UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER) **APPEAL NUMBER: OA/08929/2013**

THE IMMIGRATION ACTS

Heard at: Field House on
On 22 December 2015

Decision and Reasons Promulgated
On 19 January 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE MAILER

Between

ENTRY CLEARANCE OFFICER

Appellant

and

MRS ZUHRA YEQUBI
NO ANONYMITY DIRECTION

Respondent

Representation
For the Appellant: **Mr S. Kotas Senior Home Office Presenting Officer**
For the Respondent: **Mr J Reynolds, counsel, instructed by Stanley and Co, Solicitors**

DECISION AND REASONS

1. I shall refer to the appellant as "the entry clearance officer" and to the respondent as "the claimant."

2. The entry clearance officer appeals against the decision of the First-tier Tribunal Judge promulgated on 12 November 2014, allowing the claimant's appeal under Article 8 of the Human Rights Convention.

3. The claimant appealed the respondent's decision dated 11 March 2013 refusing her application for an entry clearance as a spouse. She is an Afghan national, born on 16 August 1981. Her application to join her sponsor in the UK was refused as she had not provided the sponsor's original wage slips, a letter from the sponsor's employer

and the sponsor's bank statement to show corresponding payments of salary, as required by Appendix FM-SE of the Immigration Rules.

4. The Judge noted at [16] that at the date of the entry clearance officer's decision, the appellant was required under section E-ECP3.1(a) of Appendix FM to produce specified documents in accordance with Appendix FM-SE showing that the sponsor had an annual gross income of £18,600 or that he had sufficient savings to make good any shortfall. That she failed to do with the result that the application failed.

5. The Judge referred to the evidence produced relating to earnings, including his P60 from Katsouris. Those earnings for the tax year amounted to £17,087.39 and were not sufficient to meet the requirements under Appendix FM [19]. He found that in his attempt to make good the shortfall the sponsor could not establish earnings from Cooper Thai by reference to payslips and his bank statements as required under Appendix FM-SE. The appendix did not contain any provision whereby earnings that are paid in cash can be established in some other way. Accordingly, the appeal failed under the immigration rules [20].

6. The Judge noted that there are sound policy reasons for requiring that proper documentary evidence is to be produced as evidence of earnings because of the ease with which false documents including P60s can be obtained by the unscrupulous. However, this consideration was compensated for by the fact that HMRC wrote to the sponsor confirming that its records showed that he was paid £17,087 by Katsouris in the tax year ending 5 April 2013 and £4,498 by Cooper Thai in this tax year, and that he had been employed by Cooper Thai since July 2010. That evidence was at least as compelling as that provided by payslips, bank statements and employment letters. HMRC's letter also showed that tax has been paid on all the sponsor's earnings in the tax year [23].

7. The Judge noted at [24] that Parliament has provided in s.86(6) of the Nationality, Immigration and Asylum Act 2002 that the Tribunal has no jurisdiction to review a refusal to depart from the immigration rules. Article 8 is not a means of circumventing this and does not provide a mechanism for dealing with near misses: Patel v SSHD [2014] IMM AR 456. He referred to the section in Lord Carnwath's judgement in Patel that deals with near misses, where it is emphasised that the Immigration Rules are the starting point for the consideration of Article 8. The balance drawn by the Immigration Rules might be relevant to the consideration of proportionality. Lord Carnwath referred to Huang, where favourable treatment outside the Rules did not turn on how close she came to compliance with paragraph 317 but on the application of the family values which underlay this paragraph and which were also at the heart of Article 8.

8. The Judge found that there was no dispute about the existence of family life between the claimant and her sponsor. The only dispute was whether they are able to maintain themselves. That went to the proportionality of exclusion because of the public interest in ensuring that immigrants do not become a charge on public funds [25].

9. The Judge found that in circumstances where it had been shown by evidence from an independent and impeccable source that the requirements of this public interest are met, albeit not in the manner mandated by Appendix FM-SE, there were

sufficiently compelling reasons for granting leave under Article 8 because it would be disproportionate to refuse admission simply because the requirements of this appendix were not met. He concluded that nothing in the decision in Patel [2014] Imm AR 456 prevented him from reaching such a conclusion [25].

10. On 1 September 2015, the Upper Tribunal granted the entry clearance officer permission to appeal. In granting permission, reference was made to the production of documents by the sponsor at the hearing but that he had failed to provide bank statements covering the same period which appeared to have been received after the hearing. It was not clear if this was in accordance with the direction to this effect or that the documents were served upon the entry clearance officer who had the opportunity to respond. As a general rule, post hearing evidence should not be considered. Having assessed the evidence it was found that the claimant had not shown that she was able to meet the requirements of the rules which is an arguably sustainable decision.

11. The Judge granting permission then considered the matter by reference to Article 8 and noted that the First-tier Tribunal correctly noted that the change in the sponsor's circumstances occurred after the date of decision and was therefore inadmissible. The Judge then arguably erred after reminding himself that Article 8 is not to be used as a means to circumvent the rules by arguably doing precisely that at [25] of the determination.

12. Mr Kotas submitted that the Judge erred in law, having failed to provide adequate reasoning as to why maintenance of the refusal would lead to an unjustifiably harsh outcome. In this case the entry clearance officer applied Appendix FM which is the route to be followed for those seeking leave to enter or remain on the basis of their family life with a British or settled person. Accordingly, it is considered that the circumstances of this case are sufficiently recognised and catered for. Reference was made to decisions such as Nagre which endorsed the secretary of state's guidance on the meaning of exceptional circumstances, namely those where refusal would lead to an unjustifiably harsh outcome.

13. The claimant and her sponsor could continue their family life in Afghanistan if they chose to do so. There was no proper reasoning as to why it would be unjustifiably harsh for the sponsor to return to Afghanistan. Both had family there who could provide assistance and a support network. Article 8 should not be used to circumvent immigration rules.

14. Nor was there any analysis by the Judge as to why the claimant could not submit a further application; there was no reasoning as to why it would be unjustifiably harsh to require her to do so. Mr Kotas referred to the confirmation by Mr Reynolds at the hearing before the Upper Tribunal that the relevant minimum threshold requirements under the immigration rules and Appendix FM-SE with regard to specified documents could now be properly met. Any disruption to family life would be proportionate under the circumstances.

15. He submitted that it therefore cannot be considered to be unjustifiably harsh to require the claimant to submit a further application once it can be demonstrated that the eligibility and financial requirements can be met with the required specified evidence.

16. Mr Kotas further relied on the decision of the Court of Appeal in SSHD v SS (Congo) and others [2015] EWCA Civ 387 and referred in particular to [40] where Lord Justice Richards stated that having reviewed the authorities, the Court considered that the state has a wider margin of appreciation in determining the conditions to be satisfied before leave to enter is granted, by contrast with the position in relation to decisions regarding leave to remain for persons with a (non precarious) family life already established in the UK.

17. The secretary of state has made some use of this wider margin of appreciation by excluding EX.1 as a basis for the grant of leave to enter, although it is available as a basis for the grant of leave to remain. The leave to enter Rules therefore maintain, in general terms, a reasonable relationship with the requirements of Article 8 in the ordinary run of cases.

18. Lord Justice Richards also held that it remains possible to imagine cases where the individual interests at stake are of a particularly pressing nature so that a good claim for leave to enter can be established outside the rules. In the view of their Lordships, the appropriate general formulation for this category is that such cases will arise where an applicant for leave to enter can show that compelling circumstances exist which are not sufficiently recognised under the new rules to require the grant of such leave [40].

19. Lord Justice Richards held that the approach to Article 8 in the light of the Rules in Appendix FM-SE should be the same as in respect of the substantive leave to enter and leave to remain rules in Appendix FM. In other words, the same general position applies, that compelling circumstances will have to apply to justify a grant of leave to enter or leave to remain where the evidence rules are not complied with. That is for two principal reasons set out at [52] and [53]. The evidence rules have the same general objective as the substantive rules, namely to limit the risk that someone is admitted into the UK and then becomes a burden on public resources. Further, enforcement of the evidence rules ensures that everyone applying for leave to enter or leave to remain is treated equally and fairly in relation to the evidential requirements they must satisfy.

20. It was thus held that good reason would need to be shown why a particular applicant was entitled to more preferential treatment with respect to evidence than other applicants would expect to receive under the Rules. Moreover, in relation to the proper administration of immigration controls, weight should also be given to the secretary of state's assessment of the evidential requirements needed to ensure prompt and fair application of the substantive rules. If an applicant says that they should be given more preferential treatment with respect to evidence than the Rules allow for, and more individualised consideration of their case, good reason should therefore be put forward to justify that - [53].

21. Mr Kotas submitted that the finding by the First-tier Tribunal Judge at [25] was “absurd”. There cannot be compelling reasons for granting leave under Article 8 simply because the requirements of the Appendix were not met. This was a case where she could not meet the relevant evidential requirements, and not for any compelling reasons such as the sponsor's ill health or where children are involved, but simply that the Appendix does not contain provisions whereby earnings that are paid in cash can be established in some other way.

22. Mr Kotas finally referred to [57] in SS (Congo), *supra*, where the Court held that the secretary of state is not required to take a speculative risk as to whether the requirements in the rules will in fact be satisfied in the future when deciding what to do. Generally, it is fair that the applicant should wait until circumstances have changed and the requirements in the Rules are satisfied and then apply rather than attempting to jump the queue by asking for preferential treatment outside the rules in advance.

23. On behalf of the claimant, Mr Reynolds submitted that as at the date of hearing, the sponsor had shown by reference to the P60s produced that he earned above the relevant minimum threshold. The hearing of the appeal was on 5 September 2014. The Judge allowed the claimant 21 days after hearing submissions in which to file the sponsor's missing bank statement and other documents relied on. That time was again extended. The claimant's solicitors eventually filed further evidence on 19 September 2014 and 16 October 2014 [15]. It was on that basis that the income threshold had been met.

24. With regard to compelling circumstances, he submitted that since marrying the sponsor the claimant has been separated for a substantial period of time. The sponsor went to Afghanistan in 2012. Mr Reynolds accepted during his submissions that there was no evidence why he could not have met up with the appellant in Pakistan over the intervening period. The application was in fact processed there.

25. He submitted that it is “implicit” from the decision of the First-tier Tribunal Judge that compelling circumstances exist as this is a marriage that was contracted in 2010 and they are still not living together. Although this perhaps should have been “properly spelled out”, such circumstances did exist.

26. Mr Reynolds accepted that the Rules would have to have been satisfied as at the date of decision. The application was made in October 2012.

27. In reply, Mr Kotas submitted that it was irrelevant that the Rules could have been satisfied as at the date of the hearing.

Assessment

28. It is not disputed that the claimant's appeal against the decision of the entry clearance officer to allow her entry clearance to join her sponsor, failed under the Immigration Rules. The Judge found that the sponsor could not establish earnings from Cooper Thai by reference to payslips and his bank statements as required by Appendix FM-SE. The appendix does not contain provisions allowing for earnings paid in cash to be established in some other way.

29. The First-tier Tribunal Judge directed himself in accordance with authority, including Patel at [24]. He concluded that there were sufficiently compelling reasons for granting leave under Article 8 such that it would be disproportionate to refuse admission simply because the requirements of the Appendix were not met.

30. However, the Judge had also earlier correctly noted that the change in the sponsor's circumstances took place after the date of the decision and was therefore not admissible. Having directed himself that Article 8 was not to be used as a means to

circumvent the rules, it appears that the Judge in fact did that in concluding that there were sufficiently compelling reasons for granting leave under Article 8.

31. There were however no good reasons provided to justify that the appellant be given more preferential treatment with respect to evidence than the Rules allow for. Nor were any good reasons advanced justifying a more individualised consideration of her case entitling her 'to jump the queue' by asking for preferential treatment outside the Rules.

32. Nor did the Judge find that it would not be proportionate to expect the claimant to make a further application. Her application failed to comply with the relevant requirements under Appendix FM and FM-SE of the Rules and no compelling circumstances consistent with the approach referred to in Patel were identified as to why the Rules should not be applied in her case in the usual way.

33. The contention by Mr Reynolds that it was implicit in the First-tier Tribunal Judge's decision that their separation for a number of years amounted to sufficiently compelling reasons for granting leave under Article 8, fails to recognise the value to be attached having a clear statement of the standards applicable to everyone and fails to give proper weight to the judgement of the secretary of state as expressed in the Rules, regarding what is needed to meet the public interest which is in issue – SS (Congo) at [55]. That is particularly so having regard to the concession made that the claimant was at the date of hearing capable of meeting the Rules.

34. At the time of the refusal of leave to enter the minimum income requirements under the Rules in respect of the sponsor were not satisfied. Nor were there any compelling circumstances shown which required grant of leave outside the rules. In such a case, the sponsor could have waited to submit a properly supported application for leave to enter when the requirements of the rules could be properly satisfied.

35. I accordingly find that the Judge erred in law in finding that there were compelling circumstances to justify acceptance of the sponsor's income which did not satisfy the requirements in Appendix FM-SE.

36. I accordingly set aside the decision of the First-tier Tribunal and re-make it.

37. I have referred to the contentions as to whether there were sufficiently compelling reasons for granting leave to enter on Article 8 grounds. However, for the reasons already given, I conclude that no such circumstances have been advanced. There is nothing disproportionate in the entry clearance officer's application of the Rules according to their terms in her case.

38. The fact that she may be able to say that this is a case of a “near miss” situation in relation to satisfying the requirements of the Rules, does not amount to compelling circumstances requiring the grant of leave to enter outside the rules. In particular, in giving effect to the need to meet the public interest which is in issue, the requirement that the claimant make an entry clearance application from abroad does not constitute a disproportionate interference with her right to respect for family life.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law. Having set aside the decision aside I remake it and substitute a decision dismissing the claimant's appeal under the Immigration Rules and on Article 8 grounds.

No anonymity direction is made.

Signed Date 15 January 2016

Deputy Upper Tribunal Judge Mailer