Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/15617/2013

THE IMMIGRATION ACTS

Heard at City Centre Tower, Birmingham **Determination Promulgated**
On 17 June 2015 **On 6 July 2015**

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL M ROBERTSON

Between

ENTRY CLEARANCE OFFICER, AMMAN

Appellant

And

MRS KOCHER MOHAMMED AMEEN
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr D Mills, Senior Presenting Officer
For the Respondent: Mr I Ali, Counsel, instructed by Equity Solicitors

DETERMINATION AND REASONS

Introduction

1. Although the Entry Clearance Officer is the Appellant before me I will, for ease of reference, refer to him as the Respondent as he was the Respondent before the First-tier Tribunal at the hearing on 5 September 2014. Similarly I will refer to Mrs Ameen as the Appellant as she was the Appellant before the First-tier Judge.

2. The Respondent was granted permission to appeal against the decision of First-tier Tribunal Judge Hawden-Beal (the Judge), who dismissed the Appellant's appeal

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under the Immigration Rules, because the Appellant could not meet the evidential provisions of Appendix FM-SE in relation to the income of the Sponsor, and allowed it under Article 8 ECHR. She found that (i) it was accepted by the Respondent that the specified evidence provided by the Appellant in relation to the Sponsor's income was 13 days short of the six month period during which he had to show that he earned £18,600 in the twelve months before the date of application; (ii) that he met all the other requirements for entry clearance and it was therefore a disproportionate interference with the Sponsor's life and breached his right to a family life with his wife; and (iii) that the Sponsor could not return to Kirkuk to enjoy family life with he Appellant due to the security situation and level of risk to British citizens [19].

3. In the grounds of application, it is submitted that the Judge materially misdirected herself in law because:

   a. As stated in the grounds at paras 1 – 7, 9 – 11 and 13, **Gulshan [2013] UKUT 00640 (IAC)** make is clear that an Article 8 assessment should only be carried out where compelling circumstances not covered by the Rules are established. **R (Nagre) SSHD [2013] EWHC 720 (Admin)** provided that such compelling circumstances would only be established if the refusal would lead to an unjustifiably harsh outcome. The Judge had not established such compelling circumstances, thereby failing to apply the correct test, and had failed to provide reasons as to why it would be unjustifiably harsh for the Appellant and the Sponsor to continue family life in Kirkuk; the Appellant's security fears were generalizations and the Appellant and the Sponsor had failed to show that either of them would be at risk directly or that they would be of particular interest. It is submitted that the income requirements are within the Immigration Rules and there was no prejudice to the Appellant in the application of the law. The Appellant chose to submit her application when there was no realistic prospect of success under the Immigration Rules, rather than delaying it until such time as there was sufficient evidence, and the Judge failed to make findings on whether the Appellant could have made a further application. There was no analysis by the Judge of why the Appellant could not submit a further application.

   b. The Judge used the "…proximity of success of the application/near miss as a basis for allowing under Article 8 ECHR", when Article 8 should not be used to circumvent the Rules; there were no exceptional circumstances to warrant a grant of leave outside the Immigration Rules. The Judge's finding amounted to a reliance on the near miss argument and a finding that the Immigration Rules will never be proportionate in a case involving a British national.

4. First-tier Tribunal Judge Levin granted permission on the basis that "The failure on the part of the Judge to follow the Upper Tribunal's guidance in **Gulshan (Article 8 – new Rules – correct approach) [201] UKUT 640 (IAC)** and in effect to allow the Appeal on human rights ground as a "near miss" arguably amounts to a material error of law".

The Hearing

5. I heard submissions from the Mr Mills and Mr Ali, which are recorded in the record of proceedings and I will refer to them where necessary in my findings of fact. On finding that the Judge had materially erred in law, I also heard oral evidence from the Sponsor which again is set out in the record of proceedings. I will refer to these where necessary in my decision and reasons.

Decision and reasons

6. Mr Mills essentially relied on the grounds of application, submitting that although the case law had moved on from **Gulshan** and **Nagre**, still it had been confirmed in **SS (Congo) [2015] EWCA Civ 387** at paragraph 17 that compelling circumstances needed to be established if the Immigration Rules were not met. **SS (Congo)** at para 40 provides:

> "… we consider that the state has a wider margin of appreciation in determining the conditions to be satisfied before LTE is granted, by contrast with the position in relation to decisions regarding LTR for persons with a (non-precarious) family life already established in the United Kingdom. The Secretary of State has already, in effect, made some use of this wider margin of appreciation by excluding section EX.1 as a basis for grant of LTE, although it is available as a basis for grant of LTR. The LTE Rules therefore maintain, in general terms, a reasonable relationship with the requirements of Article 8 in the ordinary run of cases. However, it remains possible to imagine cases where the individual interests at stake are of a particularly pressing nature so that a good claim for LTE can be established outside the Rules. In our view, the appropriate general formulation for this category is that such cases will arise where an applicant for LTE can show that compelling circumstances exist (which are not sufficiently recognised under the new Rules) to require the grant of such leave."

7. Mr Mills further submitted that the Judge at [19] allowed the appeal on a straight 'near miss' basis because the Appellant had only been in employment for 5 ½ months prior to the date of application. However allowing an appeal on human rights grounds where an appellant had narrowly missed meeting the Immigration Rules had been rejected in **Miah v SSHD [2012] EWCA Civ 261** and to some extent in **Patel v SSHD [2013] UKSC 72** by the Supreme Court. He relied on paras 54 – 57 of **SS (Congo)** which provide:

> "54. At the hearing, there was debate about the proper approach to be adopted in 'near miss' cases, for example if the sponsor of an applicant for LTE could provide evidence of an annual income a little less than the £18,600 required or could provide evidence which might be regarded as similar to (but not the same as) that required under Appendix FM-SE. Mr Payne, for the Secretary of State, made submissions to the effect that 'a miss is as good as a mile' and that the fact that one is dealing with a 'near miss' case should be irrelevant to the Article 8 balancing exercise required. The general position of the respondents, on the other hand, was that great weight should be attached to the fact that there was a 'near miss' by an applicant in relation to the requirements of the Rules.
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> "55. In our judgment, the true position lies between these submissions. Contrary to the argument of the respondents, that fact that an applicant may be able to say that their

case is a 'near miss' in relation to satisfying the requirements of the Rules will by no means show that compelling circumstances exist requiring the grant of LTE outside the Rules. A good deal more than this would need to be shown to make out such a case. The respondents' argument fails to recognise the value to be attached to having a clear statement of the standards applicable to everyone and fails to give proper weight to the judgment of the Secretary of State, as expressed in the Rules, regarding what is needed to meet the public interest which is in issue. The 'near miss' argument of the respondents cannot be sustained in the light of these considerations and the authority of *Miah v Secretary of State for the Home Department* [2012] EWCA Civ 261, especially at [21]-[26].

"56. However, it cannot be said that the fact that a case involves a 'near miss' in relation to the requirements set out in the Rules is wholly irrelevant to the balancing exercise required under Article 8. If an applicant can show that there are individual interests at stake covered by Article 8 which give rise to a strong claim that compelling circumstances may exist to justify the grant of LTE outside the Rules, the fact that their case is also a 'near miss' case may be a relevant consideration which tips the balance under Article 8 in their favour. In such a case, the applicant will be able to say that the detrimental impact on the public interest in issue if LTE is granted in their favour will be somewhat less than in a case where the gap between the applicant's position and the requirements of the Rules is great, and the risk that they may end up having recourse to public funds and resources is therefore greater.

"57. In certain of the appeals before us, the respondents said that improvements in the position of their sponsors were on the horizon, so that there appeared to be a reasonable prospect that within a period of weeks or months they would in fact be able to satisfy the requirements of the Rules. They maintained that the Secretary of State should have taken this into account when deciding whether to grant LTE outside the Rules. In our judgment, however, this affords very weak support for a claim for grant of LTE outside the Rules. The Secretary of State remains entitled to enforce the Rules in the usual way, to say that the Rules have not been satisfied and that the applicant should apply again when the circumstances have indeed changed. This reflects a fair balance between the interests of the individual and the public interest. 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 the 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."

8. He submitted that although the Court of Appeal in **SS (Congo)** had watered down the application of **Miah**, it had been expressly approved by the Court who maintained that missing the requirements by a small margin was not irrelevant but that compelling circumstances for allowing an appeal outside the Rules had to be established.

9. Mr Mills submitted that the only other issue relied on by the Judge was the inability of the Sponsor to relocate to Kirkuk and the security situation there. However, the Appellant was not a refugee and he had resided in Kirkuk for a year with his wife after marriage. The Judge heard the appeal in September 2014; ISIS had stepped up their offensive in June of 2014 but the Judge had over-reacted to the threat; Kirkuk was in the control of the Kurdish Authorities and the Kurdish Government Area was

safe and was in fact the place where others went to find safety from ISIS. This is the area where failed asylum seekers are still returned and that remains the policy position. Both the Appellant and the Sponsor are Kurdish and there is no reason why they cannot live there.

10. Finally, Mr Mills submitted that the Judge completely ignored the ability of the Appellant to re-apply; having failed to delay submitting the application under appeal for two weeks, it was not unreasonable for them to re-apply and this was expressly approved in **SS (Congo)** at para 57. He submitted that the Judge's decision was unsafe and must be set aside.

11. Mr Ali submitted that **Gulshan** had been drawn to the attention of the Judge; she had been provided with a copy and it was referred to in submissions and in the skeleton argument before her. He argued that decisions such as **Gulshan** were not a 'trump card' and should not qualify or fetter an Article 8 assessment and failure to mention it did not mean that the Judge erred in law. Furthermore, **Gulshan** required some form of exceptionality to be established and all that needed to be established were 'compelling circumstances' as provided by **SS (Congo)** at paras 40 and 41.

12. As to the compelling circumstances, Mr Ali submitted that the Judge focused on: (i) the narrow margin by which the Appellant failed to meet the financial requirements; she met all the other requirements including the English language test; (ii) the strong relationship between the Appellant and Sponsor; she did not reject the Sponsor's evidence at [10]; (iii) the Sponsor is a British national, he has lived here for 13 years and has been a British citizen since 2008; he gave reasons as to why he could not live in Iraq which the Judge accepted; (iv) there was pressure from the family which is why the application was made earlier; they were blaming him for the delay in making the application and if he had had to make a further application, there would have been further delays. He submitted that the Judge was aware that the policy reason for the financial requirements was so that those who came to the UK could be maintained at a reasonable level and not become a burden on the state [19] and acknowledged the public interest considerations. She was entitled to conclude that it was a compelling case and there was no prejudice to the Respondent who accepted that he was earning sufficient income; she found that there would be no recourse to public funds and that the facts were sufficiently compelling.

13. Regarding how long the application had taken to process from the date it was submitted, it appeared from the documentary evidence that the form was submitted online on 2 April 2103 but that the paper copy of this was signed on 22 April 2013. Mr Mills confirmed that it was not unusual for this to occur where an applicant had gone in to submit documentary evidence. As the date of decision is 18 June 2013, it took less than 2 months for the application to be processed. Mr Ali submitted that even if a further application had been submitted, they could not rely on the ECO granting an entry clearance visa.

14. In reply, Mr Mills submitted that in allowing the appeal, the Judge had in mind the delay which occurred to the date of hearing; this was a further error on her part

because in an entry clearance case, even for the purposes of the Article 8 assessment, she was bound to consider circumstances as they were at the date of decision pursuant to **AS (Somalia) [2009] UKHL 32**; she did not consider the availability of the option to re-apply and **SS (Congo)** now provides that such a requirement is fair and proportionate. The mistake which led to the refusal was a mistake on the part of the Appellant; it was not the mistake of the ECO.

15. At the end of the hearing I stated that I found that the Judge had materially erred in law and that her decision must be set aside. My reasons for so doing are:

16. I accept as submitted by Mr Mills that whilst a near miss argument is capable of strengthening a claim, compelling reasons must be established for a grant of leave outside the Immigration Rules. This was not particularly in dispute, Mr Ali's main submission being that the Judge had in fact established compelling circumstances.

17. Whilst the Judge gave some reasons for applying Article 8, she gave insufficient reasons for (i) her finding that the security situation in Kirkuk rendered it unsafe for the Appellant and Sponsor to reside together there (bearing in mind that that there was no objective evidence regarding the ISIS offensive having spread to Kirkuk at the date of decision). It would appear that the Judge had in fact taken into account circumstances at the date of hearing in reaching her decision, contrary to **AS (Somalia)**; and (ii) why it was unsafe for the Sponsor to reside in Kirkuk, bearing in mind that he had resided with the Appellant in Kirkuk from the time they were married on 28 September 2011 to the time he left on 23 August 2012. Furthermore, the Judge did not take into account that if the Appellant was able to provide the specified evidence by the date of decision (and he could have if it was accepted that he had not in fact been employed for a period of 6 months by the date of application and had been by the date of decision), it was open to her to make a further application. These considerations are capable of making a material difference to the outcome of the appeal.

Remaking the decision

18. The Sponsor then gave further evidence in support of the appeal and I heard submissions from Mr Mills and Mr Ali. The additional oral evidence and submissions are set out in the record of proceedings.

19. Mr Mills submitted that the Immigration Rules could not be met, that there was no room for discretion and although the Sponsor had pleaded that the delay had caused problems with his in-laws, they could have made a further application at any point. Furthermore, although the Sponsor stated that he did not know that he would not be able to meet the Immigration Rules, he had legal advice throughout the hearing; all they had to do was submit an application and that was not disproportionate.

20. Mr Ali submitted that he relied on the submissions made in relation to the the error of law part of the hearing and from a lay person's point of view, they had only missed the requirements by 13 days; it was a near miss but there were compelling circumstances also. If another application was made there would be serious adverse

consequences for the relationship and there was considerable family pressure on the Sponsor, who was afraid that if he made another application, it would lead to the breakdown of the marriage. This was a highly relevant consideration and there was no guarantee that if the Appellant made another application she would succeed. He stated that there was room for these matters and there was no prejudice to the Respondent.

21. I find that the policy requirement for evidence of income for a period of 12 months where an Appellant has not been in the same employment for a period of 6 months prior to the date of application is underpinned by the need to ensure as far as possible that there will be no recourse or no additional recourse to public funds by ensuring stability of employment. Where the Appellant could not meet the requirements at the date of application but can do so subsequently, the correct course of action is to make a further application **(SS (Congo)**).

22. When asked why the Appellant had not simply made a further application, the Sponsor stated that (i) he had been told that his evidence was 'short'; if it was short, then it was necessary to correct it and provide the necessary evidence; (ii) the Appellant had been given a right of appeal; if it was not going to succeed, then the ECO should have simply told them to make a fresh application; (iii) there had been a lot of delay since they appealed; he did not think that he would, two years later, still be waiting for his wife to join him; and (iv) there was a lot of pressure from his in-laws to get the visa; his mother-in-law had said that she would take her daughter back and they would get a divorce and that if he had said that they needed to make another application, they would think that he was lying. There were many people in this situation where they had married a British citizen and not been able to get a visa and it is now difficult for a British citizen to get a wife.

23. When asked when the question of divorce arose, the Sponsor said that it was because it had taken nearly three years to get his wife here (they were married in 2011) and he had had to telephone the courts to get a date for the hearing. He stated that if he had known that it would take so long, he would not have appealed and that he could not live with his wife in Kirkuk because it was unsafe whatever you might hear on the BBC.

24. In assessing whether compelling circumstances have been established for a grant of leave outside the Rules, I cannot take into account matters that have arisen since the date of decision. I cannot, therefore, take into account the deterioration in the security situation and, in any event, no background evidence was presented to establish that Kirkuk was unsafe at the date of decision. It is clear from the preserved findings of fact that there was no mention of divorce which led to the making of the application earlier than it should have been made; at that stage, the Sponsor had simply stated that there was pressure from his in-laws [16]. Pressure from in-laws is not a compelling reason for failing to comply with Immigration Rules. He also stated at the hearing before the Tirst-tier Tribunal that if his appeal was refused he would have no option but to re-apply for his wife to join him. I find that the prolonged period of separation, and any problems that have arisen as a result of it, are due not to the

system for processing applications but to the course of action that the Appellant has chosen to take in not submitting a new application with the correct evidence. Although both the Sponsor and Mr Ali stated that a new application may have been refused for other reasons, there is no reason why a properly prepared application accompanied by the specified evidence should not succeed and compelling circumstances have not been established for a grant of leave outside the Rules. Even if I were to find that Article 8 should be applied directly, taking into account the factors set out in Mr Ali's skeleton argument at para 10, in response to step two of the **Razgar [2004] UKHL 27** five step approach, the interference by reason of refusal of the application does not result in consequences of such gravity as to potentially engage the operation of Article 8. This is simply because all that the Appellant needed to do is make a further entry clearance application, particularly when there has been no excessive delay in the processing of the application, and this has always been open to them. Contrary to Mr Ali's submission, there is prejudice to the Respondent if an appeal is pursued when a further application can be submitted; the Respondent has the task, and expense, of defending proceedings where the clear and reasonable approach is simply to submit a new application supported by the specified evidence.

Decision

25. There are material errors of law in the decision of Judge Hawden-Beal as set out above in relation to her consideration of Article 8. Her decision is set aside on the basis of Article 8 only. I remake the decision to dismiss the Appellant's appeal under Article 8.

26. The Respondent's appeal is allowed.

Anonymity

27. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and immigration Tribunal (Procedure) Rules 2005 and I see no reason why an order should be made pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed Date

Manjinder Robertson
Sitting as Deputy Judge of the Upper Tribunal

TO THE RESPONDENT

In light of my decision, I have considered whether to make a fee award under 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.

As I have dismissed the Appellant's appeal, I make no fee order.

Signed Dated

M Robertson
Sitting as Deputy Judge of the Upper Tribunal