Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/04212/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 11th June 2014	**On 3rd July 2014**

Before

LORD MATTHEWS
SITTING AS A JUDGE OF THE UPPER TRIBUNAL
DEPUTY UPPER TRIBUNAL JUDGE DAVIDGE

Between

ENTRY CLEARANCE OFFICER - CAIRO

Appellant

and

MR FAHMY ELGENDY

Respondent

Representation:

For the Appellant: Mr Tarlow, Senior Home Office Presenting Officer
For the Respondent: Mr P Saini, Counsel

DETERMINATION AND REASONS
EXTEMPORE JUDGMENT

1. We begin by thanking both of the representatives for the helpful way in which they have made their submissions and the positive discursive contributions to the hearing before us today.

2. The Appellant in this appeal was the Respondent at the First-tier Tribunal and for ease of reference we refer to the parties as they were known there.

3. The Respondent appeals the decision of First-tier Tribunal Judge Cohen, promulgated on 10th March 2014, in which the judge allowed the Appellant's appeal against a refusal of entry clearance on Article 8 ECHR grounds.

4. The ground that the judge's decision is flawed for a failure to set out reasoning consistent with the structure approved in the case of Gulshan (Article 8 - new Rules - correct approach) [2013] UKUT 00640, an in country exposition of the relationship between the rules and Article 8, is without force.

5. The First –tier judge noted, when considering the balancing exercise within the approved structure of the case of Razgar v SSHD [2004]UKHL 27, that the Entry Clearance Officer had failed to give any individual consideration to the Article 8 position at all. Mr Tarlow confirmed our understanding that in this case, contrary to the grounds, the judge was entitled to consider Article 8 ECHR provisions because this was an out of country case where the discretion afforded in in-country cases and set out in EX.1 of Appendix FM was not applicable, and so the rules could not be said to provide a comprehensive consideration of all relevant Article 8 factors.

6. The ground relying on the judge's consideration of matters raised in the High Court case of MM and Ors v SSHD [2013] EWHC 1900 (Admin), concerning the ability in an Article 8 ECHR consideration to take account of wider evidence as to finances than set out in the Immigration Rules, is not capable of giving rise to any material error of law. The judge found, contrary to the Entry Clearance officer's view, that the financial requirements of the Rules were met as at the date of application and decision. That is a finding that is not challenged before us and is determinative.

7. The remaining grounds of challenge address the judge's weighing of the balance between the public interest in insisting on compliance with the strict requirements of the Rules as being directed at the legitimate aim of the economic well-being of the country and the interests of the individual family. The grounds assert that the judge, contrary to jurisprudence, allowed the Appellant to circumvent the Rules using Article 8.

8. We have already set out that the Judge found that the financial requirements of the rules were met, and the grounds are simply misconceived in terms of circumvention in that respect. In the context of the Rules that leaves the issue of the English language test certificate. The evidence was that the failure to meet the rule arose because the Appellant had misunderstood the requirements and provided a certificate of competence from a supplier who was not approved. The Judge correctly found that the subsequent provision of a test certificate, from an approved

supplier, obtained, it appears, as soon as reasonably practicable following the refusal and which made the position clear came too late to satisfy the Rule, the requirement being that the certificate must be submitted with the application.

9. Mr Tarlow accepted that it could not be said that the Appellant should not have brought an appeal but should instead have reapplied, with the newly obtained correct certificate, because, as is clear from the matters laid out above, the Respondent's erroneous approach to the financial requirements required judicial correction because otherwise it would have operated to cause a wrongful refusal of the fresh application in any event.

10. We find that, it having been necessary for the judge to correct that position on appeal, it cannot be said, as these grounds assert, that by allowing the appeal on Article 8 grounds the rules are being circumvented. The judge having taken account of the difficulties with the entry clearance decision, which required the Appellant to appeal, noted the significant interference with family life that resulted from the need to embark on the lengthy appeal process. The judge took account of the strength, character and quality of the marital relationship and found that further delay to satisfy what, in this case, amounted to a procedural requirement to make a fresh application abroad, was not, in the context of the particular circumstances of the case, proportionate.

11. Looking at the decision as a whole, we are satisfied that the judge has given ample and sufficient reasons to explain why the particular circumstances of this Appellant and his family amount to exceptional compelling circumstances in the context of Article 8 and we are satisfied that the proportionality balance as drawn has paid due regard both to the public interest in the enforcement of the Immigration Rules and the particular and individual circumstances of the family rights in the context of that public interest. Following correct self-direction, where the balance falls is a finding of fact to be made by the judge hearing the evidence absent perversity. We have found correct self-direction. Mr Tarlow did not press any argument of perversity at the hearing before us and we find no perversity. We pause to note that in the event that we were to be remaking the decision we would have reached the same conclusion on the evidence.

12. Accordingly, we find that there is no material error of law requiring us to set the decision aside and the decision allowing the Appellant's appeal against the refusal of entry clearance stands.

Signed Date

Deputy Upper Tribunal Judge Davidge