Upper Tribunal
Immigration and Asylum Chamber **Appeal Numbers: OA/06211/2013**
OA/06212/2013

THE IMMIGRATION ACTS

Heard at Field House	**Promulgated on:**
On 23 July 2013	**On 30 July 2014**

Before

Upper Tribunal Judge Kekić

Between

Bibi Fatima Khan
Meena Khan

Appellant

and

Entry Clearance Officer

Respondent

Determination and Reasons

Representation
For the Appellant: Mr G Davison, Counsel
For the Respondent: Ms J Isherwood, Senior Home Office Presenting Officer

Details of appellant and basis of claim

1. This appeal comes before me following the grant of permission to the respondent on 23 May 2014 by First-tier Tribunal Judge Chohan in respect of

the determination of Immigration Judge Aujla who allowed these entry clearance appeals. The determination was promulgated on 21 March 2014. For convenience, I continue to refer to the applicant as the appellant and to the ECO/Secretary of State as the respondent. No order for anonymity was made by the Tribunal and none has been requested of the Upper Tribunal.

2. The appellants are Afghan nationals but born in Pakistan on 12 December 1990 and 4 October 2012 respectively. They are mother and daughter and seek to join the sponsor, Mohammad Sadiq, husband/father of the appellants. The applications were refused because the financial requirements of the rules were not met.

3. The judge found that the sponsor's income fell some short of the required amount (by some £7000) and that the appellants could not therefore succeed under Appendix FM. He was however persuaded to allow the appeals on Article 8 grounds, finding that *"there were compelling circumstances"* (at paragraph 26). The respondent has challenged this decision and maintains that the judge did not explain what those circumstances were and that he failed to apply the guidance in Gulshan [2013] UKUT 00640 (IAC) and Nagre [2013] EWHC 720 Admin which endorsed the Secretary of State's guidance on the meaning of exceptional circumstances, namely ones where refusals would lead to an unjustifiably harsh outcome. It is also argued that the judge failed to take the child into his calculations when assessing finances.

4. The appeal came before me on 23 July 2013. I heard submissions on whether or not the First-tier Tribunal Judge made an error on a point of law.

5. At the conclusion of the hearing I reserved my decision which I now give with reasons.

Findings and Reasons

6. The facts of the case are not in dispute. The sponsor is an Afghan refugee who came to the UK in 2006. He has a travel document issued on 6 November 2011 and has limited leave until 21 June 2016. He married the appellant in Pakistan on 1 January 2012 so this is a post-flight event. The marriage was arranged and they have one child. The sponsor has been self employed at an internet café since 6 April 2012. The appellants were required to show that his income was at least £22,400 per annum for the last financial year or as an average for two financial years. As no evidence of income was shown prior to April 2012, the applications, which were made on 22 November 2012, were refused on 20 February 2013.

7. It is conceded by the appellants that they cannot meet the requirements of the Immigration Rules.

8. The relevant date for consideration is, as the judge noted, the date of decision for both the immigration and the Article 8 claims.

9. The respondent's case is that the judge failed to identify any exceptional circumstances which would support his decision to find that Article 8 was engaged and that a grant of entry clearance outside the rules was appropriate. Ms Isherwood pointed to the findings made at paragraph 26 and submitted that the facts of this case did not amount to anything compelling and that it was open to the appellants to make a fresh entry clearance application when the sponsor's income met the required sum. Mr Davison, for the appellants, argued that it was for the judge to decide what factors were compelling and that the respondent's challenge was simply a disagreement with the outcome of the appeal.

10. At paragraph 26, the judge sets out what he considers to be the exceptional circumstances not covered by the rules. These are:
    - The sponsor is a recognised refugee
    - He had lived in the UK for five years prior to the grant of status
    - He had done well in his business
    - He earned an income of around £13,400
    - He had a child.

11. In paragraph 24 the judge expressed the view that he did not consider it reasonable to expect the sponsor to put his family life on hold indefinitely "in his particular circumstances". The only circumstances referred to in that paragraph are:
    - The sponsor arrived here in 2006 and was recognised as a refugee in November 2011
    - He got married two months after he was granted status
    - He set up a business five months after he was granted status.

12. I take account of Mr Davison's submission that this judge has "been around" for some time but nevertheless I cannot see how the factors identified above are exceptional. The fact that the sponsor is a refugee is of no relevance because his marriage took place post flight and indeed was arranged after he obtained his status. He married in Pakistan and has visited his wife once since the marriage and so can continue to do so in the future. The setting up of his business is nothing out of the ordinary; financial circumstances are covered by the rules. It is unclear why the timing of the business is of relevance or indeed why the timing of the grant of status is important. The sponsor has a child but so do many other individuals who make such applications.

13. Ms Isherwood is quite right to point out that the judge failed entirely to consider the remedy to the appellants of making a fresh entry clearance application once the financial conditions of the rules were met. On the judge's

own findings, that the business was doing well, there appears to be no reason why such a course of action cannot be followed. This is not a case where, as the judge found, the sponsor's family life, of short duration anyway, would be put on hold "indefinitely".

14. For these reasons, I conclude that the judge erred in law. This is not a disagreement with the decision on the part of the respondent; it is a valid challenge to what is an inadequately reasoned decision. It is open to a judge to give succinct reasons but they have to be substantial enough for the losing party to understand why the appeal was lost. The reasoning in the concluding paragraphs of the determination does not make that clear by any means. The decision as far as it pertains to Article 8, is set aside.

15. With regard to disposal, Ms Isherwood asked that I re-make the decision and dismiss the appeals. Mr Davison initially agreed that I could re-make the decision as the evidence had already all been set out but on instruction from the solicitor then sought a further hearing for up to date oral evidence on visits to be called. Ms Isherwood objected on the basis that such evidence would not be relevant as the date for consideration of the evidence was the date of the decision. Mr Davison did not respond.

16. I have considered whether there would be any purpose served by adjourning this to another hearing but I cannot see that there would, given that the evidence has been put forward and the issue is simply an application of the law to the undisputed facts.

17. I have considered the circumstances of the appellants and the sponsor. I appreciate that they want to live together but the requirements of the Immigration Rules have not been met. I have considered the guidance in Gulshan (Article 8 – new rules – correct approach) Pakistan [2013] UKUT 640 (IAC). Nothing exceptional has been put forward to justify a grant of leave outside the rules. This is a run of the mill situation where the financial requirements have not been met (by a considerable margin) and where a family are therefore kept apart. There is nothing to suggest that the refusal has resulted in such unjustifiably harsh circumstances as to render the decision disproportionate. The appellants and sponsor have been meeting in Pakistan (as is set out in the visa application form). It is not suggested they cannot continue to do so until the requirements can be met or the circumstances change. The appellants of course also have the option of making fresh entry clearance applications. Now that the sponsor's business has had more time to establish itself, it may be that the financial requirements can be met.

Decision

18. The First-tier Tribunal made errors of law which render the determination unsustainable.

19. I remake the decision and dismiss the appeals on all grounds.

Signed:

Dr R Kekić
Judge of the Upper Tribunal

25 July 2013