Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/12897/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 13th March 2015	**On 26th March 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

ENTRY CLEARANCE OFFICER - ISTANBUL

Appellant

and

AYSE MUTLU
(ANONYMITY ORDER NOT MADE)

Respondent

Representation:

For the Appellant: Mr C Avery, Senior Home Office Presenting Officer
For the Respondent: Ms G Peterson of Counsel instructed by Allison Solicitors

DECISION AND REASONS

Introduction and Background

1. The Entry Clearance Officer (the ECO) appeals against a decision of Judge of the First-tier Tribunal Thew promulgated on 8th October 2014.

2. The Respondent before the Upper Tribunal was the Appellant before the First-tier Tribunal and I will refer to her as the Claimant.

3. The Claimant is a female Turkish citizen born 1st May 1995 who applied for entry clearance to enable her to settle in the United Kingdom with her husband Erdem Mutlu (the Sponsor).

4. The application, which was made in May 2013, was refused on 6th June 2013, the ECO not accepting that the financial requirements of Appendix FM were satisfied. It was not accepted that the Sponsor had provided the specified evidence required to prove that he had an annual income of at least £18,600.

5. The Claimant's appeal was heard on 3rd September 2014. Judge Thew (the judge) heard evidence from the Sponsor who was not cross-examined, and considered additional evidence that had not been submitted with the application. There was no prohibition on the judge considering this further evidence if it was relevant to the application, as this is not a points-based system application, where the Tribunal can in general only consider evidence that was submitted with the application.

6. The judge found that evidence had been submitted to prove the Sponsor's income from self-employment and the appeal was allowed under the Immigration Rules.

7. The ECO was granted permission to appeal, and the appeal came before me on 9th January 2015. I found that the judge had erred in allowing the appeal under the Immigration Rules because there was no evidence before the First-tier Tribunal that the requirements of paragraph 7(g) of Appendix FM-SE were satisfied, which requires evidence of ongoing self-employment through evidence of payment of Class 2 National Insurance contributions. I could find no satisfactory explanation for the non-production of this evidence. I set aside the decision of the First-tier Tribunal, because the specified evidence required by Appendix FM-SE was not provided, and therefore it was not open to the judge to conclude that all specified evidence had been provided, and the judge had erred in allowing the appeal under the Immigration Rules.

8. Another issue related to paragraph 7(f) of Appendix FM-SE, as it was not clear whether personal bank statements for the same twelve month period as the Sponsor's tax return showed that the income from self-employment had been paid into the Sponsor's account.

9. There had been no finding by the First-tier Tribunal in relation to Article 8 of the 1950 European Convention on Human Rights, and this was an error, as section 86(2) of the Nationality, Immigration and Asylum Act 2002, requires that any matter validly raised as a ground of appeal must be determined.

10. The hearing was adjourned so that I could hear further evidence and submissions in order to re-make the decision.

11. Full details of the application for permission, the grant of permission, and my reasons for finding an error of law are contained in my decision dated 19th January 2015, which was promulgated on 27th January 2015.

Re-Making the Decision - The Upper Tribunal Hearing 13th March 2015

Preliminary Issues

12. The Sponsor attended the hearing. There was no need for an interpreter.

13. I ascertained that I had received all documentation upon which the parties intended to rely, and that each party had served the other with any documentation upon which reliance was to be placed. I had on file the Respondent's bundle that was before the First-tier Tribunal, together with the Notice of Appeal, and the Claimant's bundle comprising 52 pages.

14. I received from Ms Peterson a letter dated 25th February 2015 from the Sponsor's accountants, ADD Accounting.

15. Both representatives confirmed that they understood that the purpose of the hearing was to consider outstanding points under the Immigration Rules, those being the requirements of paragraphs 7(f) and (g) of Appendix FM-SE. Ms Peterson confirmed that she would not be making any oral submissions in relation to Article 8 of the 1950 Convention.

Evidence

16. I heard evidence from the Sponsor who adopted his witness statement dated 3rd September 2014. He was not questioned by either representative.

17. I then heard evidence from Mr Ismal Aghdiran who is the senior partner of ADD Accounting.

18. Mr Aghdiran was questioned by both representatives. I have recorded all questions and answers in my Record of Proceedings and it is not necessary to reiterate them here.

19. In very brief summary, Mr Aghdiran explained that in relation to his self-employment, the Sponsor would take drawings from the business. It was unrealistic to expect all of the income from the business to be paid into a bank account. Drawings were taken in cash and not paid into the account, and this would be accounted for by a petty cash voucher being completed by the Sponsor and passed on to his accountants.

20. In relation to Class 2 National Insurance contributions, Mr Aghdiran was asked whether the Sponsor was registered as self-employed in May 2013 when the Claimant applied for entry clearance, and he confirmed that he was not registered. This is referred to in the letter from ADD Accounting dated 25th February 2015 to

which there is attached a letter dated 6th August 2012 to HMRC National Insurance Contributions and Employer Office, registering the Sponsor as self-employed.

21. Mr Aghdiran confirmed that a telephone call had recently been made to HMRC, in which it had been confirmed that there was no record of the letter dated 6th August 2012 and HMRC had not registered the Sponsor as self-employed notwithstanding that his tax return had been submitted in April 2013 recording self-employed income. A further application had now been made to register the Sponsor as self-employed so that he would then receive a demand for Class 2 National Insurance contributions. At the date of hearing the Sponsor had not received such a demand.

The Respondent's Submissions

22. Mr Avery submitted that it was clear from the accountant's evidence that paragraph 7(f) could not be satisfied because the income from the Sponsor's self-employment had not been paid into the Sponsor's personal bank account.

23. In addition, the evidence from the Sponsor's accountant proved that he was not registered as self-employed at the date of application which is why there was no evidence of ongoing self-employment through evidence of payment of Class 2 National Insurance contributions, and therefore the requirements of paragraph 7(g) of Appendix FM were not satisfied. The appeal therefore could not succeed under the Immigration Rules.

24. Mr Avery did not make any submissions on Article 8, because of the indication given by Ms Peterson that she would not be making oral submissions to suggest that the appeal should be allowed under Article 8.

The Claimant's Submissions

25. With reference to paragraph 7 of Appendix FM-SE, Ms Peterson asked that I note that the vast majority of specified documents had been supplied. It was conceded that the evidence indicated that not all the income from self-employment was paid into the Sponsor's personal bank account, but Miss Peterson submitted that there was no requirement that all the income must be paid into the account. I was asked to note that HMRC had confirmed the Sponsor's income.

26. In relation to paragraph 7(g) and the Class 2 National Insurance contributions, Ms Peterson submitted that the evidence from the Sponsor's accountant proved that attempts had been made in August 2012 to register the Sponsor as self-employed, and the Sponsor had done all that he could to be so registered. I was asked to accept that the Sponsor is in ongoing self-employment and was at the date of application, notwithstanding there is no evidence in the form of Class 2 National Insurance contributions. I was asked to allow the appeal under the Immigration Rules.

27. At the conclusion of oral submissions I reserved my decision.

My Conclusions and Reasons

28. The burden of proof in relation to the Immigration Rules is on the Claimant, and the standard a balance of probability. I have taken into account all the evidence that has been submitted by the parties.

29. I firstly consider paragraph 7(g) of Appendix FM-SE. Because the Sponsor relies upon his income from self-employment, the specified documentation set out in paragraph 7 must be provided. I accept the Sponsor has provided evidence of the amount of tax payable, and that he has submitted his annual self assessment tax return to HMRC, and a Statement of Account (SA300) and his Unique Tax Reference Number.

30. The Sponsor has however failed to provide evidence of ongoing self-employment through evidence of payment of Class 2 National Insurance contributions.

31. There was no explanation for the non-production of this evidence with the application initially made to the Secretary of State, which meant that the initial decision maker could not decide whether to exercise discretion under paragraph D(e) of FM-SE, which provides the initial decision maker with a discretion not to apply the requirement for a document to be produced if there is a valid reason why a specified document cannot be supplied.

32. The Sponsor in his witness statement dated 3rd September 2014 explained at paragraph 8(g) because he was registered as an employee with a limited company, he was not liable for further National Insurance contributions. I find that that in fact is not the case, and I accept the evidence of the Sponsor's accountant to the effect that HMRC had never registered the Sponsor as self-employed and liable for Class 2 contributions.

33. I accept that the accountants did send a letter to HMRC on 6th August 2012, but it is clear that the registration was not effective which is why HMRC did not send the Sponsor a demand for Class 2 National Insurance contributions and explains why the Sponsor was not able to provide evidence of payment of those contributions.

34. This is not the fault of the Sponsor, but that is not the issue I am asked to decide. I have to decide whether the specified documentation required by paragraph 7 of Appendix FM-SE has been submitted, and I am afraid that in relation to paragraph 7(g) that evidence has not been submitted because it does not exist. Therefore this appeal cannot succeed under the Immigration Rules.

35. In relation to paragraph 7(f) of Appendix FM-SE, I accept that the Sponsor provided his personal bank statements for the same twelve months as covered by his tax return, that being 6th April 2012-5th April 2013. If it is a requirement that all income from self-employment must go into those personal bank accounts, then the appeal would fail on that ground. This is because it was accepted in evidence that some income from self-employment went into the personal bank account of the Sponsor but not all. Neither representative was able to refer me to any authority on this issue

as to whether all income must go into the Sponsor's personal bank account, or whether it would suffice for some of the self-employed income to go into the account. However, as the appeal cannot succeed in relation to paragraph 7(g) it is not necessary to go on and reach a conclusion on this point.

36. Article 8 was not pursued before me, although it was raised as a ground of appeal.

37. In my view it is appropriate to make a finding on Article 8. I have considered the five stage approach set out in Razgar [2004] UKHL 27. I accept that the Claimant and Sponsor have a family life and that refusal of entry clearance interferes with that family life. I therefore accept that Article 8 is engaged, but conclude that the proposed interference is in accordance with the law. This is because the Claimant cannot satisfy the Immigration Rules which must be satisfied in order to be granted entry clearance as the spouse of a person settled in the United Kingdom.

38. I then have to consider whether the proposed interference with family life is necessary for one of the reasons set out in Article 8(2) and whether the interference is proportionate to the legitimate public end sought to be achieved.

39. In considering proportionality I have regard to the factors set out in section 117B of the Nationality, Immigration and Asylum Act 2002. The maintenance of effective immigration controls is in the public interest. I accept that the Claimant can speak English and that notwithstanding that the financial requirements of the Immigration Rules cannot be satisfied, she would not be a burden on the taxpayer.

40. If this appeal were allowed under Article 8 (and I appreciate that Ms Peterson did not suggest this course of action) this would mean disregarding the financial requirements of the Immigration Rules which in my view would not be appropriate. The Supreme Court at paragraph 57 of Patel and Others [2013] UKSC 72 stated;

> 57. It is important to remember that Article 8 is not a general dispensing power. It is to be distinguished from the Secretary of State's discretion to allow leave to remain outside the rules, which may be unrelated to any protected human right.

41. It was accepted on behalf of the Claimant that a further application for entry clearance could be made. The decision to refuse entry clearance is in accordance with the law and is proportionate and does not breach Article 8. This is because significant weight must be attached to the need to maintain effective immigration control, and the need of an applicant for entry clearance to satisfy the relevant Immigration Rules. There is no reason why a further application for entry clearance could not be made, and the appropriate course of action is to make such an application, accompanied by the required specified evidence.

Notice of Decision

The decision of the First-tier Tribunal contained an error of law and was set aside. I substitute a fresh decision.

The Claimant's appeal is dismissed under the Immigration Rules and on human rights grounds.

Anonymity

There was no anonymity direction in the First-tier Tribunal. There has been no request for anonymity and the Upper Tribunal makes no anonymity order.

Signed Date 16th March 2015

Deputy Upper Tribunal Judge M A Hall

TO THE RESPONDENT
FEE AWARD

The appeal is dismissed. There is no fee award.

Signed Date 16th March 2015

Deputy Upper Tribunal Judge M A Hall