Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: OA/05970/2013**

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 4 April 2014	**On 23 July 2014**

Before

Deputy Upper Tribunal Judge MANUELL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

Miss HANIFE NAZ SAVUL
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr E Tufan, Home Office Presenting Officer
For the Respondent: Mr J Rendle, Counsel
(instructed by Wai Leung Solicitors)

DETERMINATION AND REASONS

Introduction

1. The Appellant appealed with permission granted by First-tier Tribunal Judge Parkes on 5 March 2014 against the

determination of First-tier Tribunal Judge Newberry who had allowed the Appellant's appeal against the Entry Clearance Officer's decision dated 5 February 2013 to refuse to grant the Respondent leave to enter as a spouse under Appendix FM of the Immigration Rules. The determination was promulgated on 13 February 2014.

2. The Respondent is a national of Turkey, born on 11 May 2012. She is the dependant daughter of Mrs Derya Savul, her mother who was born on 1 November 1980. Their appeals to the First-tier Tribunal were linked. The judge found that the Respondent's sponsor, her father, was earning income through his business in excess of the relevant minimum threshold laid down in Appendix FM, accepting by implication if not expressly that the sponsor had provided the relevant specified evidence laid down in Appendix FM-SE.

3. Permission to appeal to the Upper Tribunal as sought by the Appellant was granted by Judge Parkes because he considered that it was arguable that the judge had erred by failing (a) to consider Appendix FM-SE 7, which specified that 12 months of trading had to be shown where reliance was placed on earnings from self employment and (b) to note that the relevant date for the First-tier Tribunal was the date of the application, not the date of decision or any subsequent review.

Submissions – error of law

4. Mr Tufan for the Secretary of State relied on the grounds of onwards appeal and the terms of the grant of permission to appeal. It was a simple case where the specified documents had not been provided. The solution was for a fresh entry clearance application to be made once the necessary evidence of 12 months earnings from self employment was available.

5. Mr Rendle for the Respondent agreed that the basic premise had to be showing compliance as at the date of the application. He submitted that it was possible to view the entry clearance application as an ongoing process in that the original decision invited a response to which a second decision was the result. The judge had received

sufficient evidence to make a positive finding. There was no material error of law.

6. In reply Mr Tufan pointed out that in Raju, Khatel and Others v SSHD [2013] EWCA Civ 754 the Court of Appeal stated that applications under the Immigration Rules were not made throughout a period starting with the date of their submission and finishing with the date of the decision. The date of the application was governed by Rule 37 of the Immigration Rules. Paragraph 34G precluded the concept of a 'continuing application' which started when it was first submitted and concluded at the date of the decision either of the Secretary of State or, on appeal, of a tribunal.

The error of law finding

7. The tribunal reserved its determination, which now follows. The tribunal finds that the judge had inadvertently fallen into material error of law such that his decision had to be remade and the appeal dismissed under the Immigration Rules and under Article 8 ECHR.

8. It was widely predicted that the introduction of Appendix FM and Appendix FM-SE on 9 July 2012, heralded by the Secretary of State's Statement of Intent dated June 2012, would create some degree of controversy, as well as problems of interpretation. The judge evidently considered that there was merit in the substance of the Respondent's position in that the required income level was present on the judge's findings, and possibly by inference that a fresh entry clearance application after such a positive finding would cause expense and delay.

9. But this was not a situation where the Respondent or her sponsor were not and/or would never be capable of meeting the requirements of Appendix FM and Appendix FM-SE. Thus the judge rightly made no findings that there were any unusual or special circumstances attending the entry clearance application. There accordingly was no basis for disapplying any part of the Immigration Rules, however that was done. Appendix FM-SE is part of the Immigration Rules and compliance is mandatory. The decision of the First-tier Tribunal is accordingly set aside for material error of law. The decision must be remade. (It

was agreed that no further submissions were required as all relevant arguments had already been raised.)

Discussion and fresh decision

10. It is plain that the sponsor is able to put himself into a position to comply with Appendix FM-SE, for example, by producing 12 months of trading results: see Appendix FM-SE 7 which applies to him. That cannot be regarded as an onerous or unusual requirement. The new rules have been in force since 9 July 2012 and the entry clearance application was made on 1 November 2012, i.e., well after the commencement. The tribunal accepts Mr Tufan's submissions and has no option but to allow the Secretary of State's appeal. Raju, Khatel and Others v SSHD (above) applies as Mr Tufan reminded the tribunal. The Respondent had not produced the specified evidence with her entry clearance application and that sadly was an end to the matter. It was too late to send additional material after the Entry Clearance Officer's decision was made, because compliance had to be as at the date of application. As the Respondent and her mother are able to make fresh entry clearance applications which will in all probability succeed, and no exceptional circumstances were found, proportionality under Article 8 ECHR requires her to do so.

11. This determination has been prepared as a formality, in that the determination earlier promulgated for the Respondent's mother covered all of the issues. No determination had, however, been recorded for the appeal file which had been created for the Respondent.

DECISION

The making of the previous decision involved the making of an error on a point of law. The tribunal allows the onwards appeal to the Upper Tribunal, sets aside the original decision and fee award and remakes the original decision as follows:

The appeal is dismissed under the Immigration Rules

The appeal is dismissed under Article 8 ECHR

Signed **Dated**

Deputy Upper Tribunal Judge Manuell
TO THE RESPONDENT
FEE AWARD

The appeal was dismissed and so there can be no fee award

Signed **Dated**

Deputy Upper Tribunal Judge Manuell