Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/09577/2012

THE IMMIGRATION ACTS

Heard at Glasgow	**Determination issued**
on 3 October 2013	**On 8 November 2013**

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Before

MR C M G OCKELTON, VICE PRESIDENT
UPPER TRIBUNAL JUDGE MACLEMAN

Between

ENTRY CLEARANCE OFFICER, AMMAN

Appellant

and

SAHAR FAEZ HASHIM HAFETH

Respondent

For the Appellant: Mr M Matthews, Senior Home Office Presenting Officer

For the Respondent: Mr C H Ndubuisi, of Drummond Miller, Solicitors

DETERMINATION AND REASONS

1) We refer to parties as they were in the First-tier Tribunal.

2) The appellant is a citizen of Iraq, born on 13 April 1964. By notice dated 30 April 2012 the respondent refused her application for entry clearance as a spouse for settlement in the UK. The appellant did not provide the original English language test certificate required by the Immigration Rules HC395, as amended. The financial aspects of her application were also doubted. The decision was thought to be proportionate in terms of Article 8 of the ECHR.

3) In his determination, promulgated on 1 February 2013, First-tier Tribunal Judge D'Ambrosio found in the appellant's favour on accommodation and maintenance under the Rules, but that she failed to produce the required certificate of English language ability. He dismissed the appeal under the Rules, and allowed it under Article 8 of the ECHR.

4) These are the SSHD's grounds of appeal to the Upper Tribunal:

   i) The appellant failed to provide evidence of an accepted English language test. The option of resitting this test … is still open to her. The judge erred … by finding at paragraph 21 … that if the Article 8 claim fails the appellant would have no other lawful right to enter the UK, this contradicts the judge's findings at paragraph 126 … that she can apply for entry clearance as a family visitor and at paragraph 127 [that she can] submit a fresh application [as a spouse].

   ii) The sponsor is in receipt of disability benefits … this does not prevent him from supporting an application for entry clearance even if under the new Rules the requirements … are more rigorous. The judge finds that it would take the appellant years to raise sufficient funds … given his findings … that the appellant's claimed savings are credible, despite the Entry Clearance Officer's concerns … the judge's findings contradict themselves …

   iii) … The judge's findings with regard to … Article 8 … seek to excuse the appellant from seeking entry clearance under the new Rules, post 9 July 2012. In the light of the judge's flawed and contradictory findings set out above, this infected his findings under the Rules and in assessing proportionality … in Miah and Others [2012] EWCA Civ 261 … Stanley Burnton LJ said at paragraph 26 "*… there is no near miss principle applicable to the Immigration Rules. The Secretary of State, and on appeal the Tribunal, must assess the strength of an Article 8 claim, but the requirements of immigration control are not weakened by the degree of non-compliance with the Immigration Rules.*"

5) On 25 February 2013, Designated First-tier Tribunal Judge Shaerf granted permission to appeal, on the view that the judge's findings were perhaps contradictory and unclear:

> A consequence is that his treatment of the Article 8 claim appears at least in substantial parts to be no more than an argument to support a "near miss" claim … which together with the unresolved or contradictory issues … makes it arguable that the assessment of proportionality is [unsafe].

6) It does not appear that either representative acquainted the First-tier Tribunal Judge with the terms of the "new Rules" applicable to this case, and nor did he look them up. Mr Matthews referred us to the following:

> **Appendix FM family members**
> **Family life with a Partner**
> **Section EC-P: Entry clearance as a partner**
>
> **….**
>
> **Financial requirements**
> E-ECP.3.1. The applicant must provide specified evidence, from the sources listed in paragraph E-ECP.3.2., of-
>
> (a) a specified gross annual income of at least-

(i) £18,600;
(ii) an additional £3,800 for the first child; and
(iii) an additional £2,400 for each additional child; alone or in combination with

(b) specified savings of-

(i) £16,000; and
(ii) additional savings of an amount equivalent to 2.5 times the amount which is the difference between the gross annual income from the sources listed in paragraph E-ECP.3.2.(a)-(d) and the total amount required under paragraph E-ECP.3.1.(a); or

(c) the requirements in paragraph E-ECP.3.3.being met.

….

E-ECP.3.2. When determining whether the financial requirement in paragraph EECP 3.1. is met only the following sources will be taken into account-

(a) income of the partner from specified employment or self-employment, which, in respect of a partner returning to the UK with the applicant, can include specified employment or self-employment overseas and in the UK;

(b) specified pension income of the applicant and partner;

(c) any specified maternity allowance or bereavement benefit received by the partner in the UK;

(d) other specified income of the applicant and partner; and

(e) specified savings of the applicant and partner.

E-ECP.3.3. The requirements to be met under this paragraph are-

(a) the applicant's partner must be receiving one or more of the following -

(i) disability living allowance;
(ii) severe disablement allowance;
(iii) industrial injury disablement benefit;
(iv) attendance allowance;
(v) carer's allowance; or
(vi) personal independence payment; and

(b) the applicant must provide evidence that their partner is able to maintain and accommodate themselves, the applicant and any dependants adequately in the UK without recourse to public funds.

7) Mr Matthews submitted as follows. The relevant requirements in this case are set out at E-ECP3.3. They do not impose fixed income and capital limits. The sponsor is in receipt of Disability Living Allowance. Judge D'Ambrosio says at paragraph 112 that any new application would be subject to "far more onerous [requirements] for savings/income" and at paragraph 129 that the new Rules are "more rigorous … particularly as regards the amount of funds needed for adequate maintenance". Those comments are wrong. The "new Rules" in a case such as this are essentially the same as the "old Rules" on accommodation and maintenance. The judge's main reason for deciding as he did cannot stand. The rest of the judge's reasoning on Article 8 is no more than allowing the appellant to succeed because her application resulted in a "near miss", contrary to principle. On the evidence, and on those findings which were correctly made, the appellant should be expected to obtain the correct English qualification (not difficult, given her level of education) and apply again.

8) Mr Ndubuisi firstly sought to persuade us that the appellant is not only subject to E-ECP3.3 but also to the specified limits required in E-ECP3.1 and 3.2.

9) That misreads the Rules. E-ECP3.1 (c) provides that E-ECP3.3 is an *alternative* to E-ECP3.1 and 3.2.

10) Mr Ndubuisi further submitted that the judge set out all the factors to be taken into account on the respondent's side, in particular at paragraphs 122-127, and all those in favour of the appellant, at 128-136, and was entitled to decide as he did.

11) We asked Mr Ndubuisi to deal with paragraph 132, where the judge specifically says that the appeal failed under the Rules only because the appellant failed to prove that her application met one of the two English test requirements, having followed erroneous advice given to her in Iraq, for which she could not be blamed. Mr Ndubuisi argued that this did not disclose a "near miss" approach but was simply taking account of a relevant fact, and that although the judge had not considered Miah, nor the principle it contained, he reached his conclusion based on an overall proportionality assessment.

12) We reserved our determination.

13) The judge adopted without examination the submission for the appellant that the "new Rules" would be significantly more onerous on her than the old.

14) The Secretary of State is entitled to make Immigration Rules, and to change these from time to time. It is doubtful whether an appeal could properly succeed under Article 8 because it would be more difficult for an appellant to meet the requirements of the Rules in a future application.

15) It is also doubtful whether an appeal could properly succeed under Article 8 when an appellant has the option of making a further application, supported by the proper evidence, which may enable her to succeed under the Rules. If an appellant is in a position to make such an application, it is difficult to see that it could be a disproportionate interference with her rights to private and family life to expect her to do so.

16) Although the judge rehearsed the circumstances at great length, it is plain that he allowed the appeal on the view that the appellant failed only on a strict technical requirement, amounting to a near miss, for which she should be excused.

17) It may be that the amended Rules will make a difference in this case with regards to maintenance. However, unless and until a valid application is made to the ECO and assessed under the rules, it is hard to see how it might be held as disproportionate to refuse entry under Article 8.

18) The judge was wrong to consider (a) that a near miss might be a good basis for allowing the appeal; (b) that the requirements of the Rules, as amended, were necessarily a major barrier to a further application; (c) that Article 8 might exempt a person from having to comply with amended requirements of the Immigration Rules; and (d) that Article 8 might generally exempt a person from having to put forward an application complying with the Rules, when she should in the near future be capable of doing so. These are matters so fundamentally fatal to the appellant's case under Article 8 that the decision requires to be reversed.

19) The determination of the First-tier Tribunal is **set aside**. The following decision is substituted: the appeal, as originally brought to the First-tier Tribunal, is **dismissed** both under the Immigration Rules and under Article 8 of the ECHR.

20) No anonymity order has been requested or made.

9 October 2013
Judge of the Upper Tribunal