Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/15410/2013
OA/09434/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 6th August 2014	**On 21st August 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE J G MACDONALD

Between

MRS BUPINDER KAUR
MISS KIRAN KIRAN

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr K Alim, Counsel, instructed by Yaqub & Co Solicitors
For the Respondent: Mr I Jarvis, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellants are nationals of India being a mother and daughter who applied to join their husband/father in the United Kingdom. Their applications were refused

and subsequent appeal dismissed under the Immigration Rules and on human rights grounds by First-tier Tribunal Judge Ross in a determination promulgated on 29th April 2014.

2. Grounds of application were lodged on a number of points. Firstly, it was said that the first Appellant had made an application on 18 October 2012 prior to the second Appellant but had withdrawn that application because she did not pass the English language requirement. As such the judge was wrong to say that there was no application made by the first Appellant until after the refusal of entry clearance to his daughter.

3. Secondly, paragraph D of Appendix FM–SE of the Rules provided the Home Office caseworkers with flexibility to request missing evidence and that should have been done in this case. Finally it was said that the judge had failed to apply relevant case law. A judge of the First-tier Tribunal found all the grounds arguable and granted permission to appeal.

4. The Home Office lodged a Rule 24 notice saying that while it might be demonstrated that the judge was wrong in finding that the first Appellant did not apply for entry clearance until after her daughter it was immaterial in that the judge found that the correct evidence had not been submitted in accordance with Appendix FM -SE.

5. Thus the matter came before me on the above date. For the Appellant Mr Alim submitted that the judge was wrong to have treated Article 8 in the way he had. He had ignored the written and oral evidence of the sponsor and also the written evidence of the Appellant Mrs Kaur at page 8 of the bundle who confirmed their marriage was genuine and subsisting. No findings had been made in regard to that evidence. Rather the judge had wrongly concluded that if the daughter's claim had succeeded the evidence suggested that the mother would have continued to live in India with her other daughters and that she was separated from her husband. Such a finding was not justified and I was invited to find there was a material error of law and to a order a rehearing of the case.

6. Separately, while it was accepted that the Appellants did not satisfy the detailed requirements of Appendix FM–SE the Secretary of State should have exercised her discretion under paragraph FM-SE-D and called for the missing documents to be lodged.

7. For the Home Office it was said that the application did fail under Appendix FM for reasons found by the Secretary of State and subsequently by the judge. I was referred to the particular Rules which applied as at the date of decision (I was very grateful to Mr Jarvis for producing these). In particular what was missing was any documentation from Ralston Tools. The bank statements were inadequate. The evidential flexibility policy did not assist the Appellant in this case. Given that there was nothing compelling about the circumstances of this application and as such the judge did not err in law in his consideration of Article 8 ECHR.

8. I reserved my decision.

Conclusions

9. The difficulty in the judge's determination is his assessment of the Appellant's claim under Article 8 ECHR. He attached particular importance to the fact that the Sponsor's wife had made no application to join him until after the refusal of entry clearance to his daughter on 12th March 2013. In paragraph 11 of his determination he makes it clear that if the daughter's claim had succeeded the evidence suggested that the mother would continue to live in India with her other daughters and that she was separated from her husband. It was said there was no evidence of devotion between husband and wife.

10. However it seems that the factual foundation for this finding is unsound. It is not disputed that the first Appellant made an application on 18 October 2012 (reference number given) and that the second Appellant made her application on 22 November 2012 (reference number given). It does not appear to be disputed that the first Appellant did not continue with the application because she did not pass the English language requirement and that the second Appellant would have been over age if she did not continue.

11. The judge did not consider this explanation. Because there was no evidence of devotion between the husband and wife he concluded that the marriage was not subsisting.

12. It is fair to say that there was a considerable body of evidence before the judge that the marriage was subsisting. By implication he rejects this evidence although he does not say so in terms.

13. The written evidence of the Sponsor says that they have been married since 2nd December 1988 and have lived together as a husband and wife until 2001. They have three children. He has been unable to return to India while his case was going on; however he has always been in contact with his wife and children and provides remittance receipts in support of his claim. He adopted his statement in his oral evidence before the judge. He produced his passport which showed trips to India in November 2011 and 2013. He referred to photographs in the bundle and said he was working. He said that he spoke to his wife every other day. In her statement Mrs Kaur says that the marriage is genuine and subsisting. They have been living together since their marriage in 1988. They have again lived together as husband and wife during his two visits to India as mentioned in his statement. They are in contact with each other by telephone. He supports her financially. She adds that the period of separation did not weaken their relationship but has cemented it. They love each other and the separation period has strengthened their marriage and relationship. They are committed to each other for a life time. She points out that her daughter Kiran has also signed the statement.

14. If all or most of this evidence was being rejected (which by implication it was) then the Appellants were entitled to proper reasons why that is so and none have been given (apart from the erroneous factual finding set out above). As such the judge has erred in law by failing to give adequate reasons on a material matter.

15. The position of the Home Office is that because the Appellants do not qualify under Appendix FM there is nothing compelling about the circumstances in this case and as such the Appellant cannot succeed under Article 8 ECHR and the decision should stand.

16. I do not consider that such a point has been reached. I adopt the approach in R (Nagre) v SSHD [20132] EWHC 720 (Admin**)** and Gulshan (Article 8 – new Rules – correct approach) [2013] 640 (IAC**)** in that it is only after applying the requirements of the Rules and only if there may be arguably good grounds for granting leave to go outside them is it necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under the Rules. In my view this case falls into that category. While there is no near miss argument for the Appellant the judge did make a finding at paragraph 13 in that the P60 produced shows an income of around £24,000 in excess of the sum required under the Immigration Rules. As the Sponsor put in his statement, he has never claimed any benefits and offers evidence that he is able to support the Appellants without recourse to public funds. It seems to me that these are factors which require to be considered under Article 8. I have concluded that because the judge failed to make proper findings as to whether or not the marriage was subsisting at the date of decision that the judge materially erred in law and I agree with Mr Alim that a fresh hearing is required to allow the credibility of parties to be fully assessed.

17. In saying that Mr Alim freely conceded that the Appellant did not meet the terms of Appendix FM. I make no findings on whether or not in terms of Appendix FM-SE-D the Secretary of State was obliged to exercise flexibility and consider documents submitted after the application was made – that will also be a matter for the First tier Tribunal to determine.

18. In all the circumstances the determination of the First-tier Tribunal is set aside in its entirety. No findings of the First-tier Tribunal are to stand. Under Section 12(2)(b)(i) of the 2007 Act and of Practice Statement 7.2 the nature and extent of judicial fact finding necessary for the decision to be remade is such that it is appropriate to remit the case to the First-tier Tribunal.

Decision

19. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

20. I set aside the decision.

21. I remit the case to the First-tier Tribunal.

Signed Date

Deputy Upper Tribunal Judge J G Macdonald