Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: OA/12198/2014
OA/12200/2014
OA/12199/2014
OA/12201/2014
OA/12202/2014
OA/12203/2014

THE IMMIGRATION ACTS

Heard at Newport
On 24 July 2015

Decision & Reasons Promulgated
On 14 October 2015

Before

MR C M G OCKELTON, VICE PRESIDENT
UPPER TRIBUNAL JUDGE GRUBB

Between

ENTRY CLEARANCE OFFICER – ISLAMABAD

Appellant

and

MRS PN
MR FMN
MISS NN
MR FRN
MASTER FRN
MISS FN

Respondents

Representation:

For the Appellant: Mr I Richards, Home Office Presenting Officer
For the Respondents: Ms R Harrington instructed by Chetna & Co Solicitors

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DETERMINATION AND REASONS

Introduction

1. This is an appeal by the Entry Clearance Officer against a decision of the First-tier Tribunal (Judge Clemes) allowing the respondents' appeals against refusals to grant them entry clearance under the Immigration Rules (HC 395) as a partner (the first respondent) and children (the remaining five respondents) to join the sponsor (respectively the husband and father of the respondents) who is a British citizen living in the UK.

The Judge's Decision

2. Judge Clemes allowed the appeals of the first, fifth and sixth respondents under the Immigration Rules and he allowed the appeals of the second, third and fourth respondents under Art 8.

3. Before the judge, the crucial issue in respect of all six applications for entry clearance was whether the individuals could establish that they met the financial requirements in E-ECP3.1 of Appendix FM (for the first respondent as a partner) and E-ECC2.1 (in respect of the remaining respondents as children).

4. It was accepted before the judge that if all six appellants were to succeed under the requirements of Appendix FM then the sponsor must establish, by the specified evidence set out in Appendix FM-SE, a self-employed income of £32,000. In fact, the sponsor relied upon financial documents in respect of two restaurants that he ran: in respect of the "Sicilian Pizza" through documentation he demonstrated that he had an income for that business for the required twelve months of £18,776; and for the "Tuck-In Café" he demonstrated a profit for the five month period that business had been operative of £8,339. Even if, therefore, the sponsor's income from both businesses was taken into account and accumulated, it only demonstrated an income of £27,115 which was just under £5,000 short of what, it was accepted, he was required to establish under Appendix FM.

5. As a consequence, Ms Harrington who represented the respondents before the judge, invited the judge to allow the appeals of only three of the respondents under the Immigration Rules on the basis that the £27,115 was sufficient for them to succeed. Ms Harrington told us that, on instructions from the sponsor, she abandoned the appeals of the second, third and fourth respondents under the Rules. She invited the judge to allow the appeals of the first respondent (the sponsor's partner) and the fifth and sixth respondents (the sponsor's two youngest children) under the Rules and to allow the appeals of the second, third and fourth respondents under Art 8.

6. Judge Clemes acceded to that invitation. At para 9 of his determination Judge Clemes said this:

> "9. ... The rules are very much a blunt instrument and have replaced a more subjective test of 'adequate means'. In cases where a means test is imposed, there will be a 'cut off' point and some applicants will fall inside and some outside the limits. The respondent had not looked at the Appellants' cases in the correct way and – I find – had decided the applications in effect as one, applying the limit and then deciding that all of the applications must be rejected as they were regarded as inextricably linked together. I agree with the submission on behalf of the Appellants that it is unfair and disproportionate for the Respondent to tacitly acknowledge that the Sponsor's income will be over the threshold when the Appellants next come to apply but then to say that they must go through the entire process again even though (based on the objective approach of the arithmetical calculation) three of them should have been already granted entry clearance. There is nothing in the Rules to have stopped the Respondent from taking this approach".

7. Then, at para 11, Judge Clemes reached the following conclusion:

> "11. I find that the decision of the Respondent wrongly applied the Rules in the Appellants' application for entry clearance whether the group was taken as a whole or individually. It is disproportionate to expect them to re-apply as a group in a matter of months even though there is an expectation that they would then succeed. I agree with the submission by Counsel for the Appellants that the proper approach was to look at the Appellants one by one. This will mean that 3 of them (the 1st Appellant and – for these purposes – the 2 youngest Appellants) succeed under the Rules (Appendix FM E-ECP3.1 for the 1st Appellant and E-ECC 3.3 for the 5th and 6th Appellants)".

8. In respect of the second, third and fourth respondents, Judge Clemes concluded that the refusal of entry clearance to these respondents was a breach of Art 8. He said this at para 13:

> "13. ... If the Respondent had made the decision correctly, then that would have afforded entry clearance to the 1st Appellant and the others that I have identified above. This would mean that half of the family will have succeeded in their application and the others not. Although there is a legitimate public end to be achieved (economic well-being), I do not accept that in this case the splitting up of this family (whether that means some of the children coming to the UK without their mother or the mother coming here with some of the children) is a proportionate response and yet that is the response that the Rules give us. Alternatively the solution proposed by the Respondent is that the entire family go through the whole process again with the reasonable expectation that they will succeed. Setting aside the cost of that path, I do not accept that it can be regarded as proportionate as it causes further delay on an application which should have been (at least) partially acceded to in the first place. The proportionate response would have been to look at the 6 Appellants cases both as one unit and then on a case by case basis to ensure that their joint interests as a family and their separate rights as individuals were regarded and met. I do not find that the Respondent took that approach here".

9. Accordingly, Judge Clemes allowed the second, third and fourth respondents under Art 8 of the ECHR.

The Appeal to the Upper Tribunal

10. The ECO sought permission to appeal Judge Clemes' decision essentially on three grounds. First, the judge had wrongly applied Appendix FM-SE in taking into account the five months' profit from the "Tuck-in Café" of £8,339 in the five months of the relevant financial year. Para 7 of Appendix FM-SE required the evidence to relate to the "last full financial year" which, it was argued, meant the entire twelve month period of that financial year and not only five months of that financial year. Secondly, it was argued that the judge had been wrong to consider that any of the respondents met the financial requirements of Appendix FM. Their applications were to be seen in combination and none could succeed under the Rules unless the required income of £32,000 was established. Thirdly, in allowing the second, third and fourth respondents' appeals under Art 8, the judge had wrongly applied Art 8.

11. On 1 April 2015, the First-tier Tribunal (Judge Levin) granted the ECO permission to appeal on those grounds.

12. Thus, the appeal came before us.

Discussion

The claims under the Rules

13. We begin with the relevant provisions of Appendix FM dealing with the eligibility for entry clearance as a "partner" and a "child" respectively in s.E-ECP and E-ECC.

14. As regards a partner (the first respondent), E-ECP3.1 states that:

> "The applicant must provide specified evidence, from the sources listed in paragraph E-ECP3.2 of –
>
> (a) a specified gross annual income of at least –
>
> (i) £18,600;
>
> (ii) an additional £3,800 for the first child; and
>
> (iii) an additional £2,400 for each additional child; ..."

15. There is also provision for taking account of savings but for the purposes of these appeals, the income figures alone are relevant.

16. As regards "child" the meaning of that is set out in E-ECP3.1 as follows:

> "In this paragraph 'child' means a dependent child of the applicant who is –
>
> (a) under the age of 18 years, or who was under the age of 18 years when they were first granted entry clearance under this route;

(b) applying for entry clearance as a dependant of the applicant, or has limited leave to enter or remain in the UK;

(c) not a British Citizen or settled in the UK; and

(d) not an EEA national with a right to be admitted under the Immigration (EEA) Regulations 2006".

17. Consequently, a partner (such as the first respondent) must establish a gross annual income by the specified documentation of £18,600 plus £3,800 for the "first child" and an additional £2,400 for each "additional child". Taking into account all the respondent's children the mathematics led to the figure being, as is accepted, £32,000. This requirement is, of course, only applicable to the "applicant" which is, of course, the "partner". There is no doubt that by virtue of E-ECP3.1(c) each of the five respondents who are the first respondent's children is a "child" for the purposes of E-ECP3.1(a). In our judgment, there is no other way of understanding what is meant by a "dependent child of the applicant" who is applying for entry clearance "as a dependent of the applicant". Where an application is made either jointly or, as was the case in the instant appeals, individually by all six applicants but with each application identifying the family as travelling to the UK as a unit, each of the children is properly seen as a "dependent child of the applicant", namely their mother who is seeking to apply as a "partner" under Appendix FM.

18. It did not assist the first respondent that Ms Harrington withdrew reliance on the Rules in relation to three of the child respondents. They had applied for entry clearance as dependants of their mother and they continued to apply for entry clearance as her dependents albeit relying only on Art 8. They each still counted, therefore, as a "child" for the purposes of the financial rules applicable to their mother. It might well have been different if Ms Harrington had withdrawn their claims for entry clearance altogether on the basis that her instructions were they should be allowed to remain in the Philippines without their mother and siblings. But that was not what happened nor, we would venture to suggest, would that be an appropriate action to take in order to allow some of the respondents to succeed under the Rules.

19. There is another reason why the withdrawal of the three respondents' reliance on the Rules was not relevant to Judge Clemes' decision. This was an entry clearance case and, as a result, by virtue of s.85A(2) of the NIA Act 2002 the judge was required to: "consider only the circumstances appertaining at the time of the decision". At the time of the decision, each of the child respondents was seeking entry clearance under the Immigration Rules. The change in circumstances, as a result of Ms Harrington's abandonment of three of the respondents' claims under the Rules, was not a circumstance which appertained at the time of the ECO's decision. The judge was, as a consequence, required to consider whether each of the respondents' appeals could succeed under the Immigration Rules on the basis that, as at the time of decision, they were seeking to rely upon the Immigration Rules as conferring an entitlement to entry clearance.

20. In our judgment, it follows, therefore, that the first respondent simply could not succeed under Appendix FM without establishing an income of £32,000 which she could not do even if all of the sponsor's income from his two businesses disclosed in the relevant documentation was taken into account.

21. Where, then, does that leave the remaining respondents? In our judgment, their applications also could not succeed although the application of the Rules to each of their applications is not unproblematic. As the ECO decided in each of their cases, they could not succeed under E-ECC. The financial requirement for a "child" in E-ECC2.1 reflects, with one crucial distinction, that which we have already set out in relation to a partner under E-ECP3.1. Again, the applicant, by means of the specified documents, must show that the sponsor has a gross annual income of at least £18,600, an additional £3,800 for the first child and an additional £2,400 for each additional child. The definition of "child", however, in E-ECC2.1 does not exactly reflect that in the partner provision in E-ECP3.1. Instead, it provides that:

> "In this paragraph 'child' means the applicant and any other dependent child of the applicant's parent who is –
>
> (a) under the age of 18 years, or who was under the age of 18 years when they were first granted entry under this route;
>
> (b) in the UK;
>
> (c) not a British Citizen or settled in the UK; and
>
> (d) not an EEA national with a right to remain in the UK under the Immigration (EEA) Regulations 2006".

22. The difference is that the "dependent child" of the "applicant's parent" (namely the first respondent) must be "in the UK". The wording is set in the present tense and, therefore, it appears to exclude consideration of any "dependent children" of the particular applicant's parent who are outside the UK for example, as in this case, seeking entry clearance.

23. However, that said, even if the children are not considered together for each application, each child in respect of its own application (if Ms Harrington is correct that each must individually be considered under the Rules and the financial requirements) must show their own £18,600 discrete from the £18,600 which any other child seeking entry clearance in respect of its application must establish. In other words, cumulatively the five child respondents would be required to show £18,600 x 5 = £93,000. Were it otherwise, any number of children would be able to meet the financial requirements simply by pointing to the same £18,600 earned by their sponsor in the UK.

24. We conclude this is clearly what the Rules require even if this results in some rather curious features. Why the £18,600 is taken as the starting point for the child's application is not easy to discern when it is the principal figure required for a

"couple". Likewise, to then add in figures only for other "dependent" children of their parent only if they are already in the UK, omits consideration of those who are seeking to come to the UK at the same time.

25. It is clear to us that Parliament's intention was to see the family seeking to come to the UK as a unit. That is directly reflected in the "partner" financial requirements. In a case where an accompanying child's application is being considered, and where the parent satisfies the financial requirements, that in effect means the accompanying children are shown to have access to the requisite financial support from the sponsor. There is no need for them to show further financial support and yet the Rules require that they do. They must demonstrate the 'couple' sum of £18,600 for each of them when the Parliamentary intention must have been that, depending on whether they are the "first" or "additional" children to accompany their parent, they only need show individually £3,800 or £2,400. That, in our judgment, is the amount Parliament intended as representing the minimum needed to eliminate or, at least, reduce the need for reliance on public funds. Yet, the child rules are, on the face of it, worded otherwise.

26. It seems to us that the sensible interpretation of the "partner" and "child" provisions relating to financial requirements would be to recognise that family applications of the kind seen in these appeals are, in effect but not form, joint applications where one or more children are seeking to accompany a parent to the UK. The financial requirement in E-ECP3.1 directly reflects that requiring consideration, at least, in respect of the partner's application of a gross annual income because he or she is joining a partner in the UK and, if being accompanied by one or more children, specifying additional sums to reflect Parliament's view as to the minimum level of income required to avoid a reliance upon public funds.

27. In this case, as we have already noted, that means that the first respondent had to establish an income of £32,000. Without that she simply could not succeed under the Rules. Further, none of the other respondents as her "dependent" children could succeed on the Rules. We have no doubt that it was wrong for the Judge to view the applications as individual ones.

28. In any event, as a result of s.85A of the 2002 Act, in considering the children's claims it was equally wrong for the Judge to consider the circumstances other than they were appertaining at the date of the ECO's decision: all the respondents were at that time making applications for entry clearance under the Rules. Ms Harrington accepted that if all respondents have to be taken into account, none can succeed.

29. Therefore, the first respondent's appeal could not succeed under the Immigration Rules and, for the reasons we have given, neither could any of the other respondents. We are clear that that is the correct outcome of these appeals and the respondents have never had an entitlement to entry clearance under the Rules. The ECO was correct to refuse each of the respondents' applications for entry clearance under the Rules. It follows that Judge Clemes erred in law in allowing the appeals under the

Immigration Rules of the first, fifth and sixth respondents. Applying the Rules each of those appeals, together with those of the third, fourth and fifth respondents under the Immigration Rules, fell to be dismissed.

30. In reaching that conclusion in respect of the Rules, we do not need to decide whether the judge was wrong to take into account the five months' income in the relevant financial year earned by the sponsor in respect of the "Tuck-in Café". The respondents cannot succeed even taking into account that income. The total does not meet the financial requirements in Appendix FM.

Article 8

31. Turning now to Judge Clemes' decision to allow the appeals of the second, third and fourth respondents under Art 8, those decisions clearly cannot stand as they were premised on the first respondent and the fifth and sixth respondent having entry clearance to come to the UK and, in fact, potentially leaving the remaining respondents in Afghanistan. That, of course, is no longer the position given that none of the respondents can succeed under the Rules.

32. That then leaves all the respondents in Afghanistan unless and until they are able to meet the financial requirement in Appendix FM. As we understood it, that is a very real prospect in the future given that the sponsor's second business will have traded for a considerably longer period than the five months upon which he could rely in these applications.

33. Ms Harrington did not address us on whether the respondents' appeals should be allowed under Art 8 if we were to dismiss the appeals under the Rules. Even accepting that family life exists between the respondents and the sponsor in the UK, we see no basis upon which it can be said that the refusal of entry clearance is a disproportionate interference with their family life. The UK is entitled, through the Immigration Rules, to set appropriate financial requirements for entry to the UK to reflect the public interest in individuals not becoming a burden on the public funds and the UK taxpayer. The financial requirements in Appendix FM have been upheld as lawful by the Court of Appeal in R (MM (Lebanon)) v SSHD [2014] EWCA Civ 985; [2014] Imm AR 6. We were shown no solid evidence of any impact upon the respondents if there is delay in them making a successful entry clearance application at a time when the sponsor's income is such as to meet the financial requirements of the Rules. We do not consider it to be a matter of any great weight, if indeed a matter entitled to any weight at all, that further applications for entry clearance will involve the payment of further fees. That is not a matter which, in our judgment, bears on the issue of the impact of the refusal of entry clearance on the respondents' private and family life protected by Art 8.

34. We have regard to the relevant factors set out in s.117B of the NIA Act 2002. The maintenance of effective immigration control is in the public interest including the need to meet minimum financial requirements. We were not told whether any of the

respondents spoke English but, even if they do, s.117B(2) does not entitle entry to the UK or add positively to their claim (see AM (S 117B) Malawi [2015] UKUT 260 (IAC) and Forman (ss 117A-C considerations) [2015] UKUT 412 (IAC)). Likewise, it is in the public interest that the respondents are "financially independent" but, as we have already noted, they are unable to meet the financial requirements of the Rules and we do not consider that the public interest reflected in that fact is in any way dissipated in these appeals simply because the sponsor has some resources.

35. Having regard to all these circumstances, in our judgment the respondents have failed to establish that the refusal of entry clearance to them breached their rights under Art 8 of the ECHR.

Decision

36. For the above reasons, the First-tier Tribunal's decision to allow the appeals of the first, fifth and sixth respondents under the Immigration Rules involved the making of an error of law. Those decisions are set aside.

37. Further, the decisions of the First-tier Tribunal to allow the appeals of the second, third and fourth respondents under Art 8 involved the making of an error of law and those decisions are also set aside.

38. We remake the decisions and dismiss each of the respondents' appeals under the Immigration Rules and also under Art 8 of the ECHR.

Signed

A Grubb
Judge of the Upper Tribunal

TO THE RESPONDENT
FEE AWARD

Because the appeals have been dismissed no fee award is made

Signed

A Grubb
Judge of the Upper Tribunal