Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/15120/2013

THE IMMIGRATION ACTS

Heard at Glasgow	**Decision and Reasons Promulgated**
On 26th November 2014	**On 1st December 2014**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

ENTRY CLEARANCE OFFICER, UNITED STATES OF AMERICA

Appellant

and

ABDUL HAMED

Respondent

For the Appellant: Mrs M O'Brien, Senior Presenting Officer
For the Respondent: Mr J Vassiliou, of McGill & Co., Solicitors

DETERMINATION AND REASONS

1. The parties are as described above, but are referred to in the rest of this determination as they were in the First-tier Tribunal.

2. The appellant sought entry clearance as the spouse of a UK citizen. By notice dated 14th June 2013 the ECO refused that application principally for these reasons: (a) exclusion was conducive to the public good; (b) there was no proof of a genuine and subsisting relationship; and (c) the evidence fell short of the financial requirements in the Rules.

3. In a determination promulgated on 16th May 2014, Judge P A Grant-Hutchison held in favour of the appellant on all three points.

4. The ECO sought permission to appeal to the Upper Tribunal on these grounds:

   (1) The rules of specified evidence are comprehensively set out in Appendix FM-SE to the Rules. These set out what types of evidence are required, the periods they cover and the format they should be in. The Tribunal has had no regard to this ...its findings are therefore unsustainable.

   (2) ....The Tribunal has not had regard to the relevant date. For Appendix FM the significant date is the date of application and significant evidence is for the specified period before that date. The Tribunal has not addressed the relevant evidence from prior to 22nd February 2013 (the date of application). This also renders the conclusions unsustainable.

   (3) It follows... that it is not clear what the sponsor's actual gross annual income was at the date of application... The appeal can therefore not be made out... It is also worth noting that if the sponsor's current income does exceed the income threshold, there is no reason to prevent the appellant from making a fresh application based on the sponsor's income at this time.

5. The grounds go on to attack the findings related to exclusion in the public good. They do not seek to take up the issue of the relationship.

6. On 6th August 2014 permission was granted to appeal to the UT, on the view that the judge arguably failed to give reasons for finding that the appellant met the requirements of Appendix FM-SE as to income.

7. Mrs O'Brien submitted that applications and appeals of this nature are determined as at the date of application and on the documentary evidence submitted therewith. She said that there is no case law on that point, but it is inherent in the scheme of Appendix FM which is based upon evidence in specific forms being provided with the application to the ECO. No further documentation should be looked at on appeal. In any event, the relevant date could be no later than the date of decision, 14 June 2013, because in an entry clearance appeal section 85(5) of the 2002 Act restricts the Tribunal to considering circumstances appertaining at the time of the decision to refuse. Even if the First-tier Tribunal was entitled to look at any new evidence, what was produced in this case went to periods beyond that date. The Tribunal did not direct itself as to any restriction on the evidence it might entertain. Even looking at all the information which was made available, the requirements of the Rules were not met by evidence of the specified nature. The judge appeared to have thought that he was able to take it from general oral evidence that income would meet the necessary level, even if the specified evidence in written form was not supplied. The necessary evidence of pension payment and the full sequence of bank statements were not before the judge, as the appellant seemed to accept. In those circumstances, the judge could only have dismissed the appeal.

8. In respect of the ground in relation to exclusion being conducive to the public good, Mrs O'Brien had nothing to add.

9. I indicated to Mr Vassiliou that he did not need to deal with the latter ground, but that there seemed to be considerable difficulty in identifying any basis on which the judge might have been entitled to find that the financial requirements of the Rules were met.

10. Mr Vassiliou submitted that the appellant had only to prove income of £18,600 per annum. The judge accepted that, made up of three sources – the appellant's USA pension; the sponsor's USA pension; and the sponsor's UK pension. At the time of application she was receiving her USA pension but was unable to show the written evidence, because it did not then exist. Evidence of the UK pension had been provided in the hearing bundle, but the US pension evidence was still not available at the hearing date. Mr Vassiliou said that he had received such evidence only recently. If the decision were to be re-made, he would seek to have it admitted. He submitted that the First-tier Tribunal was not limited to considering the matter either at the date of application or at the date of decision, but could look at it on an ongoing basis. Although no written application had been made for further evidence to be received now, it had only recently come to hand, and he would make that application orally.

11. I indicated that the Secretary of State's appeal would be allowed and the determination reversed.

12. The determination contains no consideration of whether the circumstances were to be assessed as at the date of application, at the date of decision, at the date of the hearing in the First-tier Tribunal, or at some other date forecasting into the future. That is a material error.

13. It may be from the scheme of these particular Rules that the matter is to be tested as at the date of application and by the evidence submitted therewith, although I am not fully persuaded on that point. It is clear that at latest the decisive date is that of decision, in terms of section 85(5), and that the requirements of the Rules need to be satisfied by specified evidence in the form required. The Rules are prescriptive. Oral evidence, no matter how convincing, and incomplete documentary evidence could not make the case. The judge appears to have been misled by inaccurate presentation of the case into thinking that broadly persuasive evidence of whatever nature and going to whatever date enabled the appeal to succeed. That is not the scheme of the Rules or of the appeal jurisdiction. It was the duty of representatives to address the evidential requirements much more accurately than they did.

14. Mr Vassiliou's final submission was based upon proof in the required form in accordance with the Rules which has only recently become available. It would not be permissible to admit that evidence now. Even if allowed in, it would not show that the requirements of the Rules were met at the date of decision, the latest point at which the appellant could hope to succeed.

15. Mr Vassiliou made a faint attempt to argue that the appeal should succeed on the alternative basis of Article 8 ECHR. However, there cannot be any disproportionate interference with family life interests where the appellant has the opportunity of now making a valid application for entry clearance. (He does have the benefit of a positive outcome on the issues of relationship and of the public good.)

16. I notice one bizarre feature of the evidence, although it does not bear on the present outcome. The sponsor says that her mother, who has always lived on the Isle of Lewis, speaks only Gaelic and so cannot converse with the sponsor's daughter. The sponsor's daughter says the same. This seems extremely unlikely, even if there were no other evidence to contradict it. But the appellant also produces a letter from the sponsor's mother, written in excellent English and not said to be translated. In the letter she praises the appellant highly, and says she has been talking to the appellant regularly on the phone for the last 4 years. As the appellant is of Afghan origin and now a citizen of the USA, it seems unlikely these conversations were conducted in Gaelic.

17. The determination of the First-tier Tribunal is **set aside**, and the following determination is substituted: the appeal, as originally brought by the appellant to the First-tier Tribunal, is dismissed.

18. No order for anonymity has been requested or made.

28 November 2014
Upper Tribunal Judge Macleman