Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/00800/2013

THE IMMIGRATION ACTS

Heard at Sheldon Court, Birmingham	**Determination Promulgated**
On 14th October 2014	**On 20th October 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

ENTRY CLEARANCE OFFICER - ISTANBUL

Appellant

and

SEMRA HUYUK
(ANONYMITY ORDER NOT MADE)

Respondent

Representation:

For the Appellant: Mr N Smart, Senior Home Office Presenting Officer
For the Respondent: Mr J Dhanji of Counsel, instructed by Braitch Solicitors

DETERMINATION AND REASONS

Introduction and Background

1. The Entry Clearance Office (ECO) appeals against a determination of Judge of the First-tier Tribunal Bruce promulgated on 7th February 2014.

2. The Respondent before the Upper Tribunal was the Appellant before the First-tier Tribunal and I will refer to her as the Claimant.

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3. The Claimant is a female citizen of Turkey born 10th November 1987 who applied on 31st August 2012 for leave to enter the United Kingdom as the spouse of Ali Baba Huyuk (the Sponsor) a person settled in this country.

4. The application was refused on 15th November 2012. The ECO considered the application with reference to Appendix FM of the Immigration Rules. It was not accepted that the parties were in a genuine and subsisting relationship, nor was it accepted that they intended to live together permanently in the United Kingdom.

5. It was not accepted that the financial requirements of Appendix FM were satisfied as the specified documents required to show that the Sponsor had a gross income of at least £18,600 per annum had not been submitted.

6. The Appellant appealed. The appeal was heard by Judge Bruce (the judge) on 24th December 2013. Having considered the documentary evidence and heard oral evidence from the Sponsor, the judge found that the parties were in a genuine and subsisting marriage, and they intended to live together as husband and wife.

7. In relation to finance the judge referred in paragraph 8 to bank statements covering the period July-November 2012. Paragraph 9 refers to up-to-date bank statements. The judge was satisfied that the financial requirements of Appendix FM-SE were met, finding that although there was no letter from the Sponsor's employer, there was a letter from accountants which set out the required information, and the judge was prepared to treat this as a letter from the employer, on the basis that the accountants are his agents. The appeal was therefore allowed under Appendix FM of the Immigration Rules.

8. The judge recorded that if she was wrong to allow the appeal under the rules, because of the missing letter from the employer, the appeal would be allowed under Article 8 of the 1950 European Convention on Human Rights (the 1950 Convention).

9. The ECO applied for permission to appeal to the Upper Tribunal. In summary it was contended that the judge had had no regard at paragraph 9 of the determination, to the specified evidence set out in Appendix FM-SE of the Immigration Rules.

10. It was contended that the judge had not had appropriate regard to the relevant date, which was the date of application, and the specified evidence was required for a specified period before that date. It was contended that the application had been made in September 2012, and the judge had not considered the evidence in the specified period prior to that date.

11. It was contended that it was not clear what gross annual income the Sponsor had at the date of application and that the judge had materially erred in allowing the appeal under Appendix FM, as the specified documents had not been submitted.

12. In relation to Article 8 the ECO relied upon Gulshan [2013] UKUT 00640 (IAC) and Nagre [2013] EWHC 720 (Admin). It was contended that the judge had not explained why the decision to refuse entry clearance was disproportionate, if a

further application could be made to satisfy the financial requirements. It was therefore submitted that the judge had not considered whether there were compelling reasons for considering the appeal outside the Immigration Rules, and whether refusal of entry clearance would be unjustifiably harsh.

13. Permission to appeal was granted by Judge of the First-tier Tribunal Bird who noted that there was a requirement in Appendix FM-SE that a letter from the Sponsor's employer containing specified information must be submitted, and that the judge had arguably erred in allowing the appeal despite the absence of such a letter.

14. In relation to Article 8 Judge Bird recorded in the concluding paragraph of her grant of permission;

> "The judge's consideration of this is under paragraph 10 and it is arguable that the judge in considering Article 8 has failed to consider the findings of both the High Court and the Upper Tribunal in what circumstances an assessment under Article 8 of the ECHR is to be made if the requirements to the Immigration Rules were not met."

15. Following the grant of permission directions were issued that there should be a hearing before the Upper Tribunal, to ascertain whether the First-tier Tribunal had erred in law such that the decision should be set aside.

The Upper Tribunal Hearing

Error of Law

16. Mr Smart was provided with a copy of a rule 24 response issued on behalf of the Claimant. However Mr Dhanji indicated that he did not rely upon that response which had been prepared by Counsel who appeared before the First-tier Tribunal. Mr Dhanji said that it was conceded on behalf of the Claimant, that the judge had erred in law in allowing the appeal under Appendix FM of the Immigration Rules, despite the fact that an employer's letter containing the specified information, had not been submitted. Mr Dhanji indicated that he relied upon the rule 24 response in relation to Article 8 as it was contended that the judge had not erred in law on this issue.

17. In relation to the reference in the rule 24 response to an application under rule 15(2A) of The Tribunal Procedure (Upper Tribunal) Rules 2008 and the proposed submission of a letter from the Appellant's employer, Mr Dhanji indicated that he would not be making such an application because the letter was not relevant to the error of law consideration, and if the decision was re-made, would not mean that the appeal could succeed under Appendix FM.

18. Mr Smart relied upon the grounds contained within the application for permission to appeal and submitted that it was clear that the judge had erred in law in treating an accountant's letter as if it was a letter from the Sponsor's employer, and the judge had not taken into account the specified evidence which must be submitted to prove that the financial requirements of Appendix FM are met, and that the specified

evidence must cover a period of time, normally six months, prior to the application being made. Mr Smart submitted that the bank statements did not show receipt of the Sponsor's claimed wages. There was a conflict in the evidence provided as to what those wages were if the amount in the contract of employment was compared to paragraph 19 of the Sponsor's witness statement, which set out what he claimed to receive.

19. Mr Smart submitted that the judge had not adequately explained why it was appropriate to allow the appeal under Article 8, when the financial requirements of Appendix FM were not met, and on this issue relied upon the grounds contained within the application for permission to appeal.

20. Mr Dhanji in making submissions, having accepted that the judge had erred in considering the financial requirements of Appendix FM, argued that the evidence submitted did in fact show that the Sponsor earned above £18,600, and therefore the judge having accepted that, had not erred in allowing the appeal under Article 8 for the reasons that she gave.

21. Having considered the submissions, I decided that the First-tier Tribunal had erred in law such that the decision must be set aside. Mr Dhanji was correct to concede that the judge had erred in finding that a letter from an accountant could be regarded as a letter from the Sponsor's employer. The absence of the employer's letter meant that the requirements of paragraph 2 of Appendix FM were not satisfied and the judge erred in finding to the contrary.

22. In relation to Article 8 the judge's findings are brief and contained in paragraph 10. The judge does not make any reference to either Gulshan or Nagre and does not adequately explain why refusal of entry clearance is disproportionate given that the financial requirements of the Immigration Rules are not satisfied, and that it is open to the Appellant to make a fresh application to satisfy the rules. The Supreme Court in Patel and Others [2013] UKSC 72 stated at paragraph 57;

> "57. It is important to remember that Article 8 is not a general dispensing power. It is to be distinguished from the Secretary of State's discretion to allow leave to remain outside the rules, which may be unrelated to any protected human rights."

23. Having set aside the decision of the First-tier Tribunal I decided to proceed to re-make the decision. Both representatives indicated that they were ready to proceed and there was no application for an adjournment.

Re-Making the Decision

24. Mr Dhanji indicated that it was not proposed to call any further evidence. Mr Dhanji accepted that the appeal could not succeed under the Immigration Rules, but submitted that the appeal should be allowed under Article 8. In submitting that Article 8 should be considered outside the Immigration Rules Mr Dhanji relied upon paragraph 135 of MM [2014] EWCA Civ 985.

25. I was asked to find, with reference to section 117B of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act) that although there may be no evidence of the Claimant's ability in English, she would be financially independent if granted entry clearance to the United Kingdom, and genuine family life existed between the Claimant and Sponsor.

26. Mr Dhanji stated that he relied upon Chikwamba and Hayat on the basis that it was not necessary for a further application for entry clearance to be made. If such an application was made, this would involve the ECO having to expend further resources in assessing the application, which was unnecessary. I was asked to allow the appeal under Article 8 outside the Immigration Rules.

27. Mr Smart submitted that it was clear that the appeal could not succeed under the Immigration Rules, and contended that it should also be dismissed with reference to Article 8. Mr Smart suggested that there was no good reason to allow the appeal under Article 8 and that I should take into account that it was accepted that the appeal could not succeed under the Immigration Rules.

28. Mr Smart submitted that there was no good reason to depart from the rules and that it was open to the Claimant to make a fresh application which would be the appropriate course of action, to ensure compliance with the Immigration Rules. On that basis Mr Smart submitted that the decision to refuse entry clearance was proportionate.

29. At the conclusion of oral submissions I reserved my decision.

My Findings and Conclusions

30. I find that the financial requirements of Appendix FM are not satisfied and therefore the appeal cannot succeed under the Immigration Rules. There was however no challenge to the findings made in the First-tier Tribunal, that the Claimant and Sponsor have a genuine relationship and intend to live permanently with each other as spouses and those findings are preserved. Therefore if there is to be a further application for entry clearance, there has been a judicial finding in relation to their relationship.

31. The primary reason for finding that the financial requirements are not satisfied, is the failure to provide an employer's letter containing the specified information, which means that paragraph 2 of Appendix FM-SE is not satisfied. I do not find that it has been proved by the production of specified evidence, that the Sponsor had an annual income in excess of £18,600.

32. In relation to Article 8, this is not a case that can succeed by relying upon Article 8 as set out in the Immigration Rules, in Appendix FM in relation to family life, and paragraph 276ADE in relation to private life.

33. I therefore have to decide whether Article 8 should be considered outside the Immigration Rules. In my view where the provisions in the Immigration Rules

permit consideration of exceptional circumstances and other factors, then the Immigration Rules can be regarded as being a complete code and there will usually be no need to consider Article 8 directly. This is because the same outcome would derive from the application of the Immigration Rules as under Article 8. Where the Immigration Rules contain no such provisions, then they are not a complete code, and Article 8 will need to be considered directly. I set out below paragraph 135 of MM, referred to by Mr Dhanji, which summarises the position;

> "135. Where the relevant group of IRs, (Immigration rules) upon their proper construction, provide a 'complete code' for dealing with a person's Convention rights in the context of a particular IR or statutory provision, such as in the case of 'foreign criminals,' then the balancing exercise and the way the various factors are to be taken into account in an individual case must be done in accordance with that code, although references to 'exceptional circumstances' in the code will nonetheless entail a proportionality exercise. But if the relevant group of IRs is not such a 'complete code' then the proportionality test will be more at large, albeit guided by the Huang test and UK and Strasbourg case law."

34. There has been no proportionality exercise under the Immigration Rules, and the Appellant cannot rely upon section EX.1 of Appendix FM, and therefore I find it appropriate to consider Article 8 outside the rules.

35. I therefore follow the step-by-step approach advocated by the House of Lords in Razgar [2004] UKHL 27 which involves answering the following questions;

> "(1) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?
>
> (2) If so, will such interference have consequences of such gravity as potentially to engage the operation of Article 8?
>
> (3) If so, is such interference in accordance with the law?
>
> (4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?
>
> (5) If so, is such interference proportionate to the legitimate public end sought to be achieved?"

36. If I find that the Appellant has established family life, the decision in Beoku-Betts [2008] UKHL 39 means that I have to consider the family life of the Sponsor as well as the Claimant.

37. I am satisfied that the parties have established a genuine family life, and that refusal of entry clearance is an interference with that family life, which engages Article 8.

38. I find that the decision is in accordance with the law because the Claimant cannot satisfy the Immigration Rules in order to be granted entry clearance.

39. I then have to consider whether the decision is necessary and proportionate. I take into account section 117B of the 2002 Act which states that the maintenance of effective immigration controls is in the public interest.

40. It is in the public interest, and in the interests of the economic well-being of the United Kingdom, that individuals seeking to enter this country are able to speak English, and are financially independent.

41. There is some evidence in the Claimant's bundle at page 55 that she has achieved level A1 of the CEFR and I am therefore satisfied that she can speak English.

42. The evidence submitted does not prove that the Claimant would be financially independent.

43. I do not find that the decisions in Chikwamba and Hayat assist the Claimant. Although Mr Dhanji referred to these cases very briefly, and I was not referred to any particular provision, the applications which were the subject of appeals in those cases were not entry clearance applications.

44. The position in this appeal is that the Claimant cannot satisfy the requirements of the Immigration Rules. I am asked to state that notwithstanding that the specified evidence has not been provided, the Claimant could be adequately maintained, and therefore notwithstanding the failure to meet the rules, the appeal should be allowed under Article 8.

45. As previously mentioned in this determination, the Supreme Court has indicated that Article 8 is not a general dispensing power. While there is an interference with the family life of the Claimant and Sponsor, by refusal of entry clearance, this is because the Immigration Rules cannot be satisfied. That in my view is not disproportionate.

46. The appropriate course of action would be for the Claimant to make a further application for entry clearance to provide the specified documentation to prove that the financial requirements of the rules can then be met. I do not find that refusal of entry clearance breaches the Claimant's rights under Article 8 and I find that the

weight to be accorded to the maintenance of effective immigration control, outweighs the wishes of the Claimant and Sponsor to live together in the United Kingdom.

Decision

The determination of the First-tier Tribunal contained an error of law and was set aside.

I substitute a fresh decision.

The Claimant's appeal under the Immigration Rules is dismissed.

The Claimant's appeal on human rights grounds is dismissed.

Anonymity

The First-tier Tribunal made no anonymity direction. There has been no request for anonymity and the Upper Tribunal makes no anonymity order.

Signed Date 15th October 2014

Deputy Upper Tribunal Judge M A Hall

Fee Award

The Claimant's appeal is dismissed. There is no fee award.

Signed Date 15th October 2014.

Deputy Upper Tribunal Judge M A Hall