Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/06132/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 21st July 2014	**On 24th July 2014**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

ENTRY CLEARANCE OFFICER

Appellant

and

MS BIBI NAZMIN HOSSANY
(ANONYMITY ORDER NOT MADE)

Respondent

Representation:

For the Appellant: Mr Walker, Senior Presenting Officer
For the Respondent: Mr H Kannangara, Counsel instructed by way of direct access

DETERMINATION AND REASONS

1. The appeal comes before the Upper Tribunal following the grant of permission to appeal to the Entry Clearance Officer by the First-tier Tribunal (Judge De Haney) on 21st February 2014. For the ease of reference, I shall continue to refer to the Entry Clearance Officer as the Respondent and to Ms Hossany as the Appellant. No anonymity order was made by the First-tier Tribunal and no request has been made

of the Upper Tribunal either at the hearing that took place on 30th April 2014 or that of the present appeal on 21st July 2014.

2. In a determination promulgated on 2nd May 2014 following a hearing on 30th April, I reached the conclusion after considering the evidence in the appeal and in the light of the submissions made by both representatives that the First-tier Tribunal (Judge Telford) who had allowed the appeal under the Immigration Rules had erred in law in reaching that decision. There is annexed to this determination a copy of that decision which sets out the reasons given for reaching that conclusion. In summary form, it had not been demonstrated that the Appellant could meet the Immigration Rules as a result of her failure to meet the financial requirements that were plainly set out in Appendix FM-SE. The reasons are set out at paragraphs 15-25 of the determination of the Upper Tribunal. As set out there, the judge was required to set out the relevant paragraphs of Appendix FM-SE relating to family members and specified evidence and in particular that of paragraph 7 which related to self-employment at (a)-(h) and to cross reference the evidence provided, including that given orally, to establish whether in fact the correct specified documents had been provided. However, the judge erred in law by not considering those issues in the light of the specified documents which were required to be produced to demonstrate that the financial requirements were met. As stated at [18] had the judge set out the requirements, it would have been plain that the Appellant could not meet the Rules on the documents that had been presented; they are mandatory documents that are required to be produced and there is no discretion to reach the decision that they are not applicable. Thus the Appellant had not provided the specified documents showing the Sponsor's income as a self-employed person as required by paragraph 7 of Appendix FM-SE. At paragraphs 19 to 25, the missing documentation that had not been produced was set out in some particularity by the Upper Tribunal.

3. Thus in those circumstances, I found that the judge had erred in law and that the decision could not stand. In the light of those matters, the decision was remade by dismissing the appeal under the Immigration Rules.

4. The judge, having found that the Appellant could meet the Immigration Rules did not go on to consider Article 8. In those circumstances Mr Kannangara had invited the court to consider Article 8 in the light of the oral evidence of the Sponsor and any further documentation he would wish to provide. In those circumstances, the case was listed as a resumed hearing before me.

5. The case resumed on 21st July 2014. At that hearing Mr Kannangara appeared on behalf of the Appellant and Mr Walker, Senior Presenting Officer, appeared on behalf of the Respondent. For the purposes of the hearing a short bundle had been provided under cover of a letter dated 14th July 2014 consisting of a witness statement from the Sponsor Mr Mohammad Norani Edoo, a letter from his daughter Farheen Edoo, a letter from her school confirming that she was a full-time student and a handwritten letter dated 4th June 2014 from the ex-wife of the Sponsor. No further documentation was provided but the Tribunal had the previous bundle that

had been placed before the First-tier Tribunal under cover of the letter of 16th December 2013 which contained in it a witness statement from the Sponsor.

6. The Tribunal also heard oral evidence from the Sponsor Mr Edoo. He adopted those two witness statements as his evidence-in-chief. No further questions were asked of him. In cross-examination he was asked about the reference in his witness statement to having seen his wife in Mauritius. He confirmed that the last time he went was in May 2013 and that he had not been since because it was too expensive and cost him too much money. He confirmed that they communicated over the phone and had done so even this morning. As to the children, he confirmed that they also communicated with his wife approximately once a week or once every fifteen days but not every day. He confirmed that his ex-wife had sent a letter (exhibited in a bundle). In answer to a question as to who his wife was living with in Mauritius, he confirmed that she was living with his mother, her own sister and also her mother. He stated that she did not live with them all together as one household but had stayed for a week with his mum then rotates with a week with her sister and then also her own mother. In answer to questions relating to his visit to Mauritius in 2013 he confirmed that in that year he had visited for a period of seventeen days; as he was self-employed that was the period that he could take. Previously he said that he had been in 2012 when the application was submitted when he had stayed for a longer period to await the outcome which did not take place until February 2013. That was a longer period but that could not be replicated now as he would not have sufficient funds.

7. No further questions were asked of the Sponsor.

8. I therefore heard submissions from each of the parties. Mr Walker fairly conceded that it was to the Appellant's credit that she returned to Mauritius for entry clearance and that given the circumstances of the Sponsor as a self-employed gas engineer it was plain that any visits would have to be for a short period and that he had been on a visit last year but has not been able to go again due to the expense of it. He acknowledged that there was a relationship between the Appellant and the children from the Sponsor's first marriage and also that he was in contact with his wife every day and that she was living with family members, including her mother and sister and the Sponsor's mother. He further submitted it was clear that she could not satisfy the Immigration Rules at the date of decision but had a strong family life with her husband and the children. He submitted that when the decision was made by the Entry Clearance Officer applying the relevant law, there must be exceptionally strong circumstances as to why it should be allowed outside of the Immigration Rules under Article 8. Whilst the facts were moving they were not compelling to the extent they did not outweigh the decision of the Secretary of State via the Entry Clearance Officer to refuse entry clearance. The Appellant could continue life as before since she had returned to Mauritius and that it would be open for her to make a fresh application given the circumstances of the Sponsor that would on the evidence be successful.

9. Mr Kannangara submitted that the Appellant had failed under the Immigration Rules having failed to provide the specified documents under Appendix FM-SE, however, the documents when seen as a whole did show that the Sponsor had earned the minimum level of income of £18,600. As to Article 8 outside of the Rules, the evidence relating to family life with his wife is set out in the papers. There is a history, namely that she was approximately six years in the UK. She then went to Mauritius in October 2012 to make an application to re-enter as the spouse of the Sponsor. He submitted that whilst there was a delay in submitting the appeal, no point had been taken either before the First-tier Tribunal or the Upper Tribunal and in those circumstances the evidence was accepted as to why there had been a delay. He submitted that the Appellant could satisfy EX.1(b) of insurmountable obstacles as the Sponsor could not return to Mauritius. The reasons given is that he has two children for which he has a strong bond and at the time of decision the eldest child was 17½ (now 19) and the other child a minor. There was a letter from his ex-wife confirming their relationship. If the Sponsor was to return to Mauritius having been a British citizen of twenty years standing and with both children having been born here that would be disproportionate.

10. In consideration of the case of **Gulshan**, there is no test of exceptional circumstances and no criminal element alleged in this case. It is also not the case of a precarious family life as he met his wife in legitimate circumstances. Thus for those reasons, the children have a strong bond with their father and therefore he could not live in Mauritius; that would be disproportionate.

11. When asked to deal with the second submission made by Mr Walker which was that it would be open to the Appellant to apply again for entry clearance, Mr Kannangara submitted that it would be difficult for her to do so and that there had already been disruption of family life and that the Sponsor continued to be employed and maintain his income. The amount of money it would involve and it would be time consuming and thus he invited the court to disregard that as a future possibility. He also submitted that whilst there may be an option for a fresh application the Entry Clearance Officer would look at the previous refusal.

12. At the end of the proceedings I reserved my determination which I now give.

13. Having found that the Appellant could not meet the Immigration Rules, the correct legal test that I must apply is that of **Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 00064 (IAC)** and **R (Nagre) v SSHD [2013] EWHC 720 (Admin)** and the approach endorsed in the Upper Tribunal's decision in **Shahzad [2014] UKUT 85** at paragraph 31 that where an area of the Rules does not have such an express mechanism, the approach in **R (Nagre) v SSHD [2013] EWHC 720 (Admin)** at [29-31] and **Gulshan** (as cited) should be followed, that is, after applying the requirements of the Rules, only if there may be arguably good grounds for granting leave to remain outside them is it necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under them. Thus the relevant jurisprudence makes it clear that the Immigration

Rules should certainly be the starting point in any consideration of the issue of the rights of the Appellant under Article 8 of the ECHR.

14. I make the following findings from the evidence. There is no dispute that the parties are in a genuine relationship and are married. The evidence demonstrates that in October 2011 the parties met in London and lived together following the nikah in November 2011 until she left for Mauritius to apply for entry clearance in or about September 2012. The application was made on 29th October 2012. The Sponsor Mr Edoo accompanied the Appellant when she left for Mauritius and they remained together until the decision of the Entry Clearance Officer was received. Whilst the decision appears to be dated 5th December 2012, from the evidence of Mr Edoo, it appears that it was not served until sometime later in February. Following the service of the decision he returned to the United Kingdom.

15. Since the parties have not lived together, Mr Edoo has been to Mauritius on three occasions (see paragraph 12 of the witness statement); the most recent visit was in May 2013 for a period of seventeen days. Mr Edoo is originally from Mauritius. They have maintained contact with each other by frequent telephone contact.

16. Mr Edoo was previously married and it is plain from the letter written by his ex-wife that notwithstanding their divorce and separation they remain on good terms and indeed the two children of the relationship aged 19 and 18 now (but 17½ and 16 at the date of decision) who reside with his ex-wife also have continued to enjoy a strong relationship with their father, the Sponsor. I am satisfied that he has maintained a good relationship with both of those children and set out in the letter of his ex-wife exhibited in the bundle (see letter dated 4th June 2014). The letter also makes plain that he helps the children with their studies and also the letter from Farheen, who at the date of decision was in full-time education, makes reference to the type of support that he provided to her and her sibling which included regular weekend contact.

17. The Sponsor is a British citizen although he is originally from Mauritius. Whilst Mr Kannangara made submissions that EX.1(b) should be applied this is an out of country entry clearance case to which EX.1 has no application. However, whilst the submissions made relate to the unreasonableness of expecting the Sponsor to leave the United Kingdom and live with his wife in Mauritius, that was not an argument properly advanced by Mr Walker on behalf of the Secretary of State. Indeed if it were I would not have found that it could have succeeded. Such an argument would fail to take into account the effect of disrupting the relationship that the Sponsor has maintained with his two children, both minors at the date of decision, and it would not be, I find, in their best interests for that to occur given the type of relationship that they have with their father; it being one that could not properly be replicated or continued by the modern methods of communication.

18. As set out earlier, the Appellant cannot meet the Immigration Rules and therefore whilst they are the starting point for an Article 8 application to succeed there must be a compelling reason which would mean that the Appellant could succeed outside the

Rules on Article 8 grounds. I remind myself there is no need for exceptionality as Mr Kannangara quite correctly submitted. However, I do not find that it has been demonstrated that there are any compelling circumstances or in the alternative, that the decision to refuse entry clearance was disproportionate. The failure to meet the Immigration Rules because of the stringency of the documents required for those Immigration Rules is not a factor to amount to "compelling circumstances", nor is the submission made by Mr Kannangara that the Sponsor has, in effect, been able to meet the minimum level of income necessary by provision of the documentation when viewed as a whole. Firstly, this is an argument based on the basis of a "near miss" and contrary to the decision in **Miah [2012] EWCA Civ 261** where at [26] it was said "there is no Near-Miss principle applicable to the Immigration Rules". Secondly, such an argument fails to have regard to the requirement of predictability and certainty in the application of the Rules. In considering the issue of proportionality the decision of **Huang [2007] UKHL 11**, referred to the general administrative desirability of applying known Rules if a system of immigration control is to be workable, predictable, consistent and fair as between one applicant and another and that "the damage to good administration and effective control if a system is perceived by applicants internationally to be unduly porous, unpredictable or perfunctory". The legitimate aim under Article 8 in this case is the economic wellbeing of the country expressed as the maintenance of effective immigration control bearing in mind the principle of applying a predictable and consistent application of the Immigration Rules. As identified in the decision of **Shahzad [2014] UKUT 85**, it is necessary to consider not only an assessment at the individual "micro" level but also the "macro level" and that the general aspects of economic wellbeing include the need to limit numbers who have access to public services and the benefits of the NHS and who are able to compete for housing and for employment with those already in the UK (see **FK and OK (Botswana) [2013] EWCA Civ 238**).

19. I have had to consider whether under "compelling circumstances" or under a proportionality assessment it would be open to the Appellant to make a fresh application for entry clearance again. The present circumstances of the Appellant are that she lives with family members including her sister and mother and also the Sponsor's mother. The evidence before me from the Sponsor, which I accept, is that she is alternating between those households. She returned to Mauritius in 2012 to make this application and it is entirely to her credit that she did so to make such an application. However, that does not mean that she should not make an application that complies with the UK Immigration Rules and law. She would be able to continue her family life with the Sponsor as she has done to date by being able to maintain the telephone contact which I am satisfied takes place frequently and also by the medium of visits. I wholly accept that time and money are both limited for the Sponsor, who I believe to be a hardworking man. Indeed I found him a credible witness as indeed the First-tier Tribunal Judge did, but it is the case that since she returned to Mauritius he has been able to visit on three occasions and at the date of the application stayed there for a prolonged period from December until February 2013 and therefore it is open to him to continue family life with his wife in that way and during the period where the entry clearance application is being made.

20. Whilst there would be some delay, the evidence demonstrates that when the application was made on 29th October, the decision came a few months later and therefore any delay would not be for an overly long period and the relationship can be maintained as it is presently.

21. Whilst I also accept that she has a relationship with the children in the UK, it is a relationship that is a limited one and it is not said that they have visited her in Mauritius, however, they have maintained contact by telephone calls which according to the evidence of the Sponsor take place approximately once a week or every fifteen days and there is no reason why that could not continue in any period when the entry clearance application is being made and considered. Mr Kannangara submitted that the Entry Clearance Officer would look at the old refusal, however, I do not think that that is the case. The Entry Clearance Officer will have this determination and that of the previous judge as well as the findings made concerning the genuineness of the relationship, the strength of the family life, the Sponsor's self-employment record and earlier documentation and no doubt will give proper consideration to the application being made. It is for the Appellant and the Sponsor to ensure that they provide all the documents that are necessary and ones that are specified documents with the application. If necessary to obtain advice at the time the application is to be made. If this is done, there is no reason why the application should not be successful. However, that by itself is not in my judgment sufficient to allow the appeal on Article 8 grounds outside the Rules.

Decision

The decision of the First-tier Tribunal is set aside. The decision is remade as follows. The appeal is dismissed under the Immigration Rules. The appeal is dismissed on Article 8 grounds.

Signed Dated

Upper Tribunal Judge Reeds