IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/12055/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 10 December 2014	**On 17 December 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE HANBURY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

MRS RATREE THORN
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Ms Everett
For the Respondent: Mr Wray

DECISION AND REASONS

Introduction

1. The appellant in this case is a Thai national. She began a relationship with the sponsor, who is a British national, and they had a child together, Felix Jack Thorn, date of birth 18 June 2013, who, by virtue of his father's British nationality, is a British citizen.

2. The appellant applied for entry clearance to the UK as the partner of the UK sponsor and that was considered by the Entry Clearance Officer in Bangkok but he refused the application for various reasons. There were concerns about the relationship between the sponsor and the appellant but the ECO was also not satisfied that the financial requirements of the Immigration Rules and specifically Appendix FM paragraph E-ECP.1.1 were met. Therefore on the balance of probabilities he concluded that this was not an application which ought to succeed under the Immigration Rules.

The appeal proceedings

3. The appellant subsequently appealed against that decision and that appeal came before Immigration Judge Majid sitting at Taylor House on 24 September 2014. Both parties were represented at that hearing. According to Mr Wray, the Immigration Judge found the sponsor to be a credible witness but there does not appear to be any clear finding of credibility anywhere in the determination that I can find and Mr Wray did not refer me to any particular passage.

4. The determination does not adopt a conventional format in that it does not clearly set out the law and then the facts and then apply the law to those facts. Nor did the Immigration Judge give clear reasons for reaching the decision he did. This, by itself, would not necessarily be fatal but for the fact that the Immigration Judge appears to have decided that the case could succeed under Article 8 without properly analysing why the case failed under the Immigration Rules and whether Article 8 really had any application to the case at all. It has been emphasised many times by the higher courts that it is essential to be able to identify why a judge reached his conclusions, even if the detail of how he got there is not immediately apparent.

5. It seems to have been accepted by the parties before the First-tier Tribunal that the case could not succeed under the Immigration Rules and that was why the Immigration Judge went on to deal with Article 8.

6. The respondent's grounds of appeal dated 6 October 2014 have been settled by D Neale. In those grounds the respondent properly summarises the test in Article 8 cases to be: whether there are compelling circumstances not recognised by the Immigration Rules for allowing the case under Article 8? It has also been said that there must be insurmountable obstacles to family life not continuing abroad in order for the case to succeed under Article 8 in circumstances where it cannot succeed under the Rules.

7. The respondent submits in her grounds of appeal that the appellant and sponsor entered their relationship in full knowledge of the fact that there was no automatic right to enter the UK to form a family life here. It is right that the UK maintains immigration controls and these include insisting that financial requirements be met before foreign nationals are allowed to

enter or remain in the UK. Pausing there, it may be that in the future the appellant might meet these requirements and be allowed to continue her family life with the sponsor in the UK but the test as set out by the respondent in her grounds of appeal is correct.

Conclusions on the arguments before the Upper Tribunal

8. With respect, the Immigration Judge's determination does not adequately address the respondent's concerns. He did not apply the correct Article 8 test and he did not consider the whole issue of proportionality. The principal issue before him was whether the Secretary of State was entitled to refuse entry to the UK to a foreign national on the grounds that she failed to meet the financial requirements of the Rules.

9. The Immigration Judge failed to consider the fact that the appellant's failure to meet the financial requirements of the Rules was also material to the question of proportionality under Article 8. He also failed to consider whether the relationship between the appellant and the sponsor could continue from afar. In particular, the appellant can continue to communicate with the sponsor by telephone, e mail and, possibly, may be able to visit the appellant in the future. It was not, in my view, unreasonable for the respondent to decide that this was a case where entry clearance should be refused and insist that the appellant make a fresh application when and if she meets the requirements of the rules.

10. I am satisfied having heard brief argument at the hearing that the Immigration Judge did not produce a decision which is cogent, coherent and clear and more importantly it does contain a material error of law as addressed in the grounds of appeal, namely it does not properly identify the test under Article 8 and reach clear conclusions.

11. In my view it would not be desirable to have a further hearing at which the whole case was reheard effectively de novo. This is an appellate tribunal. The directions sent out by Judge Southern clearly state that if a party wishes to adduce any fresh evidence not before the First-tier Tribunal he must make an application to do so and that application must be made no later than 14 days before the hearing. The date they were sent out is not clear from the draft that I have been sent but it would have been on or after 12 November 2014. There has been no application to adduce fresh evidence.

12. I am satisfied that even if the First-tier Tribunal reached a favourable view of the sponsor's evidence, this was not a case that ought properly have succeeded under Article 8 based on the evidence and arguments submitted before the Immigration Judge. In the circumstances I do find there to be a material error of law in the decision of the First-tier Tribunal. I am going to substitute the decision of the Upper Tribunal which is that the appeal against the decision of the Entry Clearance Officer to refuse entry clearance is dismissed.

13. As a postscript to my decision I would add that there is no bar that I can see to the appellant making a fresh application for entry clearance either on the basis of continuing her family life with the sponsor in the UK or indeed for the purposes of family visits but I say no more about that because obviously the relevant criteria would need to be met.

Notice of Decision

The appeal by the respondent is allowed. The decision of the respondent to refuse the appellant entry clearance stands.

No anonymity direction is made.

Signed Date **16 December 2014**

Deputy Upper Tribunal Judge Hanbury

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed Date **16 December 2014**

Deputy Upper Tribunal Judge Hanbury