Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/12231/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 11 January 2018	**On 12 January 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN

Between

ENTRY CLEARANCE OFFICER – SHEFFIELD

Appellant

and

LINDA ANTWI
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr. P. Duffy, Home Office Presenting Officer
For the Respondent: Mr. C. Talacchi, Counsel instructed by Waran & Co Solicitors

DECISION AND REASONS

1. This is an appeal by the Entry Clearance Officer against the decision of First-tier Tribunal Judge M. R. Oliver, promulgated on 11 October 2017, in which he allowed Miss. Antwi's appeal against the Respondent's decision to refuse leave to enter as the spouse of the Sponsor.

2. For the purposes of this decision, I refer to the Entry Clearance Officer as the Respondent, and to Miss. Antwi as the Appellant, reflecting their positions as they were before the First-tier Tribunal.

3. Permission to appeal was granted as follows:

> "The grounds disclose arguable errors of law. The Judge arguably fails to give adequate reasons for concluding that the relationship is a genuine and subsisting one and engage with the Respondent's contentions in the notice of decision given that he identifies that the evidence from the Appellant was not substantial. Further, the Judge arguably fails to properly address the public interest in the light of the finding that the Appellant failed to satisfy the Rules and arguably further failed to consider whether family life could reasonably be continued elsewhere."

4. I heard submissions from both representatives following which I announced that the decision involved the making of a material error of law and would be set aside.

Submissions

5. Mr. Duffy submitted that the Judge had failed to give adequate reasons for his findings. Paragraph [11] was the only paragraph where reasons were given. It was difficult to see the Judge's reasoning for allowing the appeal.

6. Mr. Talacchi submitted that the Sponsor had given oral evidence. He had given evidence in chief and had been cross-examined. The Judge had referred to the onus being on the Appellant and to the balance of probabilities. Taking the decision as a whole, the Judge had accepted the evidence of the Sponsor. He had found the relationship to be genuine and subsisting with reference to the Sponsor's communication with the Appellant. This evidence was consistent with the Sponsor's evidence in his witness statement. He had found that the Sponsor was a credible witness, and therefore the burden of proof had been discharged on the balance of probabilities. He submitted that the Sponsor had impressed the Judge. Reasons had been given. Questions had been asked about the relationship, and the Sponsor had given reasons for why he was not able to visit Ghana more frequently. This was set out at [6].

7. The Sponsor had two children in the United Kingdom which is why he could not return to Ghana. This added to the evidence regarding the genuine and subsisting nature of the relationship. In relation to the evidence under Appendix FM-SE I was referred to paragraphs [11] and [3].

8. In the event that the Judge had erred in failing to give sufficient reasons, this was not material in the context of the case. The Appellant could meet the financial threshold. The only shortfall in the evidence in Appendix FM-SE was that the employers' letters did not show the gross salary. I was referred to pages 16 to 20 of the Appellant's bundle. Mr. Talacchi accepted that the decision did not set this out.

9. The other issue relating to Appendix FM-SE identified in the Respondent's decision was the bank statements, which did not cover a period within 28

days of the application. He submitted that this had been rectified in the evidence provided to the First-tier Tribunal. I was referred to pages 232 to 247 of the bundle. It could be inferred that the defect referred to in [11] was in relation to the employers' letters. He accepted that Appendix FM-SE was not met, but it was solely in respect of the employers' letters. In the context of that failure alone, refusal of the application was disproportionate, and interference in family life was disproportionate.

10. In response Mr. Duffy submitted that the Judge had set out some of the evidence, but it was only in [11] that any findings were made. No reasons, or inadequate reasons, had been given for his findings. If the rules were not met, then the assessment of Article 8 outside the rules was clearly inadequate. Nowhere had the Judge stated how the Appellant did not meet the requirements of the immigration rules. It was necessary to read between the lines, and the decision could not stand on that basis. There was a lack of relevant findings.

Error of law

11. The decision is very short, amounting to only four pages in total. The findings are set out in one paragraph, [11]. This states:

> "No photographic evidence of the appellant's wedding has been provided and the certificate was not in the bundle, but the genuineness of the marriage has not been questioned by the respondent. The public interest in the maintenance of fair but firm immigration is not substantially involved in cases where an appellant satisfies the rules. The reasons why the appellant fails to satisfy the rules are simply a shortfall in the documentation required under appendix FM-SE to show that he meets the financial requirements so that the respondent can be satisfied that he will be able adequately to maintain his spouse on arrival. He has clearly shown that he can. Although the burden of showing that his family life is based on a genuine and subsisting relationship with his wife and the evidence produced in support has not been substantial, he has nevertheless provided sufficient financial support to her ever since the application and I find that the relationship is genuine and subsisting and the interference with their family life is disproportionate."

12. In relation to ground 1, the lack of adequate reasons for the finding that the relationship was genuine and subsisting, the only reason given by the Judge for finding that the relationship is genuine and subsisting is that the Sponsor has provided financial support to the Appellant since the application. It was submitted by Mr. Talacchi that the Judge had found the Sponsor to be a credible witness, and on this basis found the relationship genuine and subsisting, but there is no such finding. The only reason given by the Judge for finding that the relationship is genuine and subsisting is that the Sponsor has financially supported the Appellant since the application was made. He acknowledges that there has not been much evidence provided, and rests his finding simply on the financial support.

13. The Judge refers to the evidence of money transfers at [8]. He notes that these all post-dated the application. It therefore appears from this that there was no evidence of any financial support before him which pre-dated the application. It is on the basis of post-application evidence of financial assistance alone that the Judge has based his finding that the relationship was genuine and subsisting.

14. It was further submitted by Mr. Talacchi that the Judge had taken into account the communication between the Appellant and Sponsor, but there is no reference to this at [11]. The Judge has set out the evidence from [5] to [8]. However, while there is reference to the "frequent telephonic exchanges" at [8], there is no reference to these exchanges at [11], and it cannot be assumed that the Judge has relied on these in his findings, especially as he does not set out at [8] any detail. There is also a reference in [5] to the Sponsor's evidence that they spoke every other day, but the Judge has nowhere stated that he accepted the Sponsor's evidence. Given the fact that he has not referred to the evidence of communication, it appears that he placed no reliance on this evidence when making the finding that the relationship was genuine and subsisting.

15. The Respondent set out numerous reasons in the decision to refuse entry clearance for not being satisfied that the relationship was genuine and subsisting. The evidence as set out by the Judge does not address the issues raised in the Respondent's decision. Reading the decision as a whole it cannot be assumed that the Judge has taken these other factors into account. The Judge has acknowledged that overall the evidence provided was not substantial. I find that the Judge has failed to give adequate reasons for his finding that the relationship is genuine and subsisting.

16. Regarding ground 2, and the consideration of the public interest under Article 8, while it was submitted before me that the only reason the Appellant did not meet Appendix FM-SE was due to the employers' letters not stating the Sponsor's gross salary, it is not clear to me from considering these letters that this is the only information missing. In any event, it was accepted by Mr. Talacchi that the Appellant did not meet the requirements of Appendix FM-SE because these letters did not contain the required information. However, it is not clear from the decision why the Appellant did not meet the requirements of Appendix FM-SE. It is not set out at all in the decision. Although the deficiencies in the employers' letters are referred to in the ECM review, they are not referred to in the Judge's consideration of the ECM review at [4].

17. In relation to the public interest consideration, the Judge has referred to the need for "exceptional circumstances which warrant consideration of the claim outside the rules" [10], yet he has not set any out. He has indicated that the financial requirements have not been met, i.e. the immigration rules are not met, but he has not then done what he states is necessary in [10]. There is no reference in [11] to anything described as

exceptional.

18. The Judge states in [11] that "the public interest in the maintenance of fair but firm immigration is not substantially involved in cases where an appellant satisfies the rules." This is not such a case. The Judge is therefore required to do more to explain why, in the Appellant's case, not satisfying the requirements of the rules nevertheless justifies a grant of entry clearance. He has failed so to do.

19. Further, it was submitted at the hearing in relation to the ability of the Sponsor to go and live in Ghana in order to enjoy family life with the Appellant, that he could not do so as he had two young children in the United Kingdom. They are not referred to at all in paragraph [11]. There is a brief mention of them in paragraph [6]. I make the observation that, if there are children affected by the decision, more has to be done to consider the situation of any children than a passing reference to them in the summary of the evidence.

20. I find that the Judge has erred in failing to give adequate reasons for his finding that the Appellant and Sponsor are in a genuine and subsisting relationship. He has erred in failing to give adequate reasons for why the decision is a disproportionate interference in the Appellant's family life, given his finding that the Appellant did not meet the requirements of the immigration rules.

21. I have taken account of the Practice Statement dated 10 February 2010, paragraph 7.2. This contemplates that an appeal may be remitted to the First-tier Tribunal where the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for the party's case to be put to and considered by the First-tier Tribunal. The findings of the First-tier Tribunal are insufficient for me to remake the appeal. Therefore given the nature and extent of the fact-finding necessary to enable this appeal to be remade, having regard to the overriding objective, I find that it is appropriate to remit this case to the First-tier Tribunal.

Decision

22. The decision of the First-tier Tribunal involves the making of a material error of law, and I set the decision aside.

23. The appeal is remitted to the First-tier Tribunal to be reheard.

24. No anonymity direction is made.

Signed Date 11 January 2018

Deputy Upper Tribunal Judge Chamberlain