Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: OA/17188/2013

THE IMMIGRATION ACTS

Heard at Field House
On 24 October 2014

Determination Promulgated
On 11 December 2014

Before

UPPER TRIBUNAL JUDGE LATTER

Between

ENTRY CLEARANCE OFFICER, PARIS

Appellant

And

LAKEHAL SADOUDI SOUMIA
(Anonymity direction not made)

Respondent

Representation:

For the Appellant: Mr P Duffy, Home Office Presenting Officer
For the Respondent: Mr Z Naseem, instructed by Yakub & Co Solicitors

DETERMINATION AND REASONS

1. This is an appeal by the Entry Clearance Officer, Paris, against a decision of the First-tier Tribunal issued on 29 July 2014 allowing an appeal by the applicant against the decision made on 27 June 2013 refusing her leave to enter as the spouse of a UK citizen. In this decision I will refer to the parties as they were before the First-tier Tribunal the applicant as the appellant and the Entry Clearance Officer as the respondent.

© CROWN COPYRIGHT 2014

Background

2. The appellant is a citizen of Algeria born on 27 July 1983. She married her husband, the sponsor, in Algeria on 29 March 2009 and they have a daughter born on 17 September 2010. The applicant applied for entry clearance on 5 June 2013 as a spouse. However, her application was refused on the basis firstly that the respondent was not satisfied that the relationship was genuine and subsisting or that the parties intended to live together permanently in the UK. The appellant had failed to provide any evidence of contact with the sponsor in the form of photographs, dated Skype messages, flight tickets or entry clearance stamps. He was also not satisfied that the financial requirements of the rules were met in that she failed to show that her sponsor had a gross income of at least £18,600 per annum. She had stated that he earned in excess of £22,400 per annum commencing employment in February 2012 with Slough Borough Council, the position becoming permanent in October 2012 but six months payslips were provided which showed an annual gross salary of £16,790.24.

3. There was also evidence that the sponsor was employed by Greater London Food Company (GLFC) but this employment only commenced on 1 January 2013. There was a failure to provide documents to show the sponsor's wage slips for 12 months with Slough Borough Council from 5 June 2012 to 5 June 2013, the date of application, his bank statements for the same period showing the payment of wages into his bank account or an official letter signed from GLFC confirming his employment, the position within the organisation and whether it was permanent or temporary. The respondent also noted that the appellant had provided a P60 for tax year 25 April 2013 for GLFC showing that tax to date was £1,500 in this employment but the last payslip dated 31 March 2013 showed gross pay of £5,500 and therefore the payslips and the P60 for this employment did not correspond.

4. The appellant appealed against this decision and the grounds were submitted with a number of further documents. The decision to refuse the application was reviewed by an entry clearance manager and in the light of further evidence it was conceded that the relationship was genuine. However, with regards to maintenance the financial requirement was calculated by taking the past six months gross earnings dividing by 6 and multiplying by 12. For the employment with Slough Borough Council this equated to £17,759.40 per annum evidenced by the required documents, payslips, corroborating bank statements and an employer's letter. However, for the employment with GLFC bank statements had not been received to corroborate the claimed earnings as stipulated in the rules. Attempts had been made to verify the authenticity of the documents from GLFC including checks on 192.com and BT directory, neither of which showed any contact details. A search at Companies House showed that this company was only registered on 16 January 2013 despite the sponsor's payslip from January 2013 showing year to date earnings implying that he had been employed for the full financial year earning £500 per month, (the £4,500 total gross pay would equal nine months pay). There were no corroborating bank statements and accordingly these claimed earnings could not be taken into account.

The hearing before the First-tier Tribunal

5. At the hearing before the judge it was submitted on behalf of the respondent that the sponsor had not showed the required earnings and that the income from GLFC should not be taken into account as there were no bank statements to corroborate the claimed earnings as required by the rules. The start date of the employment should be on the letter from GLFC and the sponsor did not have enough savings to make up the shortfall. It was argued on behalf of the appellant that the sponsor had shown his earnings through payslips and bank evidence. He had obtained a new job from 1 April 2014 and the financial threshold was met.

6. The judge set out his findings of fact and law as follows:

> "16 The appellant states in his witness statement of 2 June 2013 that he commenced employment with GLFC in January 2013 and continued until 31 October 2013. He has submitted payslips from May 2013 to October 2013. The company commenced business in January 2013. I found the sponsor to be a credible witness and accept that his employment commenced in January 2013- the payslips do not indicate anything to the contrary. The payslips from May 2013 to October 2013 appear to be genuine. There is no evidence to suggest otherwise. The sponsor was paid in cash. I find that the appellant's total earnings comfortably meet the £18,600 requirement.
>
> 17 I have carefully considered the bank statements submitted by the appellant. The Natwest bank statements from 19 March 2013 to 2 September 2013 show various cash credits resulting in total savings of £8290 by 2 September 2013. I am satisfied that the cash credits represent the sponsor's surplus income from GLFC and therefore corroborate his claimed earnings from that employer.
>
> 18 The sponsor's income is the only matter in dispute under the Rules and therefore I am satisfied that all of the requirements are met."

7. In the event that he was wrong under the rules the judge went on to consider article 8 outside the rules. He found that the appellant and their daughter had developed a strong degree of private and family life with the sponsor who resided in the UK and that refusal would interfere with that right. On the issue of proportionality, this involved striking a fair balance between the rights of the appellant and the public interest. The judge took into account the best interests of their daughter finding that it was in her best interests to reside in the UK with both parents as she was a UK citizen and entitled to the benefits of UK education and healthcare. She could not come to the UK unless her mother had leave to enter. There was evidence, he commented, that the sponsor had sufficient income to support his family in the UK and had a new part time job to replace the GLFC post. He found that the public interest in exclusion on income grounds was very weak. Accordingly, the appeal was allowed on both immigration and human rights grounds.

The grounds and Submissions

8. The respondent was granted permission to appeal for the following reasons:

"… 2 It is arguable that the entire approach by the judge to the appeal was flawed. Arguably the judge failed to identify the issues of fact that were in dispute, or to make adequate findings of fact upon the relevant evidence, before deciding that the requirements of the immigration rules were met. If he had done so, then it is difficult to see how he could have reached the decision he did.

3 Equally it is arguable that the entire approach taken to the article 8 appeal was fundamentally flawed, and displays a misunderstanding or, failure to apply the principles and guidance set out in MM to which the judge referred himself. If the judge was entitled to find, and did find, that after the date of the decision the appellant had met the requirements of the immigration Rules then he failed to identify any reason why the appellant should not be expected to make a fresh application relying upon that change in circumstances. If the appellant did not meet those requirements then the judge failed to identify what was disproportionate about the expectation that the appellant's spouse and child should live with her in Algeria; that child being a dual national of Algeria and Britain. Arguably the Judge failed to have any adequate regard to the public interest, or to the proper approach to the question of proportionality in the light of the guidance to be found in the Court of Appeal's decision in MM."

9. Mr Duffy adopted the respondent's grounds of appeal which can be summarised as follows. The rules set out in appendix FM-SE what types of evidence were required, the period they covered and the format they should be in and the appellant had failed to produce the necessary evidence to show the sponsor had the required earnings. There were no bank statements to corroborate all the claimed earnings, a mandatory requirement of the rules. Further, the judge did not have appropriate regard to the relevant date, the date of application, or to the requirement that the required evidence must be for the specified period before that date. The judge did not address the period prior to the date of application when attempting to find that the financial requirements could be met through the new employment and therefore reached an unsustainable conclusion. The judge, so he argued, applied his own methods of calculation ignoring the requirements of appendix FM-SE. It was not clear or substantiated what the sponsor's actual gross income was at the date of application. If the sponsor's current income exceeded the income threshold, there was no reason to prevent a fresh application being made on that basis.

10. So far as article 8 was concerned, the Rules required appendix FM to be the route for those seeking entry on the basis of their family life. When considering whether the appeal should be allowed on article 8 grounds, the judge failed to follow the guidance in Nagre v Secretary of State for the Home Department [2013] EWHC 720 (Admin) or Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 640 (IAC). In any event, the appellant and sponsor could continue their family life together in Algeria and article 8 should not be used to circumvent the Immigration Rules. There was no analysis of why the appellant could not submit a further application or why it would be unjustifiably harsh to require her to do so.

11. Further, the sponsor could not evidence his second employment as required under the mandatory requirements of appendix FM-SE and that income therefore could not

be taken into account. The couple had married in Algeria and there could have been no legitimate expectation that family life could necessarily be established in the UK. There would be no disproportionate effect on the best interests of the child who as a British citizen could join her father in the UK if her family wished her to do so.

12. Mr Duffy summarised the grounds by submitting that the findings under the immigration rules were inadequate and wrong as the appellant could not meet the requirements of FM-SE and the appeal should not have been allowed under article 8 as there was no additional factor justifying that course. In substance, the judge was permitting reliance on a near miss argument.

13. Mr Naseem submitted that the determination had to be put into its proper context. The application had been supported by further documents which had been accepted by the entry clearance manager in relation to the genuine nature of the relationship. On the basis of the accepted evidence there was a limited shortfall of £840 from the required level of £18,600. The judge had accepted the evidence about the primary and secondary employment and was entitled to consider the evidence in the light of the review by the entry clearance manager.

14. So far as article 8 was concerned Mr Naseem argued that the judge had properly applied the relevant jurisprudence giving proper weight to the fact that there was a British citizen child. He was also entitled to comment that the public interest in exclusion on income grounds was very weak in the light of the small shortfall. Appendix FM did not include all matters relevant to an assessment of private life and the judge had been entitled to go on to consider the matter under article 8.

Assessment of the Issues

15. The first issue for me to decide is whether the judge erred in law such that his decision should be set aside. I am satisfied that he did err in law both in respect of the immigration rules and article 8. The provisions of appendix FM set out the requirements to be met when an application is made by a spouse and appendix FM-SE identifies the evidence to be provided. The financial requirements must be supported by specific evidence for the period of six months prior to the date of application, in this case up to 5 June 2013. The evidence relating to the employment with Slough Borough Council was duly evidenced as required with payslips, corroborating bank statements and the employer's letter and equated to £17,759.40. The appellant also sought to rely on the sponsor's employment with GLFC but this was not supported by the required evidence. Further, it is clear that there were concerns as set out in the entry clearance manager's decision about the reliability of a number of documents. In any event the extra £500 per month would not have taken the income up to the required level for the relevant period. It was not open to the judge to do a recalculation covering a period from May 2013 to October 2013 or to take into account the new part time employment replacing the GLFC employment.

16. On the basis of the evidence produced in support of the application and subsequently, the appellant was not able to meet the financial requirements of the

rules. I am not satisfied as submitted by Mr Naseem that the entry clearance manager review should be the starting point. The appeal is against the original decision and the entry clearance manager was simply and accurately explaining why that decision was maintained on financial grounds.

17. I am also satisfied that the judge erred in the way he dealt with article 8. In the light of further evidence submitted, it may well be the case that a further application would be successful. However, that without more does not justify the appeal being allowed under article 8 so circumventing the requirements of the immigration rules. The assessment of article 8 must be carried out in the light of the requirements of the rules and the judge should have considered whether there were any particular circumstances justifying the appeal being further considered under article 8 in the light of the failure to meet the requirements of the rules.

18. The judge was of course right to take into account the best interests of the child of the family but the fact of the matter is that their daughter is 4, has been living with her mother in Algeria and whilst being a British citizen is also an Algerian citizen. In the light of the evidence that a further application was likely to be successful there has been no consideration of why it would not be reasonable for such an application to be made. The judge commented that the public interest in exclusion on income grounds was very weak but this wholly overlooks the public interest in requiring that an applicant is able to meet the financial requirements of the rules and more generally that there should be a predictable and consistent system of rules by which applications are assessed. For these reasons, I am satisfied that the error of law is such that the decision should be set aside.

<u>Re-making the Decision</u>

19. Both representatives were satisfied that if the decision was set aside I should re-make it on the basis of the submissions I have heard. For the reasons I have already given the appellant was not and is still not able to show that she could meet the financial requirements of the rules for the prescribed period. The appeal under the rules must be dismissed.

20. So far as article 8 is concerned I am not satisfied that there are any compelling or exceptional factors falling outside the rules which would justify the decision being allowed on article 8 grounds. It is not a question of applying a test of exceptionality or a threshold requirement before article 8 can be considered. The position here is that there is evidence to support the contention that the appellant if she made a fresh application would now be able to meet those requirements although it must be for the entry clearance officer to assess the application on the basis of the evidence provided. It is not unreasonable to expect an application to be made in accordance with the rules. The best interests of the child of the family must be taken into account but that is in the context of the fact that she continues to live with her mother in Algeria although this may not be for much longer if the requirements of the rules can be met. It is also right to take into account that the couple married in Algeria and

there could have been no legitimate expectation that family life could necessarily be established in the UK in the absence of being able to comply with rules.

21. I am not satisfied that there are any further circumstances not sufficiently recognised under the new rules to justify the grant of leave under article 8. Whilst the decision engages article 8(1) I am satisfied, even taking due account of the best interests of the child of this family as a primary consideration, that the decision is proportionate to the legitimate aim of requiring compliance with the immigration rules as part of protecting the economic well-being of the country.

Decision

22. The First-tier Tribunal erred in law and the decision is set aside. I re-make the decision by dismissing the appellant's appeal on both immigration and human rights grounds.

Signed Date 9 December 2014

Upper Tribunal Judge Latter