Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/04786/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 3 June 2019	**On 11 June 2019**

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR
UPPER TRIBUNAL JUDGE O'CALLAGHAN

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR SAJEEWAN H G WELHENAGAMAGE
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr E Tufan, Senior Home Office Presenting Officer
For the Respondent: Mr J Martin, Counsel, instructed by Nag Law Solicitors

DECISION AND REASONS

Introduction

1. For ease of reference and the sake of continuity, we shall refer to the Appellant in these proceedings as the "Secretary of State" and to Mr Welhenagamage as the Claimant.

2. This is the remaking of the decision in the Claimant's appeal against the Secretary of State's decision of 18 January 2018, refusing his human rights claim made by way of

an application for entry clearance. The claim had been made in order for the Claimant to join his spouse, Mrs Kanchana Nihathamani Jayamanna, a British citizen ("the Sponsor") in the United Kingdom.

3. In refusing the claim, the Secretary of State had relied on a single ground, namely that the financial requirements of Appendix FM to the Immigration Rules ("the Rules") had not been met because of a failure to provide all of the specified evidence mandated by Appendix FM-SE.

4. First-tier Tribunal Judge Easterman allowed the Claimant's appeal against the refusal. He concluded that whilst the Claimant could not satisfy the requirements of the Rules as a result of the absence of specified evidence, the Sponsor had been earning over £20,000 a year and this, together with the existence her daughter (the Claimant's stepdaughter), rendered the decision disproportionate and thus unlawful.

5. By a decision promulgated on 10 April 2019, Judge Norton-Taylor concluded that the First-tier Tribunal had materially erred in law in two respects: first, by failing to take any or any adequate account of the fact that the Claimant could not meet the Rules when assessing the wider Article 8 claim; second, by failing to make findings and reach conclusions on the Sponsor's daughter. The error of law decision is annexed, below.

6. The case was adjourned at the error of law hearing in order that the Claimant could adduce further evidence concerning the Sponsor's income and her daughter. Any new evidence was subject to an application under rule 15(2A) of the Upper Tribunal Procedure Rules 2008. Directions to that effect were issued.

The scope of the remaking decision in this appeal

7. As stated in para. 18 of the error of law decision, the First-tier Tribunal's finding that the Sponsor was, at the time of the hearing in January 2019, earning in excess of £20,000 a year, is preserved.

8. The Secretary of State has always expressly accepted the Claimant's ability to meet the requirements of Appendix FM as regards his relationship with the Sponsor, suitability, and the English language criterion. None of these issues are live.

9. The central issues in this appeal are now:

   a) The Sponsor's earnings and the evidence in support thereof;

   b) The relevance of the earnings to the Article 8 claim;

   c) The circumstances of the Sponsor's daughter and the relevance of these to the Article 8 claim.

The evidence

10. In remaking the decision in this appeal, we have had regard to the following sources of documentary evidence:

a) The Secretary of State's appeal bundle;

b) The Claimant's appeal bundle before the First-tier Tribunal, running to 271 pages;

c) Further evidence from the Claimant contained in a bundle, paginated 1-37, an updated witness statement, dated 30 May 2019, and additional bank statements.

11. A word should be said about the new evidence. Clear directions were set out at the end of the error of law decision requiring any further evidence from either party to be submitted no later than 28 days before the resumed hearing. In fact, the new evidence was received by the Upper Tribunal in two batches: the new bundle on 30 May 2019; and the remaining evidence on 31 May. We appreciate Mr Martin's point that the notice of hearing was only issued on 13 May 2019, but that really does not address the lateness of the evidence. The Claimant and her representatives were on notice of the possibility of submitting further evidence upon receipt of the error of law decision (which was promulgated on 10 April 2019). Therefore, although the period between receipt of the notice of hearing and the resumed hearing itself was relatively short, it is difficult to see why the evidence was not submitted, or at least not collated ready for submission, at an earlier stage.

12. We have admitted the new evidence, perhaps generously and certainly having placed weight on the absence of any objection from Mr Tufan. However, we wish to make it clear that lateness without good explanation is going to prove a much greater obstacle in the way of the admission of further evidence in the future and the Claimant's representatives (indeed all representatives) must take this on board.

13. The Sponsor attended the resumed hearing and gave oral evidence, a full note of which is contained in the record of proceedings. Having adopted her new witness statement, the Sponsor told us that she had not wanted the Claimant to make a fresh application because it might take a long time to be decided. She accepted that the last application had taken approximately three months for a decision. The Sponsor confirmed that her daughter attends school and has no additional needs. We are told that the Sponsor and a daughter had visited Sri Lanka three times in 2018, twice in 2017, and on one occasion in the years 2016 and 2015.

Submissions

14. Mr Tufan submitted that the Claimant had been unable to meet the requirements of Appendix FM-SE in respect of the application made to the Secretary of State. There was no specific challenge to any of the new evidence. Mr Tufan accepted that the Sponsor's earnings remain in excess of the minimum income requirement of £18,600. He acknowledged that if a new application were made, it would be "likely to succeed". However, it was submitted that a fresh application was the correct course to follow. We were referred to paras. 82 and 89 of SS (Congo) [2015] EWCA Civ 387. In the present case, it was said that there were no exceptional circumstances relating either to the Claimant, the Sponsor, or her daughter.

15. Mr Martin relied on the rule 24 response provided in advance of the error of law hearing. He submitted that even on the evidence provided with the original application, there had been a discretion under GEN.3.1 of the Rules. Given the nature of the Sponsor's work at the time, which included being paid in cash, it could be said that exceptional circumstances existed then. On this point, we were referred to MM (Lebanon) [2017] UKSC 10. Mr Martin submitted that the combination of a number of factors disclosed exceptional features in this case which meant that flexibility should be applied in respect of the evidence needed to meet the financial requirements. The features included the passage of time since the original application and the interests of the Sponsor's daughter.

16. Mr Martin then helpfully took us through the new evidence, providing cross-references to show that, his submission, the Claimant could now satisfy all of the requirements set out in Appendix FM-SE. In light of this, it was said that it would be disproportionate to expect the appellant to make a fresh application.

Findings of relevant facts

17. There is no material dispute as to the reliability of the evidence before us. We find the Sponsor and the documents provide a perfectly credible evidential platform. In light of this, we make the following findings of fact.

18. We, like the First-tier Tribunal, find that the Sponsor had previously been earning in excess of the £18,600 threshold. At the time of the entry clearance application, we find that the Sponsor's earnings were derived from a combination of self-employment and employment with P2M Coffee. The evidence shows that in June 2018 the Sponsor took on another job with Coral Bookmakers. We find that the Sponsor has continued with both employments to the present day.

19. With reference to the Sponsor's witness statement and the employer's letter at page 4 of the new bundle, we find that she is currently working as a store manager with P2M Coffee. Although the start date given in the letter is 9 September 2016, the implication in para. 5 of the witness statement is that the store manager role has only been taken on recently. In any event, we find that the gross annual salary is currently £18,720. The earnings from the Coral employment vary on a month to month basis, as can be seen from the payslips in the new bundle: the highest figure is £143.66 (for December 2018), and the lowest is £51.60 (for March 2019).

20. The payslips and bank statements to which we have been referred by Mr Martin clearly establish six months' worth of corresponding earnings and deposits into the Sponsor's bank account, that period running from November 2018 to April 2019. For ease of reference, we set out the relevant page references within the new bundle and additional evidence here:

Payslip	Bank statement
10 (30 November 2018)	33
9 (31 December 2018)	27

8 (31 January 2019)	24
7 (28 February 2019)	21
6 (31 March 2019)	Separate statement attached to witness statement
5 (30 April 2019)	Separate statement attached to witness statement

21. In respect of the employer's letter, dated 23 May 2019, at page 4 the new bundle, we find that it contains all required information about the Sponsor's employment including her position, the annual gross salary, the length of her employment, and the nature of that employment.

22. We turn to the issue of the Sponsor's daughter. We find that she is a British citizen, currently in Year 9 of a secondary education. In light of the Sponsor's oral evidence, we find that the daughter has no additional educational or health difficulties. Helpfully, we have a letter from the daughter at pages 2-3 of the new bundle. We fully accept that she has a good relationship with the Claimant and sees him as a father-figure. That relationship will have been maintained, and even strengthened, by the fact (as we find it to be) of the annual visits made by the Sponsor and her daughter to Sri Lanka since 2015. We fully accept that the daughter misses the Claimant and would clearly like him to be with her and the Sponsor in the United Kingdom.

23. We find that the Sponsor does not have any health issues.

Conclusions

24. Beginning with a consideration of the relevant Rules, it is clear to us, as it was to the First-tier Tribunal, that the Claimant was unable to meet specific requirements of Appendix FM-SE. Primarily, this is on the basis that the relevant bank statements did not show the earnings relied on being deposited. We would add that the employer's letter at page 96 of the Claimants original bundle does not state the Sponsor's gross annual salary, an omission which causes difficulties under para. 2(b)(i) of Appendix FM-SE.

25. Mr Martin has relied on the flexibility inserted into the Rules by GEN.3.1, following MM (Lebanon). In our view, this provision does not assist the Claimant's case. First, this not a case in which alternative sources of income or financial support were being relied upon: it was the Sponsor's earnings, and those alone. Second, whilst we appreciate the practical realities of receiving wages in the form of cash, we do not regard that as constituting, in and of itself, an exceptional or compelling basis requiring a departure from the mandatory evidential requirements in order to avoid unjustifiably harsh consequences for the Claimant, the Sponsor, or her daughter. We arrive at the same conclusion when we take into account all of the additional factors put forward by Mr Martin.

26. Therefore, this is a case in which it falls to us to conduct a wider Article 8 assessment outside the context of the Rules.

27. It is quite clear that there is, and has been at all material times, family life as between the Claimant and the Sponsor and, on the facts of this case, the Claimant his stepdaughter. The Secretary of State has never sought to argue the contrary.

28. The Secretary of State's decision constitutes a sufficiently serious interference with (or to put it another way, a lack of respect for) the Claimant's family life.

29. The decision under appeal was clearly in accordance with the law and made in pursuance of a legitimate aim.

30. The core issues therefore that of proportionality.

31. The best interests of the Sponsor's daughter are a primary consideration. She is clearly well-settled in the country of her birth and residence. Whilst we fully appreciate the fact that she misses the Claimant and would like the family unit to be reunited, there has been no evidence to the effect that her separation from the Claimant has had, or is having, a materially negative impact on her overall well-being. Notwithstanding this, we are prepared to accept that her best interests do lie with having the Claimant in the United Kingdom. However, those best interests are not of a particularly strong nature on the facts of this case.

32. We also take into account the quite understandable fact that the Claimant misses his wife and *vice versa*. The has now been a lengthy separation of the couple, although we do bear in mind the fact that the Sponsor and her daughter have made regular trips back to Sri Lanka over the course of time.

33. The nub of this case relates to our findings on the Sponsor's earnings and the evidence provided in support thereof. On the face of it, a fresh application for entry clearance would be very likely to succeed, an outcome recognised by Mr Tufan (although we acknowledge that he used the term "likely"). Would it be proportionate for the Claimant to make such a fresh application? Or to put it another way, would such a requirement be disproportionate?

34. On the particular facts of this case we conclude that it would not be disproportionate to require the Appellant to make a fresh application for entry clearance. Although we have made findings of fact that clearly provide good support for the prospects of success of an application if one were to be made now, in our view it is not enough to say that this, without more, justifies circumvention of the need to pursue the appropriate channel provided by the Rules. It might be that not very much more is required, but in this case there are no features which can properly be categorised as strong, compelling, compassionate, or suchlike.

35. As we have said previously, the best interests of the Sponsor's daughter are not of a particularly strong nature. We cannot see that any significant detriment would be caused to her by the making of a fresh application. There are no health issues relating

to any of the protagonists in this case. Whilst there has been a lengthy separation of the Claimant from his wife, regular visits have taken place in the interim. We bear in mind the costs of making a new application, but in light of the Sponsor's earnings and the ability to have undertaken the visits to Sri Lanka, it is highly likely that the fees are not prohibitively high. In terms of any potential delay between the making of a new application and a decision upon it, there was nothing unduly protracted about the process when the last application was made and there is no evidence to indicate that significant delays are now occurring.

36. A final factor that we considered is the worry of the Claimant and Sponsor that a fresh application may be refused, leading to potentially protracted appellate proceedings once again. We cannot of course guarantee an outcome. Having said that, we emphasise the following matters:

    a) There has never been any dispute about the Claimant's ability to meet the provisions of Appendix FM, save for the issue of the financial requirements;

    b) Our findings on the Sponsor's earnings and the evidence provided in support thereof represent a clear judicial statement of relevant facts.

37. It would be wholly unsurprising if a copy of our decision were included with any fresh application.

38. As matters stand, the Secretary of State's decision was proportionate and therefore lawful.

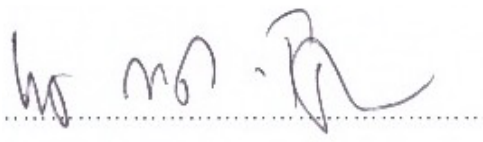
Anonymity

39. We make no anonymity order in this case.

Notice of Decision

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law and it has been set aside.

We remake the decision by dismissing Mr Welhenagamage's appeal.



Signed Date: 6 June 2019

H B Norton-Taylor
Judge of the Upper Tribunal

ANNEX: ERROR OF LAW DECISION

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/04786/2018

THE IMMIGRATION ACTS

Heard at Field House
On 1 April 2019

Decision & Reasons Promulgated

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Before

DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR SAJEEWAN H G WELHENAGAMAGE
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr S Whitwell, Senior Home Office Presenting Officer
For the Respondent: Mr S Martin of Counsel, instructed by Capital Legal Solicitors

DECISION AND REASONS

1. This is a challenge by the Respondent ("the Secretary of State") against the decision of First-tier Tribunal Judge Easterman (the judge), promulgated on 28 January 2019, in which he allowed the appeal of Mr Welhenagamage ("the Claimant"). That appeal had in turn been against the decision of an Entry Clearance Officer, dated 18 January 2018, refusing to issue entry clearance to the Claimant in order to join his wife in the United Kingdom. The sole basis for refusal was the conclusion that the

Claimant had failed to meet the financial requirements of Appendix FM to the Immigration Rules ("the Rules") with particular reference to the specified evidence required under Appendix FM-SE.

The judge's decision

2. The Judge identified the core issue in the appeal at [16], noting that the whole case turned on whether or not the Claimant's wife ("the Sponsor") could show that she was earning, in the manner required by the Rules, enough to meet the minimum income threshold of £18,600.

3. On the basis of the evidence before him the judge concluded that the Sponsor was indeed earning in excess of that threshold (the figure being over £20,000 per annum). He found that much of the Sponsor's income was paid to her in cash and that she had not in fact been depositing all of her wages into her bank account, but had instead kept some back for day-to-day expenses. In light of this, at [34] the judge concluded that the Sponsor (and in turn the Claimant) had been unable to satisfy all of the specific evidential requirements under Appendix FM-SE.

4. The judge then turned his attention to a wider Article 8 assessment. He took into account the fact that the Sponsor met the "financial requirements of the Secretary of State" and the existence of "protected family life" because of the Sponsor's daughter (the Claimant's stepdaughter). The ultimate conclusion was that the refusal of the entry clearance application (which had constituted the human rights claim) was disproportionate.

The grounds of appeal and grant of permission

5. The grounds are succinct. They assert that the judge had effectively allowed the appeal on the basis of a "near-miss" argument, something that was, in light of the relevant law, impermissible.

6. Permission to appeal was granted by First-tier Tribunal Judge Boyes on 19 February 2019.

The hearing before me

7. For the Secretary of State, Mr Whitwell provided a skeleton argument relied on it in combination with the grounds of appeal.

8. Mr Martin relied on his rule 24 response and submitted that the judge had not in fact relied on a "near-miss" argument, but rather had simply applied flexibility to the issue of the relevant financial threshold. He cited the judgment of the Supreme Court in MM (Lebanon) [2017] UKSC 10 and the changes brought about to Appendix FM-SE by the introduction of GEN.3.1 of the Rules. On an overall picture of the evidence, Mr Martin submitted that the judge had been entitled to allow the appeal with reference to the financial issue. It was submitted that the existence of the child

was not necessary for the Claimant to have succeeded, although there had been a good deal of underlying evidence before the judge.

9. In reply, Mr Whitwell emphasised the fact that the Claimant had been unable to satisfy the requirements of Appendix FM-SE. This was not a case in which third party support had been relied on: it was simply the Sponsor's income. The judge had failed to take any or any adequate regard of the failure to meet the Rules when assessing proportionality. In addition Mr Whitwell submitted that there were simply no reasons in respect of the evidence relating to the relevant child.

Decision on error of law

10. I conclude that there are two errors in the judge's decision, both of which are material to the outcome.

11. It is well-settled that the requirements of Appendix FM-SE are mandatory in nature and substantive insofar as an application under the Rules is concerned. It is also the case that a failure to satisfy the relevant Rules is a factor which should be attributed "appropriate" weight in the Secretary of State's favour (see for example [57] of Agyarko [2017] UKSC 11).

12. Once the judge had concluded that the Claimant could not satisfy the requirements of Appendix FM-SE, it was in my view incumbent upon him to factor this in on an express basis as being a matter adverse to the Claimant's Article 8 case outside the context of the Rules. It is not to say that the inability to meet all of the evidential requirements under the Appendix is necessarily fatal to such a claim: it is nonetheless clearly a relevant factor.

13. With respect to the judge, I cannot see anything in [36] and [37] to indicate that he has specifically addressed his mind to the Claimant's failure to meet the Rules in the manner required by the case law. I note that he states in [36] that the Sponsor met "the financial requirements of the Secretary of State", but that was not the case: the requirements of Appendix FM-SE had *not* been met. This is an indication that the significance of the Claimant's failure had not been adequately factored in to the overall balancing exercise.

14. I take on board Mr Martin's point about flexibility, and it is of course a case that the strict requirements of Appendix FM-SE are not necessarily the last word. However, none of the provisions cited by Mr Martin in his rule 24 response were addressed (in form or substance) by the judge and, importantly, he has in any event failed to factor in the impact of the failure to meet the Rules.

15. In respect of the Sponsor's daughter, it is difficult to see that she did not play a material part in the judge's overall consideration. Her presence is mentioned in [36] and [37]. These passages contain the substance of the judge's wider Article 8 assessment. I conclude that it is unrealistic to try and excise this particular factor from the judge's overall considerations. Whatever the underlying evidence may have been in respect of the child, there is simply no assessment of it, and no reasoned

findings or conclusions thereon. In my view it is impossible to simply assume that all the evidence was weighed up, accepted, and that relevant conclusions were drawn on it in light of the applicable legal framework.

16. In light of the above the judge's decision must be set aside.

Disposal

17. Initially it was my view and that of both representatives that I should remake the decision in this appeal based upon the evidence now before me. However, having taken further instructions, Mr Martin informed me that there was additional evidence relating to the Sponsor's income and the circumstances of her daughter.

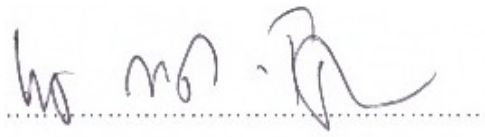
18. Although it should be said that such evidence could and should have been adduced in preparation for the error of law hearing, I am satisfied that it would be appropriate in this case to adjourn the appeal for a resumed hearing before me in due course. In so doing I expressly preserve the judge's finding of fact that the Sponsor was (at least in respect of the date of hearing before him) earning over £20,000 a year.

19. In order to progress this matter I issue directions to the parties, below.

Notice of Decision

The decision of the First-tier Tribunal contains material errors of law and I set it aside.

I adjourn this appeal for a resumed hearing in due course.



Signed Date: 4 April 2019

Deputy Upper Tribunal Judge Norton-Taylor

DIRECTIONS TO THE PARTIES

1. **Any further evidence relied on by either party shall be filed with the Upper Tribunal (with an explanation as to why it was not provided to the First-tier Tribunal or in advance of the error of law hearing) and served on the other side no later than 28 days before the resumed hearing;**

2. **Oral evidence from the Sponsor will be permitted at the resumed hearing, but only if an updated witness statement is provided in accordance with Direction 1**.