



**Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number OA/16754/2013**

THE IMMIGRATION ACTS

**Heard at Field House
On 9 October 2014**

**Decision & Reasons promulgated
On 18 May 2015**

Before

Deputy Judge of the Upper Tribunal I. A. Lewis

Between

**Entry Clearance Officer,
Tirana**

Appellant

and

**Nexhmie Docaj
(Anonymity order not made)**

Respondent

Representation

For the Appellant: Ms K Pal, Home Office Presenting Officer.

For the Respondent: Ms J Heybroek of Counsel instructed by Marsh & Partners.

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Hanes promulgated on 14 July 2014 allowing Ms Docaj's appeal against the decision of the ECO dated 29 July 2013 to refuse entry clearance as a partner pursuant to section EC-P of Appendix FM of the Immigration Rules.
2. Although before me the ECO is the appellant and Ms Docaj is the respondent, for the sake of consistency with the proceedings before the First-tier Tribunal I shall hereafter refer to Ms Docaj as the Appellant and the ECO as the Respondent.

Background

3. The Appellant is a national of Albania born on 3 February 1965. On 25 August 2004 she was married to Mr Isni Docaj ('the sponsor'). The sponsor has been living in the UK since 2000. On 13 May 2013 the Appellant applied for entry clearance with a view to settlement as the spouse of the sponsor. An application was also made for entry clearance by the couple's adult son, Mr Zamir Docaj (date of birth 25 December 1991) – and who was a second appellant in the proceedings before the First-tier Tribunal. (The appeal in respect of Mr Zamir Docaj was dismissed under the Immigration Rules and on human rights grounds by the First-tier Tribunal and there has been no challenge to that decision. Accordingly the issues before the Upper Tribunal only relate Ms Nexhmie Docaj.)
4. The Appellant's application was refused for reasons set out in a Notice of Immigration Decision dated 29 July 2013, with particular reference to paragraphs E-ECP.2.6, and 2.10 ('relationship requirements') of Appendix FM of the Immigration Rules.
5. The Respondent also addressed the financial requirements of Appendix FM, and noted that the Appellant had failed to provide a tax return for the sponsor and had not provided bank statements covering a sufficient period. The Respondent, however, indicated that no final determination was being made in respect of the financial requirements of the Rules because of outstanding appeals addressing the financial requirements of Appendix FM. (In context this was a reference to the then ongoing appeal of **MM (Lebanon) and other [2014] EWCA Civ 985** which was yet to be heard in the Court of Appeal – in due course heard on 4-5 March 2014 with judgement given on 11 July 2014.) This was set out in the Notice of Immigration Decision in the following terms:

"I am not satisfied you have provided all required evidence to establish your sponsor's employment and income and your application therefore falls to be refused under the Rules because you do not meet the income threshold requirement under Appendix FM and/or the related evidential requirements under Appendix FM-SE. However, no final determination has been made at this stage as to whether you meet the income threshold and/or related evidential requirements. This is because the Courts have not yet decided the outcome of the Secretary of State's appeal in a legal challenge to the income threshold requirement. More information about this is set out on the Home Office website.

If you appeal against this refusal decision, a final determination as to whether you meet the income threshold and/or related evidential requirements under the Rules may be made at a later stage. In making any such determination account would be taken of any further information or

document(s) regarding the income threshold and/or related evidential requirements which you enclosed with your appeal.”

6. The Appellant appealed to the IAC.
7. The First-tier Tribunal Judge was satisfied in respect of the relationship requirements of the Rules finding that the marital relationship between the Appellant and the sponsor was genuine and subsisting and they intended to live together permanently in the UK as husband and wife (determination at paragraph 9).
8. The Judge noted the contingent nature of the Respondent’s decision in respect of the financial requirements (determination at paragraph 5). The Judge also noted that the Appellant attempted to demonstrate that the financial threshold under the Rules was met by reliance in substantial part on evidence that post-dated the Respondent’s decision. The Judge correctly identified that the jurisdiction of the Tribunal did not permit taking into account matters that did not appertain to the circumstances at the date of the Respondent’s decision. (See determination at paragraph 10.) The Judge concluded that he was “not able to make a finding that the financial requirements of Appendix FM have been met as the evidential requirements of Appendix FM-C have not yet been totally met”.
9. However, the Judge did not dismiss the appeal, but allowed it on the limited basis “*that the decision is not in accordance with the law and awaits a lawful decision*” (paragraph 10–12 and 19).
10. The Respondent sought permission to appeal which was granted by First-tier Tribunal Judge Fisher on 31 July 2014.

Consideration

11. The First-tier Tribunal Judge explained the decision to remit the appeal to the Respondent at paragraph 11 of the determination. It was noted that the contents of the Notice of Immigration Decision reflected the Respondent’s policy of ‘putting on hold’ applications that were being refused solely on the basis of the financial requirements of the Rules pending the litigation in **MM (Lebanon)**. Although the particular application had been refused for other reasons – in respect of the relationship requirements – the Judge having made favourable findings in that regard identified that accordingly the only ‘live’ issue remaining in the appeal related to the financial requirements. Given that there had been no proper decision in this regard by Respondent, the matter effectively remain outstanding before the Respondent.
12. I pause to note that the Respondent’s effective undertaking to take into account any further evidence relating to the financial requirements that might be submitted in the context of an appeal given the contingent nature of the decision, could not in any way extend the jurisdiction of the Tribunal in respect of

admissibility of evidence or the evaluation of the circumstances as they appertained at the date of the Respondent's decision.

13. The Respondent raises the challenge that the Judge having concluded at paragraph 10 that the Appellant did not meet the requirements of Appendix FM should have simply dismissed the appeal outright. It is said that any issue of policy did not arise because the Respondent refused the application on matters other than the financial requirements.
14. I do not accept the Respondent's submission. The Judge clearly and sustainably rejected the basis of the Respondent's refusal. In this context it is important to note that the Respondent did not refuse the application on the basis that the Appellant failed to satisfy the financial requirements of the Rules, but declined to determine that specific issue. Once the Judge had determined the basis of the refusal in the Appellant's favour, the issue of whether the Appellant met the requirements of all of the Rules became key. The Judge appropriately identified that there was no decision made by the Respondent in this regard, and that the Tribunal was limited in its jurisdiction in such a way that it could not undertake the sort of re-evaluation offered by the Respondent in the Notice of Immigration Decision.
15. In such circumstances it seems to me that realistically the only proper, just, and procedurally fair way to determine the appeal was to identify that there was indeed an outstanding issue that required to be decided by the Respondent.
16. I find no error of law in the approach taken by the First-tier Tribunal.

Notice of Decision

17. The decision of the First-tier Tribunal contained no material error of law, and accordingly the decision stands.
18. The appeal of Ms Nexhmie Docaj remains allowed to the limited extent that the decision of the Respondent was not in accordance with the law and the Appellant awaits a lawful decision on her application for entry clearance.
19. No anonymity order is sought or made.

Deputy Judge of the Upper Tribunal I. A. Lewis 10 May 2015