Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/00626/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 11 October 2013	**On 22 October 2013**
	.....

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

ENTRY CLEARANCE OFFICER-NAIROBI

Appellant

and

JOTHAM NJOROGE MARAI

Respondent

Representation:

For the Appellant: Mr L. Tarlow, Home Office Presenting Officer
For the Respondent: Not represented.

DETERMINATION AND REASONS

1. This is an appeal by the Entry Clearance Officer against a decision of First-tier Tribunal Judge Coleman who allowed the appellant's appeal against a decision to refuse entry clearance as a partner. The refusal was based on Appendix FM of HC 395 (as amended). For convenience, I refer to the parties as they were before the First-tier Tribunal.

2. The sponsor was given notice of the hearing before me by letter from the Tribunal but she did not attend. There was no notification to the Tribunal that she had wanted to attend but was unable to for some reason. The appellant was also notified of the hearing, the significance of that being that he would also have been able to ask his wife to attend. There was no reason to do other than to proceed with the hearing notwithstanding the absence of the sponsor.

3. The appellant is a citizen of Kenya, born on the 13 September 1969. The application for entry clearance was refused on the basis that he had not satisfied the financial requirements of the rules in terms of evidence provided in relation to his sponsor's employment and salary.

4. Judge Coleman concluded at [9] that the appellant was not able to succeed in his appeal under the Immigration Rules because he had not provided his sponsor's contract of employment and the bank statements did not coincide with the period covered by the wage slips. The latter months were not covered in the bank statements although the earlier months were. There were no wage slips for the earlier months. At [10] she stated that the Rules are specific and do not admit of any discretion.

5. In relation to Article 8, she appears to have found at [13] that the appellant could not meet the 'Article 8' rules, although she did not express it that way. She made reference to the requirement of there being insuperable obstacles to family life being conducted elsewhere, although whether in any event that requirement of the Rules accords with Article 8 is doubtful (see MF (Nigeria) [2013] EWCA Civ 1192 at [49]).

6. Nevertheless, in going on to consider Article 8 proper, and adopting the structured approach set out in Razgar [2004] UKHL 27, she concluded that the decision to refuse entry clearance would amount to a disproportionate interference with the appellant's family life and thus allowed the appeal.

7. Her reasons for so concluding were firstly that it would not be reasonable to expect the appellant's wife, who has indefinite leave to remain and is settled and has employment in the UK, to leave so that they could be together in Kenya. Secondly, she found that the evidence was more than sufficient to show that the sponsor earns considerably more than the minimum requirement to maintain and accommodate them. It was only because of the lack of certain specific pieces of evidence that the appeal under the Rules failed, and changes in the rules meant that the application would now have been allowed.

8. She concluded that given that all that would be served by dismissing the appeal was that the appellant would have to make a fresh application, the interference was disproportionate.

9. On the question of accommodation, she resolved that issue in favour of the appellant, albeit within the Article 8 assessment.

10. Mr Tarlow relied on the grounds of appeal to the Upper Tribunal. It was submitted that the appellant would be able to make a further application for entry clearance and so the decision was not disproportionate (under Article 8).

Conclusions

11. It is clear from Judge Coleman's determination that the appellant was not able to meet the financial requirements of the Immigration Rules for entry clearance as a partner, as set out in Appendix FM. Judge Coleman allowed the appeal effectively on the basis that the appellant had almost met those requirements and because the Rules subsequently changed in a way that meant that the appellant would have been able to meet the requirements if the new Rules were applied.

12. It is understandable why she allowed the appeal under Article 8 but in doing so I am satisfied that she erred in law. Judge Coleman in effect allowed the appeal on the basis that the appellant had only failed to satisfy the requirements of the Rules by a small margin. In other words she dealt with it, in part, on the basis of a 'near miss'. As the respondent's grounds point out, this is contrary to the decision in Miah [2012] EWCA Civ 261, where at [26] it was said that "there is no Near-Miss principle applicable to the Immigration Rules".

13. Although Judge Coleman concluded that the appellant would have succeeded in the application had it been decided under the later version of the Rules that came into force shortly after the decision in her case, that it not necessarily so. Under Appendix FM-SE, 2A(ii) the ECO *may* grant the application where the applicant does not submit a signed contract of employment, if satisfied that all the requirements of the Appendix relating to employment are met. There is also a discretionary element in paragraph D of Appendix FM-SE, a part of the Rules that the judge also referred to.

14. Whilst any discretion would have to be exercised reasonably, the fact that there is a discretionary aspect to the Rules as modified, in so far as they relate to circumstances similar to those of this appellant, means that there is no certainty that the application for entry clearance would have been granted. That aside, the fact remains that at the date of the decision the appellant was not able to meet the requirements of the Rules.

15. I am satisfied that in dealing with the proportionality issue partly on the basis of 'near miss' and in concluding that the appellant would have succeeded in the application if made under the new Rules, the First-tier judge erred in law. The 'near miss' approach is illegitimate and the judge did not apparently give any consideration to the requirements of

predictability and certainty in the application of the Rules, as explained by the House of Lords in Huang, cited below. Accordingly, I set aside her decision.

16. It is only the proportionality aspect of Article 8 that needs to be re-decided. In this context I bear in mind that the appellant would be able to make a fresh application for entry clearance in which he would be able to submit the specified financial documentary evidence. I accept that that would involve some expense, but nevertheless it is an option that is available to him. There would be some delay but the application which was the subject of this appeal was decided by the ECO in about five weeks.

17. In considering the proportionality of the decision I bear in mind that in Huang [2007] UKHL 11, the House of Lords referred at [16] 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 "the damage to good administration and effective control if a system is perceived by applicants internationally to be unduly porous, unpredictable or perfunctory…"

18. The legitimate aim under Article 8 in this case is the economic well-being 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, I am not satisfied that the decision of the respondent does amount to a disproportionate interference with the appellant's family life. The appellant has the option of making a fresh application for entry clearance which is likely to be decided within a reasonable time.

Decision

19. The decision of the First-tier Tribunal involved the making of an error on a point of law in terms of Article 8 of the ECHR. The decision of the First-tier Tribunal in that respect is set aside.

20. The decision to dismiss the appeal under the Immigration Rules stands.

21. The appeal under Article 8 of the ECHR is dismissed.

Upper Tribunal Judge Kopieczek

21/10/13