Upper Tier Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/06686/2013

THE IMMIGRATION ACTS

Heard at Manchester	**Determination Promulgated**
On 11 June 2014	**On 12 June 2014**

Before

Deputy Upper Tribunal Judge Pickup
Between

Secretary of State for the Home Department

Appellant

and

Hedieh Hazegh Nikroo
[No anonymity direction made]

Claimant

Representation:

For the claimant: Ms G Patel
For the appellant: Ms C Johnstone, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The claimant, Hedieh Hazegh Nikroo, date of birth 26.5.85, is a citizen of Iran.

2. This is the appeal of the Secretary of State against the determination of First-tier Tribunal Judge Malik, who allowed the claimant's appeal against the decision of the respondent, dated 31.1.13 to refuse her application for clearance to the United Kingdom to settle as the partner of Bardia Hazeeh, a British citizen.

3. The Judge heard the appeal on 6.2.14.

4. First-tier Tribunal Judge Plumptre granted permission to appeal on 10.3.14.

5. Thus the matter came before me on 11.6.14 as an appeal in the Upper Tribunal.

Error of Law

6. In the first instance I have to determine whether or not there was an error of law in the making of the decision of the First-tier Tribunal such that the determination of Judge Malik should be set aside.

7. In granting permission to appeal, Judge Plumptre found it arguable, "that the judge erred in her approach to "post decision facts" and further erred in law in that she made no reference to the provisions of Appendix FM-SE and hence the failure of the applicant to provide relevant evidence of her sponsor husband's income from two jobs for the periods required at the time of her application."

8. I have carefully considered and taken account of Ms Patel's submissions in her Rule 24 reply, as amplified in her oral submissions.

9. The application for settlement fell to be considered under the provisions of section EC-P of Appendix FM of the Immigration Rules. The claimant's sponsor was not exempt from the financial requirements of E-ECP 3.1.

10. The application was refused on the grounds that the claimant has failed to provide the specified evidence of employment as required under Appendix FM-SE. Although FM-SE was not specifically referred to in the refusal decision, its application is mandatory.

11. At §9 and §10 of the decision, Judge Malik dealt with the financial requirements. She was satisfied that the sponsor was employed in two jobs at the date of the decision of the Secretary of State. The judge also calculated that on the evidence his annual income would amount to £20,640.36, in excess of the threshold income required under the Rules. The judge was satisfied that the requirements of the Rules in regards to the financial requirements were met.

12. However, Judge Malik made no reference to Appendix FM-SE, which sets out "the specified evidence applicants need to provide to meet the requirements of rules contained in Appendix FM. The Tribunal has no discretion to dispense with the requirements of the Immigration Rules and even though not specifically referenced by the Entry Clearance Officer, for which there was good reason as set out below, the Tribunal must apply those rules when considering an appeal.

13. Effectively, Judge Malik was making her own assessment of the prospective income of the sponsor rather than, as required by the Rules, a historical assessment of the sponsor's income at the date of the application.

14. It is clear from the application form that the claimant asserted that he had been employed since 2011. That turned out not to be true. However, on that basis the Entry Clearance Officer expected to see, amongst other documents, 6 months monthly salary slips. The Entry Clearance Officer was not to know, because the

claimant had not disclosed it, that whilst he had two different employments he had not had either job for at least 6 months. Also there were no P60 documents or letters from the employer.

15. Considering the appeal to the First-tier Tribunal, the Entry Clearance Manager noted that on the basis of documents not submitted with the application but with the notice of appeal, the sponsor was now claiming to have been employed with Artics since November 2012 and was thus unable at that date of application to submit 6 monthly wage slips. In respect of his employment with Pizzeria, he also had less than 6 months employment, starting only in June 2012, and thus was also unable to provide 6 monthly wage slips for that employment. There were still missing documents.

16. Paragraph 13(b) of Appendix FM-SE provides for the situation where the person has been in salaried employment for less than 6 months at the date of application. In those circumstances the gross annual income for the purpose of E-ECP 3.1 of Appendix FM will be the total of the gross annual salary from employment as it was at the date of application (together with non-earned income and pension income, neither of which applies to the sponsor). E-ECP 3.1 requires the application to provide specified evidence of a "specified gross annual income of at least" and relevant figure in this case is £18,600. It is clear that Paragraph 13(b) defines what is to be regarded as the sponsor's gross annual income. Ms Johnstone referred me to the salary slips for both employments nearest to the date of application which set out the total income to date. Taken together, the gross annual income for the purpose of E-ECP 3.1 in this case is approximately £5,569, woefully short of the necessary £18,600.

17. Paragraph 15 of Appendix FM-SE also provides that in order to evidence the level of gross annual income required by Appendix FM, the person must meet the requirements in paragraph 13(b) and the threshold level of income must also be met by the total income from salaried employment earned in the 12 months prior to the date of application (together with non-employment income and pensions).

18. Whilst I accept in principle Ms Patel's argument that, as this is an out of country appeal, the Tribunal can take account of evidence appertaining to the date of decision, that does not assist as the Immigration Rules provide very clearly that in the sponsor's circumstances the income must be as calculated above, i.e. at the date of application. I do not accept her submission that there is a contradiction in the Rules or the law. The Rules are very clear and it is abundantly clear that the claimant's application was doomed to failure from the outset; on the evidence the sponsor could not demonstrate the necessary level of gross annual income required by the Immigration Rules.

19. I also reject Ms Patel's argument that because the Entry Clearance Officer didn't mention Appendix FM-SE the judge was entitled to ignore those provisions. I have set out above why the Entry Clearance Officer would not have mentioned the provisions of paragraphs 13 and 15, as the application form suggested that the sponsor had been employed since 2011.

20. I have not dealt with the absent documentation, such as P60s, contracts, and employer's letters, that were also required as evidence under Appendix FM-SE, as it is clear the claimant and the sponsor could not meet the primary financial threshold on the available evidence. In the circumstances, the appeal should have been dismissed on the Immigration Rules at the First-tier Tribunal and thus there were errors of law requiring the decision to be set aside.

21. I heard further submissions from both representatives as to the remaking of the decision in the appeal.

22. I am satisfied for the reasons set out above that the claimant cannot succeed under the Immigration Rules.

23. In reaching that conclusion I also note the handwritten grounds of appeal to the First-tier Tribunal where the claimant accepts that she did not meet the requirements of the Immigration Rules but pleaded that, "the paperwork demonstrates that I am (my husband) on track to provide for my family." If the claimant and the sponsor feel that the current income may be sufficient to meet the threshold, and they can marshal the specified evidence, it is open to the claimant to make a fresh application. By the Rules in force Judge Malik was in error to consider what the sponsor's income was likely to be in the future or even at the date of the appeal hearing.

24. In relation to article 8 ECHR, it is obvious that Judge Malik did not consider it necessary or appropriate to consider article 8 private and family life, as she allowed the appeal under the Immigration Rules.

25. Summarised, the current case law in relation to article 8 private and family life is to the effect that the Immigration Rules are a complete code and there is no need to look outside the Rules unless there are arguably good grounds for consideration that there are compelling circumstances not adequately recognised in the Rules, which render the decision of the Secretary of State unjustifiably harsh. I set out below a summary of some of the recent case law.

26. In MF (Nigeria) v SSHD [2013] EWCA Civ 1192, the Court of Appeal held that in relation to deportation cases the 'new' Immigration Rules are a complete code but involve the application of a proportionality test. Whether that is done within the new rules or outside the new rules as part of the article 8 general law was described as a sterile question, as either way the result should be the same. MF (Nigeria) was followed in Kabia (MF: para 398 - "exceptional circumstances") 2013 UKUT 00569 (IAC).

27. In Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 00640 (IAC) has set out, inter alia, that on the current state of the authorities:

    (a) the maintenance requirements of E-LTRP.3.1-3.2 stand, although Blake J in R (on the application of MM) v Secretary of State for the Home Department [2013] EWHC 1900 (Admin) said that they could constitute an unjustified and disproportionate interference with the ability of spouses to live together; he

suggested that an appropriate figure may be around £13,400, and highlighted the position of young people and low wage earners caught by the higher figure in the rules;

(b) after applying the requirements of the Rules, only if there may be arguably good grounds for granting leave to remain outside them is it necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under them: R (on the application of) Nagre v Secretary of State for the Home Department [2013] EWHC 720 (Admin);

(c) the term "insurmountable obstacles" in provisions such as Section EX.1 are not obstacles which are impossible to surmount: MF (Article 8 – new rules) Nigeria [2012] UKUT 00393 (IAC); Izuazu (Article 8 – new rules) [2013] UKUT 00045 (IAC); they concern the practical possibilities of relocation. In the absence of such insurmountable obstacles, it is necessary to show other non-standard and particular features demonstrating that removal will be unjustifiably harsh: Nagre.

28. It is illustrative that in Gulshan the Upper Tribunal considered that it was not unduly harsh for a husband who originated from Pakistan but was now a British national, to return to Pakistan with his wife who was seeking leave to remain as his spouse. The panel acknowledged that the couple would suffer some hardship, as he had been in the UK since 2002, he had worked here and was receiving a pension, and housing benefit and other state benefits, some of which could not be transferred to Pakistan.

29. More recently, in Shahzad (Art 8: legitimate aim) [2014] UKUT 00085 (IAC), the Upper Tribunal held:

(i) Failure on the part of the Secretary of State to identify in her decision any legitimate aim under Article 8(2) of the ECHR does not prevent a court or tribunal from seeking to do so on the basis of the materials before it.

(ii) "Maintenance of effective immigration control" whilst not as such a legitimate aim under Article 8(2) of the ECHR can normally be assumed to be either an aspect of "prevention of disorder or crime" or an aspect of "economic well-being of the country" or both.

(iii) "[P]revention of disorder or crime" is normally a legitimate aim both in expulsion cases where there has been criminal conduct on the part of the claimant and in expulsion cases where there have only been breaches of immigration law.

(iv) MF (Nigeria) [2013] EWCA Civ 1192 held that the new immigration rules regarding deportation of a foreign criminal are a complete code. This was because of the express requirement in them at paragraph 398 to have regard to exceptional circumstances and other factors.

(v) It follows from this that any other rule which has a similar provision will also constitute a complete code;

(vi) Where an area of the rules does not have such an express mechanism, the approach in R (Nagre) v Secretary of State for the Home Department [2013] EWHC 720 (Admin) ([29]-[31] in particular) and Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 640 (IAC) should be followed: i.e. after applying the requirements of the rules, only if there may be arguably good grounds for granting leave to remain outside them is it necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under them.

30. At §6 of Ms Patel's Rule 24 response it is submitted that the decision to refuse entry has effectively resulted in a British citizen child being denied entry to the UK with his mother and that any further application necessary will result in yet further delay and separation between the child and the sponsoring father. It is further pleaded that the sponsor and the claimant abided by the Immigration Rules in sending the claimants back to Iran in order to make application from there as a spouse, when she had previously been in the UK as a family visitor.

31. Ms Patel elaborated on those submissions at the hearing before me asserting that there was a breach of article 8 in the refusal decision. She also submitted that because EX1 does not apply to out of country applications there was no proportionality assessment within the Rules.

32. I am asked and do take into account the best interests of a British citizen child as a primary consideration. However, there is no reason why a British citizen child cannot come to the UK to be with the father. It may be practically difficult to arrange care for the child but that is a matter for the parents to resolve. The decision of the Secretary of State does not prevent the child's entry. Neither does it prevent the sponsor from going to visit or stay with the claimants in Iran or elsewhere; such as Cyprus where they previously lived. I have to take into account that the Rules are the Secretary of State's response to private and family life rights, as well as section 55 in relation to the best interests of a child. I also have to take into account that the claimant has failed to demonstrate that she meets the requirements of the Rules and that is a significant factor.

33. One may have sympathy for the circumstances of the claimants and recognise their justified desire to be reunited as a family with the sponsor and their frustration and sadness at not being able to do so as soon as they hoped. However, there is no right for the family to settle in the UK just because that is their desire. Like all other applicants they must not only meet the requirements of the Immigration Rules but provide the specified evidence required by the Rules.

34. I take into account that there may be a delay whilst another application is made. However, there remains a route for entry, one in respect of which the claimant and the sponsor now assert they can meet the requirements of the Immigration Rules. For that reason alone it would be difficult to conclude that requiring the claimant to meet the Immigration Rules by a fresh application is unjustifiably harsh.

35. Taking everything urged upon me into account I find that on the facts of this case the circumstances of the claimant and her family cannot properly be described as compelling and insufficiently recognised within the Rules so as to justify allowing the application outside the Immigration Rules on the basis of article 8 ECHR private and/or family life because the result is unjustifiably harsh.

36. In the circumstances, I also dismiss the appeal under article 8 ECHR.

37. The claimant's application was also refused by the Secretary of State in relation to the English language requirements of E-ECP 4.2. However, Judge Malik found on the evidence that this requirement was met. The Secretary of State has not appealed that part of the decision of the First-tier Tribunal and it need be considered no further.

Conclusion & Decision:

38. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside.

I set aside the decision.

I re-make the decision in the appeal by dismissing it on all grounds, for the reasons set out above.

Signed: Date: 11 June 2014

Deputy Upper Tribunal Judge Pickup

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Given the circumstances, I make no anonymity order.

Fee Award **Note: this is not part of the determination.**

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

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: The appeal has been dismissed.

Signed: Date: 11 June 2014

Deputy Upper Tribunal Judge Pickup