IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/06524/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 03 September 2015	**On 07 September 2015**

Before

UPPER TRIBUNAL JUDGE BLUM

Between

ARBEN BAJRAMI
(ANONYMITY DIRECTION NOT MADE)

Appellant

And

ENTRY CLEARANCE OFFICER - Warsaw

Respondent

Representation:
For the Appellant: Mr A Shajko, of Visa & Immigration UK Ltd
For the Respondent: Mr Jarvis, Senior Home Office Presenting Officer

DECISION AND REASONS

Background

1. The Appellant is a national of Kosovo, born on 29 November 1982. His appeal against a refusal of entry clearance dated 24 April 2014, as the partner of Ms S. Potter (the sponsor), a British citizen, was allowed by Judge of the First-tier Tribunal Lebasci (the Judge) in a determination promulgated on 12 March 2015. The Respondent appealed to the Upper Tribunal against that decision on the basis

that the Judge failed to consider or apply provisions of the immigration rules (paragraph 1(n) of Appendix FM-SE) dealing with cash deposits identified in the sponsor's bank account statements.

2. Permission to appeal was granted and I heard the Respondents' appeal on 09 July 2015. In a determination promulgated on 15 July 2015 I found that the First-tier Tribunal Judge materially erred in law by failing to consider the financial evidence relating to the sponsor's income within the framework of the requirements of Appendix FM-SE 1(m) and (n). While there were a number of large deposits into the sponsor's bank account statements during the relevant period prior to the date of the application these did not correspond to her net income as disclosed in her salary slips as required by Appendix FM-SE(1)(n).

3. I additionally found that the First-tier Tribunal Judge erred in law by taking account of the sponsor's premium bonds, which where to the value of £10,000, when assessing whether she had 'specified' savings for the purpose of Appendix FM and paragraph 11A of Appendix FM-SE. The bonds could only be taken into account if they were cashed-in to provide savings. Nor, in the alternative, had any consideration been given by the First-tier Tribunal to the fact that the sponsor had not met the documentary requirements relating to any income she received from the bonds held (she had produced no portfolio report or dividend voucher). In these circumstances I was satisfied the First-tier Tribunal materially erred in law and that the Appellant could not succeed in his entry clearance application under the immigration rules.

4. Mindful of the fact that the First-tier Tribunal Judge had not gone on to consider whether the refusal of entry clearance could constitute a disproportionate interference with Article 8 ECHR I adjourned the hearing to enable further evidence, both oral and documentary, to be provided in this regard.

Further evidence

5. The Appellant provided a further bundle of documents for the adjourned hearing on 03 September 2015. Much of this evidence post-dated both the Respondent's decision under appeal and the previous appeal hearings. The additional documentary evidence included, *inter alia*, P60s for the year ending April 2015 relating to the sponsor's employment with both Hart Stores & Costessey Post Office and West End Cue Club, further wage slips relating to these two jobs, further bank account statements, further evidence of the sponsor's visits to Kosovo, and birth certificates relating to the sponsor's two adult children. I additionally received skeleton arguments from both representatives.

Oral evidence form the sponsor

6. The sponsor adopted her earlier statement of 19 January 2015. In this statement the sponsor reiterated the genuineness of her relationship with the Appellant, a matter no longer in issue. The sponsor additionally identified the financial documents

provided to the Respondent relating to her employment, her savings, her bonds and her mortgage.

7. In her oral evidence the sponsor explained that she now deposited her cash income straight into her bank account and this was reflected in her new bank account statements. As this early juncture I indicated to Mr Shajko that, pursuant to section 85A of the Nationality, Immigration and Asylum Act 2002, and following the House of Lords decision in **AS (Somalia) (FC) and another (Appellants) v Secretary of State for the Home Department (Respondent) [2009] UKHL 32**, I could only consider evidence appertaining to circumstances at the date of the refusal of entry clearance, which was 24 April 2014. Mr Shajko, in reply, submitted that the amount of money received by the sponsor at the date of decision was exactly the same as that reflected in the post-decision evidence, the only difference being that the full income was now deposited into her bank account statements, and that she had now 'cashed-in' her bonds.

8. The sponsor stated that both her sons lived in Norwich and that she was very close to them. She was also close to her mother, who had recently been hospitalised and who would be staying with the sponsor upon her discharge. She did not want to leave her mother or children. She had also previously lost a baby daughter. She could not move to Kosovo because she had two jobs and a home. There was no work for the Appellant in Kosovo, let alone for the sponsor. She could only speak the odd word of Albanian. The separation from her husband was affecting her emotionally and she now felt she had done everything that was required of her.

9. In cross-examination the sponsor said she was not sure how long the Appellant had lived in the United Kingdom prior to meeting him. She did not at first know that he was present in the United Kingdom illegally but she became aware of this before they married. She thought that her youngest son may have lived with her at the date of decision because he had split up with his girlfriend around that time.

10. In response to questions from me the sponsor said her sons were both in employment at the date of the Respondent's decision and that they were neither dependent nor reliant on her. At the date of the Respondent's decision her mother was in good health. The sponsor's mother lived by herself in a normal residence about 6 or 7 miles away. The Appellant had his parents in Kosovo, two married sisters, a brother, nephews, aunts and uncles and cousins. The sponsor had twice been to Kosovo this year and four times previously. In Kosovo she stayed in her in-law's home.

Submissions

11. Both representatives relied on their skeleton arguments. Mr Jarvis submitted that the documentary requirements in Appendix FM-SE were set within specific time lines and that I was not entitled to take account of financial evidence outside the requisite periods. He submitted that the application under the immigration rules was doomed to failure and queried why no further application had been made in

the meantime. He referred me to the authority of **SS (Congo) [2015] EWCA Civ 387** and submitted that the failure of the Appellant to meet the financial requirements by £1,200 was not a 'near-miss'. The sponsor's British nationality, her life long residence in the United Kingdom and her job could not amount to insurmountable obstacles. The relationship was formed when the Appellant's immigration status was precarious.

12. Mr Shajko took issue with the requirement in the immigration rules to meet have an income of £18,600. He pointed out that the sponsor spent very little on her mortgage and could afford to support the Appellant. He referred to the fact that the premium bonds were now cashed-in. He took issue with the failure of the immigration rules to designate premium bonds as specified savings. He submitted that the P60s for the year ending April 2014 showed only a £1,200 difference between the sponsor's income and the requirements of Appendix-FM. This was sufficient to amount to a 'near miss'. The sponsor had experienced a lot of hassle and the appellant's circumstances were 'exceptional within the terms of **SS (Congo)**. She had lived all her life in the United Kingdom, had jobs here, her extended family, and owned property.

13. I indicated that I would reserve my decision.

Discussion

14. The sponsor has produced a significant amount of new evidence relating to her income, which I have outlined at paragraph 5 of this decision. As I had indicated to Mr Shajko, pursuant to section 85A of the Nationality, Immigration and Asylum Act 2002 and the House of Lords decision in **AS (Somalia)** I am simply not entitled to take account of this new evidence. Although the new documentary evidence may indicate that the Appellant does now meet the financial requirements of Appendix FM and Appendix FM-SE (and I make no specific finding on the point) the fact remains that, at the date of decision (24 April 2014), he did not meet those requirements. I cannot take the new financial evidence into account in my consideration of the compliance of the refusal of entry clearance with Article 8.

15. Adopting the 5 step approach in **Razgar [2004] UKHL 27** I am satisfied there is family life between the Appellant and the sponsor and that the interference with that family life by the refusal of entry clearance is of sufficient severity to attract the protection of Article 8. Having found that the Appellant cannot meet the requirements of the immigration rules I am satisfied the decision is lawful. I am further satisfied that the decision is in pursuit of a legitimate aim (the economic well-being of the United Kingdom and the rights and freedoms of others, as protected by immigration control). The remaining issue for my determination is that of proportionality.

16. Following a long line of authorities, including **R (Nagre) v Secretary of State for the Home Department [2013] EWHC 720 (Admin), Singh v Secretary of State for the Home Department [2015] EWCA Civ 74** and **SSHD v SS (Congo) [2015]**

EWCA Civ 387, in order for the Appellant to succeed in his application for leave to enter outside the immigration rules pursuant to Article 8, I must be satisfied there are compelling circumstances not sufficiently recognised under those rules. As was stated in paragraph 44 of **SS (Congo)**, "*If there is a reasonably arguable case under Article 8 which has not already been sufficiently dealt with by consideration of the application under the substantive provisions of the Rules (cf Nagre, para. [30]), then in considering that case the individual interests of the applicant and others whose Article 8 rights are in issue should be balanced against the public interest, including as expressed in the Rules, in order to make an assessment whether refusal to grant LTR or LTE, as the case may be, is disproportionate and hence unlawful by virtue of section 6(1) of the HRA read with Article 8*." This is a fairly demanding test, reflecting the reasonable relationship between the rules themselves and the proper outcome of the application of Article 8 in the usual run of cases (paragraph 44 of **SS (Congo)**). It is therefore apparent that, in assessing the proportionality of the decision, I must look at the circumstances of the Appellant and his sponsor through the prism or lens of the Immigration Rules, which have not been met.

17. As I have set aside the decision of the First-tier Tribunal and have embarked on remaking that decision, pursuant to **YM (Uganda) v Secretary of State for the Home Department [2014] EWCA Civ 1292** (at paragraph 38) I am obliged to consider paragraphs 117A to D of the Nationality, Immigration and Asylum Act 2002 when assessing the proportionality of the decision to refuse entry clearance.

18. I note, pursuant to section 117B(1), that the maintenance of effective immigration control is in the public interest. Section 117B(2) indicates that it is in the public interest, and in particular the economic well-being of the United Kingdom, that the Appellant is able to speak English. I note the Appellant has obtained an ESOL Entry 1 is Speaking and Listening. It is in the same public interest that the Appellant is financially independent. There is no evidence of any skills or qualifications that the Appellant may possess. I note that the sponsor is employed in two jobs but, at the date of the decision, she did not earn £18,600 as required by the immigration rules. I do note however that she had £10,000 in premium bonds. The necessary documentation to prove an income from these bonds were not however provided. I further note that in **AM (S 117B) Malawi [2015] UKUT 0260 (IAC)** the Upper Tribunal held that an appellant can obtain no positive right to a grant of leave to remain from either s117B (2) or (3), whatever the degree of his fluency in English, or the strength of his financial resources.

19. Section 117B(4) indicates that little weight should be given to a relationship formed with a qualifying partner (such as the sponsor) if the relationship was established when the Appellant was in the United Kingdom unlawfully. It was not disputed that the Appellant was in the United Kingdom unlawfully when his relationship with the sponsor was formed. I must therefore attach little weight to that relationship.

20. The existence of any 'insurmountable obstacles' is a factor to be taken into account in the broader Article 8 assessment. In this regard I note that the sponsor has two

jobs in the United Kingdom, and that she owns (mortgaged) property in the United Kingdom. I additionally note that she is British, that she was born in this country and has always lived here. I additionally note that she can speak only the 'odd word' of Albanian. However, in **Agyarko & Ors, R (on the application of) v Secretary of State for the Home Department [2015] EWCA Civ 440** the Court of Appeal held that it was not unlawful for the Secretary of State for the Home Department to hold there were no insurmountable obstacles to the appellants in that case, who were British citizens, had lived all their lives in the United Kingdom and had jobs here, to relocate. Although they might find it difficult and might be reluctant to do so these factors did not amount to insurmountable obstacles. I further note that the sponsor appears to have had a significant amount of equity in her property and which could be used to support both her and the Appellant should she choose to relocate to Kosovo, and that they would have available to them a network of family support from the Appellant's family, the sponsor having already stayed in with her in-laws when visiting Kosovo. The Appellant is clearly fluent in Albanian and could assist the sponsor in communicating until she reached a reasonable degree of proficiency.

21. I accept that the sponsor has a good relationship with her two sons and that they live nearby. I additionally accept that the sponsor has a good relationship with her mother. Following the authority of **Singh v The Secretary of State for the Home Department [2015] EWCA Civ 630** I note that there is no legal or factual presumption as to the existence or absence of family life for the purpose of Article 8 between adult children and their parents. It all depends on the particular facts. The love and affection between an adult and his parents will not of itself justify a finding of family life. There has to be something more. The sponsor's evidence was that, at the date of the Respondent's decision, her children were both adults, and working, and at least one of them was living separately. The sponsor indicated that her sons were not dependent or reliant upon her. The sponsor further indicated that, at the date of the decision, her mother was living alone, some 6 or 7 miles away, and was in good health. In these circumstances I am not satisfied that, at the date of the decision, the relationships the sponsor had with her family in the United Kingdom was sufficient to render the refusal of entry clearance disproportionate. I additionally find that the sponsor could maintain contact with her family through remote forms of communication and through periodic visits. I note that she lost a baby daughter but there does not appear to be anything preventing her from visiting the place where her daughter rests if based in Kosovo.

22. I have considered the Appellant's financial circumstances, including her stated income from the P60s as of the date of the decision and the funds she held as premium bonds. I am not satisfied the difference of £1,200 between the income disclosed in the P60s and the required amount of £18,600 is such as to render the failure to meet the financial requirements a 'near miss'. The difference is a significant amount. Nor am I entitled to take into account the post-decision evidence that the sponsor has now cashed-in her premium bonds.

23. Having holistic regard to the aforementioned factors, and having regard to the wide margin of appreciation enjoyed by the state in determining the conditions for leave to enter through the exclusion of EX.1 as a basis for the grant of entry clearance, I am not satisfied there exist compelling reasons relating to the Appellant and the sponsor such as to require the grant of entry clearance under Article 8 ECHR.

Decision

The appeal is dismissed

Signed

04 September2015
Date

Upper Tribunal Judge Blum