Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/07025/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 23rd May 2014	**On 3rd June 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE LINDSLEY

Between

ENTRY CLEARANCE OFFICER - ISTANBUL

Appellant

and

MRS NAZILA ATMANI
(NO ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Mr C Avery, Home Office Presenting Officer
For the Respondent: Mr I Khan, Counsel, instructed by Str8T Record Ltd

DETERMINATION AND REASONS

Introduction

1. This is an appeal by the Secretary of State but I shall refer to the parties as they were before the First-tier Tribunal.

2. The appellant is a citizen of Iran born on 6th July 1985. She applied to join her husband Mr Asghar Ali Ismailzadeh, a British Citizen born on 23rd March 1978. Her application for entry clearance was refused on 14th February 2013. The entry clearance officer was not satisfied that the couple's marriage was genuine and subsisting and that they intended to live together permanently as husband and wife; or that the sponsor earned sufficient income as he had failed to provide all the specified evidence. The appellant appealed, and this appeal was dismissed under the Immigration Rules on the basis that the sponsor's full cash pay was not put into his bank account so the evidential requirements under Appendix FM could not be met, but was allowed on Article 8 ECHR grounds by Judge of the First-tier Tribunal Munro in a determination promulgated on the 24th January 2014.

3. Permission to appeal was granted to the Secretary of State by Judge of the First-tier Tribunal PJM Hollingworth on the basis that it was arguable that the First-tier judge had erred in law in failing to establish that the criteria for passing the gateway between the Immigration Rules and Article 8 ECHR.

4. The matter came before me to determine whether the First-tier Tribunal had erred in law.

Submissions – Error of Law

5. Mr Avery relied upon the grounds of appeal. The grounds argue that Judge Munro had allowed the appeal on the basis of a "near-miss" argument. At paragraph 24 it was said that the only requirement of the Immigration Rules that had not been met was the failure to pay all the sponsor's wages into his bank account. Other evidence showed that he could support his wife, and thus given the genuine spousal relationship the decision was disproportionate under Article 8 ECHR. The cases of Patel & Ors v SSHD [2013] UKSC 72 and Nasim and Others (Article 8) [2014] UKUT 00025 held that Article 8 ECHR is not a general dispensing power. He added that Judge Munro had not followed Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 00640 in failing to consider whether there were compelling circumstances not recognised by the Immigration Rules before going on to consider Article 8 ECHR outside of the Immigration Rules.

6. Mr Khan argued that it was correct for Judge Munro to record that the appellant had not met the Immigration Rules, and simply so doing was not making a near-miss argument. He argued that the authorities of Gulshan and R (on the application of) Nagre v SSHD were from the Upper Tribunal and Administrative Court and were not therefore to be given as much weight as those of Patel, Huang & Kashmiri v SSHD [2007] UKHL 11 and MF (Nigeria) v SSHD [2013] EWCA Civ 1192 which were from the Court of Appeal, House of Lords and Supreme Court. Judge Munro was simply relying at paragraph 24 of her determination on the principle set out at paragraph 23 of that document (and derived from R (on the

application of MM) v SSHD [2013] EWHC 1900) that the Immigration Rules could themselves be disproportionate interference with a genuine spousal relationship.

7. I found that Judge Munro had erred in law for the reasons set out below. I set aside her decision under Article 8 ECHR. I asked the parties for submissions on re-making the appeal.

Evidence and Submissions – Re-making

8. Mr Khan tried to raise a cross-appeal relating to whether the Secretary of State had erred in law in failing to consider use of discretion at D (d) of Appendix FM-SE but I refused to allow this to be done as it had not been raised at an earlier point in proceedings as should have happened in accordance with the Procedure Rules.

9. Mr Khan then asked the sponsor to adopt his statement which was before the First-tier Tribunal, which he did confirming it to be true and correct and that there had been no material change in circumstances since the statement was made. Neither Mr Khan nor Mr Avery wished to ask any further questions. In response to questions from me the sponsor explained that he did not wish to have family life with his wife in Iran because he had lived in the UK for ten years; he had a job and friends in this country and would find it difficult to live in Iran again. He confirmed he had only one bank account for his personal and business affairs, which was his Halifax one for which there were statements in the bundle.

10. Mr Avery submitted the appellant's appeal had failed under Appendix FM of the Immigration Rules and therefore it was necessary to look to see if there were any arguably good grounds to grant leave outside of the Immigration Rules in accordance with Gulshan, and in this case there were none. The sponsor in this case could relocate to Iran, see particularly the finding by Judge Munro under the Immigration Rules at paragraph 20 of her determination that there was no evidence before her that there were insurmountable obstacles to the sponsor relocating to Iran. Even if the matter was considered outside of the Immigration Rules the decision was proportionate as the appellant had not succeeded under the Rules, and he could apply in another year if he started paying his full cash salary into his bank account before spending any money.

11. Mr Khan submitted that the appeal should be allowed. It was permissible to look at Article 8 ECHR generally because the outcome under the Immigration Rules was unjustifiably harsh because the Rules did not cater for those who were paid in cash, and because re-applying was hugely expensive for this appellant as was set out in the sponsor's statement. As Mr Justice Blake had said in MM a British Citizen should be able to live in his country without let or hindrance, and in this case the Immigration Rules were a disproportionate interference with the right to respect for family life, as other less intrusive responses were available and had not been considered. The decision was disproportionate because the sponsor was a British citizen, because he had lived in the UK for ten years; because he had built a business here; because reapplying for a visa under the Immigration Rules would

take a year and be very expensive and because the sponsor had sufficient income to support the appellant and she was a qualified accountant who would also contribute to the UK economy.

12. At the end of the hearing I reserved my determination.

Conclusions: Error of Law

13. I find that Judge Munro erred in law in her determination of the matter under Article 8 ECHR. I find that whilst she made no reference to Gulshan she did identify matters which she found justified looking outside of the Immigration Rules at Article 8 ECHR including the finding that the Rules did not deal with persons paid in cash in an equitable fashion. However she then, at paragraph 24 of her determination, either failed to give any reasons beyond the appellant and sponsor having a genuine spousal relationship to explain why the decision to refuse entry clearance was disproportionate; or employed a "near-miss" argument, contrary to what is said by the Supreme Court in Patel, finding that due to the appellant only failing for lack of one piece of evidence under Appendix FM-SE (payments in of the sponsor's salary into his bank statement corresponding to payslips/ profit from his business) she was entitled to succeed under Article 8 ECHR .

Conclusions: Re-making

14. In accordance with Gulshan, and in accordance with the submissions for the appellant, I find that there are good grounds to consider whether the appellant's refusal of admission was a breach of the UK's obligations under the wider law relating to Article 8 ECHR as there are features (identified below) which are not sufficiently recognised by the Immigration Rules which would make a failure to do so unjustifiably harsh.

15. I find that the appellant and sponsor have family life together, and had this at the time of decision in January 2013. They are lawfully married, and in determining the appeal under the Immigration Rules the First-tier Tribunal found that they have a genuine relationship and intend to live together permanently as husband and wife. The sponsor has attested to this in his statement before me. I find that the appellant and sponsor have kept in touch since their marriage on 20th June 2012 by telephone, text, email, Skype and four visits by the sponsor since the instigation of their relationship in 2009 (documentary evidence of which is also in the appellant's bundle along with photographs of the appellant and sponsor together), and are both distressed at their separation.

16. I find that the refusal of entry clearance interferes with the family life of the appellant and sponsor, and that the interference is of sufficient gravity to engage Article 8 ECHR. In this connection I note what was said by the Supreme Court in Quila v SSHD [2011] UKSC 45 by Lord Wilson at paragraph 43 about not

following the old authority of Abdulaziz v UK 7 EHRR 471, and that issues of the possible reasonableness of family life being exercised elsewhere should be dealt with in consideration of whether the decision to refuse entry clearance is justified. The Supreme Court also clarified that no difference should be made between family life in an entry case as opposed to an expulsion case, as there was no different standard in relation to positive or negative obligations.

17. As the appellant cannot satisfy the Immigration Rules under Appendix FM-SE the decision to refuse entry clearance is in accordance with the law. The respondent justifies the interference with the appellant's family life in the interests of the maintenance of economic order by applying a consistent system of immigration control. In the evidence before me there is no suggestion that the appellant has a criminal record, or is otherwise not of good character.

18. I have finally to consider whether the significant interference with the appellant's family life rights that refusal of entry clearance represents is justified as proportionate, and a fair balance between the competing considerations of the appellant's family life and the respondent's desire to maintain economic order by applying a consistent system of immigration control.

19. In favour of the respondent is the fact that weight must be given to the refusal under the Immigration Rules as special consideration has been given to making these compliant with the UK's obligations under Article 8 ECHR. I also note that a narrow failure to meet the Rules, in this case by virtue of having insufficient documentation, is not to be seen as a matter which can be cured in an Article 8 ECHR balancing exercise, see Patel and others v SSHD [2013] UKSC 72. I therefore give no weight to any argument that a "near miss" under the Immigration Rules assists the appellant to succeed in this balancing exercise. This appeal can only succeed, as was said in Gulshan, if refusal of entry clearance would: "result in unjustifiably harsh consequences for the individual or their family such that refusal of the application would not be proportionate." In this case I also consider the fact that the sponsor is of Iranian origin and speaks Kurdish, and so would find relocation to Iran easier by reason of his background, as a matter supportive of the respondent's decision.

20. In favour of the appellant is the fact that the sponsor cannot be reasonably be expected to relocate to Iran by virtue of his British citizenship. In Sanade & Others (British Children -Zambrano – Dereci) [2012] UKUT 48 at point 5 of the head note it says as follows: "Case C-34/09 Ruiz Zambrano now makes it clear that where the child or indeed the remaining spouse is a British citizen and therefore a citizen of the European Union, as a matter of EU law it is not possible to require the family as a unit to relocate outside of the European Union or for the Secretary of State to submit that it would be reasonable for them to do so." Further at the time of decision the sponsor rented his own home in the UK (verified by the tenancy agreement); and is a self-employed taxi driver (verified by private hire and Hackney carriage driver licence, documents from Andicars

Ltd, letters from his chartered accountant and HMRC documents) and is employed by Agir (UK) Ltd a restaurant (see P60 for year ending April 2013 and payslips). The sponsor also has friends in the UK, and was settled in the UK way of life having lived here for seven years at the time of decision. I find what was said by Blake J in MM, agreeing with Sedley LJ, relevant to this appeal: "in the generality of ordinary cases, the abandonment of the citizen's right of residence in order to enjoy family life with his or her spouse is an unacceptable choice, and a disproportionately high price to pay for choosing a foreign spouse in an increasingly international world."

21. I am also more than satisfied that at the time of decision the sponsor had a gross annual income from his work of £36,223 (which is set out in his letter from his chartered accountant), plus additional gross annual income from paid employment of £7800(see P60 for year ending April 2013). I accept that his Halifax bank statements do not show regular payments of the sponsor's wages/income corresponding to his payslips. However the statements show very many payments in of cash, for instance in the month of the decision his account received £1790 in cash, and the sponsor is clearly paid in cash for both for his self-employed work as a taxi driver and his employed work (this is set out on the payslips). Of course he may well have chosen not to pay all or any of his wages/income into his account on the day these were received or thereafter as money could be used for living and work expenses before being paid into the bank. He has supplied a lot of documentary evidence supporting his claimed income and given credible evidence to the Tribunal on this issue. On the balance of probabilities I am satisfied that he has earned the gross amounts that he claims, and that in terms of net monthly income as a taxi driver at the time of decision he had £1642 (£19,700 net profit from his accounts and HMRC documents divided by 12) and a net amount of £650 per month (yearly amount on P60 ending April 2013 divided by 12) from his employed work. This total of £2292 per month less £550 in rent and £58 in council tax, i.e. £1684, compares very favourably to the amount a couple would have received per week on income support of £482.95 a month at the time of decision(based on a weekly amount of £111.45).

22. I find that on the balance of probabilities I am more than satisfied at the time of decision the appellant could have been more than adequately financially support by the sponsor. I therefore find that the legitimate aim of the Secretary of State to ensure that that families of migrants do not live at or near subsistence level and are not perceived to be a long term drain on the public purse in the form of increased access to state benefits is met by the appellant in this case. I am also satisfied that more than adequate accommodation was available to her in the one bedroom flat rented by the sponsor, as attested to by the tenancy agreement and the letter from Aharva & Co LLP Solicitors inspecting his property.

23. The sponsor has given detailed evidence about the costs of the appellant in applying and re-applying for another visa. The visa application process has already cost him £2500. He estimates the cost of a further application to be £2000. He has broken this down into costs of travel to Turkey (as there is no visa office in Iran), visa application fee, hotel stay, food and other incidental expenses, and I accept that this is a reasonable estimated budget. The sponsor is able to provide financially for himself and the appellant in a more than adequate way but he is not a very wealthy man and whilst his Halifax bank account is normally in credit he has no separate savings account. GR v Netherlands 22251/07 judgement dated 10th April finds that on the facts of that case there was a breach of Article 13 ECHR because excessive charges prevented the applicant from seeking recognition of his arguable claim under Article 8 of the Convention. I find that this must be a consideration in the case before me. Further the appellant could not immediately re-apply. He would have to wait 12 months during which time he paid in his gross income in its entirety into his bank account so he was able to meet the requirements of the Immigration Rules at Appendix FM-SE 7(f). 2012. In these circumstances I do not find it an appropriate or proportionate response to the appellant's Article 8 ECHR claim for entry to suggest that she should re-apply under the Immigration Rules.

24. When all factors are considered I find that the decision of the respondent was not proportionate to the legitimate aim given the sponsor's citizenship and integration and ties in the UK, the genuine relationship between the appellant and sponsor, the appellant's adequate ability in the English language, the more than adequate provision in terms of accommodation and financial support in the UK for the appellant and the expense and delays of re-applying under the Immigration Rules.

25. I find that there have been no significant changes in the appellant or sponsor's circumstances since the date of decision so refusal of entry clearance continues to be a breach of the appellant and sponsor's Article 8 ECHR rights.

Decision

26. The decision of the First-tier Tribunal involved the making of an error on a point of law in relation to Article 8 ECHR.

27. The decision of the First-tier Tribunal allowing the appeal under Article 8 ECHR is set aside.

28. The decision is re-made allowing the appeal under Article 8 of the ECHR.

Deputy Upper Tribunal Judge Lindsley

3rd June 2014

Fee Award

In the light of my decision to re-make the decision in the appeal by allowing it, I have considered whether to make a fee award (rule 23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007). I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011). I note that a fee order was made by the Judge of the First-tier Tribunal, and no further submissions were made about this by either party, and therefore that it is appropriate to re-make the same full fee-award.

Deputy Upper Tribunal Judge Lindsley
3rd June 2014