submissions, Mr Karim of Counsel acknowledged that the appellant did not meet all the requirements of Appendix FM for the grant of leave to remain as the spouse of a British national. However, he submitted that his appeal should be allowed on the basis of a family life established outside the Immigration Rules which was deserving of protection. He also acknowledged that the parties had embarked on marriage when the appellant had no settled status in the UK. However, he submitted that, as the appellant had given his evidence in English and public funds were not at risk, his appeal should succeed.

6. In paragraphs [7]-[18] of his decision, Judge Callow gave his reasons for dismissing the appellant's appeal under the Rules and also outside the Rules under Article 8 ECHR. He supported his reasoning by reference to a number of authorities, including **R (On the application of Chen) (Appendix FM - Chikwamba - temporary separation - proportionality) IJR [2015] 189 (IAC)**, **Rhuppiah [2016] EWCA Civ 803** and **Bibi and Another [2013] EWCA Civ 322**.

The Reasons for the Grant of Permission to Appeal

7. On 9 March 2017, First-tier Tribunal Judge Chohan granted the appellant permission to appeal for the following reasons:

> 2. In short, the grounds argue that the Judge erred in law because the Judge misapplied the relevant immigration rules, i.e. GEN.1.2, and failed to give adequate reasons in respect of financial requirements.
>
> 3. At paragraph 7 of the decision, the Judge notes that the appellant did not meet the requirements of GEN.1.2 of the Immigration Rules as the parties had not lived together for at least two years prior to the date of application. As such, the Judge concluded that the appellant did not meet the requirements of GEN.1.2(iv). However, at paragraph 5 of his decision, the Judge notes that following the Islamic marriage ceremony the parties underwent a registry office wedding ceremony on 6 February 2016 and therefore are legally married. In light of that, it seems that the appellant and her partner met the requirements of GEN.1.2(i). Furthermore, it seems that the Judge may not have given adequate reasons in respect of findings relating to the financial circumstances.

The Hearing in the Upper Tribunal

8. At the hearing before me to determine whether an error of law was made out, Mr Malik, who did not appear below, developed the arguments advanced in the application for permission to appeal. On behalf of the Secretary of State, Mr McVeety adhered to the Rule 24 response settled by a colleague. The Judge was wrong to have held that the parties needed to have resided together for at least two years at the date of application. But the error was not material, as the Judge was right to find that the appellant did not meet the other relevant requirements of the Rules, namely the financial requirement and the English language requirement.

Discussion

9. As the appellant was married to the sponsor, he was eligible for a grant of leave to remain under Appendix FM as the partner of a British national. But the Judge's error at paragraph [7] of his decision is not material, as the Judge rightly found that the appellant did not meet other relevant requirements in Appendix FM so as to qualify for leave to remain as a partner of a British national under Appendix FM. Indeed, Counsel had not contended otherwise.

10. In oral argument before me, Mr Malik said that before the First-tier Tribunal there was some documentary evidence to show that the appellant's wife was earning at least £18,600 per annum. But he conceded that the appellant had not provided *all* the specified evidence required by Appendix FM-SE. In particular, he had not provided an employer's letter in respect of both his wife's jobs; and he had not provided a run of 6-months' payslips and bank statements evidencing his wife's salary from either job going into her bank account, or into a joint bank account.

11. Nonetheless, Mr Malik submitted that the Judge had erred in law as he failed to consider the exercise of discretion under paragraph D of Appendix FM-SE.

Paragraph D provides, *inter alia*, that in deciding an application in relation to which this appendix (Appendix FM-SE) states that specified documents must be provided, the Entry Clearance Officer or Secretary of State (the decision-maker) will consider documents that have been submitted with the application, and will only consider documents submitted after the application where sub-paragraph (b) or (c) applies.

12. I consider that Mr Malik's submission is without merit. Firstly, there is no evidence that Mr Karim of Counsel, who appeared for the appellant below, asked the Judge to exercise discretion under paragraphs D of Appendix FM-SE, so as to make a finding that the financial requirement was met, notwithstanding that much of the specified evidence was missing. Since such a case was not put to the First-tier Tribunal Judge, he cannot be criticised for not asking himself whether he should exercise discretion in the appellant's favour.

13. Secondly, the discretion arising under paragraph D of Appendix FM-SE is afforded to the primary decision-maker, not to the Judge hearing a claimant's appeal. Judge Callow accepted that the appellant's wife was probably earning more than £18,600, but he rightly declined to find in the appellant's favour that the financial requirement was met, as the appellant had not produced the specified evidence to show that it was met. The Judge had to apply the Rules and he applied the Rules correctly.

14. Thirdly, the discretion was not engaged even from the perspective of the primary decision-maker, as the appellant had never made an application for leave to remain as a partner. The application which had been refused was an application for leave to remain on private life grounds. It was open to the appellant to rely on his relationship with a British national by way of appeal, but he had no legitimate expectation of being able to succeed in his appeal on this ground - unless he complied in every respect with the relevant Rules.

15. The same considerations apply to the appellant's failure to provide the specified evidence that he met the English language requirement. It is argued in the permission application that the Judge failed to take into account that from October 2015 the appellant required his passport in order to sit for a recognised English language test, and therefore the absence of the required English language test certificate was a matter which was beyond his control. As was raised in the Rule 24 response, there is no evidence of the appellant seeking to obtain a certified copy of his passport from the Home Office in order to sit for any English language test before the hearing of his appeal. The bundle prepared for the hearing in the Upper Tribunal includes an English language test certificate which the appellant has obtained since the hearing in the First-tier Tribunal. This underscores the fact that the point taken in the permission application is a bad one. It was within the appellant's power to sit for an English language test *before* the hearing of the appeal in the First-tier Tribunal.

16. Although it is not an issue upon which permission to appeal was specifically granted, it is argued in the permission application that the Judge was wrong to find that there are not insurmountable obstacles to family life between the appellant and his partner being carried on in Pakistan; and wrong to find, in the alternative, that it

would be reasonable and proportionate for the appellant to go back to Pakistan with a view to seeking entry clearance as a spouse. Apparently it was argued before Judge Callow that neither the appellant nor his wife could afford the expense which would be involved in such an enterprise.

17. No note from Counsel who appeared at the hearing has been produced which substantiates the claim that it was part of the Appellant's evidence that he could not afford to return back to Pakistan to seek entry clearance. Furthermore, this claim sits uneasily with the parallel claim that his wife earns an annual income in excess of £18,600, and with the fact that the appellant has family to return to in Pakistan who could presumably maintain and accommodate him while he is waiting for a decision on his entry clearance application.

18. I consider that the Judge has given adequate reasons for finding that the appellant cannot bring himself within the scope of EX.1 of Appendix FM - and again it appears that Mr Karim of Counsel did not contend otherwise - and for finding that it would not be disproportionate for the appellant to return to Pakistan to seek entry clearance.

Notice of Decision

19. The decision of the First-tier Tribunal did not contain an error of law, and accordingly the decision stands. This appeal to the Upper Tribunal is dismissed.

No anonymity direction is made.

Signed Date 12 May 2017

Judge Monson

Deputy Upper Tribunal Judge