Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/12015/2016

THE IMMIGRATION ACTS

Heard at : Field House	**Decision and Reasons Promulgated**
On : 6 November 2017	**On: 14 November 2017**

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

YA WEN TSAI YA WEN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: [SM] (the Sponsor)
For the Respondent: Ms K Pal, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This appeal comes before me following the grant of permission to appeal on 12 September 2017.

2. The appellant is a national of Taiwan, born on 9 April 1966. On 8 December 2001, in Taiwan, she married [SM], a British citizen who had been residing in Taiwan since 1998.

They had a daughter, [M], born on 13 February 2002, a British citizen. Following the death of [SM]'s mother in the UK the family decided to move to the UK and on 12 February 2016 the appellant applied for entry clearance to the UK as a spouse under Appendix FM of the immigration rules. Her application was considered under paragraph EC-P.1.1 of Appendix FM.

3. The respondent refused the appellant's application on 16 July 2016 on the basis that she was not satisfied that the appellant had provided all the specified evidence required to demonstrate that she met the financial requirements as set out in Appendix FM-SE paragraphs 3 and 4. The respondent considered that the appellant had failed to provide the specified evidence with respect to her employment outside the UK, namely a letter from her current employer in Taiwan, and had failed to provide the required evidence as to the offer of employment in the UK for the sponsor. It was noted that the email produced from the relevant employer cwkproperties did not confirm that the sponsor would start work within 3 months of his return to the UK, as required in paragraph E-ECP.3.2(a) and E-ECC.2.2(a) of Appendix FM. The application was therefore refused under paragraph EC-P.1.1(d) as the appellant failed to meet the requirements of E-ECP.3.1. The appellant's application was also refused under the English language requirement as she was not exempt from the requirement under paragraph E-ECP.4.2 and the respondent was not satisfied that the reason given by the appellant for not meeting the requirement, namely the sudden passing of her spouse's mother, was sufficient to justify waiving that requirement.

4. The appellant appealed against that decision. In support of her appeal her husband, [SM], provided some background to the relationship, explaining that their daughter [M] was now fourteen years of age. [SM] referred to evidence he was submitting to meet the requirements of the immigration rules consisting of a letter from his employer in Taiwan and a signed contract of employment for employment in the UK starting within three months of return to the UK. [SM] explained that when his wife made enquiries to the UK Visa Service they informed her that she did not need to do the English language test as her husband and child were British and they had a permanent address in the UK where he had lived previously. They had decided to move to the UK after his mother's death, to be with his father and other family members. He was due to start his employment with CWK in September 2016 and their daughter had been accepted into a school and was also due to start in September 2016. The refusal of entry clearance to his wife would tear apart the family and would be in breach of their Article 8 human rights.

5. The Entry Clearance Manager undertook a review of the decision on 23 August 2016 in light of the grounds of appeal, but maintained the decision and concluded that it did not breach Article 8.

6. In the meantime, and before the appeal was listed for hearing, the appellant and her family travelled to the UK and the appellant sought entry as a visitor. As a national of Taiwan she did not require prior entry clearance. However she was refused entry on the basis that it was not accepted that she was a genuine visitor owing to her previous

unsuccessful application for entry as a spouse. She was returned to Taiwan and the sponsor and their daughter remained in the UK.

7. The appellant's appeal was considered on the papers on 18 November 2016 by First-tier Tribunal Judge Juss. The judge noted the evidence from the sponsor in relation to his employment addressing the requirements of the immigration rules, but considered that the appellant could not succeed because she could not comply with the English language requirement of the immigration rules. He dismissed the appeal as the requirements of the immigration rules could not be met.

8. In seeking permission to appeal to the Upper Tribunal the sponsor, on behalf of the appellant, referred to the fact that he and his daughter had now been separated from his wife for six months.

9. Permission to appeal was refused by the First-tier Tribunal, but then granted by the Upper Tribunal on 12 September 2017 on the grounds that the judge had arguably erred by focussing solely on the appellant's ability to meet the requirements of the immigration rules as a partner without considering her family life.

Appeal Hearing

10. The sponsor, [SM], appeared at the hearing before me without a legal representative. His step-father and daughter [M] were also in attendance.

11. Ms Pal agreed that Judge Juss had erred by failing to make any findings on Article 8 and that the decision needed to be re-made in that respect.

12. There was then some discussion as to how and when the decision on Article 8 should be made. Ms Pal, erring on the side of caution, suggested that the decision be re-made on another day so that the sponsor could produce supporting evidence in an organised bundle rather than the pile of loose documents he had brought with him. She said that she was, however, willing to look through the documents. Having done so she was prepared to concede that there was family life between the appellant and the sponsor and [M] and the only issue, therefore was proportionality. She was prepared to cross-examine the sponsor and, if necessary, [M], but equally she was content for the matter to be adjourned and considered another day with a more organised bundle of documentary evidence from the sponsor. [SM], however, was keen for the matter to be dealt with immediately, stating that he had been waiting so long for the matter to be resolved and that he had had problems getting anyone to consider the matter, and furthermore that he had had to travel from Portsmouth and would find it difficult missing work again to attend a further hearing when he believed that he had all the necessary evidence with him.

13. I decided to proceed with the appeal. Ms Pal cross-examined the sponsor. He said that he had had to apply for his daughter's place at school a year before she could start and when it was time to enrol her his wife came with, on a return ticket, intending to settle [M] in and then return to Taiwan. They did not think there would be a problem as his wife did

not require a visa and had visited the UK several times previously. However she was denied entry and sent straight back to Taiwan without any of her possessions. His wife had tried to pass the English language test but had failed it. He had all the papers with him to prove that. She was able to speak English but found the test stressful. She was suffering from anxiety as a result of the current situation. [SM] said that he last saw his wife in August of this year. [M] was having to go to school by herself, as he had to go to work, whereas in Taiwan her mother had always taken her. She had her GCSEs this year. He would rush home to be there by 4pm in time for when [M] got home from school. [M] spoke to her mother every day or every other day. [SM] said that he was currently self-employed, making roller shutters for doors and doing groundworks and dealing with drainage systems. He and [M] were living in a house owned by his father, where his wife would also live when she came here. His father bought the house when he said that he was returning to the UK. He had the contract for the house with him, as well as the tenancy agreement, as he paid rent to his father, of £500 per month. His father lived in Cornwall in another house that he owned. [SM] said that he returned to the UK on 2 August 2016 and stayed with his step-father at first, but then moved into his father's house in May 2017. They had to wait until [M] finished school in Taiwan before coming here.

14. [SM] said that his wife had visited the UK three times, in 2005, 2010 and 2013. She owned her own property in Taiwan and had £25,000 in her bank account which she had inherited from her father when he died in 2012. She would want to work in the UK, not necessarily for the money, but to keep her occupied. Some of his mother's friends had restaurants and so she could work there. [SM] said that his earnings varied, but October had been a good month and he had earned around £600 a week, although other months he earned £1600. He had had to turn down a lot of work because of having to get home for 4pm for [M] and could earn a lot more if he was able work longer hours. He had worked as an English teacher in Taiwan. His wife used to be a Chinese teacher until she had [M] and she was currently working in a restaurant.

15. In response to my questions, [SM] said that he was not able to take up the offer of employment with CWK because he had to look after [M], although he was able to prove the required income from that employment when his wife made her entry clearance application. [M] had her GSCEs coming up shortly. She was not really coping without her mother although she said she was okay and he was not able to discuss the women's issues with her for which she needed her mother. I asked [SM] what would happen if his wife could not come here and he replied that he did not know as he did not want to take [M] out of school. Also he did not want to leave his father or his step-father who had been married to his mother for 30 years. He was worried about his step-father when his mother died and he wanted to be here to look after him. His mother's death was very unexpected. [SM] said that his wife had tried to take the English language test once so far. It was very expensive to keep taking it. He had always conversed with [M] in English whilst his wife conversed with her in Mandarin. His wife would speak to him in Mandarin whilst he would speak to her in English. She could speak English but she got words mixed up when under pressure, as when doing the test.

16. Ms Pal did not seek to cross-examine [M] and I saw no need myself for her to be questioned, although she was willing to answer questions put to her.

17. Ms Pal then made submissions. She submitted that Judge Juss had made no clear findings on the financial requirements of the immigration rules and that that was still a matter to be decided. She relied on a recent Court of Appeal judgment on Article 8 entry clearance cases which considered the weight to be given where the immigration rules could not be satisfied. The appellant could not meet the requirements of the immigration rules as the financial requirements were not demonstrated and the appellant did not have the English language requirement. There were no sufficiently exceptional circumstances to justify a grant of entry clearance outside the immigration rules. The appellant could not meet the public interest requirements in section 117B(2) and (3) of the Nationality, Immigration and Asylum Act 2002.

18. In response, [SM] said that it was his understanding that the financial requirements had changed and that third-party support was permitted. His father and step-father were able to help them if further financial support was needed.

Consideration and findings

19. As agreed by Ms Pal, the decision in the appellant's appeal is to be re-made with respect to Article 8, Judge Juss having failed to make any findings in that regard. I would agree with Ms Pal, furthermore, that Judge Juss's findings on the financial requirements of the immigration rules were not clear, although it could be said from [6] and [7] that he was satisfied in that regard but dismissed the appeal owing to the appellant's inability to meet the English language requirements of the rules. In any event I have given consideration to the appellant's ability to meet the financial requirements of the immigration rules.

20. However before doing so I have had regard to the question of the relevant date for consideration of the appellant's circumstances. Ms Pal asked me to find that, since this was an Article 8 case, the relevant date was the date of the hearing and she believed that that was clarified in a recent Court of Appeal judgement. Having considered the recent Court of Appeal judgments in Article 8 entry clearance cases I am, however, unable to find any such clarification. It has always been the case that in entry clearance cases, both when considering the immigration rules and Article 8, the relevant date was the date of the decision, as stated in clear terms in Gurung v The Entry Clearance Officer, New Delhi [2016] EWCA Civ 358 at [17] with reference to section 85A(2) of the 2002 Act. It is of course the case, however, that section 85A(2) has since been repealed.

21. In view of the lack of clarity in this respect, and given that I do not consider the different dates would make any material difference in this particular case, I have considered the appellant's circumstances at both points in time.

22. There is a further complication in that it is not entirely clear what documentary evidence was before the entry clearance officer when the decision was made and what evidence was produced thereafter. [SM] assured me that the entry clearance officer had his

contract of employment showing that his employment in the UK with CWK was due to commence within three months of his return to the UK. What is clear from the respondent's appeal bundle is that, at the very least, the entry clearance manager had before him a letter from CWK Electrical Limited confirming the sponsor's employment in the UK commencing in September 2016, which was within three months of his return to the UK, at a salary of £31,200. The entry clearance manager also had a letter from the sponsor's employer in Taiwan confirming his gross annual salary of £21,329, confirmation of the appellant's ownership of property and land in Taiwan and the appellant's bank statement showing savings of TWD 1,001,553, which my own investigation has shown is currently equivalent to £25,320, as consistent with the sponsor's evidence before me. It is unfortunate that the entry clearance manager did not list the documents produced by the appellant with her grounds of appeal but merely referred to "supporting documents". Neither did the entry clearance manager address the documents in any detail, simply confirming that they had been considered. It seems to me, and I find as a fact, that whilst the appellant may not have produced all the required evidence to satisfy the specified evidence requirements in Appendix FM-SE (and that is not entirely clear), she was nevertheless able to show that there were sufficient funds available to her and the sponsor to meet the level of funds required in paragraph E-ECP.3.1 and E-ECP.3.2.

23. Of course the position has now changed, as [SM] was unable to take up the employment offered at CWK, as he had to look after his daughter owing to the absence of the appellant, and therefore could not take up a full-time job. Instead he has been working on a self-employed basis. [SM]'s oral evidence was that he could earn around £600 a week in a good week, but otherwise he averaged at around £1600 a month. When taken together with the evidence of the appellant's savings, it seems to me again that there were sufficient funds to meet the relevant level required under the immigration rules. Clearly the requirements of the rules could not be met, as that was not evidenced by any of the required specified evidence, but it is a matter of weight to be taken into consideration in assessing proportionality under Article 8. I note that Ms Pal's concern was a lack of documentary evidence to support the sponsor's claim to have sufficient funds to meet the required level, but at no point was there any challenge to the sponsor's credibility and his evidence that further third-party funds were available from his father and step-father. I found the sponsor to be entirely credible and have no doubt that the appellant would have access to sufficient funds so as not to require assistance from the state, bearing in mind that [SM] would be able to earn more if his wife were in the UK and he did not need to be home by 4pm for [M] and that the appellant would be able to work in one of his mother's friends' restaurants.

24. I turn, therefore, to the question of proportionality under Article 8, which is the only matter to be determined, Ms Pal having quite properly conceded that family life has been established and that the respondent's decision interferes with that family life being conducted in the UK. I have to give substantial weight to the fact that the appellant cannot meet the requirements of the immigration rules, both in relation to the financial requirements and the English language requirement and to the strong public interest in maintaining an effective immigration control. In cases where the requirements of the

immigration rules cannot be met there have to be truly compelling circumstances justifying a grant of leave outside the immigration rules.

25. It seems to me that this is an unusual case which must be decided very much on its own particular facts and circumstances. It also seems to me that there are a number of considerations which, taken individually, may not assist the appellant in the balancing exercise, but which taken cumulatively lead me to conclude that there are, in this case, particularly compelling circumstances. With regard to the appellant's inability to meet the financial requirements of the immigration rules, I have found that this is based upon a failure to provide specified evidence rather than an inability to meet the level of funds required by the immigration rules. On the evidence available to me, including the sponsor's oral evidence, I find that there are sufficient funds for the appellant to be maintained to the level required in the immigration rules. I find no reason to conclude that the appellant would become a burden on the state, in terms of section 117B(3), although I accept that that in itself is a neutral factor when considering the public interest. As to the English language requirement, the appellant cannot meet that requirement in terms of test results. However I accept [SM]'s evidence that she is able to speak English and that he would always speak to her in English whilst she replied in Mandarin. I take account of the evidence, which I accept, that the appellant made enquiries about the English language requirement and was advised (wrongly) by UK Visas that she did not need to take the test because of her family circumstances. I note that there is evidence to show that she has been attending English language lessons and I accept [SM]'s oral evidence that she is trying hard to pass the required test. I have no doubt at all that, but for the incorrect advice she received, the approach taken to meeting this requirement would, from the start, have been significantly different and the outcome may or may not have been different.

26. A matter of significant weight, albeit not the primary consideration, is the best interests of [M], who experienced the distress of being separated from her mother when the family arrived in the UK and her mother was immediately sent back to Taiwan. [M] has now been apart from her mother for over a year and is in a crucial year in terms of her education, with her GCSEs looming in the summer. I have had regard to a letter of support from her school, dated 26 September 2016, referring to the significant effect her mother's presence would have on helping her achieve the best grades possible and have a happy life in the UK. Whilst [M] has her father in the UK, he is not able to deal with the "women's issues" which arise and he is unable to work the hours he wishes as he has to be home early for [M]'s return from school. Clearly the separation of the family is causing much distress to all parties and in particular to [M] and must inevitably have some impact upon her preparation for and performance during the important period of her GCSE year at school, something that may well have a lasting effect upon the direction of her ongoing education.

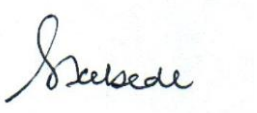
27. Of course there is the possibility of [SM] and [M] returning to Taiwan to join the appellant. However I accept that that would be difficult, given that [M] is in the middle of her GCSE year and that the purpose of relocating to the UK was to be with family members here and to provide support to [SM]'s step-father after the sudden death of his wife.

28. For all of these reasons, and emphasising the unique circumstances of this case, I conclude that the appellant has demonstrated compelling circumstances justifying a grant of entry clearance outside the immigration rules. I conclude that the public interest considerations arising from the appellant's inability to pass an English language test and her failure to provide the specified documentary evidence in relation to the funds available for her maintenance in the UK are outweighed by the various and cumulative other factors including in particular the adequacy of the funds available for the appellant's maintenance, the effect of enforced separation on a sixteen year old marriage, the best interests of a fifteen year old child separated from her mother at a crucial time in her life and the additional other considerations mentioned above.

29. Accordingly, and acknowledging the significant weight to be given to the public interest in maintaining immigration control, I conclude that the refusal of entry clearance to the appellant on the unusual facts of this particular case is disproportionate and in breach of Article 8. The appeal is allowed on Article 8 grounds, outside the immigration rules.

DECISION

30. The making of the decision of the First-tier Tribunal involved an error on a point of law. The decision is set aside and is re-made by allowing the appeal.

Signed 

Upper Tribunal Judge Kebede Dated: 13 November 2017