First-tier Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/13844/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 13th June 2014	**On 4th July 2014**

Before

JUDGE OF THE FIRST-TIER TRIBUNAL M A HALL

Between

ROBERT ANDREW MARK
(NO ANONYMITY ORDER MADE)

Appellant

and

ENTRY CLEARANCE OFFICER
(POST REFERENCE SHEFO/889)

Respondent

Representation:

For the Appellant: No representation
For the Respondent: Miss A Everett, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

Introduction and Background

1. The Appellant appeals against a determination of Judge of the First-tier Tribunal Horvath (the judge) promulgated on 7th February 2014.

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2. The Appellant is a citizen of the United States of America born 2nd June 1961 who applied for entry clearance to enable him to settle in the United Kingdom with his spouse Helen Mark to whom I shall refer as the Sponsor.

3. The application was made on or about 11th March 2013. The Appellant explained in the application form that his relationship with the Sponsor first began on 5th November 2012, and they first met in person in the United Kingdom on 9th January 2013. They lived together in the United Kingdom from 9th January 2013, before travelling to the United States on 18th February 2013. They married on 7th March 2013 and were living together in the United States when the application for entry clearance was made.

4. The Appellant explained that the Sponsor has two children, both British citizens, born 21st March 2001 and 7th April 2004 respectively.

5. In relation to finance it was explained that the Sponsor received disability living allowance of £72.40 per week, child tax credit of £111.52 per week, incapacity benefit of £226.70 every two weeks, and child benefit of £134.80 every four weeks. The Sponsor lived in private rented accommodation in the United Kingdom, and received council tax benefit which paid the £900 per annum council tax in full, and received housing benefit of £415.40 per calendar month whereas the rent was £470 per month.

6. The Appellant confirmed that he had employment in the United States which was internet based.

7. The application was refused on 17th June 2013. The Respondent referred to section E-ECP2.6, 2.7 and 2.10 of Appendix FM not accepting that the relationship between the Appellant and Sponsor was genuine and subsisting, nor that they had contracted a valid marriage, nor that they intended to live together permanently in the United Kingdom.

8. In giving reasons the Respondent noted that other than a marriage certificate and a small number of photographs, the Appellant had not submitted any supporting evidence to confirm the relationship.

9. In relation to financial requirements, it was noted that the Sponsor claimed to be exempt from meeting the financial requirements set out in section E-ECP3.1 because she received Disability Living Allowance. Although the Sponsor's bank statements had been submitted to prove this, there was no letter from the Department of Work and Pensions (DWP) to confirm that the Sponsor was entitled to and was receiving DLA and this was a requirement of the Rules.

10. In addition there was in any event, even if the Sponsor was exempt from the financial requirements in E-ECP3.1, a requirement that the parties must be able to maintain and accommodate themselves and any dependants adequately in the United Kingdom without recourse to public funds. The Sponsor's bank account on 23rd July 2012 was £44.73 overdrawn, which suggested that the Appellant could not be

adequately financially supported, particularly as the Sponsor also had two children to support.

11. In relation to accommodation the Appellant had stated that he would live with the Sponsor and her children in privately rented accommodation but no tenancy agreement or other documentation had been submitted to confirm the ownership of the property or that he had permission to move in. The Respondent was therefore not satisfied that the Appellant would be adequately accommodated without recourse to public funds as required by E-ECP3.4.

12. The Respondent considered whether the application raised or contained any exceptional circumstances consistent with the right to respect for family life contained in Article 8 of the 1950 European Convention on Human Rights, which might warrant consideration of a grant of entry clearance outside the requirements of the Immigration Rules. The Respondent decided that no exceptional circumstances existed which would merit such consideration.

13. The Appellant appealed. In summary he explained that the guidance for entry clearance for spouses indicated that he only had to provide a marriage certificate and proof that the parties to the marriage had met. This evidence was supplied and the Appellant stated he was enclosing with the appeal form letters written to the Sponsor at their joint address in the United States, insurance documents showing joint insurance, school records listing the Appellant as the stepfather of the Sponsor's children, and an affidavit from a neighbour confirming their cohabitation.

14. A letter from the DWP confirming the Sponsor to be in receipt of DLA was said to be submitted with the appeal, and it was contended that because the Sponsor was exempt from the financial requirements of Appendix FM, there was no requirement that she must still prove that she can adequately maintain the Appellant.

15. The Appellant requested that the Respondent consider his finances and pointed out that they had been keeping two residences over six months, one in the United Kingdom and one in the United States. The Appellant worked for an American company which paid him approximately $30,000 per year, as evidenced by his tax returns. His employment involves working through the internet, and would still be available to him if he lived in the United Kingdom. He was able to undertake his employment when he was in the United Kingdom in January 2013. The Appellant contended that he had savings of approximately £20,000 available.

16. The Appellant confirmed that he had lived at the Sponsor's address in the United Kingdom for six weeks in January and February 2013. The Appellant requested that his appeal be determined on the papers and submitted to the Tribunal an undated letter to be considered by the judge determining the appeal, together with the documents referred to in the letter, numbered 1-17.

17. The appeal was determined on the papers, as requested by the Appellant, by the judge on 24th January 2014. The judge found that he could only take into account documents submitted with the application for entry clearance and that the

Respondent had not had an opportunity to consider the documents submitted by the Appellant direct to the Tribunal. The judge therefore decided that he could not take into account any documents submitted post-application, and he therefore declined to consider the Appellant's documents numbered 1-17. The judge referred to these documents in paragraph 5 of the determination as being a bundle of papers in a blue file, and in paragraph 6 as being the Appellant's appeal bundle without an index or pagination and in loose form contained in a blue folder. The documents are in fact paginated 1-17, and the index is contained within the Appellant's undated letter.

18. The judge found insufficient evidence had been submitted to prove that the Appellant and Sponsor had a genuine and subsisting marriage and intended to live permanently together in the United Kingdom.

19. In relation to the financial requirements the judge did not accept that it had been proved that the Sponsor was exempt from the requirements in E-ECP3.1 but even if she was, it had not been proved adequate maintenance was available. In addition there was no tenancy agreement for the accommodation, and as the Sponsor was entirely reliant on public funds, it could not be said that adequate accommodation was available.

20. The judge found that in relation to the Appellant's finances, he had not submitted satisfactory documentary evidence of his income or of his savings, with this application.

21. In relation to Article 8 of the 1950 European Convention, which relates to family life, the judge made no findings on this, as the Appellant had raised no Article 8 issues.

22. The Appellant applied for permission to appeal contending in summary that the Respondent did have knowledge of the evidence submitted by the Appellant to the Tribunal as a list of the evidence was attached to the appeal form though the documents could not be attached to the appeal form which was lodged on line. The Appellant contended that if it was felt that the Respondent needed further time to consider the documents, the appeal could have been adjourned.

23. The Appellant pointed out the directions he received from the Tribunal indicated that he only had to send evidence to the Tribunal which he had done. The Appellant pointed out that his evidence was indexed and had a listing number on each piece of paper. The Appellant contended that the judge had erred in refusing to consider documents numbered 1-17.

24. Permission to appeal was granted by Judge of the First-tier Tribunal Lambert in the following terms;

    1. The Appellant seeks permission to appeal, in time, against the decision of the First-tier Tribunal (Judge Horvath) who, in a determination promulgated on 7 February 2014 dismissed the Appellant's appeal against the Respondent's decision to refuse entry clearance as a spouse under Appendix FM of the Immigration Rules. The Appellant had requested in the appeal notice that it be determined on the papers.

2. The grounds maintain that the judge should have had regard to the financial documents submitted by the Appellant to the Tribunal for the appeal and received on 20th January 2014. This was within the time limit given to the Appellant in the appeal notice. The judge at paragraph 15 of the determination concluded that because the Entry Clearance Officer had not had sight of these documents and because of the wording of Appendix FM-SE paragraph D(a) as to specified evidence, the judge was precluded from taking those documents into account. He concluded that he could only consider documents submitted with the application. There is an arguable error of law here, since the judge seems to be conflating the issue of what evidence could be considered by the Entry Clearance Officer in deciding the application, with that of the evidence that could be considered by a judge on appeal.

3. The judge concluded in paragraph 17 that the marriage had not been proved to be genuine. The reasoning given is arguably inadequate and the observation that the parties had known each other for 3 months at the date of application is at odds with the evidence that the parties had known each other (via Facebook and phone calls) since 5.11.12 and therefore for just over four months when they married on 7.3.13.

4. Given the judge's acceptance of the receipt of disability living allowance by the Appellant as shown by her bank statements and the fact that she has two children who are almost certainly British citizens, Article 8 was arguably a '**Robinson** obvious' point in this appeal that should have been dealt with by the judge despite the fact that it had not been raised by the Appellant.

5. There are therefore arguable errors of law disclosed by the application.

25. The reference to the Appellant in paragraph 4 should be a reference to the Sponsor.

26. Following the grant of permission, the Respondent lodged a response pursuant to rule 24 of The Tribunal Procedure (Upper Tribunal) Rules 2008 contending that the First-tier Tribunal's determination did not disclose a material error of law and should stand.

27. The Tribunal issued directions that there should be a hearing before the Upper Tribunal to ascertain whether the First-tier Tribunal had erred such that the decision should be set aside.

The Upper Tribunal Hearing

Preliminary Issues

28. There was no attendance by or on behalf of the Appellant. I was satisfied that proper notice of the hearing had been given and having considered rule 38 of the 2008 Procedure Rules, was satisfied that it was in the interests of justice to proceed with the hearing. I took into account that the Appellant had written to the First-tier Tribunal indicating that he was still resident in the United States, and that the Sponsor had been given permission to live with him while they waited for the appeal to be heard.

Error of Law

29. Miss Everett did not rely upon the rule 24 response but conceded that the judge had materially erred by not considering the documents numbered 1-17 which had been submitted by the Appellant to the Tribunal in response to directions.

30. I decided, with respect to the judge, that he had materially erred by declining to take into account the documents submitted by the Appellant and I indicated to Miss Everett that the decision of the First-tier Tribunal was set aside and that I would confirm my reasons in writing.

Re-making the Decision

31. Miss Everett advised me that in view of the evidence contained within the documents numbered 1-17, she conceded that the marriage between the Appellant and Sponsor is subsisting, and the evidence proves that they are validly married and that they intend to live permanently together in the United Kingdom.

32. Miss Everett accepted that adequate accommodation for the parties would have been available at the date of refusal, having taken into account an email from the Sponsor's landlord which is document 13 in the Appellant's bundle.

33. In relation to maintenance Miss Everett advised that she was content for this to be left to the Tribunal to decide, but accepted that evidence had been provided to prove that the Sponsor was in receipt of DLA and therefore was exempt from the income and savings requirements set out in E-ECP3.1 of Appendix FM.

34. In relation to Article 8 Miss Everett had no submissions to make save to observe that this had not been raised by the Appellant as a ground of appeal before the First-tier Tribunal, and the evidence indicated that the family were living together in the United States of America. Therefore Ms Everett submitted Article 8 was not before the Upper Tribunal, but if I decided otherwise, and if the Appellant did not satisfy the Immigration Rules, refusal of entry clearance would be proportionate and would not breach Article 8.

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

My Conclusions and Reasons

36. I remind myself, that in relation to the Immigration Rules, the burden of proof is on the Appellant, and the standard of proof a balance of probabilities.

37. I also remind myself that as this is an appeal arising from an entry clearance application, I must consider the circumstances appertaining at the date of refusal, that being 17 June 2013, and not the circumstances appertaining at the date of the hearing. I can however take into account evidence arising after the date of refusal, if it is relevant to the circumstances appertaining at the date of refusal.

38. I will set out firstly my reasons for finding that the First-tier Tribunal erred in law such that the decision had to be set aside.

39. I respectfully take the view that the judge erred in not taking into account the documents numbered 1-17 submitted to the Tribunal by the Appellant in accordance with directions from the Tribunal dated 22nd November 2013, which stated that any further evidence must be submitted by 20th January 2014.

40. The First-tier Tribunal (the FTT) confirm in paragraph 1 of the determination that the documents were submitted by the deadline date. It is not absolutely clear why in paragraph 15 the FTT found that the Respondent was not afforded the opportunity of considering those documents. When documents are submitted in a paper case by or on behalf of an Appellant, the FTT would normally make the Presenting Officers' Unit aware that the documents had been submitted, so that they could be inspected. It appears to be the case that the Secretary of State has taken a policy decision not to engage with an appeal decided on the papers, and therefore documents submitted on behalf of the Appellant are not inspected.

41. The FTT erred in finding in paragraph 15 of the determination, that only those documents submitted with the application could be taken into account. This would be the case, subject to certain exceptions, if this was an appeal under the points-based system but it is not. Section 85A of the Nationality, Immigration and Asylum Act 2002, sets out the exceptions to the principle that the Tribunal can on an appeal consider evidence about any matter which it thinks relevant to the substance of the decision, including evidence which concerns a matter arising after the date of the decision.

42. As previously mentioned, in an entry clearance appeal, the Tribunal can only consider the circumstances appertaining at the date of refusal, but this does not mean that the documents submitted after the application cannot be considered.

43. The documents numbered 1-17, contained evidence which merited consideration, and should have been considered by the FTT. Failure to consider those documents amounted to a material error of law which is why the decision had to be set aside.

44. In re-making the decision I take into account the concession by Ms Everett, in which it is accepted that the requirements of E-ECP2.6, 2.7 and 2.10 are satisfied. In other words it is accepted that the parties have a genuine and subsisting relationship, a valid marriage, and they intend to live permanently together in the United Kingdom.

45. In my view this is a concession rightly made. The evidence indicates that a valid marriage took place in the United States. I do not find that any cogent reason was given by the Respondent for contending that the marriage was not valid. The parties lived together prior to the marriage, in the United Kingdom, and after the marriage in the United States. There is documentary evidence to confirm that they have joint bank accounts, joint insurance, that they live together in the United States, and that in relation to the Sponsor's daughter who was attending school in the United States, both the Appellant and Sponsor are listed as her parents.

46. In relation to accommodation, once again Ms Everett conceded that at the date of refusal adequate accommodation was available. The reason given in the initial refusal notice for not accepting that adequate accommodation was available, was that no tenancy agreement or other documentation had been submitted to confirm the ownership of the property or that the Appellant had permission to move in. The Appellant has provided an email from the landlord of the property dated 12th August 2013, confirming that the property was leased to the Sponsor from December 2011 until August 2013 and that the rent was paid as agreed every calendar month. The Sponsor's bank account proves payment of the rent. The landlord confirms meeting the Appellant in January 2013 and that he stayed with the Sponsor at the property until the end of February 2013.

47. I am satisfied that adequate accommodation was available for the parties at the date of refusal.

48. Turning to the financial requirements I am satisfied that the Sponsor received DLA. This is referred to in E-ECP3.3(a)(i) of Appendix FM and means that the income and savings requirements set out in E-ECP3.1(a) and (b) need not be satisfied. However E-ECP3.3(b) stipulates that;

> (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.

49. There is still therefore a requirement of adequate maintenance and accommodation without recourse to public funds.

50. There is also a requirement that specified evidence must be provided to prove that the Sponsor receives DLA. This is set out in paragraph 12 of Appendix FM-SE, which requires that official documentation from the DWP confirming the entitlement and the amount received must be submitted, together with at least one personal bank statement in the twelve month period prior to the date of application showing payment of the benefit or allowance into the person's account.

51. The Sponsor provided her bank statements covering a period between 23rd July 2012 and 1st August 2012, and 22nd January 2013 to 22nd March 2013. These statements showed weekly payments of DLA of £72.40. In addition the Appellant submitted a letter from the DWP dated 8th March 2013 addressed to the Sponsor, confirming her entitlement to DLA, and the amount received.

52. I am therefore satisfied that the income and savings requirements in E-ECP3.1 need not be met in this case, but there must still be evidence that adequate maintenance is available. In my view this means considering the adequacy of maintenance principles set out in the case law which gave guidance on this issue prior to the changes in the Immigration Rules on 9th July 2012.

53. I have therefore taken into account the guidance given by the Tribunal in KA and Others (Pakistan) [2006] UKAIT 00065. The requirement of adequacy of maintenance

is objective. The level of income and other benefits that would be available if the parties were drawing income support remains the yardstick. The parties must prove that after payment of accommodation costs, they have an income equivalent to what would be received by a family in receipt of income support.

54. At the date of refusal a couple in receipt of income support would receive £112.55 per week, and £65.62 for each dependent child. A couple with two children would therefore receive £243.79 per week, with child benefit of approximately £33.70 giving a total weekly income of £277.49.

55. I find that on a weekly basis the Sponsor's income at the relevant time was £111.52 child tax credit, £72.40 DLA, £110.85 incapacity benefit, and approximately £33.70 child benefit making a total of £328.47 per week.

56. I accept that the Sponsor received council tax benefit and therefore did not have to make those payments, and that the monthly rent on her property is £470 per month. The Sponsor received housing benefit of £415.40 per month and therefore had to contribute £12.60 per week by way of rent. If this amount is deducted from the figure of £328.47, it gives a weekly income of £315.87.

57. This figure exceeds what a family in receipt of income support would receive, which was the figure of £277.49. Therefore on that basis, the Sponsor's income is adequate to maintain the family of four.

58. This does not take into account the Appellant's income that he states he would continue to receive from his employment because his employment is internet based, nor does it take into account the Appellant's savings, which the Appellant had proved by submission of his bank statements covering a period between 18th May 2013 and 19th June 2013 which showed a balance in his account of approximately $18,171.

59. For the reasons given above, I conclude that the issues raised by the Respondent in the refusal notice have been satisfactorily addressed, the Appellant satisfies the requirements of Appendix FM of the Immigration Rules, and on that basis the appeal is allowed.

60. I therefore do not consider it necessary to go on and consider Article 8 of the 1950 Convention, which in any event has not been relied upon as a ground of appeal by the Appellant.

Decision

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

I substitute a fresh decision.

The appeal is allowed under the Immigration Rules.

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 27th June 2014

Judge M A Hall

Judge of the First-tier Tribunal

Fee Award

As the appeal is allowed I have considered whether to make a fee award. I do not consider it appropriate. The evidence which I found to be relevant, was not produced with the application and therefore was not before the initial decision-maker. There is therefore no fee award.

Signed Date 27th June 2014

Judge M A Hall

Judge of the First-tier Tribunal