Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: OA/10055/2012

THE IMMIGRATION ACTS

Heard at Laganside Courts Centre, Belfast	**Determination Promulgated**
On 13 January 2014	**On 30 January 2014**

Before

The Hon. Mr Justice McCloskey, President

Between

SUSANA ELISA LAMMARDO

Appellant

and

ENTRY CLEARANCE OFFICER, BUENOS AIRES

Respondent

Representation:

For the Appellant: Mr McTaggart (of Counsel) instructed by RP Crawford & Co Solicitors

For the Respondent: Mrs O'Brien, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. This written Determination supplements and summarises the *ex tempore* judgement pronounced at the conclusion of the appeal hearing on 13 January 2014.

2. This appeal has its origins in a decision made by the Entry Clearance Officer ("*the ECO*") refusing the Appellant's application for clearance to enter the United Kingdom as a dependent parent. The refusal was based on an assessment that the application did not comply with all of the requirements of paragraph 317 of the Immigration Rules. Upon internal appeal, this decision was affirmed by the Entry Clearance Manager, on 8th November 2012.

3. The ensuing appeal to the First-Tier Tribunal ("*FTT*") was dismissed in a determination promulgated on 1st March 2013. The Judge reasoned, found and concluded as follows:

   (a) The accommodation on offer to the Appellant, located in the same accommodation block as her daughter at a monthly rent of £130, differs from that proposed by the Appellant in her application – and, by implication, constitutes evidence postdating the ECO's decision, which must be disregarded by virtue of section 85(A) of the Nationality, Immigration and Asylum Act 2002 ("*the 2002 Act*").

   (b) During the period of six months preceding the ECO's decision, the Appellant was receiving, on average, some £312 per month from a Northern Ireland bank account sustained by voluntary payments made by various persons.

   (c) Her daughter (the sponsor) is a qualified nurse and would do everything possible to support the Appellant.

   (d) The sponsor has an income of at least £350 per month, funded as noted above, which is "*undoubtedly adequate for her own needs*" and will remain secure.

   The Judge stated, finally, in paragraph 20:

   > "*However, for the foregoing reasons, in particular the uncertainty over the Argentinean pension and the rate of £130 per month, I am not satisfied the Appellant can satisfy the provisions of Rule 317(iv) and (iv)(a) and accordingly I find myself having to dismiss this appeal.*"

4. In granting permission to appeal, Upper Tribunal Judge Kebede stated:

   > "*There is an arguable point about the nature of the accommodation offered to the Appellant and whether or not it must be disregarded as post-decision evidence. There is also arguable merit in the grounds relating to the calculation of the sponsor's income and the lack of consideration given to Article 8 ECHR.*"

   One relates this to the grounds of appeal, which embody the following contentions:

(i) The Judge erred about the sponsor's income, the evidence (emanating from two bank accounts) being that this was around £700 per month, of which some £300 was devoted to the support of the Appellant.

(ii) This error is exposed and magnified by the simple calculation which, based on the Judge's apparent finding, yields the meagre residual sum of around £38 per month for the sponsor's maintenance and accommodation.

(iii) The judge failed to make any clear finding about whether the Appellant's Argentinean state pension would continue to be available to her in the United Kingdom.

(iv) The Judge, wrongly, appeared to invoke the current UK basic state pension of £107.45 per week as the yardstick for the amount which the Appellant would require to maintain herself. This ignored, for example, the current Job Seeker's Allowance rate of £71 per week.

(v) The FTT determination contains no consideration of Article 8 ECHR.

5. With specific reference to the grounds of appeal listed above, questions posed by the Tribunal at the hearing elicited the following response from the Respondent's representative:

(i) It was acknowledged that the Judge's finding that the sponsor's income was some £350.00, rather than £700.00, per month is perverse, as the evidence confounds it.

(ii) The unsustainability of the income finding is magnified by appropriate consequential calculations.

(iii) The Judge failed to make any finding about the availability of the Appellant's Argentinean state pension to her in the event of coming to live in the United Kingdom, a failing of undeniable significance.

(iv) The yardstick which the Judge should properly have employed was that of the Income Support rate of £67.50 per week, rather than the current UK basic weekly state pension of £107.45.

(v) The Judge's failure to consider Article 8 ECHR and to make appropriate findings was a substantial one.

6. The two discrete requirements at paragraph 317 of the Immigration Rules in play throughout were whether the Appellant:

(a) can, and will, be accommodated adequately, together with any dependents, without recourse to public funds, in accommodation which the sponsor owns or occupies exclusively; and

(b) can, and will, be maintained adequately, together with any dependents, without recourse to public funds.

It was incumbent on the Judge to make findings on every issue bearing on the question of whether the application complied with paragraph 317. He was obliged to do so in clear terms and to articulate his supporting reasons. See MK (Duty to give Reasons) Pakistan [2013] UKUT 641 (IAC). In the Determination under scrutiny, there is a failure to make clear findings of fact relating to each of the requirements of the Rules. There is also a free standing failure to make a clear finding concerning the Appellant's Argentinian state pension. Furthermore, there is no consideration at all of Article 8 ECHR. The inexorable conclusion is that the decision of the FTT suffers from a series of errors of law and is unsustainable in consequence. It must be set aside accordingly.

REMAKING THE DECISION

7. The parties' representatives concurred with the Tribunal's proposal that the decision be remade in this forum. In this exercise, the only mildly contentious issue which emerged was whether the Appellant was attempting, impermissibly, to rely on some new, additional information contained in a letter dated 16 May 2012 transmitted on her behalf. By virtue of Section 85A of the Nationality Immigration and Asylum Act 2002, the Tribunal was confined to considering *"only the circumstances appertaining at the time of the decision"*. I am satisfied that the aforementioned letter did not add anything of substance or novelty to the information contained in the completed entry clearance application dated 12 March 2012 and duly considered by the ECO in the initial decision of 26 April 2012 and, subsequently, by the Entry Clearance Manager in the internal appeal decision dated 8 November 2012. It is evident that the ECO's decision, affirmed by the Manager, consisted of a failure to properly consider and understand the information supplied in the application. I consider that the application was compliant with the Rules and should, therefore, have been allowed. It follows that this appeal must succeed substantively.

8. In passing, it is unnecessary to consider the potentially interesting question of whether the operative decision, for initial appeal purposes, was, as a matter of law, the initial ECO decision or the subsequent review decision of the Entry Clearance Manager which *"maintained"* the former.

DECISION

9. The decision of the FtT is set aside and remade and the appeal is allowed.

10. It follows that it is now incumbent on the ECO, subject to any sustainable bar, to grant the Appellant the visa requested.

THE HON. MR JUSTICE MCCLOSKEY
PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Date: **30** January 2014