Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/13816/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 17 November 2014	**On 02 January 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE RIMINGTON

Between

ENTRY CLEARANCE OFFICER

Appellant

and

MRS JAMUNA KANAKARATHINAM

Respondent

Representation:

For the Appellant: Mr E Tufan, Home Office Presenting Officer
For the Respondent: Mr R Singer of Counsel instructed by Sriharans Solicitors

DECISION AND REASONS

1. The application for permission to appeal was made by the Entry Clearance Officer, nevertheless I shall refer to the parties as they were described before the First-tier Tribunal, that is Mrs Kanakarathinam as the appellant and the Entry Clearance Officer as the respondent.

2. The appellant is a citizen of Sri Lanka, born on 3 June 1987 and she made an application on 13 February 2013 for a spousal visa further to Appendix FM of the Immigration Rules.

3. This application was refused on 28 May 2013 with an Entry Clearance Manager decision of 6 December 2013. The refusal was based on the genuineness of the relationship further to paragraph EC-P.1.1(d) of Appendix FM of the Immigration Rules. In addition it was stated by the Entry Clearance Officer that the appellant had not provided specified documents as evidence of the sponsor's gross income from their employment, such as a letter from the employer containing all the specified information, specifically confirmation as to the nature of the sponsor's employment such as whether it was a permanent contract, wage slips for the six months prior to the application, the most recent of which should be dated within 28 days of the application (the most recent of those was 26 January 2013) and also bank statements for the same period as the wage slips showing deposits consistent with the net salary shown on the wage slips submitted.

4. The appellant had submitted bank statements for Sponsor's Lloyds TSB covering the period 7 June 2012 to 8 January 2013 only, and none of the net salary figures shown on the payslips submitted were reflected in the bank statements submitted. Nor were there deposits to the account around the dates shown on her wage slips broadly consistent with the sums detailed on her wage slips suggesting a significant portion of the wages had been deposited to the account. These documents were specified as being required in the Immigration Rules at Appendix FM-SE and should be provided. The application was therefore refused under EC-P.1.1(d) of Appendix FM of the Immigration Rules E-ECP3.1.

5. The Entry Clearance Officer was not satisfied that the appellant had satisfactory accommodation.

6. Application for permission to appeal was made by the respondent on the basis that First-tier Tribunal Judge Finch had allowed the appeal on the basis of Article 8 but had failed to undertake any assessment with regards to Article 8. The Rules and specified evidence were comprehensively set out in Appendix FM-SE to the Immigration Rules and covered the periods and the formats that the evidence should take. The Tribunal had no regard to this at paragraph 15 of the determination and the Tribunal had failed to comply with the Immigration Rules and the findings were unsustainable. For example wage slips covering a period of six months at the date of application should be provided and personal bank statements corresponding to the same period as the wage slips at paragraph 2(a) showing the salary had been paid into the account in the name of the person or their partner jointly.

7. The appellant could not meet the requirements of Appendix FM-SE for the six month period prior to the date of the application as the sponsor's wages were not shown to be deposited into his bank account. These were mandatory requirements and must be fulfilled and are clearly stipulated.

8. The appellant could not succeed under the Rules.

9. Permission to appeal was granted by First-tier Tribunal Judge Parkes who acknowledged that the judge found the marriage was genuine and subsisting and the

appellant and sponsor intended to live with each other but the judge had not regard to paragraph 2 of Appendix FM-SE and the evidence to be provided in support of the mandatory requirements had not been met.

10. The determination did not contain a proper analysis of the Immigration Rules or an explanation why it was appropriate to consider the position outside the Immigration Rules under Article 8.

11. A response was submitted by Guy Davison of Counsel who submitted that First-tier Tribunal Judge Finch's judgment was an obvious misprint and she did not include any earlier discussion of Article 8 and clearly intended to allow the appeal under the Immigration Rules. (Paragraphs 12, 15 and 16).

12. In the light of the above findings it was submitted that, and contrary to the appellant's contention it was not correct that Judge Finch had no regard for the requirements of Appendix FM and Appendix FM-SE.

13. Rule 2(c) of Appendix FM-SE required the respondent sponsor to provide bank statements showing his salary being paid into his bank account over a period of six months prior to the application. There was, it was argued, no requirement that *all* of the sponsor's salary must have been paid into this account or that he could not show that some of his salary was refused to make direct rental payment.

14. Judge Finch found that the appellant had produced bank statements showing the salary being paid into the account, albeit not on a regular day and in a regular amount. She accepted the sponsor's account of these irregularities. The respondent was illegitimately attempting to challenge the finding of fact.

15. Alternatively, the respondent sought to rely on Article 8 in addition to the Immigration Rules in any re-hearing.

Conclusion

16. I accept in accordance with the submissions of both Mr Davison and Mr Singer that Judge Finch had merely by way of typographical error referred to allowing the appellant's appeal under Article 8 of the European Convention on Human Rights as opposed to under the Immigration Rules and this was clear from a reading of the decision as a whole. There was no substantive discussion of Article 8 and the judge set out at paragraph 7 that she had taken into account the criteria contained in Section E ECP 3.1 of Appendix FM.

17. At the outset I will set out that Mr Tufan conceded that the judge had accepted that the relationship was a genuine and subsisting relationship and that there was no challenge by the respondent save for the challenge in relation to the financial requirements.

18. I therefore have set out the Immigration Rules in relation to Appendix FM-SE.

"In respect of salaried employment in the UK (except where paragraph 9 applies), all of the following evidence must be provided:

(a) Pay slips covering:

(i) a period of 6 months prior to the date of application if the person has been employed by their current employer for at least 6 months (and where paragraph 13(b) of this appendix does not apply); or

(ii) any period of salaried employment in the period of 12 months prior to the date of application if the person has been employed by their current employer for less than 6 months…

(b) A letter from the employer(s) who issued the pay slips at paragraph 2(a) confirming:

(i) the person's employment and gross annual salary;

(ii) the length of their employment;

(iii) the period over which they have been or were paid the level of salary relied on in the application; and

(iv) the type of employment (permanent, fixed-term contract or agency).

(c) Monthly Personal bank statements corresponding to the same period as the pay slips at paragraph 2(a), showing that the salary has been paid into an account in the name of the person or the name of the person and their partner jointly".

19. The Entry Clearance Officer specifically stated that the appellant had not provided specified documents as evidence of the sponsor's gross income, for example "a letter from his employer containing all the specified information, such as confirmation as to the nature of the sponsor's employment (whether a permanent contract) and further noted that the letter was not on company headed paper and the sum quoted for the sponsor's gross annual income was inconsistent with the monthly gross salary shown on the wage slips submitted.

20. As pointed out in the hearing before me by Mr Singer the letter was not required to be on company headed paper and this is not a requirement of the Regulations. I dismiss this objection.

21. The judge at paragraph 14 stated that she found that the letter provided by the husband's employer dated 4 February 2013 confirmed he worked on a full-time basis as supervisor at Kingsway Store Londis and that his annual gross salary was £20,800. It also explained that he had been employed on a part-time basis from 3 May 2006 until August 2010 when he was employed on a full-time basis and when his annual gross salary was increased to £20,800. The judge accepted that the appellant's husband was working under a contract of employment and that his gross annual salary was £20,800. This however did not address the type of employment of the

appellant such as whether the employment was permanent or temporary and although it might be inferred this is a specific requirement and this letter did not comply with the Immigration Rules.

22. The Entry Clearance Officer also took issue with the fact that the bank statements covered the period 7 June 2012 to 8 January 2013 only and that none of the net salary figures on the payslips submitted were reflected in the bank statements submitted. The Entry Clearance Officer submitted that there were not deposits to the account around the dates shown on the wage slips broadly consistent with the sums detailed on the wage slips. At paragraph 13 the judge found that the appellant had submitted six months' work payslips which were dated from 16 June 2012 to 3 November 2012 and she found that the appellant had in fact submitted an application dated 13 February 2013. This was a point challenged by the respondent. It was pointed out in the application for permission to appeal that the wage slips should cover the period to the date of the application.

23. At paragraph 13 the judge also found that there were further payslips and she could not take them into account. However the appellant sponsor gave evidence that in fact although the judge recorded the application was made on 13 February 2013 his wife did not in fact attend and the payment was not made for the application until March 2013. The judge does not address this issue and I find that the rules are clear that the wage slips should be produced for the six month period prior to the application and they were not. Even by 13th February 2013 the documentation was out of date.

24. Another aspect in issue was Appendix FM-SE, paragraph 2(c) which states "*personal bank statements corresponding to the same period as the payslips at paragraph 2(a) showing that the salary has been taken into an account in the name of the person or in the name of the person and their partner jointly.*" The judge made a finding at paragraph 15 in the following terms:

> "*15. There were also a number of bank statements for the Appellant's husband's account with Lloyds TSB. The Sponsor explained in his witness statement that he was paid in cash and only paid some of his income into his bank account and that he did not do so on the same date every month. In addition, he explained that his employer deducted his rent of £450 from the cash he paid him each month. The fact that he was renting his room from his employer was confirmed in a tenancy agreement, dated 11th October 2011. He explained that there was no standing order for this rent, even though this was required in the agreement. He said that this was because initially Joshua Alcasas was also renting a room in the flat and his rent of £325 was paid to the Sponsor as part of his income. This arrangement was confirmed in a further letter from Mr. Pushparajah, dated 16th July 2014, in which he said that this arrangement was in force between 16th July 2012 and January 2013. Taking this and the totality of the evidence and applying a balance of probabilities I find that the Appellant had met the necessary financial and evidential requirements as a spouse.*

25. What is required under paragraph 2(c) is that personal bank statements are provided corresponding to the same periods as the payslips. Does this require that exactly the same amount from the payslips should be paid into the bank statements and does this require that the employer directly transfers money to the employee's account? The question is what does "the" refer to in terms of the salary. Does this mean the whole salary or does it mean part of the salary? The Immigration Rules allow for cash to be paid into the account and which would indicate that there is some leniency. However, even if only part of the salary could be included, I note at paragraph 1(m) only cash income on which the correct tax has been paid may be counted as income under this Appendix subject to the relevant evidential requirements of this Appendix. The evidence given was that the sponsor received a benefit from his employer by way of rent and thus the exact sum was not paid into his account. There was no confirmation from the HMRC as to whether tax was paid on this 'benefit'. Therefore in accordance with the rules only the net amount paid into the account could be taken into account and this did not fulfil the financial requirements.

26. Mr Singer referred me to Appendix FM(D)(b)(i)(dd) which states that if an applicant has submitted a document which does not contain all of the specified information then the decision maker may contact the applicant or his representative in writing. The appellant did in fact make contact with the Entry Clearance Officer indicating that her husband was paid in cash. I am not persuaded that the appellant's sponsor is precluded from being paid in cash or that it is a requirement for him to have a bank account which on the reading of the Immigration Rules as the respondent wishes me to read it would be a requirement.

27. Nonetheless I find that even if the Entry Clearance Officer might have made a request under the Immigration Rules this would not have assisted. It is not for the ECO to request information confirming what tax was in fact paid. Indeed the visa application form completed by the appellant states that the sponsor was paid '£400 a week' [5.1] and makes no mention, at this stage, particularly in the application to the ECO, of a deduction for rent. I note the P60 for the tax year ending 2013 but this was produced by the employer and not an independent document produced by the HMRC. There was HMRC documentation available for the year 2013 to 2014 but not 2012 to 2013.

28. For the reasons given above namely the defects in the employer's letter and the difficulties with the financial evidence provided relating to the salary, such that the salary deposits in the bank account were not consistent with the wage slips and that the correct income had been paid on the income. Finally, paragraph 1 (l) of Appendix FM requires that

> *'where this Appendix requires the applicant to provided specified evidence relating to a period which ends with the date of application, that evidence, or the most recently dated part of it, must be dated no earlier than 28 days before the date of application'.*

Even if the application was made on 13th February 2013, the judge found that the wage slips ended on 3rd November 2012.

29. For the reasons given above I find that the Judge did not apply the financial requirements of the Immigration Rules correctly, that there was an error of law and remaking the decision the appellant could not fulfil the requirements of the Immigration Rules. Bearing in mind the variety of defects in the evidence provided with the application I do not find that the paragraph D(b)(i)(dd) would assist the appellant, that is that the ECO should call for 'a document which does not contain all of the specified information'.

30. I turn to the question of whether there is an Article 8 claim in this matter outside the Immigration Rules. It was conceded by Mr Tufan that there was a genuine and subsisting relationship and I preserve the findings of Judge Finch with respect to the accommodation and the English language test which were not challenged by the Secretary of State.

31. In view of her failure under the Immigration Rules I have considered the matter with reference to in **Razgar v SSHD [2004] UKHL 27**. I acknowledge case law which considers that there is either an Article 8 case or not and the Immigration Rules cannot displace Strasbourg jurisprudence. I can accept that the appellant has established a family life as it was accepted that the relationship was genuine and subsisting. Clearly by preventing the appellant from joining her spouse there are consequences of such gravity as to cause interference with family life. I find that there the decision was in accordance with the law.

32. Once there is an interference with family or private life, the decision maker must justify that interference. **Hayat (Nature of Chikwamba principle) Pakistan** [2012] Civ 1054 at paragraph 18 confirmed:

"It may at first blush seem odd that Article 8 rights may be infringed by an unjustified insistence that the applicant should return home to make the application, even though a subsequent decision to refuse the application on the merits will not. The reason is that once there is an interference with family or private life, the decision maker must justify that interference. Where what is relied upon is an insistence on complying with formal procedures that may be insufficient to justify even a temporary disruption to family life. By contrast, a full consideration of the merits may readily identify features which justify a refusal to grant leave to remain".

33. I note however the decision of **Patel and ors v SSHD [2013] UKSC 72**

56. 'Although the context of the rules may be relevant to the consideration of proportionality, I agree with Burnton LJ that this cannot be equated with a formalised "near-miss" or "sliding scale" principle, as argued for by Mr Malik. That approach is unsupported by Strasbourg authority, or by a proper reading of Lord Bingham's words. Mrs Huang's case for favourable treatment outside the rules did not turn on how close she had come to compliance with rule 317, but on the application of the family values which underlie that rule and are at

the heart also of article 8. Conversely, a near-miss under the rules cannot provide substance to a human rights case which is otherwise lacking in merit'.

Further

'It is important to remember that article 8 is not a general dispensing power'

34. The sponsor is a British citizen who is integrated in society here. I take into account the impact on the partner of the appellant's removal, following **Beoku Betts v SSHD** [2008] UKHL 39, nonetheless I find that the status quo will be preserved. The appellant and sponsor knew when marrying that they would have to go through the process of entry clearance. At paragraph 100 of **MM Lebanon & Ors v SSHD** [2014] EWCA Civ 985 the court confirmed that the ECtHR had repeatedly recognised the general right of states to control the entry and residence of non-nationals and *'repeatedly acknowledged that the Convention confers no right on individuals or families to choose where they prefer to live'*

35. I have also considered whether the appellant should be expected to return to make an entry clearance application.

36. I take into account that the appellant made an application over a year and half ago but **Chikwamba v SSHD** [2008] UKHL 40 accepted that maintaining immigration control for the protection of the rights and freedoms of others was a legitimate aim and not objectionable in itself. In that case the court referred to those having to leave the United Kingdom in order to make an application from abroad, stating

42. Now I would certainly not say that such an objective is in itself necessarily objectionable. Sometimes, I accept, it will be reasonable and proportionate to take that course. Indeed, Ekinci still seems to me just such a case. The appellant's immigration history was appalling and he was being required to travel no further than to Germany and to wait for no longer than a month for a decision on his application. Other obviously relevant considerations will be whether, for example, the applicant has arrived in this country illegally (say, concealed in the back of a lorry) for good reason or ill. To advance a genuine asylum claim would, of course, be a good reason. To enrol as a student would not. Also relevant would be for how long the Secretary of State has delayed in dealing with the case—see in this regard EB (Kosovo) v Secretary of State for the Home Department [2008] UKHL 41. In an article 8 family case the prospective length and degree of family disruption involved in going abroad for an entry clearance certificate will always be highly relevant'.

Further

'Rather it seems to me that only comparatively rarely, certainly in family cases involving children, should an article 8 appeal be dismissed on the basis that it would be proportionate and more appropriate for the appellant to apply for leave from abroad.

37. I can accept that this principle can apply to families without children, which is the position here, and that the appellant claimed to live as a refugee in India but I note she had continued to do so since 2009. There was no evidence that the appellant was being returned to a place or living in a place of poor conditions such as the case in

Chikwamba. The status quo can effectively be maintained whilst the appellant makes a further application. I am not persuaded that there was evidence of such delay on the part of the Secretary of State in dealing with an application.

38. The rules are indicative of the balance to be struck and at the date of the decision the appellant could not comply with the rules. The question was raised by Mr Singer was that by the date of the ECO's decision the appellant *could* comply with the financial requirements. The level of income was indicated by the HMRC documentation. There was indeed HM Revenue and Customs annual tax summary dated 2013 to 2014 produced indicating that for the financial year in which the decision of the Entry Clearance Officer was made the appellant did indeed earn £20,800 although there is a requirement to show that from the six months preceding the application

39. Indeed although there was an indication that the sponsor now earned above the required level I am not satisfied that the requirements as set out in the Immigration Rules had been fully complied with. There are specific financial requirements to be satisfied under the Immigration Rules and I have highlighted the deficiencies above. It is not merely the case that the appellant has shown that all the requirements of the Immigration Rules have been met save for the bureaucratic requirement of entry clearance. In addition for the purposes of Article 8 the date for my decision is 30th May 2013. The bank statements of the sponsor produced which were closest to this date ended on 10th December 2012 and showed that the sponsor had a deficit in his Lloyds TSB account of £2,684.51. There was reference to a later balance as I note below but this was not supported by detailed statements and was a snapshot of one date on 9th January 2013.

40. I am enjoined by Section 117B (3) to consider the public interest and to take into account that It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—
(a)are not a burden on taxpayers, and (b) are better able to integrate into society.

41. Although the sponsor produced HMRC information to show at the end of the tax year (2012-2014) in which the date of the ECO decision fell, he was earning above the level specified by the Immigration Rules for the entry of a spouse, he nonetheless produced no bank statement as at the date of the decision itself was considerably overdrawn (over 10% of his claimed income) and had been so since September 2012 ato 11th December 2012 although the balance on 9th January 2013 was recorded as £286.72. This does not persuade me that at the relevant date the appellant would be financially independent. She claimed that she had jewellery but no specific or independent valuation was produced.

42. Taking all of the considerations above into account, I have considered the appellant's right to a family and private life and have considered the matter with reference to **Huang v SSHD [2007] UKHL 11** and whether the decision

'prejudices the family life of the applicant in a manner sufficiently serious to amount to a breach of the fundamental right protected by article 8'

and I find that it does not. It is open to the appellant to renew her application from abroad and in the meantime the couple can continue their relationship as they have done since 2012 to date.

43. For the reasons given above I find an error of law in the decision of Judge Finch and set it aside but preserve the findings with respect to paragraphs 16 and 17 which were not challenged. I remake the decision and find that the appellant cannot fulfil the financial requirements of the Immigration Rules and I dismiss the appeal under the Immigration Rules and on Article 8 grounds.

Decision

Appeal Dismissed

Signed Date 31st December 2014

Deputy Upper Tribunal Judge Rimington