Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: OA/18769/2012

THE IMMIGRATION ACTS

Heard at Laganside Courts Centre, Belfast	**Determination Promulgated**
On 10 January 2014	**On 30 January 2014**
	………………………………

Before

The Hon. Mr Justice McCloskey, President

Between

MR YUNME KISMET

Appellant

and

ENTRY CLEARANCE OFFICER, ISTANBUL

Respondent

Representation:

For the Appellant: Unrepresented
For the Respondent: Mrs O'Brien, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. This appeal was listed for hearing at Laganside Courts Complex, Belfast on 10th January 2014. The Appellant did not appear, he was unrepresented (in contrast with the hearing at first instance) and there was no communication of any kind to the Tribunal on his behalf.

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Telephone enquiries undertaken by the Tribunal's administrative personnel yielded no information. Having stood the appeal over on 10th January 2014, I received the representations of the Respondent's representative, Mrs O'Brien, on the second of the two successive arranged days of hearing at this centre, on 13 January 2014. I now proceed to determine the appeal on its merits.

2. This appeal originates in an unsuccessful application for an entry clearance visa by Yunme Kismet (hereinafter "*the Appellant*"). The Appellant is, according to the evidence, married to Margaret Ingrid Crawford (hereinafter "*the sponsor*"). The application for a settlement visa was made on 28th June 2012. This resulted in a refusal decision of the Entry Clearance Officer ("*the ECO*"), dated 3rd September 2012. This decision was subsequently affirmed, on review, by the Entry Clearance Manager, on 26th February 2013.

3. The gist of the ECO's refusal was that the application did not satisfy the requirements of paragraph 281 of the Immigration Rules. On appeal, the First-tier Tribunal ("*the FtT*") made the following material findings:

(a) The Appellant and the sponsor are validly married.

(b) The marriage is subsisting.

(c) The Northern Ireland Housing Executive ("*NIHE*"), landlord of the dwelling house in which the sponsor resides with her four children, would probably permit the Appellant to reside there.

(d) However, there is no evidence that this property is "*certified to be suitable and would not be subject to overcrowding*", given particularly the absence of a surveyor's report.

(e) The Appellant will require recourse to public funds in order to be maintained.

(f) There is a job available to the Appellant in Leicestershire, England, in a Turkish fast food business.

(g) However, if the Appellant were to take up this job, he would not have the financial means to visit the sponsor.

Having made these findings, the Judge then expressed the following conclusion:

> "*For these reasons I am satisfied that the Appellant cannot meet the requirements under the Immigration Rules to be admitted to join his spouse for settlement.*"

4. This was followed by the Judge's assessment of the Appellant's claim under Article 8 ECHR, which was thus:

   (a) The impugned decision of the ECO interferes with the exercise of the Appellant's right to respect for his family life.

   (b) This interference is in accordance with the law.

   (c) The interference is proportionate, having regard to the Judge's earlier finding of the projected reality of family life for the Appellant and his spouse in the event of him being admitted to the United Kingdom. Quite simply, he would not be a present or active family member. Thus the interference is proportionate to the legitimate aim of immigration control.

   The Judge expanded on his reasoning in the following passage:

   > "*…. If a secure and valid job and employment could be found for the Appellant in Northern Ireland close in proximity to the proposed accommodation (that) a fresh application would, in all probability, succeed.*"

5. In granting permission to appeal, Upper Tribunal Judge Rintoul identified two arguable errors of law on the part of the Judge:

   (a) Misdirection regarding the suitability of accommodation in failing to have due regard to the statutory over crowding provisions of the Housing Act 1986.

   (b) Misdirection in finding that the Appellant would not have the funds to visit the sponsor, rather than determining the issue of whether the Appellant could be supported adequately without recourse to public funds.

6. As regards the first of the two permitted grounds of appeal, this Tribunal would observe that the Housing Act 1986 does not apply to Northern Ireland. In this jurisdiction, housing has, since the creation of the state of Northern Ireland, consistently been, constitutionally, a so-called "transferred" matter. Accordingly, the competent legislature is the devolved one and Northern Ireland has its own separate body of housing legislation. While this is the correct legal and constitutional position, this Tribunal received no considered argument from either party on the relevant provisions of Northern Irish legislation. Given my evaluation of the second ground of appeal, and taking into account the absence of any adversarial argument, I decline to explore this discrete ground further.

7. By virtue of the requirements contained in the Immigration Rules, it was incumbent on the Judge to consider the question of whether the Appellant could be supported adequately without recourse to public funds **and** to make findings accordingly. My analysis of the Judge's findings in this respect is set out in paragraph [3] above.

8. The Judge is to be commended for the demonstrable care which he exercised in compiling his determination. However, I consider that there is a significant incompatibility between the finding, in paragraph [16], that the Appellant "*could only be maintained without recourse to further public funds*" and the finding, albeit expressed in less cogent terms, but readily implicit in paragraph [17] – [26], considered in their entirety, that if admitted to the United Kingdom the Appellant will be employed at the minimum wage level and will have meals provided to him free of charge. I further consider that these incompatible findings give rise to the conclusion that the FTT determination, in this important respect, is infected by an error of law the materiality whereof is incontestable.

9. There is also a demonstrable incompatibility between the Judge's finding that the Appellant *"could only be maintained without recourse to further public funds"* (on the one hand) and his separate finding, in the Article 8 ECHR assessment which he conducted, that the Appellant would be living apart from his family, elsewhere in the United Kingdom: where, on the basis of another separate finding, he would be self sufficient by virtue of his employment and subsistence arrangements.

10. Mrs O'Brien, representing the ECO, was disposed to acknowledge the shortcomings in the decision of the FtT outlined above. Mrs O'Brien further drew attention to the absence of any specific finding as to whether the marriage between the parties was subsisting.

11. There is a further aspect of the FTT determination which must be highlighted. In paragraph [29] the Judge stated:

> "*Also of concern but to a lesser extent was the imposition of potential overcrowding at the proposed accommodation. This may have a detrimental effect upon the health and educational wellbeing of the minor children. Although not a determining factor, it was one that I took into account.*"

This assessment, with respect, is irreconcilable with the Judge's earlier clear finding that the Appellant, in the event of securing settlement to enter the United Kingdom, would work and reside in Leicestershire and would not have the means to travel to Northern Ireland, where the relevant accommodation is situated.

DECISION

12. For the reasons elaborated above this is, therefore, one of those cases falling within the compass of the principles enunciated by the House of Lords in Edwards –v – Bairstow [1956] AC 15. Errors of law have been demonstrated and the decision of the FtT cannot, accordingly be sustained. It must, therefore, be set aside and remade.

13. Bearing in mind that, on appeal, decisions of this kind must be made on the basis of the information available to the ECO at the material time, I proceed to remake the decision. Having regard to the errors of law in the Determination of the FtT outlined above I am satisfied that the Appellant's initial appeal should have been allowed under the Immigration Rules. This, accordingly, is my decision.

14. I allow the Appellant's appeal under the Immigration Rules. It follows that, subject to anything of an unexpected or novel nature, it will be incumbent on the ECO to grant the Appellant the entry clearance for settlement visa for which he originally applied.

THE HON. MR JUSTICE MCCLOSKEY
PRESIDENT OF THE

UPPER TRIBUNAL

IMMIGRATION AND ASYLUM CHAMBER

Dated: 30 January 2014