Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/09250/2013

THE IMMIGRATION ACTS

Heard at Bradford	**Determination Promulgated**
On 3rd March, 2014	**On 28th March, 2014**

Before

UPPER TRIBUNAL JUDGE D E TAYLOR

Between

MARIA MAROOF

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Mr Hussain of Counsel instructed by Musa Patels Solicitors
For the Respondent: Mr M Diwnycz, Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is the Appellant's appeal against the decision of Judge Shimmin made following a hearing at Bradford on 4th December, 2013.

Background

2. The Appellant is a citizen of Pakistan, born on 10th February 1990. She applied to come to the UK as the wife of Vaqas Younis but was refused entry clearance on 19th

March 2013. The Entry Clearance Officer was not satisfied that she was in a genuine and subsisting relationship with her husband nor that she had provided an employer's letter confirming her Sponsor's gross annual salary. In view of the fact that she had not provided the specified evidence for the specified period as stated in Appendix FM/SE of the Immigration Rules he was not satisfied that she had met their financial requirements.

3. The Judge was satisfied that the couple were in a genuine relationship. He also accepted that the Sponsor was in work in the UK and that the documentation supported his promotion within his employment. His income for the six months before the date of application (16 January 2013) when annualised exceeded the required figure of £18,600. He dismissed the appeal because the Appellant did not meet the strict requirement of Appendix FM/SE, namely that she produce a letter from the employer who issued the wage slips confirming the person's employment and gross annual salary. The employer's letter did not state the gross annual salary. It stated the weekly gross wage. The gross annual salary was cited in a further document submitted with the Notice of Appeal.

4. He considered paragraph 245AA of the Rules which states that the application might be granted exceptionally provided the UKBA was satisfied that the specified documents were genuine and the applicant meets all of the other requirements of the Rules, including, inter alia, for example, where a specified document is in the wrong format.

5. The Judge wrote as follows:

> "I have considered whether the absence of content from the document is the same as the document being in the wrong format and that the omission of the gross salary is format.
>
> In the concise Oxford dictionary those words are defined as follows:
>
> Content – the things that are contained in something;
>
> Format – the way in which something is arranged or presented."

I find there is a clear difference between the meanings.

Accordingly, I find that the Respondent was not under a duty to apply evidential flexibility as set out in paragraph 245AA and the Appellant has failed to meet the requirements of Appendix FM-SE.

Accordingly I find the Appellant fails to meet the requirements of the Immigration Rules."

6. The Judge then considered whether the appeal ought to be allowed under Article 8 of the ECHR. He said:

"The Immigration Rules set out how facts must be established but if a Tribunal is fully satisfied that the facts are established by other evidence it appears to me that the public interest is diminished.

However, it is the prerogative of the government to fix the financial and documentary requirements for certain types of immigration permissions. Those requirements are set out in the Immigration Rules and I find that it is only in a rare case that they should be departed from by the application of the protection offered by Article 8.

In the Appellant's case I have found that she has failed to meet the strict evidential requirement to establish that she has the required funds available to her. I find that this is something that cannot normally be repaired by Article 8.

The Appellant could argue that she meets the financial requirements of the Rules but that the stringent requirements for specific documents is not proportionate when balanced against the rights of the Appellant to a private life. It is also submitted that the decision is unreasonable when only the content of a single document is awry and the mischief of the Rule, that there be no recourse to public funds, is met.

I have sympathy for the Appellant in attempting to satisfy the strict and prescriptive requirements of Appendix FM/SD. However Article 8 is not a means of allowing an appeal that does not quite meet the requirements of the Immigration Rules. It is open to the Appellant to make a fresh application under the Immigration Rules supplying all the required documentation.

After considering all the circumstances of the Appellant's case and balancing the competing factors I find the favours which are in favour of the Appellant do not outweigh the legitimate public interest."

The Grounds of Application

7. The Appellant sought permission to appeal on the grounds that the judge had erred in his approach to paragraph 245AA and his view of the evidential flexibility. The Appellant relied on the case of Rodriguez (flexibility policy) [2013] UKUT 00042.

8. Permission to appeal was granted by Designated Judge Lewis for the reasons stated in the grounds on 21st January 2014. Judge Lewis stated that although not raised in the permission application he harboured doubts about the Article 8 assessment which was arguably insufficiently reasoned.

9. On 5th February 2014 the Respondent served a reply opposing the appeal.

Submissions

10. Mr Hussain relied on his grounds and submitted that the evidence was plainly before the Entry Clearance Officer to establish that the substantive requirements of

the Rules could be met. The Appellant met the requirements of paragraph 245AA and the Judge was wrong to find otherwise. The appeal ought to have been allowed under the Rules and on common law principles of fairness. In his consideration of Article 8 the Judge had taken too narrow a view of the enquiry which he was required to undertake and had failed to take into account all relevant factors. The reality of the situation was that the Sponsor was clearly earning the required sum of £18,600 and there was no policy imperative underlying the refusal.

11. Mr Diwnycz submitted that the Judge was entitled to interpret paragraph 245AA as he did, particularly since on the face of the documentation there was an error. The letter from the Sponsor's employer contained a mistake on its face. The second letter said that the Sponsor was working for 40 hours per week at £8 per hour and he had a gross weekly wage of £360 but in fact, at 40 hours a week, his wage would have been £320.

Findings and Conclusions

12. Paragraph 245AA states as follows:

> "Documents not submitted with applications:
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> (a) Where part 6A or any appendices referred to in part 6A state that specified documents must be provided the UK Border Agency will only consider documents that have been submitted with the application, and will only consider documents submitted after the application where they are submitted in accordance with sub-paragraph (b).
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> (b) If the applicant has submitted:
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> (i) a sequence of documents and some of the documents in the sequence have been omitted (for example if one bank statement from a series is missing);
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> (ii) a document in the wrong format; or
>
> (iii) a document that is a copy and not an original document,
>
> the UK Border Agency may contact the applicant or his representative in writing and request the correct documents. The requested documents must be received by the UK Border Agency at the address specified in the request within seven working days of the date of request.
>
> (c) The UK Border Agency will not request documents where a specified document has not been submitted (for example an English language certificate is missing), or where the UK Border Agency does not anticipate addressing the omission or are referred to in sub-paragraph (b) will lead to a grant because the application will be refused for other reasons.
>
> (d) If the applicant has submitted a specified document:
>
> (i) in the wrong format, or

(ii) that is a copy and not an original document,

The application may be granted exceptionally, providing the UK Border Agency are satisfied that the specified documents are genuine and the applicant meet all the other requirements. The UK Border Agency reserves the right to request the specified documents in the correct format in all cases where (b) applies and to refuse applications if these documents are not provided as set out in (b).

13. So far as the Rules are concerned, there is a particular problem with the evidence from the employer. The letter dated 29th March 2013 is not consistent with the evidence in the payslips. In the payslips the Sponsor is recorded as working for 45 hours per week and a payment being made of £360 which is indeed reflected in the bank accounts. Had there not been an error within the employer's letter, it would have been more strongly arguable that the evidence submitted with the application, which gave a gross weekly wage rather than an annual wage, could properly have been regarded to be in the wrong format. Paragraph 245AA may have come into play and an opportunity ought to have been given by the UKBA for the correct document to be produced. However, since the letter contains a clear mistake on its face, there is no such duty and no error in the judge so finding.

14. Secondly, it is difficult to see how the judge erred in his assessment of Article 8. He addressed himself to the question as to whether the decision was in pursuit of a legitimate aim, in particular the economic wellbeing of the country and said that he was satisfied that the facts were established by other evidence, and the public interest in the refusal was therefore diminished. There is no error in his stating that since the Appellant had failed to meet the strict evidential requirements of the Rules it would only be in rare cases that the requirement as set out in the Rules should be circumvented by allowing the appeal on human rights grounds, citing Patel & Others v SSHD [2013] UKSC 72 and in particular the observation that Article 8 is not a general dispensing power to be distinguished from the Secretary of State's discretion to allow leave to remain outside the Rules. The judge clearly had sympathy with the Appellant, but it was a matter for him to decide whether the refusal was disproportionate and that decision will not be interfered with by an Appellate Tribunal absent an error of law.

Decision

15. The original judge did not err in law. The appeal is dismissed.

Signed Date

Upper Tribunal Judge Taylor