`

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/04256/2013

THE IMMIGRATION ACTS

Heard at Bradford	**Determination Promulgated**
On 22 April 2014	**On 30 April 2014**

Before

UPPER TRIBUNAL JUDGE CLIVE LANE

Between

ENTRY CLEARANCE OFFICER - MANILA

Appellant

and

DAMION ZACHERY THOMAS

Respondent

Representation:

For the Appellant: Mrs R Pettersen, a Senior Home Office Presenting Officer
For the Respondent: Did not attend and was not represented

DETERMINATION AND REASONS

1. The respondent, Damion Zachery Thomas, was born on 1 January 1964 and is a male citizen of New Zealand. I shall refer to the respondent as "the appellant" and to the Entry Clearance Officer at Manila as the respondent as they were before the First-tier Tribunal. The appellant had applied for entry clearance for leave to remain in the United Kingdom as the partner of Ms Deborah Brown (hereafter referred to as the sponsor) a

British citizen. The sponsor had returned to the United Kingdom from New Zealand in January 2013 her two eldest children having returned in November 2012. Having been refused entry clearance by the respondent, the appellant had appealed to the First-tier Tribunal (Judge Dickson) which, in a determination promulgated on 14th January 2004, had allowed the appeal under the Immigration Rules. The Entry Clearance Officer now appeals, with permission, to the Upper Tribunal.

2. The first ground is that the judge wrongly applied EX1 of Appendix FM of the Immigration Rules in this instance; EX1 has no application in out of country entry clearance cases. At [33], the judge had concluded that "I reach the conclusion that EX1 applies and that the appellant succeeds on the Immigration Rules. If I am wrong then I will consider the appellant and the sponsor's Article 8 claim in respect of the existing case law as set out in this determination. Again I conclude the interference in the family and private life of the sponsor and the appellant is unnecessary and disproportionate having regard to the best interests of the sponsor's two eldest children". At [32], the judge had found that

> "in view of the circumstances of this case the idea of the sponsor's two oldest children should abandon their studies and relocate their school in New Zealand is unjustifiably harsh. It is a totally unnecessary step and not in the best interests of the sponsor's two oldest children".

3. I note that the appellant continues to live in New Zealand and has no United Kingdom representative. The sponsor was served with a notice of the hearing before the Upper Tribunal by first class post on 14 March 2014. There is nothing on the file to indicate that the notice of hearing sent to the sponsor failed to reach her, and I proceeded with the hearing in the absence of the appellant/any representative/the sponsor.

4. I find that the judge did, as the grounds assert, wrongly apply EX1 of the Immigration Rules. This is an out of country entry clearance case to which EX1 has no application. I also find that the judge's disposal of the appeal under Article 8 ECHR is inadequate. He refers at [33] to "the existing case law as set out in this determination". He has cited *Gulshan (Article 8 – new Rules – correct approach)* [2013] UKUT 00640 (IAC) and *Nagre* [2013] EWHC 720 (Admin). It is not clear to me how either of these or authorities should have led the judge to allow the appeal under Article 8 outside the Rules . This was an application for entry clearance which had failed (narrowly) because of the couple's inability to meet the financial requirements of the Immigration Rules. As noted above, the judge appears to have been particularly influenced by what he regarded as the "totally unnecessary step" of the children of the sponsor (the appellant and sponsor are not married so they are not yet stepchildren) having to abandon their studies in the United Kingdom in order to relocate to schools in New Zealand. As Mrs Pettersen pointed out, the Entry Clearance Officer did not require the children to undertake that step. I agree with her submission that, notwithstanding with requirement of decision makers to have regard to the promotion of family life as well as avoiding

disproportionate interference with it, the lives of the sponsor and her children in the United Kingdom have not been altered in any way by the Entry Clearance Officer's refusal. In considering Article 8 ECHR, the judge appears to have had no regard to the public interest concerned with the management of immigration control manifested through the Immigration Rules which contain legitimate financial requirements for those seeking to settle in the United Kingdom. I find that the judge's termination of the Article 8 appeal is perfunctory and inadequately reasoned. I find that the determination should be set aside both in respect of Article 8 and the Immigration Rules appeal.

5. I have remade the decision. I find that the appellant cannot succeed under the Immigration Rules. I repeat my observation above of the interference which has been caused in the existing family lives of the appellant, sponsor and her children is negligible whilst the public interest concerned with excluding those individuals from the United Kingdom cannot satisfy the Immigration Rules is a strong one. Whilst I am sure that this family would wish to be living together, I cannot see that the circumstances are especially compelling or unusual. The proper course of action for this appellant is to make a further application for entry clearance as and when he is able to meet the requirements of the Immigration Rules.

DECISION

6. The determination of the First-tier Tribunal which was promulgated on 14 January 2014 is set aside. I have remade the decision. This appeal in respect of the Immigration Rules is dismissed. This appeal is dismissed on human rights grounds (Article 8 ECHR).

Signed Date

Upper Tribunal Judge Clive Lane