Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: VA/00285/2014

THE IMMIGRATION ACTS

Heard at: Field House	**Determination Promulgated**
On: 1st December 2014	**On: 3rd February 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE BRUCE

Between

Entry Clearance Officer, Abu Dhabi

Appellant

and

Domnic Antony Fernandes
(no anonymity direction made)

Respondent

Representation
For the Appellant: Mrs Pal, Senior Home Office Presenting Officer
For the Respondent: Mr Otchie, Malik Law Chambers Solicitors

DECISION AND REASONS

1. The Respondent is a national of India date of birth 30th October 1970. On the 8th September 2014 the First-tier Tribunal (Judge YJ Jones) allowed his appeal against a decision to refuse to grant him entry clearance as a family visitor to the UK. The Entry Clearance Officer now has permission[1] to appeal against that decision.

[1] Granted by First-tier Tribunal Judge Ransley on the 27th October 2014

2. It is not in dispute that the Respondent's appeal rights were limited. That is because his appeal was brought after the 25th June 2013 when s52 of the Crime and Courts Act 2013 came into effect, amending s88A of the Nationality Immigration and Asylum Act 2002. The effect of those changes is that appeals against a refusal of a visit visa can now only be brought on two grounds: race discrimination and human rights. It was the latter avenue that the Respondent pursued.

3. As the facts set out by the determination illustrate, this was not an average visit visa application. That was because the Respondent wishes to come to the UK in order to visit his wife, a British citizen who lives and works here. The First-tier Tribunal accepted that the two had entered into marriage on the understanding that for the immediate future at least, she would continue to reside and work in the UK and he would continue to reside and work in the UAE. He has been there for over twenty years. They maintain their relationship by regular visits: they speak by phone etc and see each other every 2-3 months.

4. Judge YJ Jones found the Sponsor to be an entirely credible witness. Taking her evidence in the round with the documentary evidence before him he was satisfied that the Respondent has been living and working in the UAE for over twenty years. He has extended family there as well as in India. The Sponsor has been visiting him every 2-3 months. This marriage was agreed on that basis. There was an Article 8 family life. Judge Jones was satisfied that this decision interfered with it and the consequences were of such gravity as to engage the Article. He then went on, to analyse the reasons for refusal. He found no reason to suspect that the Respondent was not a genuine visitor who intends to leave the UK at the end of his trip. On the evidence before Judge Jones, the requirements of paragraph 41 were all met. He went on to find the refusal to be a disproportionate interference with the Respondent and Sponsor's family life and allowed the appeal.

5. The Entry Clearance Officer now appeals on the grounds that the First-tier Tribunal failed to identify whether there are compelling circumstances not recognised by the Rules: Gulshan [2013] UKUT 00640 (IAC), Nagre [2013] EWHC 720. Since the decision failed to identify what in the circumstances were compelling or exceptional, the decision could not stand.

No Error of Law

6. Permission was granted in this appeal before the decision of the Court of Appeal in R (MM & Others) v SSHD [2014] EWCA Civ 985 was handed down. As that decision makes clear there is no 'gateway' or intermediate threshold that needs to be crossed

before Article 8 can be considered. There is no "exceptionality" test: see also R (Ganesabalan) v SSHD [2014] EWHC 2712 (Admin), R (on the application of Esther Ebun Oludoyi & Ors) v Secretary of State for the Home Department (Article 8 – MM (Lebanon) and Nagre) IJR [2014] UKUT 00539 (IAC). All Gulshan, Nagre and Shahzad underline is that where an applicant cannot meet the requirements of the relevant immigration rule the consideration of proportionality will involve looking to see whether there are any particular factors pertaining to that applicant that are not reflected in the Rules. In this case it is the unchallenged finding of fact that the applicant does meet the requirements of the relevant rule so none of these authorities have any application. He is a genuine visitor who meets all of the requirements of paragraph 41. The reason that Article 8 is engaged in this very unusual case is because he and his wife's marriage is, for the moment at least, based upon visits. If he is prevented from coming to the UK to see her that will be a very substantial interference with their family life together since face to face contact will then be limited to the times that she manages to get to the UAE. This was a decision open to the Judge on the evidence before him and it contains no error of law.

7. I would add that the grant of permission mentions ss117A and 117B of the Nationality Immigration and Asylum Act 2002. The public interest considerations set out therein are concerned with the extent of an applicant's integration into the UK in the context of considering whether he should have to leave it. Since this applicant does not claim to be integrated, nor does he express any desire to become so, it is doubtful that express recognition of these principles would have made any difference at all to this decision. The Respondent wishes to come to visit the UK for 11 days. If Judge Jones had fulfilled the statutory obligation to have regard to these factors the decision would have been exactly the same. If he recognized that the maintenance of immigration control is in the public interest he would have pointed out that the Respondent meets all of the requirements of paragraph 41 of the Rules etc.

Decision

8. The determination of the First-tier Tribunal does not contain an error of law and it is upheld.

Deputy Upper Tribunal Judge Bruce
28th January 2015