IAC-PE-SW-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/17468/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 17th February 2015	**On 23rd March 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

MR MD AJAMOL KHAN
(ANONYMITY ORDER NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER - DHAKA

Respondent

Representation:
For the Appellant: Mr M Chowdhury, Solicitor
For the Respondent: Mr E Tufan , Home Office Presenting Officer

DECISION AND REASONS

The Appellant

1. The Appellant is a citizen of Bangladesh born on 6th June 1970. He appealed against a decision of the Respondent dated 7th August 2013 refusing him leave to enter the United Kingdom under paragraph EC-P.1.1 of Appendix FM of the Immigration Rules. The Appellant wished to join his wife, Mrs Raina Khanam a United Kingdom citizen ("the Sponsor").

2. The Appellant's appeal was allowed at first instance by Judge of the First-tier Tribunal Majid sitting at Taylor House on 24th October 2014. The Respondent appeals with leave against that decision and the matter therefore comes before me in the first place as an appeal by the Respondent. For the reasons which I set out in some detail below I have set aside the decision of the First-tier Tribunal on the grounds of a material error of law and have proceeded to rehear the appeal. I therefore continue to refer to the parties as they were known at first instance for the sake of convenience.

Immigration Law and Rules relevant to the Appellant

3. Section EC-P sets out the requirements to be met for entry clearance as a partner. Sub-paragraph (c) states that the applicant must not fall for refusal under any of the grounds in Section S-EC suitability - entry clearance. Section S-EC.2.2 states that an applicant will be refused entry clearance on grounds of suitability where there has been a failure to disclose material facts in relation to the application whether or not that was to the Appellant's knowledge. Section E-ECP sets out the relationship requirements and includes at E-ECP 2.6 that the relationship between the applicant and their partner must be genuine and subsisting and at 2.10 that the applicant and partner must intend to live together permanently in the United Kingdom.

4. The applicant must satisfy the financial requirements under paragraph E-ECP3.1. The applicant must provide specified evidence from the sources listed in paragraph E-ECP3.2 of a specified gross annual income for the Sponsor of at least £18,600. Appendix FM-SE sets out the specified evidence which must be produced by an applicant in order to be able to demonstrate that they meet that financial requirement. Where an applicant relies on the Sponsor's paid employment this includes a letter from the employer who issued the wage slips. The letter must confirm the person's employment and gross salary, the length of employment, the period over which they have been paid, the level of salary relied upon in the application and the type of employment.

5. Where an applicant relies on the Sponsor's self-employment the applicant must supply remuneration evidence of ongoing self-employment through evidence of payment of class 2 national insurance contributions. If the business is not required to produce annual audited accounts the latest unaudited accounts and an accountant's certification of confirmation from an accountant who is a member of a UK recognised supervisory body should be given. There should also be provided personal bank statements for the same twelve month period as the tax return showing that the income from self-employment has been paid into an account in the name of the person or in the name of the person and their partner jointly.

6. Finally an applicant must show that they meet the English language requirement. An applicant must provide specified evidence that they have passed an English language test in speaking and listening at a minimum of level A1 of the Common European Framework of Reference for Languages with a provider approved by the Respondent or have an appropriate academic qualification or be exempt from the

English language requirement (where the applicant is aged 65 years or over or there are exceptional circumstances which prevent the applicant from being able to meet the requirement prior to entry to the United Kingdom).

7. The burden of establishing that the requirements of the Immigration Rules are met rests upon the Appellant and the standard of proof is the usual civil standard of the balance of probabilities. In addition in this case the Appellant argues that the refusal of his application for entry clearance breaches this country's obligations under Article 8 (right to respect for private and family life) of the European Convention on Human Rights. The burden and standard of proof of establishing this equates with the burden and standard of proof under the Immigration Rules.

Explanation for Refusal

8. The Respondent refused the application for the following reasons:

(i) Material non disclosure.

The Appellant had previously made an application for a family visit visa and had submitted a passport which gave his date of birth as 16th December 1972. In the current application under consideration the Appellant had provided a new passport with a different date of birth 6th June 1970. It was not clear why the Appellant's date of birth had changed between the two passports. The Respondent refused the application on the grounds of a failure to disclose material facts in relation to the application. The Appellant appealed against that part of the decision arguing that the discrepancy about the dates of birth in the two passports arose because Bangladesh upgraded the passports issued to a new digital style. On review by the Entry Clearance Manager this point was conceded.

(ii) Genuine and subsisting and relationship.

The Respondent was not satisfied that the relationship was genuine and subsisting. The marriage had taken place on 13th July 2012 and the Appellant and Sponsor were said to have lived together until the Sponsor left Bangladesh on 26th July 2012. The photographs of the wedding and some photographs of the Appellant and Sponsor together with some telephone cards did not demonstrate what calls the cards were used for or whether they were used for calls between the Appellant and Sponsor. There was no further evidence of contact between the Appellant and Sponsor since the marriage. The lack of intervening devotion for the entire twelve months period since the marriage and the application led the Respondent to doubt that the marriage subsisted. The Sponsor had not chosen to visit the Appellant since the marriage in July 2012 and they had spent less than two months together since that time. The Respondent was not satisfied that the Appellant's relationship with the Sponsor was genuine or that they intended to live together permanently in the United Kingdom.

(iii) Financial requirements

The Appellant stated that the Sponsor was employed as a cleaner for Copperfield House with a gross annual income of £8,678.78. It was also said that the Sponsor was self-employed and that her gross annual income was £10,264. However the Appellant had not provided all the documents to prove the earnings from the Sponsor's employment or self-employment. There was no employment letter with the specified details from Copperfield House. The letter provided only confirmed leave arrangements. As to the self-employment there was a letter from Royal Associates but that did not constitute unaudited accounts and did not adequately demonstrate that the Sponsor's income from self-employment was as claimed. Whilst there were regular cash deposits into the Sponsor's bank account the Respondent was not satisfied that the Sponsor had demonstrated that this was the Sponsor's self-employment income. The Respondent did not accept that the self-employment in fact existed and the income from paid employment from Copperfield House was insufficient to meet the financial requirements.

(iv) English Language.

The Appellant had submitted an ESOL entry level certificate in both speaking and listening from City and Guilds dated 13th October 2012 and 10th October 2012 from test centre 821470 as evidence of the English language proficiency. However the documents did not indicate that the Appellant has passed an English language test in speaking and listening at a minimum level of A1. The documents did not reliably demonstrate that the Appellant had passed the stated qualification.

9. The Appellant's grounds of appeal argued that the relationship between the Appellant and Sponsor was genuine and subsisting. The Appellant and Sponsor utilised calling cards as a cost effective way of maintaining regular contact. Although the parties had had an arranged marriage it had evolved into something deeper. The Sponsor maintained regular contact with the Appellant when possible. She had sought to ensure that her two adult children from her previous marriage and integrated and bonded well with the Appellant. On review the Entry Clearance Manager stated that the doubts that the Entry Clearance Officer had regarding the genuine and subsisting nature of the relationship had not been adequately addressed in the grounds of appeal.

10. The grounds of appeal further argued that the Sponsor had provided wage slips and a P60 as evidence of her employment at Copperfield House. The grounds went on to argue (wrongly) that the P60 is a government issued document. It is not it is issued by the employer at the end of the tax year. The grounds further argued that the Sponsor had provided a letter from her employer. As to her self-employment, she had provided a letter from Royal Associates detailing her job. The Sponsor had provided a tax return which indicated her yearly earnings. Again the grounds wrongly asserted that the tax return was a "government certified document".

Further the Sponsor at present was now self-employed full-time earning above £18,600. The Entry Clearance Manager's review stated that the Immigration Rules were clear about what documents were required to be produced to evidence income and the Appellant had failed to provide all of the required documents under categories (a) and (f).

11. The grounds of appeal further argued that the Appellant had provided the ESOL entry level certificate and had therefore passed the tests set down. The City and Guilds of London Institute was regulated by the High Commission. In response the Entry Clearance Manager stated that investigations conducted by City and Guilds and UK Visas and Immigration Dhaka revealed inconsistencies in testing in Bangladesh. As a result of those investigations the Entry Clearance Officer was satisfied that the documents which the Appellant had provided could not be relied upon. The inconsistencies in testing had subsequently been addressed by City and Guilds in Bangladesh who agreed to offer free testing to all affected visa applicants. The Appellant had been issued with a letter explaining this on the same day that he was given his refusal notice. He was offered a free retest. It was not clear why the Appellant had failed to take advantage of this free test given that he had ample opportunity to do so. The Entry Clearance Manager was satisfied that the Entry Clearance Officer was correct to doubt the Appellant's English language ability.

12. Finally the grounds of appeal argued that the Respondent's decision breached Article 8. The Sponsor had two children from a previous marriage which were described in the grounds of appeal as "very young and would benefit from having a constant father figure in their lives". In fact, contrary to that assertion, the Sponsor's two children from her previous marriage were born in 1993 and 1996 respectively making them 21 and 18 at the time. It was not entirely clear why the author of the grounds of appeal should consider that a 21 year old and an 18 year old were "very young".

13. In response to the argument that the decision breached Article 8 the Entry Clearance Manager stated that there was no evidence that either the Appellant or Sponsor would be unable to live in Bangladesh especially given that the Sponsor did not require a visa to live there. The Appellant had chosen to enter into an arranged marriage with someone living in another country and was aware that marriage in itself would not guarantee that he would be assured entry to the United Kingdom. The Appellant and Sponsor could maintain contact using modern means of communication and the Sponsor was free to visit Bangladesh whenever she was able to do so. The decision did not result in unjustifiably harsh consequences for the Appellant or his family and was proportionate under Article 8.

The Hearing at First Instance

14. In considering the evidence the Judge found (at paragraph 10 of his determination) that the Appellant was able to meet the financial requirements to show £18,600 accepting the Sponsor's evidence to him that she could evidence the total of £18,942 per annum from her employment. The Respondent had ignored the evidence of the Appellant's ability to speak English. The two children of the Sponsor even though

over 18 were both born in the United Kingdom. The Judge quoted the Sponsor's statement in which the Sponsor had said she had been unable to visit the Appellant in Bangladesh as regularly as she would have liked due to work commitments and her children's school timetables. (The statement does not appear to have dealt with what school timetable in particular her 21 year old daughter had). She said she could not leave her 21 year old and 18 year old daughters to travel to Bangladesh herself and it was difficult to find a mutually convenient period of time. The statement did not indicate that she had visited the Appellant in Bangladesh since the marriage in July 2012 save that the three had visited the Appellant in the summer of 2014. She called the Appellant through her line rental from Sky which listed the Appellant's Bangladesh mobile numbers.

15. She had not provided further evidence of her employment at Copperfield House as she had been informed by her employer that the P60 which she also described as "a government issued letter" and payslips would be sufficient evidence of employment. She was now working full-time on a self-employed basis. At paragraph 19 of his determination the Judge stated that the factors outlined in paragraph 10 of his determination (the Appellant being able to meet the financial requirements etc.) were powerful factors which persuaded him that depriving the Appellant of protection of Article 8 would be disproportionate. The Judge was persuaded that the Appellant could benefit from the relevant Immigration Rules and he allowed the appeal.

The Onward Appeal

16. The Respondent appealed against that decision arguing that the Judge had failed to give any or any adequate reasons. There was no authority to support the proposition that the Judge did not have to detail which Rules were applicable, which aspects were in issue and why they were all met. The Judge had failed to indicate which aspects of Appendix FM-SE were applicable and when they had been evidenced. The Judge had failed to identify the credibility issues which had emerged in cross-examination and had failed to account for what was said on behalf of the Respondent at the hearing including a failure to engage with the live issue of whether the relationship was genuine.

17. The Judge's handling of Article 8 was not founded on the statement of the authorities as they are at present. Sections of the determination were utterly irrelevant and factually in accurate. The Judge had relied on authority which was no longer good law and had misapplied the case of **Nagre**. The Judge had failed to take into account the provisions of Section 117A to D of the Nationality, Immigration and Asylum Act 2002. At paragraph 15 the Judge had said that the Appellant's case deserved "an illuminated use of exercise of discretion in his favour". This was more properly the preserve of the Entry Clearance Officer and was a clear and material error in law relying on the case of **Ukus [2012] UKUT 00307**.

18. The application for permission to appeal came on the papers before First-tier Tribunal Judge Davidge on 7th January 2015. In granting permission to appeal she wrote that there was merit in the grounds asserting that the Judge has failed to

identify and engage with the Immigration Rules applicable to out of country spousal applications and Article 8 ECHR. He had failed to conduct any assessment of the evidence both in terms of its credibility and/or sufficiency to meet the requirements of the Rules or set out the factual matrix from which he had drawn his Article 8 conclusions.

19. Following the grant of permission the Tribunal issued directions to the parties that they should prepare for the forthcoming hearing on the basis that if the Upper Tribunal decides to set aside the determination of the First-tier Tribunal any further evidence including supplementary oral evidence that the Upper Tribunal might need to consider if it decided to remake the decision can be so considered at that hearing.

The Error of Law Stage

20. In the first place I had to decide whether there was an error of law in the determination such that it fell to be set aside. In brief submissions the Presenting Officer relied on the grounds of appeal and the grant of permission to appeal. The various issues in the case had been insufficiently analysed by the Judge and there were very large credibility issues in the case. For the Appellant his solicitor relied on the documents supplied in the Appellant's bundle. The principal issues were whether the Sponsor could meet the financial requirements and whether the Appellant could meet the language requirement. All necessary documents were contained in the bundle. There had been evidence before the Judge to show that the marriage was subsisting.

21. I held that there was a material error of law in the determination such that it fell to be set aside and the appeal to be reheard. I indicated that I would give fuller reasons in my determination which I now do. This was a case where a number of issues were in dispute between the parties. Whilst it is correct that the Judge does not need to set out each and every piece of evidence put before him a basis for the decision has to be given such that a losing party can reasonably be expected to understand why he has lost. In this case the Judge failed to give adequate reasons for his finding that the Immigration Rules were met particularly how the Sponsor was said to have provided the necessary supporting evidence to demonstrate her earnings. The Judge failed to indicate why he was satisfied that the Appellant could meet the English language requirement given the Respondent's objections. In allowing the appeal under Article 8 the Judge had failed to deal with the provisions of Section 117 A to D and had failed to deal with the issue of whether it was reasonable to expect the Sponsor to travel to Bangladesh to be with the Appellant if he was refused entry clearance.

The Substantive Hearing Before Me

22. Having found an error of law the issue then arose as to whether I should remit the appeal back to the First-tier to be heard again or whether I should proceed to rehear the appeal myself. Neither party indicated to me that they wished the matter to be remitted back and I did not consider that the requirements of the Senior President's Direction regarding remittals back to the First-tier were met in this case. I indicated

that the matter would proceed and enquired of the Appellant's solicitor whether the Sponsor wished to give any further oral evidence. The solicitor indicated that the Appellant's case could be deduced from the Appellant's bundle submitted at first instance and there was no further oral testimony which he wished to call on behalf of the Appellant. I therefore heard closing submissions from the representatives before reserving my decision.

23. For the Respondent it was argued that the present appeal had no reasonable prospects of success and that what the Appellant ought to do if he could show that he met the requirements was to submit a fresh application to the Entry Clearance Officer. It was not in dispute that insufficient documentation had been submitted to the Entry Clearance Officer. The employer's letter in particular lacked the required information. The Appellant could not rely now in this appeal on documents that had come into existence since the date of decision.

24. For the Appellant reliance was placed on the skeleton argument which pointed out that there had been no interview in this case and thus the Appellant had no opportunity to clarify the concerns of the Respondent. Appendix FM-SE paragraph 2A(i) stated that in respect of salaried employment in the United Kingdom the applicant may in addition to payslips and personal bank statements submit a P60 for the relevant period of employment. Even if that was not done the Respondent could still grant the application if otherwise satisfied that the requirements of the Appendix relating to that employment were met. There would have been no difficulties to find out what work the Sponsor was doing. There were stamps in the Sponsor's passport showing how long she had been in Bangladesh and when she had returned to the United Kingdom.

Findings

25. The first issue I have to decide is whether the Appellant can meet the Immigration Rules. It is only if he cannot that I need to go on to consider whether his exclusion from the United Kingdom breaches this country's obligations under Article 8. The first issue which the Appellant had to deal with was whether the marriage between him and the Sponsor was genuine and subsisting. Although the determination is not entirely clear I deduce from the decision at first instance that Judge Majid was satisfied that the relationship between the Appellant and Sponsor was genuine and subsisting. Since he had the benefit of seeing the Sponsor give evidence and I have not I do not depart from that finding. I appreciate the Respondent's argument that a number of matters emerged during cross-examination which in fact undermined the argument that the marriage was genuine and subsisting. I was not given any details of what those matters might have consisted of but even if Judge Majid's decision might be construed as a generous one which another Judge might not have reached on the same evidence, that of itself would not have demonstrated an error of law or importantly at this stage a finding which I could go behind. The issues in dispute are whether the Sponsor could show that she was earning in excess of £18,600 and whether the Appellant could show that he had a suitable English language qualification.

26. On the issue of finances the Appellant makes two points. Firstly he says he has provided sufficient documentation and secondly he says if the Sponsor has not then the Respondent could have still granted the application anyway. Dealing with the first point as the Entry Clearance Manager explains the documentation requirements in Appendix FM-SE are fixed. The letter from the employer Copperfield House did not meet the requirements of the Appendix. Given the ease with which false wage slips etc. can be produced it is understandable why the Immigration Rules require a letter from an employer confirming the necessary details so that that can be verified by the Entry Clearance Officer before a decision to grant or refuse entry clearance is taken.

27. In this case the details from the employer were quite inadequate (it is not suggested that they were adequate). Some of the confusion which has arisen on the Appellant's side may be due to the false impression that the Appellant and his representatives have that a P60 is in some way a government issued document. It is not any more than a wage slip is. A P60 is a statement by the employer of what the employee has earned and what tax and other deductions have been made. In a case such as this where the Respondent had a number of objections it is not surprising that the Respondent was not prepared to grant the application on the basis of insufficient documentation.

28. The Appellant has not sought to produce an up-to-date letter from the Sponsor's employer. The letter might not have been admissible but it might have shed some light on the documentation which the Appellant produced at the time of the application. In those circumstances I find that the Appellant has not submitted sufficient documentation to demonstrate the Sponsor's earnings. Whether or not the Sponsor is now earning more than £18,600 from self-employed income is not a relevant matter for me since that is postdecision evidence and could not have been in the contemplation of the parties at the date of refusal. The Appellant's remedy in that respect is to submit a fresh application with up-to-date evidence which meets the requirements of the Rules. I find therefore that the Appellant fails on the issues of maintenance as the Sponsor cannot demonstrate through sufficient documentation that she earned more than £18,600 at the date of the Respondent's decision.

29. Turning to the issue of the English language test the Respondent explained why the City and Guilds certificate was not considered sufficient as City and Guilds themselves were no longer supporting their own certificates as they realised that the certificates had been open to abuse. In those circumstances the Respondent acted reasonably by offering the Appellant an opportunity to undertake a free test before a final decision on the application for entry clearance was made. This the Appellant declined to take up. What he subsequently did was to take a test with TOEIC obtaining relatively low scores of 90 out of 200 for speaking and only 100 out of 495 for listening. The Appellant took this test thirteen days after he was refused entry clearance on the grounds of sufficient evidence to show linguistic ability. Although a letter produced over a year later dated 27th September 2014 from UK Education states that the Appellant passed his TOEIC exams on 28th August 2013 successfully the Appellant's low scores reinforced the view that the Appellant clearly had not

demonstrated his ability in English at the date of decision. Even if the TOEIC results show the Appellant has passed the English language (which I have some reservations about) that is evidence obtained postdecision and cannot be taken into account in this case. I find therefore that the Appellant cannot meet the Immigration Rules in relation to his English language ability either.

30. The issue therefore is whether the Appellant should nevertheless succeed outside of the Immigration Rules under Article 8. As the Respondent pointed out the Appellant was aware when he married the Sponsor in an arranged marriage that would not confer upon him a right to enter the United Kingdom. The disruption to the family life between the Appellant and the Sponsor was caused by the decision of the Sponsor to return to the United Kingdom and remain there apart from a visit in the summer of 2014 to the Appellant. The decision to refuse entry clearance merely confirms the existing status quo. There appears to be no reason why the Sponsor could not go to join the Appellant in Bangladesh if she so chose as she evidently maintains links with her country of origin and family life could be continued elsewhere. Alternatively if the Sponsor does not wish to return to Bangladesh to live with the Appellant, there is no reason why the relationship cannot be continued with visits and through modern means of communication as it has been up until now.

31. The interference such as it is with the family life between the Appellant and the Sponsor is pursuant to the legitimate aim of immigration control since the Appellant cannot meet the Immigration Rules and the Sponsor could not demonstrate at the date of decision that she had the necessary funds to be able to maintain the Appellant. The legitimate aim is thus the economic wellbeing of the country. I also note the provisions of Section 117B that an ability to speak English is considered to be in the public interest. It is particularly in the interests of the economic wellbeing of the United Kingdom that persons who seek to enter or remain in the United Kingdom are able to speak English because persons who can speak English are less of a burden on taxpayers and are better able to integrate into society (Section 117B(2). Furthermore it is in the public interest and in particular in the interests of the economic wellbeing of the United Kingdom that persons who seek to enter or remain in the United Kingdom are financially independent because such persons are not a burden on taxpayers and are better able to integrate into society (117B(3)). Since the Appellant cannot satisfy either the financial requirements or the linguistic requirements of Appendix FM it is clearly not in the public interest that he should nevertheless be admitted into the United Kingdom outside the Immigration Rules.

32. I find therefore that the interference caused to the relationship between the Appellant and the Sponsor is proportionate to the legitimate aim being pursued because of the statutorily defined public interest and because family life could be continued elsewhere for the reasons I have given. I find therefore that the Appellant is not able to show that the refusal of entry clearance breaches this country's obligations under Article 8 and I dismiss his appeal under both the Immigration Rules and under Article 8.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law and I have set it aside.

I have remade the decision by dismissing the Appellant's appeal against the Respondent's decision to refuse to grant entry clearance.

Appellant's appeal dismissed.

I make no anonymity order as there is no public policy reason for so doing.

Signed this 23rd day of March 2015

…….
Deputy Upper Tribunal Judge Woodcraft

TO THE RESPONDENT
FEE AWARD

As I have overturned the decision of the First-tier Tribunal because it involved the making of an error of law, I also set aside the fee award made in that determination such that no fee is payable by the Respondent to the Appellant in this case.

Signed this 23rd day of March 2015

…….
Deputy Upper Tribunal Judge Woodcraft