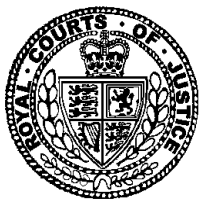

Neutral Citation Number: [2021] EWCA Civ 1873

Case No: C2/2021/0818

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)
UPPER TRIBUNAL JUDGE BLUM
JR/16/2020

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 09/12/2021

Before :

LADY JUSTICE MACUR

LADY JUSTICE CARR

and

LORD JUSTICE WILLIAM DAVIS

- -

Between :

SECRETARY OF STATE
FOR THE HOME OFFICE **Appellan**

- and -

WALEED AHMAD KHATTAK **Respond**

- -

- -

Zane MalikQC (instructed by Government Legal Department) for the **Appellant**

Billal Malik (instructed via direct access) for the **Respondent**

Hearing date : 1 December 2021

- -

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, released to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be

10.30am 9 December 2021

Lord Justice William Davis :

Introduction

1.
On 26 June 2019 the respondent, Dr Waleed Ahmad Khattak, applied for leave to remain in the United Kingdom. His application was made via the family route. In his application he stated that he was applying to remain as the parent of children who were British citizens. Under the Immigration Rules that was a valid route (the parent route) by which to apply for leave to remain.

2.
On 1 October 2019 the Secretary of State for the Home Department (the "SSHD") granted the respondent leave to remain. In her decision she said that he did not meet the requirements for a grant of leave under the partner route. No reference was made to his application under the parent route. However, the SSHD granted limited leave to remain for 30 months on the basis that there were exceptional circumstances. His relationship with his partner and his child meant that refusal of leave would be a breach of the appellant's Article 8 rights under the Convention.

3.
The respondent requested a reconsideration of the decision. He asked the SSHD to consider granting him leave to remain as a parent. She refused to reconsider her decision. She explained that, because the appellant had a partner, his application was considered by that route. Because he did not meet the requirements under that route, leave was granted for the reason already given.

4.
The respondent applied to the Upper Tribunal (the "UT") for a judicial review of the decisions of the SSHD i.e. the original decision and the reconsideration. By a decision dated 23 February 2021 UT Judge Blum granted the application for judicial review of the SSHD's decisions. He quashed the decisions insofar as they refused to grant the respondent leave to remain under the parent route.

5.
The SSHD now appeals on a single ground, namely that Judge Blum misconstrued the relevant parts of Appendix FM of the Immigration Rules. This was an error of law. The respondent resists the appeal and relies on the reasoning of Judge Blum.

Factual background

6.
The respondent is a Pakistani citizen. In August 2013 he married a British citizen, Aliya Ahmad. The marriage took place in Pakistan. Aliya Ahmad returned to the UK. The respondent applied for entry clearance to the UK as the spouse of Aliya Ahmad. This was granted in January 2015 and the respondent arrived in the UK on 29 January 2015. On 28 October 2015 Aliya Ahmad gave birth to their child, a girl. This marriage did not last long. It ended in divorce on 26 August 2016. In consequence the respondent's entry clearance was curtailed. The expiry date was 15 January 2017.

7.
On 2 December 2016 the respondent made an application for leave to remain under the provisions of the Immigration Rules relating to family members. These are contained in Appendix FM of the Rules. The basis of the respondent's application was his family life with his very young daughter. He was

granted leave to remain under the parent route until 30 June 2019. That meant that potentially he would be eligible to apply for settlement after five years. The grant of leave was headed “FIVE YEAR PARENT ROUTE”.

8.
In May 2017 the respondent started a new relationship with Razia Begum. She is a British citizen. At that time the respondent was living and working near Manchester. Razia Begum lived and worked in Birmingham. From December 2017 the respondent would stay with Razia Begum at weekends and over holiday periods. In July 2018 the respondent moved to Birmingham from which point he lived together with Razia Begum. In November 2018 they had a daughter together.

9.
When the respondent applied in June 2019 for leave to remain, the children in respect of whom he made the application were both his daughter from his marriage and his daughter from his relationship with Razia Begum. Each was a British citizen.

Appendix FM

10.
The relevant general purpose of Appendix FM is to provide a route is for those seeking to enter or remain in the UK on the basis of their family life with a person who is a British Citizen. The Appendix contains definitions of terms. The most significant in relation to this appeal is set out in paragraph GEN.1.2:

For the purposes of this Appendix “partner” means-

(i) the applicant’s spouse;

(ii) the applicant’s civil partner;

(iii) the applicant’s fiancé(e) or proposed civil partner; or

(iv) a person who has been living together with the applicant in a relationship akin to a marriage or civil partnership for at least two years prior to the date of application, unless a different meaning of partner applies elsewhere in this Appendix.

The words of particular significance are “unless a different meaning of partner applies elsewhere in this Appendix”.

A further definition on which the SSHD relies in relation to her argument as to the meaning of GEN. 1.2 appears in paragraph GEN.1.4:

In this Appendix “specified” means specified in Appendix FM-SE, unless otherwise stated.

No issue arises in respect of Appendix FM-SE. The words which the SSHD says have significance are “unless otherwise stated”. Comparison is drawn between those words and the qualification applied to the term “partner”.

11.
Appendix FM sets out financial requirements in relation to those applying for leave to remain as a partner. At the time of the respondent’s application they included a requirement to provide evidence of gross annual income of at least £18,600 with additional income for any children. In contrast, for

those applying to remain as a parent the financial requirement was to provide evidence that they would be able to maintain and accommodate themselves without recourse to public funds. Thus, the requirements imposed on those applying to remain as a partner were more stringent.

12.
When applying for leave to remain as a partner, detailed relationship requirements have to be met. However, before any of those requirements can fall to be considered, the applicant has to demonstrate that they have a partner within the definition set out in GEN.1.2. The detailed relationship requirements do not indicate at any point that a different meaning of partner from the one in GEN.1.2 is to apply.

13.
The relationship requirements in relation to limited leave to remain as a parent are at paragraph E-LTRPT.2.3. Sub-paragraph (b) was the requirement which applied to the respondent insofar as his application related to his daughter with Aliya Ahmad:

(b) the parent or carer with whom the child normally lives must be-

(i) a British Citizen in the UK, settled in the UK, or in the UK with limited leave under Appendix EU in accordance with paragraph GEN.1.3.(d).;

(ii) not the partner of the applicant (which here includes a person who has been in a relationship with the applicant for less than two years prior to the date of application); and

(iii) the applicant must not be eligible to apply for leave to remain as a partner under this Appendix.

There is no dispute that the respondent met the requirements in (i) and (ii) of sub-paragraph (b). The issue in the appeal relates to the requirement in (iii).

14.
Whether limited leave to remain is granted by the parent route or by the partner route, the eligibility to apply for settlement generally will arise at the same point, namely after 5 years.

15.
Where there is an application for leave to remain under Appendix FM and the applicant does not otherwise meet the requirements of the Appendix the SSHD is required to consider whether exceptional circumstances apply as set out in paragraph GEN.3.2.(2):

….the decision-maker must consider, on the basis of the information provided by the applicant, whether there are exceptional circumstances which would render refusal of entry clearance, or leave to enter or remain, a breach of Article 8 of the European Convention on Human Rights, because such refusal would result in unjustifiably harsh consequences for the applicant, their partner, a relevant child or another family member whose Article 8 rights it is evident from that information would be affected by a decision to refuse the application.

A person granted leave to remain due to exceptional circumstances will not be eligible to apply for settlement until the expiry of 10 years. Thus, the grant of leave to the respondent was headed “TEN YEAR PARTNER ROUTE (EXCEPTIONAL CIRCUMSTANCES)”.

The proceedings before UT Judge Blum

16.

The respondent argued before Judge Blum that he met the relationship requirements for leave to remain as a parent. Although he had a partner at the time of his application, namely Razia Begum, he had not been living together with her for at least two years as at 26 June 2019, the date of his application. Thus, he was not eligible to apply for leave to remain as a partner. On that simple basis he should have been given leave to remain as a parent assuming all other requirements were met.

17.
The SSHD submitted that the respondent was eligible to apply for leave to remain as a partner by reason of his relationship with Razia Begum albeit that he had not been living together with her for two years. The argument was that eligibility to apply and meeting the requirement are not the same thing. The SSHD also submitted that, considering paragraph E-LTRPT.2.3 in its full context, the term “partner” in sub-paragraph (iii) bore a different meaning to that provided at GEN.1.2. The SSHD relied on the policy of the SSHD as revealed in the guidance document issued by her, namely that the parent route was “not for couples who are in a genuine and subsisting partner relationship”. The guidance stated this included cases where the partner definition was not met. Finally, the SSHD argued that the respondent’s argument would allow someone in his position to avoid the financial requirements applicable to partners which would be wrong in principle.

18.
In a conspicuously clear judgment Judge Blum rejected the arguments of the SSHD and granted the respondent’s application for judicial review. He quashed the decisions of 1 October 2019 and 20 November 2019 insofar as they refused to grant the respondent leave to remain under the 5 year parent route. His essential reasoning was as follows:

(i)
A person who is “eligible to apply for leave to remain as a partner” as set out in paragraph E-LTRPT. 2.3(b)(iii) must meet the threshold criteria of the term “partner”;

(ii)
The meaning of “partner” in that sub-paragraph is to be gleaned from the general definition section in GEN.1.2;

(iii)
There was no basis for applying a different meaning to the term. The qualification to the meaning of “partner” in sub-paragraph (b)(ii) could not be carried over into the following sub-paragraph;

(iv)
The fact that a person could be granted leave due to exceptional circumstances relating to their partner whose Article 8 rights would be affected by a refusal to grant leave did not assist the SSHD in applying a different meaning to “partner” in sub-paragraph (iii) since, by definition, exceptional circumstances could only be relevant when an applicant failed to meet the requirements of Appendix FM;

(v)
The existence of different financial requirements for the partner route and the parent route could not undermine the construction of E-LTRPT.2.3(b) based on its ordinary and natural meaning.

(vi)
The policy guidance issued by the SSHD was not be used as an aid to construction.

The submissions on appeal

19.
On behalf of the SSHD Mr Zane Malik QC substantially relied on the arguments deployed in the UT. He submitted that the term “partner” in E-LTRPT.2.3(b)(iii) has a different meaning to the definition in GEN.1.2 because the context demands it. The context is eligibility to apply. An applicant will be eligible to apply for leave to remain as a partner if they are in a partnership relationship of whatever length. The context of sub-paragraph (iii) required a different meaning of partner. Mr Zane Malik noted the contrast between GEN.1.2 and GEN.1.4. The use of the phrase “unless a different meaning….applies” allowed a contextual and flexible approach as opposed to something being “otherwise stated” which required explicit words showing a different meaning.

20.
Mr Zane Malik argued that the conclusion reached by Judge Blum would lead to “absurd consequences”. First, the conclusion means that there will be an inverse relationship between the strength of a person’s partner relationship and their ability to obtain leave to remain. If a person had a strong partner relationship, they would have to meet the more stringent financial criteria applicable to the partner route. Someone with a less robust relationship would be able to apply under the parent route with its more modest financial requirements. Second, in a submission not raised before Judge Blum, Mr Zane Malik pointed to the position that could be reached at the point at which someone in the respondent’s situation applied for indefinite leave to remain as a parent. If that person applied for such leave after 5 years, they would have to meet all of the requirements of E-LTRPT. That is the effect of paragraph E-ILRPT(1A). Thus, if that person then was eligible to apply for leave to remain as a partner because they now had a partner with whom they had been living for two years, they would not be able to obtain indefinite leave to remain as a parent. This would leave that person worse off.

21.
Finally Mr Zane Malik argued that the construction adopted by Judge Blum was capable of leading to abuse. It was said that an unscrupulous applicant might seek to hide or disguise a partner relationship so as to allow an application under the parent route. They would do that to avoid the more stringent financial requirements under the partner route. Mr Zane Malik submitted that Judge Blum’s construction thereby was inconsistent with the Immigration Rules read as a whole.

22.
Mr Billal Malik on behalf of the respondent supported the reasoning of Judge Blum. He submitted that the ordinary and natural meaning of “partner” in sub-paragraph (iii) was clear. The definition in GEN. 1.2 was clear. There was nothing in E-LTPRT to indicate that a different definition of the term should apply. Rather, the qualification of the term in sub-paragraph (ii) which was not carried over to the succeeding sub-paragraph made it clear that a different meaning of “partner” was not to apply.

23.
Mr Billal Malik argued that the wording of GEN.3.2 could not assist the SSHD’s case for the reasons given by Judge Blum. He said that the proposition that applicants might be unscrupulous in their applications was of no relevance unless it could be shown that the relationship requirement for a parent was drafted with that mischief in mind. His submission was that the SSHD was attempting to “reverse engineer” a meaning simply to avoid supposedly adverse policy outcomes.

24.

As to the first of the absurd consequences relied on by the SSHD, Mr Billal Malik said that her argument failed to recognise the importance of the parental relationship. If the parent route involves less stringent financial criteria, that is not unprincipled. The SSHD's apparent policy objective was met by requirement in sub-paragraph (iii) i.e. a person in a partner relationship which had subsisted for two years would not be able to take the parent route. In relation to the second absurd consequence, that involved an impermissible speculative exercise. What an applicant's position might be 5 years hence could not affect the ordinary and natural meaning of the terms of the sub-paragraph.

Discussion

25.
The proper approach to be taken to interpretation of the Immigration Rules is common ground. It is set out in Mahad v Entry Clearance Officer [2010] 1 WLR 48 at [10]:

"There is really no dispute about the proper approach to the construction of the Rules. As Lord Hoffmann said in Odelola v Secretary of State for the Home Department[2009] 1 WLR 1230, 1233 (paragraph 4):

"Like any other question of construction, this [whether a rule change applies to all undetermined applications or only to subsequent applications] depends upon the language of the rule, construed against the relevant background. That involves a consideration of the immigration rules as a whole and the function which they serve in the administration of immigration policy."

That is entirely consistent with what Buxton LJ (collecting together a number of dicta from past cases concerning the status of the rules) had said in Odelola in the Court of Appeal ([2009] 1 WLR 126) and, indeed, with what Laws LJ said (before the House of Lords decision in Odelola) in the present case. Essentially it comes to this. The Rules are not to be construed with all the strictness applicable to the construction of a statute or a statutory instrument but, instead, sensibly according to the natural and ordinary meaning of the words used, recognising that they are statements of the Secretary of State's administrative policy. The respondent's counsel readily accepted that what she meant in her written case by the proposition "the question of interpretation is . . . what the Secretary of State intended his policy to be" was that the court's task is to discover from the words used in the Rules what the Secretary of State must be taken to have intended. After all, under section 3(2) of the Immigration Act 1971, the Secretary of State has to lay the Rules before Parliament which then has the opportunity to disapprove them. True, as I observed in Odelola (para 33): "the question is what the Secretary of State intended. The rules are her rules." But that intention is to be discerned objectively from the language used, not divined by reference to supposed policy considerations. Still less is the Secretary of State's intention to be discovered from the Immigration Directorates' Instructions (IDIs) issued intermittently to guide immigration officers in their application of the rules."

I shall apply that approach to the issue which arises in this appeal. That is what Judge Blum did. He cited the passage from Mahad as set out above.

26.
What then is the ordinary and natural meaning of the words of sub-paragraph (iii) – "the applicant must not be eligible to apply for leave to remain as a partner under this Appendix" – coupled with words of GEN.1.2 – "partner" means.....(iv) a person who has been living together with the applicant in a relationship akin to a marriage or civil partnership for at least two years prior to the date of application, unless a different meaning of partner applies elsewhere in this Appendix"? I am quite satisfied that the term "partner" in sub-paragraph (iii) has the meaning as set out in GEN.1.2. There is

no indication that a different meaning should apply. The clear inference is to the contrary. First, sub-paragraph (ii) contains a qualification of the term “partner” which is not carried over to sub-paragraph (iii). Had it been intended that the meaning in sub-paragraph should similarly be qualified, the sub-paragraph would have contained a qualification. Yet it does not. Second, sub-paragraph (iii) deals with eligibility “to apply for leave to remain as a partner under this Appendix”. One is eligible to do something if one satisfies the necessary or relevant requirements. The only requirements which could apply here are those set out in the Appendix in relation to “partner” as defined in GEN.1.2. The reference to eligibility would be meaningless if the term “partner” had a different meaning.

27.
Judge Blum drew a distinction between a person “eligible to apply for leave” and a person who was “eligible for leave” although the distinction did not affect his ultimate conclusion. I am unpersuaded that, in the context of sub-paragraph (iii), any distinction there may be is of any consequence. By way of example, there was a time when all police officers had to be of a certain minimum height. Had a person below that height knowing of the restriction been asked whether they were eligible to apply for appointment as a police officer, they would have said that they were not. When asked why they were not eligible, they would have said it was because they did not satisfy the necessary conditions. On the interpretation for which the SSHD contends, the term “eligible” is devoid of meaning. The words “to apply” appear in the sub-paragraph because an important function of the Appendix is to explain to potential applicants what requirements they must satisfy. When they apply for leave to remain, they will consider which requirements they satisfy. By reference to those requirements they will decide whether they are eligible to apply for leave to remain by a particular route. This is illustrated by the application form completed by the respondent. He stated that he was applying for leave to remain as a parent. In answer to the pre-printed question “Have you lived with your partner continuously for 2 years?” he answered no. The pre-printed question was directly referable to the requirement established in GEN.1.2 and sub-paragraph (iii). The construction for which Mr Zane Malik contends is to be rejected.

28.
The argument that there is a mismatch between the parent route and the partner route under Appendix FM as put forward on behalf of the SSHD is without substance. If there is a mismatch, it is the consequence of how the Rules are drafted. In fact, the fact that the financial requirements in relation to the parent route potentially are less stringent is a principled reflection of the desirability of maintained parental relationships in order to best serve the interests of the child.

29.
The argument made by reference to the position that might obtain if and when the respondent applied for indefinite leave to remain under Appendix FM was not raised with Judge Blum. This appeal is against the decision of Judge Blum which was based on the matters argued before him. I consider that some very good reason needs to be shown before this court can rely on a matter not argued before Judge Blum in order to conclude that he erred in law. I cannot identify any good reason. The point taken arises out of the terms of Appendix FM. This is not new material. In any event I am satisfied that, had the argument been put to Judge Blum, he would have rejected it. There is no logic in construing a provision in Appendix FM by reference to something which might happen in the future. Moreover, the provisions of E-ILRPT are concerned with the position as it is at the time of application for indefinite leave to remain. At that point it may well be appropriate to re-consider the position of the applicant. There is no merit in the argument that the ordinary and natural meaning of a provision

in Appendix FM should be set aside because there is a mere possibility that the respondent might find himself disadvantaged at some point in the future.

30.
The final argument raised by Mr Zane Malik also was not put to Judge Blum. Although he argued that applicants would be able to choose whether to apply under the parent route or the partner route, he did not suggest that applicants might abuse the system because they would see an advantage in concealing a partner relationship in order to take the parent route. As an aside I consider that this submission does not sit well with the application made by the respondent in this case. He provided great detail about his previous marriage, his partnership with Razia Begum and the nature and extent of his relationship with his children. There is no hint of any abuse of the system by the respondent. However, assuming that it is appropriate to consider the SSHD's argument in relation to possible abuse at all, I am sure that it is without merit. It is a sad fact that there are efforts made by some applicants to conceal relevant matters from the SSHD. There are cases where applicants will tell lies and produce false documents to support or bolster an application. I see no basis for suggesting that interpreting the relevant parts of Appendix FM by reference to the ordinary and natural meaning of the words may give rise potential abuse of the system.

Conclusion

31.
For all the reasons given above I consider that Judge Blum was entirely correct when he concluded that the SSHD had taken her decisions by reference to an erroneous interpretation of Appendix FM. Thus, he was right to quash the decisions. In those circumstances I would dismiss the appeal.

Lady Justice Carr: I agree

Lady Justice Macur: I also agree