Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/19878/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 26 January 2015	**On 9 February 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE J M HOLMES

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

F. C.
(ANONYMITY DIRECTION)

Respondent

Representation:

For the Appellant: Ms L Kenny, Home Office Presenting Officer
For the Respondent: Mr C Ikegwuruka, Almond Legals

DECISION AND REASONS

1. The Appellant is a citizen of Mali. She made an application for entry clearance for the purpose of settlement in the UK as the spouse of the sponsor, and stated therein that she intended to travel in the company of her son. He made his own application for entry clearance for the purpose of settlement in the UK as the son of the sponsor, as the child of their marriage. The two applications were each refused by the Entry Clearance Officer on 9 October 2013.

2. In brief the Entry Clearance Officer noted that this was not the first application for entry clearance that had been made by the Appellant. It was refused on the basis that she could not satisfy the financial requirements set out in Appendix FM. Her husband's income fell below the stipulated threshold, and as a further ground of refusal it was noted that she had not produced, and did not have, a language qualification of the type specified in the Immigration Rules. The child's application was refused because his mother's application had been refused.

3. For whatever reason, only the Appellant lodged an appeal – her son did not. The appeal came before Judge Cockrill on 9 October 2014 and he promulgated his decision in relation to it on 16 October 2014. That decision allowed the appeal under the Immigration Rules, although the text of the decision makes clear that he would have allowed it under Article 8 if he had been unable to allow it under the Immigration Rules.

4. The Respondent applied for permission to appeal that decision and permission was granted by Judge Colyer on 5 September. So the matter comes before me.

5. I am satisfied that Judge Cockrill fell into an error of law, indeed a number of errors of law. First, and perhaps most importantly, he appears to have treated the appeal as if it was an appeal by both mother and son when it was not. Second, he appears to have treated the appeal as if mother could change tack, and post decision during the course of the appeal require her application to be considered as if she had only ever applied for entry clearance to travel alone. That approach was not open to the Appellant, although it is one that continued to be pursued before me. Third, he appears to have reversed the burden of proof in relation to the English language test requirement, and to have satisfied himself (for grounds that are not at all clear) that the Appellant had demonstrated a perfectly reasonable grasp of English and that this was all she needed to do in order to meet the fluency requirement under the Rules. That approach was plainly wrong. Specified English language test providers are listed by the Respondent and the Appellant was simply unable to show that she had a test certificate from an approved provider at the date of decision. No evidence was provided to the judge to suggest that she did, and none is provided even now.

6. Finally, in relation to the approach to the Immigration Rules the judge clearly fell into error in his approach to the financial threshold. Since mother and son had each applied declaring an intention to travel together the sponsor needed to show a gross annual income of at least £22,400 in order to meet the relevant financial threshold, and he simply could not do so. Indeed I note in passing, as became clear in the course of submissions to me, that there was no evidence at all before the judge to show what the sponsor's income was at the date of decision. The last evidence of any quality to corroborate his assertion that he did have an income of more than £22,400 was his bank statement for June 2013. That document demonstrated his financial position four months before the date of decision, and no explanation was offered to the judge for why more relevant bank statements were not produced in evidence. The P60 to which the judge referred was for the tax year 2013; that predated the date of the decision by six months. Again no explanation was offered to the judge for why the P60 for the 2014 tax year was not produced. Even now there is

no evidence to show by way of bank statements, payslips, letter from the employer or the 2014 P60 what the sponsor's actual income was in October 2013.

7. I am satisfied therefore that I must set aside the judge's decision under the Immigration Rules and remake it, and there is then I am afraid, only one possible outcome. The appeal under the Immigration Rules must be dismissed for failure to satisfy both the language requirement and the financial requirement.

8. The judge went on to look at the Appellant's circumstances under Article 8 outside the Rules. He did not refer himself to Section 117 of the 2002 Act although his decision post dated 28 July 2014, and nor did he refer himself to the Court of Appeal decision in MM [2014] EWCA Civ 985. He appears to have approached the Article 8 proportionality exercise on the basis that the child must also be granted entry clearance for compliance with Article 8 although it is not at all clear why he was considering the child's circumstances in this way. I note that the Appellant and her son have made more than one application for entry clearance to allow them to settle in the UK, but they have not yet been successful under the Immigration Rules. If they now qualify under the Immigration Rules the answer is obvious, it is for a fresh application to be made.

9. It would in my judgement be entirely inappropriate to approach this Article 8 appeal on the basis that it was for the Respondent to show that the sponsor could not live in Mali, although that appears to be what the judge did. It is plain from the papers before me that the sponsor was able to travel to Mali in July 2009 in safety to marry the Appellant, because the marriage certificate of that date shows that he was present at that ceremony. This was not a proxy marriage as is sometimes relied on before the Tribunal. Given the child's date of birth over three years later it is plain that the sponsor must have been able to return to Mali to see and to spend time with his wife subsequently, although there are no details in the evidence of how frequently he has done so. There is no possible basis upon which it could be assumed that he cannot live with his wife and son in Mali as a family unit in safety. In those circumstances the answer under the Article 8 proportionality assessment is clear, and the appeal is dismissed.

Notice of decision

The Determination did contain an error of law in the decision to allow the appeal under the Immigration Rules, which requires that decision to be set aside and remade. I remake that decision so as to dismiss the appeal both under the Immigration Rules and on Article 8 grounds.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any

member of her family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date

Deputy Upper Tribunal Judge J M Holmes

To the Respondent
Fee award

I have dismissed the appeal and therefore there can be no fee award.

Signed Date

Deputy Upper Tribunal Judge J M Holmes