Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/10126/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 7 March 2014	**On 31 March 2014**
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Before

UPPER TRIBUNAL JUDGE ESHUN

Between

MRS SILVANA ZEKTHI

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Mr Z Nasim, Counsel
For the Respondent: Mr I Jarvis, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The respondent has been granted permission to appeal the decision of First-tier Judge A M Baldwin who dismissed the appellant's appeal under the Immigration Rules and allowed it on human rights grounds. The appellant is a citizen of Albania born on 27 December 1991. She applied for entry clearance as a spouse. The

application was refused on 27 March 2013 because the respondent was not satisfied that the appellant met the maintenance requirements or that the sponsor was free to marry her at the time of their marriage.

2. The judge held as follows:-

> "20. I accept that it may well be the case that the Appellant did provide with her Application more documents than the E.C.O. has listed and it may be that the Sponsor, who I found to be a distressed, genuine husband, believed he had given everything which was likely to be required. However, the Grounds of Appeal themselves point away from everything having been provided because Section D (p.5) makes it very clear that the Divorce paperwork and Accounts were only provided at that stage, his SA302 would follow 'very shortly' and the rest of the paperwork from HMRC would also follow. I therefore conclude that the Appeal must fail under the Rules. I now address Article 8.
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> 21. The Appellant was at the time of her application and at the Hearing without legal representation. Her husband did his best and came across as a credible witness. He has provided tax calculations from the Revenue for 2011/2012 and 2012/2013 which show he earned £31,954 and £23,809 in those respective years. They also show that he had in fact overpaid tax due in each of those years, to the extent of £147.61 and £691.84 respectively. N.I. contributions due by 31.01.14 are also shown to have been paid ahead of time, on 15.11.13, through Newman Street Post Office. Again, with the reference number given on these Revenue documents (11834 55029) and the Sponsor's name, it is difficult to believe that they are not genuine, not least because the Sponsor would be likely to realise that their genuineness might well be checked by the Respondent and that, were they found to be false, he would not be likely to be allowed to have a family like in the U.K. in the foreseeable future.
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> 22. I find that the marriage is genuine and lawful, that the Sponsor was divorced from his former wife some years ago and that he has been earning more than the Rules require and has an income substantially more than the c.£13-14,000 per annum he would be likely to receive were he working for the minimum legal hourly wage in the U.K. There is, I find, no doubt that he can adequately maintain and accommodate himself and his wife. The question is whether in these circumstances it is reasonable and proportionate in the interests of effective immigration control to delay the couple's ability to have a full family life in the U.K. where the Sponsor is a British National. I conclude that it would be neither disproportionate nor reasonable."

3. Mr Jarvis submitted that the judge accepted that the appellant had not produced the specified documents and therefore her application failed under the Immigration

Rules. He said that this is relevant because under Appendix FM E-ECP.3.1 under Financial Requirements the appellant must provide specified evidence from the sources listed in Appendix FM SE.A1(2)(a). This evidence must include six months' financial documents prior to the date of application and this is a Rule specified in Rule 34G. Appendix FM-SE makes plain that there is an expectation on the Secretary of State that an ECO will see all the relevant documentary evidence before he or she makes the decision. The ECO/caseworker should be the primary decision-maker.

4. Mr Jarvis relied on **Shahzad (Article 8: legitimate aim) Pakistan [2014] UKUT 85 (IAC)** which held at paragraph 31 as follows:

> "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: that is 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."

5. Mr Jarvis submitted that under the deportation Rules the Secretary of State may grant leave where the criteria have not been met, however, under **Nagre** and **Gulshan** the Immigration Rules have to be applied first. In non-deportation appeals the Secretary of State refers to exceptionality although that is not the legal test as made clear in **FM**, but the courts have accepted that there must be an exceptional test i.e. where the decision would lead to unjustifiably harsh consequences.

6. Mr Jarvis submitted that it is plain that the First-tier Judge made no reference to Article 8 outside the Immigration Rules. That was a material error. He has not made clear why there are exceptional circumstances or why the appellant should be granted leave outside the Immigration Rules. The Immigration Rules make clear what a person has to satisfy. Where an appellant does not do that absent compelling circumstances, the appeal must be dismissed. In this case many of the relevant documents were put in after the application was made. Mr Jarvis submitted that the judge's approach on proportionality did not follow the approach in **Nagre** and **Shahzad**.

7. Counsel submitted that the First-tier Judge did not allow the appeal under the Immigration Rules. He allowed it under Article 8. He said that Appendix FM does not state that financial documents have to be six months before the date of application. Under the 2002 Act a judge can allow an appeal on the basis that the decision was not in accordance with the Immigration Rules or the law. There was nothing to prevent the documents which were relevant to the evidence prior to the date of application being considered by the judge. He said that there is a distinction between a substantive requirement and a procedural requirement. If one does not

meet the substantive requirement it may not be fatal. The judge's findings at paragraph 22 were open to him on the evidence.

8. I find that whilst Mr. Jarvis was right to submit that the appellant did not produce with her application the specified documents, his reference to Appendix FM SE A1(2)(a) was incorrect because this particular subsection is in respect of a salaried employee. The sponsor is a sole trader and not a salaried employee. The list of documents to be produced by a sole trade is at Appendix FM SE A1(7). In that list at 7(b)(ii) is *Statement of Account (SA300 or SA302)* and paperwork from HMRC, which the sponsor said would follow "very shortly". In the absence of these documents the judge rightly found that the appellant's appeal must fail under the Immigration Rules. Whilst I accept Counsel's submission that a judge can under the 2002 Act allow an appeal on the basis that the decision was not in accordance with the Immigration Rules or the law, the judge in this case did not allow the appeal under the Immigration Rules because the appellant could not meet the requirements of the Immigration Rules. It follows therefore that the respondent's decision was in accordance with the Immigration Rules.

9. I find that the judge materially erred in law in allowing the appeal under Article 8 because he did not follow the approach identified in paragraph 31 of **Shahzad,** which expressly approves the approach in **Nagre** and **Gulshan.** It is only if there may be arguably good grounds for granting leave outside the Immigration Rules that is it necessary to for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under them.

10. Having found that the judge materially erred in law, I set aside his decision on the appellant's Article 8 appeal and remake it. On the evidence I do not find that there is a compelling reason to grant the appellant entry clearance outside the Immigration Rules under Article 8. The delay in the couple's ability to have a full family life came about because the appellant failed to produce the specified financial documents with her application. Had she done so, she would not have been in this predicament. It is up to the appellant to make a fresh application in light of the positive findings made by the judge in respect of her sponsor's finances.

11. The appellant's appeal is dismissed.

Signed Date

Upper Tribunal Judge Eshun