Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/10714/2012

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 12 February 2014	**On 27 February 2014**
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Before

UPPER TRIBUNAL JUDGE PINKERTON

Between

ENTRY CLEARANCE OFFICER – RIO DE JANEIRO

Appellant

and

M T B
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr G Jack
For the Respondent: Mr S Mahmud

DETERMINATION AND REASONS

1. For ease of reference purposes hereafter I refer to the parties as they were before the First-tier Tribunal. Hence MTB is the appellant and the Entry Clearance Officer is the respondent. There were originally linked appeals before the First-tier Tribunal Judge in respect of MTB and her dependent child.

2. In relation to anonymity the First-tier Tribunal Judge granted that and anonymity is hereafter continued for the same reasons and I direct accordingly.

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3. The appellant and her son appealed against the respondent's decision dated 26 April 2012 to refuse them entry clearance as the unmarried partner and child of a refugee who has limited leave to remain in the United Kingdom. The judge allowed the appeal of MTB's child under the Immigration Rules, decided that the decision in relation to MTB was in accordance with the Immigration Rules, but allowed her appeal on human rights grounds.

4. The respondent sought leave to appeal the decision in relation to MTB on the grounds that the judge made a material misdirection of law in relation to Article 8. The respondent further argued that in relation to the child the judge did not give adequate reasons for accepting documents in relation to the sponsor's financial status on the day of the hearing, thus preventing the respondent from checking them without a proper audit trail showing the amounts claimed.

5. In granting permission to appeal in relation to MTB only the judge doing so found no arguable material error of law on the financial status point because at the hearing the respondent's representative agreed to the matter proceeding based upon electronically produced evidence. Permission was, however, granted on the Article 8 ground. Mr Jack at the hearing before me did not seek to go behind the decision to refuse the application in respect of MTB's child.

6. Before me I had all the documentation that was before the First-tier Tribunal Judge and in addition some case law was handed up to me on the day.

7. The first thing to note is that at the hearing before the judge there was a lengthy discussion as to what aspect of the Immigration Rules or human rights law was likely to be relevant to this appeal. It appears that the appellant's legal representative had advised MTB to make an application for refugee family reunion but it was clear that the application could not succeed given that the couple met in the UK sometime after the UK refugee sponsor had left his country of origin. The appellant's bundle had therefore not been prepared with the necessary evidence that would be relevant to an entry clearance appeal. The judge then took the decision not to adjourn the matter for further evidence to be produced and the sponsor was given time to access various financial documents electronically.

8. The judge found the sponsor to be a credible witness. The appellant in her witness statement said that she had to leave the United Kingdom in 2008, in part because her visa was about to run out. However, it is unclear whether she had leave to remain or had overstayed her visa. The main reason given for choosing to return to Chile with her child was because MTB's mother was in poor health. The appellant and the sponsor have continued to maintain their relationship since the appellant returned to Chile. The sponsor made a visit to see his family in December 2011. He has sent regular financial remittances to his family.

9. At paragraph 13 of the determination it is recorded that the sponsor said that there had been no application for his family to return to the UK "for some time" because he wanted to make sure that he was in a good position to provide for them in the UK.

At the time he was a student and he thought that he may not have been able to make a successful application for them to join him. After he was recognised as a refugee he was able to increase his work hours and he is still working, earning a good salary.

10. The sponsor gave evidence that he finds it very difficult being separated from his son during such important early years of his life. He talked of his son being mildly autistic. He outlined what problems his son has in school in Chile and the difficulty in finding people who are able to address his behaviour. The appellant had to take their son out of school recently because the school could not deal with him. The sponsor thinks that he will be able to find a better school for his son that has experience of dealing with such issues here in the United Kingdom. Although he enjoyed his visit to Chile the sponsor did not think that it would be possible for him to move there on a more permanent basis because he does not speak Spanish and would not be able to get a good enough job to support his family. They had all lived in the UK previously and if possible he would prefer it if they could join him here.

11. The judge found in paragraph 17 that "the appellant is likely to speak good English". She commented that the emails appear to be in good grammatical English and the sponsor said that it was their language of communication. The judge then commented that because the appellant and the sponsor were wrongly advised to make an application under paragraph 352AA of the Immigration Rules:

> "It seems that very little evidence was produced to show whether the appellant might have met the alternative requirements of the Immigration Rules for post-flight family members".

There was no evidence to show that the appellant produced a recognised English language certificate or other evidence relating to the sponsor's finances or accommodation at the date of the decision. There is recognition in paragraph 18 that the sponsor would have been in a position to rent adequate accommodation for the family in preparation for their arrival in the UK. The judge went on to say that whilst the evidence before the judge shows on the balance of probabilities that the appellant and her son were likely to have been adequately maintained and accommodated in the UK the fact that there is no evidence to meet the English language requirements shows that she was unlikely to meet all of the strict requirements of the Rule. The only aspect of paragraph 319O the appellant did not meet was the evidential requirement for an English language test certificate.

12. The judge then found that the evidence before her shows that a further entry clearance application for the appellant would have a good chance of success but given the delays that have already occurred found that it would not be in the best interests of the child for there to be any further delay. The judge then reasoned that the effect of her decision in the son's appeal would be that he would be granted entry clearance but his mother would not. It is clearly in his best interests for his mother to accompany him to the UK and given the fact that the appellant failed to meet only one requirement of paragraph 319O which she could no doubt have provided the relevant evidence for if she had been adequately advised the judge found that the

decision showed a lack of respect for her family life with her partner and son and that was disproportionate in all the circumstances of this particular case. The judge recognised that the application was made and decided before 9 July 2012 so the Article 8 definition contained in the new Immigration Rules did not apply.

13. In paragraph 23 of the determination the judge found that there has been quite some delay because the appeal was made in December 2011. The couple's child, who does meet the requirements of the Immigration Rules, has been separated from his father during an important period of his young life and it was only the lack of the appellant meeting the formal requirement to produce an English language certificate that prevented her from meeting the Rules and she is likely to speak English to a higher standard than would be required in an entry clearance application. The judge concluded that the public interest behind the requirement would in fact be adequately addressed, i.e. the need for a general ability to speak English, obtain work and not be reliant on public funds.

My decision on the Error of Law Point

14. I made my decision at the hearing and announced that the judge had erred materially in law. It is quite obvious that the judge had considerable sympathy for the parties, not least because there had been a long separation since the appellant and their child went to Chile in 2008. However, the application (under the wrong Rule) was not made until 31 December 2011 according to the documents on file. The decisions are dated in April 2012 which does not disclose undue delay on behalf of the Entry Clearance Officer and the file records show that an out of time appeal was not received until 18 June 2012 and then it was without payment of the fee that was required. That problem was not resolved until 24 January 2013 when a decision was taken that the Tribunal would allow the appeal to proceed being satisfied that by reason of special circumstances it would be unjust not to extend time. The hearing in the First-tier Tribunal took place on 7 November 2013. The fact that there has been a long delay has certainly not been the fault of the respondent and it appears to be that of the appellant and sponsor.

15. More important, however, is the fact that the appellant and sponsor appear to have been poorly advised. Although there is acknowledgement that the Rules surrounding refugees and their families are complicated the judge did her best to avoid further delay. The fact is that although the judge's confidence that the appellant speaks good English appears to have been well-founded one of the recognised strict requirements referred to by the judge was that the appellant did not produce an English language test certificate. I agree with the respondent that the judge was not entitled to dispense with that requirement even if it seemed to the judge that the appellant is likely to speak good English.

16. I further agree with the respondent that the lawful operation of immigration control will be proportionate in all save a small minority of exceptional cases identifiable on a case by case basis. The case law prior to the introduction of additions to the Immigration Rules in July 2012 still holds good. The fact that the appellant has not

been able to meet the Immigration Rules, the judge erred in not reasoning sufficiently how Article 8 ECHR considerations meant that MTB succeeded in her appeal.

The Resumed Hearing

17. Having announced my decision both representatives announced that they were in a position to proceed with the resumed hearing.

18. I heard evidence from the sponsor, Mr MM. Reference was made to the documentation that had been produced for the Upper Tribunal hearing relating to the test certificate concerning the appellant's English proficiency. The witness confirmed that he sent the documentation to his solicitor. He was not sure why it had not been produced at the first hearing but it was in existence at the time of that hearing.

19. Cross-examined by Mr Jack the sponsor said that he has been to Chile once since the appellant went there and that was in December 2011. He has not returned since because it costs a lot of money to get there, he sends the appellant and his son money, and he has to pay legal fees. The sponsor said that he was not aware how long it might take before MTB and their son could come into the country if the appeal is successful. Did he know of any reason why the appellant could not make a new application? The sponsor replied that he did not know why she could not. This has all gone on too long and he finds the situation very taxing emotionally. He hoped that the appellant could be successful at this hearing. There was no re-examination.

20. In submissions Mr Mahmud said that this was not a near-miss case under the Immigration Rules. The appellant was able to satisfy anyone that she was proficient to a high level in English as she is a bilingual secretary and therefore the proficiency in English requirement was met. She did not take and miss by one mark, for instance, any test and her employment shows that her abilities are higher than those required by the test. There is also the issue that her child has difficulties because of possible autism and he would come to the UK for a more understanding education.

21. Mr Jack responded that this is a near-miss case because the appellant had shown that the Immigration Rules have not been met. The documentation produced in 2014 should have been produced in 2012. Mr Mahmud responded that policy is not a dogma designed to keep families apart and the appellant had been wrongly advised.

Findings and Conclusions

22. It is common ground that MTB did not meet the requirements of the Immigration Rules as they relate to an entry clearance application for settlement to join a sponsor in the United Kingdom. The determination of the First-tier Judge refers to and in essence defines Article 8 ECHR and is not repeated here. (See paragraph 21).

23. There appears to be no challenge to the relationship between the sponsor, MTB and their child, even though I am somewhat surprised that despite the demands upon the sponsor's funds he has not been able to make a trip to see his family since 2011, the

appellant having left with their son to go to Chile in 2008. An application now known to be in the wrong form was made at the very end of 2011 and I have already commented as to the reasons for the delay before the application was listed for hearing. The family communicates in the ways described in the First-tier determination. Quite obviously that is no substitute for a family living together under the same roof. I take into account that the appeal of the couple's child has been allowed and that he may therefore come to the United Kingdom albeit that may be unlikely to happen unless and until he is able to travel with his mother.

24. The judge in deciding whether it would be reasonable and proportionate to expect the appellant to make a further application for entry clearance under Appendix FM took into account the House of Lords decision in **Chikwamba v SSHD [2008] UKHL 40**. However, the facts in that case were very different to the current one. The appellant is out of the country already and is not being asked to leave the United Kingdom to make an application that might, may or would be likely to succeed. There would be a further fee to be paid but that is only what is required of any person seeking to settle in the United Kingdom on similar facts.

25. Although it is true that the couple's child has been separated from his father during an important period of his life that is to no small degree a situation of his parents' making. Although it may not be in his best interests for there to be any further delay I find that on balance it is a proportionate decision to refuse MTB in all the circumstances of this particular case. If an application is made in proper form and is supported by all the necessary documentation then one supposes that the application would be successful and if it is not, for whatever reason, the appellant would have a right of appeal. Given the current circumstances and the history of this case it is not appropriate that Article 8 should trump the requirements of the Immigration Rules and for these reasons I find that this appeal fails.

Decision

26. The appeal of MTB is dismissed under the Immigration Rules and under Article 8 ECHR.

Direction Regarding Anonymity – Rule 14 of The Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of her family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date

Upper Tribunal Judge Pinkerton