Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/02450/2015
OA/02451/2015
OA/02453/2015

THE IMMIGRATION ACTS

Heard at North Shields	**Decision & Reasons Promulgated**
On 21 July 2016	**On 25 July 2016**
Prepared 22 July 2016	

Before

DEPUTY UPPER TRIBUNAL JUDGE JM HOLMES

Between

Z. A.
M. K.
M. K.
(ANONYMITY DIRECTION MADE)

Appellants

And

ENTRY CLEARANCE OFFICER ISLAMABAD

Respondent

Representation:
For the Appellant: Ms Weatherall, Counsel instructed by Kingstons Solicitors
For the Respondent: Ms Petterson, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellants applied for a grant of entry clearance as the partner and children of the sponsor, a British citizen, pursuant to paragraph EC-P.1.1 of Appendix FM to the Immigration Rules. Their applications were refused on 31 December 2014 on the basis the Respondent was not satisfied that the Appellants were related to the sponsor, or to one another, as claimed. In addition the Respondent was not satisfied the Appellants met the requirements of paragraph EC-C.1.1 and E-ECC.2.1 and E-ECP.3.3. of Appendix FM to the Immigration Rules.

2. The ECM reviewed the refusal in the light of the grounds of appeal, and evidence filed in support, on 29 May 2015. He maintained the overall decision to refuse the application, and each of the bases upon which that had been reached.

3. The appeal was heard by First Tier Tribunal Judge Kempton, and in a Decision promulgated on 1 December 2014 it was allowed under the Immigration Rules.

4. By a decision of First Tier Tribunal Judge EB Grant of 9 May 2016 the Respondent was granted permission to appeal to the Upper Tribunal on the basis it was arguable the Judge had fallen into error in her approach to "evidential flexibility" and paragraph 245AA of the Immigration Rules.

5. The Appellants filed no Rule 24 Notice. Neither party has applied for permission to rely upon further evidence pursuant to Rule 15(2A) of the Upper Tribunal Procedure Rules 2008.

6. Thus the matter comes before me.

Error of law?

7. By the date of the hearing the Appellants had served upon the Respondent evidence of DNA tests undertaken upon themselves and the sponsor. As a result the Respondent had formally conceded that the Second and Third Appellants were the children of the First Appellant and the sponsor. The Judge accepted that concession [12].

8. The Judge was not provided in evidence by either party with the payslips and bank statements for the sponsor which had been submitted by the Appellants in support of their applications. Neither representative appears to have considered that to be a problem at the time, and instead the appeal appears to have been conducted before the Judge on the basis that it was agreed that there were some inconsistencies between the amounts shown as having been paid to the sponsor by standing order as his net pay in the payslips, and the amounts shown as having been received in his bank account by way of

standing order from his employer. The Judge appears to have been content to adopt that approach.

9. Although the Judge set out in her decision at some length various passages from the Immigration Rules which were not relevant to the disputed issues in the appeal, she did not set out in detail the discrepancies between the payslips and the bank statement entries, or record how often those discrepancies arose.

10. According to the decision under appeal, there were three discrepancies of 20pence each. Thus the bank statements consistently recorded weekly payments by standing order of £381.19, whereas on 17 January 2014 the payslip recorded a payment of £380.99, and on 15 August 2014 and again on 5 September 2014 the payslips each recorded a payment of £381.39.

11. The Judge heard oral evidence from the Company Secretary of the Appellant's employer, who explained how the discrepancies had arisen, and that this was through administrative error when the payroll had been administered manually. This was no longer the case because the employer had moved to a Sage payroll system, and she confirmed that the P60s issued to the sponsor in relation to his employment (which he had held since 2004) were accurate.

12. It is agreed before me that the Respondent did not seek to challenge any aspect of this evidence as untrue. Nor did the Respondent seek to dispute that the sponsor had in fact earned in excess of the requisite Appendix FM threshold over the requisite period of time. This was a genuine and long standing employment.

13. The position that the Judge was faced with was therefore a genuine subsisting family relationship between the sponsor and the Appellants, and applications for entry clearance for settlement by his wife and children that both parties agreed failed to meet the requirements of the Immigration Rules not because the sponsor did not earn in excess of the Appendix FM threshold, but because there was an inconsistency on three occasions between the various documents filed in support of the applications that in value amounted to a discrepancy of 60pence, and for which an explanation had been provided by the third party responsible for the error which the Respondent had not sought to challenge.

14. It is agreed before me by both parties that the Judge's decision to allow the appeals pursuant to the Immigration Rules resulted from an error of law, because both parties were agreed before her that the Immigration Rules were not met because, however trivial, the inconsistencies in the documents as set out above meant that the evidential requirements of Appendix FM-SE were not met. That decision must be set aside, and remade.

Conclusions

15. As set out above, the appeals under the Immigration Rules must be dismissed. There is no scope for any other conclusion based upon the proposition that the applications were an extremely close "near miss", since the starting point for such a proposition is that the Rules were not complied with; Miah [2012] EWCA Civ 261

16. The grounds of appeal did however raise an Article 8 appeal. In my consideration of the Article 8 appeal I have to determine the following separate questions:

- Is there an interference with the right to respect for private life (which includes the right to physical and moral integrity) and family life?
- If so will such interference have consequences of such gravity as to potentially engage Article 8?
- Is that interference in accordance with the law?
- Does that interference have legitimate aims?
- Is the interference proportionate in a democratic society to the legitimate aim to be achieved?

17. Given the concession made by the Respondent before the Judge, the position is that the decisions to refuse entry clearance did engage the Article 8 rights of both the sponsor and the Appellants, since it is accepted that they enjoy "family life" together for the purposes of Article 8. The interference is however in accordance with the law, and had legitimate aims. There can be no issue that the decisions under appeal were made in the pursuit of a legitimate aim; the protection of the economic security of the UK, and the maintenance of public confidence in immigration controls.

18. Although the Judge did not make any reference to this in the course of her decision, and indeed she appears to have been led astray by the manner in which the parties presented their respective arguments, the real thrust of the Appellants' case ought to have been (as both parties now accept) that their marginal failure to meet the evidential requirements was relevant to the issue of the proportionality of the decisions under appeal; Patel [2013] UKSC 72. As explained by the President in Chau Le (Immigration Rules – de minimis principle) [2016] UKUT 186 @13, such a marginal failure may be relevant in the Article 8 context.

19. The evidential requirements set out in Appendix FM-SE do constitute "bright line" rules. They are either met, or, as in this case they are not. As the President warned in Chau Le [17], "bright line" rules must be

given their full and literal effect. It might well be thought that in this example the result is one that is unduly harsh, or austere. The Judge was in my judgement of that view [20-21] and I would not disagree with her. As the President explained however the relief from the consequences of this result is to be found in three ways; (i) the Respondent's ability to use her residual discretion to waive the evidential requirements for this family, (ii) their own ability to make a fresh application, or, (iii) their ability to assert that the result is unduly harsh and disproportionate given that a qualified human right is in play.

20. The Respondent has not used her residual discretion.

21. The Appellants could indeed make fresh applications, and on the face of the evidence before me they would be able to do so successfully if the sponsor's circumstances have not changed. I am told that they have not. It is plain that there would however be a consequential cost, and delay, in their doing so, from which the Appellants ask to be relieved through my remaking the decisions on the appeals so as to allow them on Article 8 grounds.

22. I note that the applications which led to the decisions under appeal were made in August 2014. There has therefore been a terrible cumulative delay, in the processing of those applications and the consequent appeals before both the First Tier Tribunal and the Upper Tribunal, so that almost two years have now passed. The Appellants have also been put to significant expense both in rebutting the Respondent's stance upon whether they were genuinely related to one another, and in the pursuit of these appeals. Given that two children are involved, I am not satisfied that on these facts the public interest is served by requiring the Appellants to lodge fresh applications and to start the process all over again. (I do not consider relevant to my decision in this respect the fact that the Appellants had made applications for entry clearance in 2013 that were also refused because the Respondent was not satisfied the financial requirements were met, and that the Appellants lodged these 2014 applications rather than pursue appeals against those refusals.)

23. I am satisfied from her comments that had the Judge approached the appeals upon the correct legal basis that she would have concluded that there were compelling compassionate circumstances that meant the refusal to grant entry clearance to the Appellants led to an unjustifiably harsh outcome. I agree, and I therefore allow the appeals on Article 8 grounds.

DECISION

The Decision of the First Tier Tribunal which was promulgated on 1 December 2014 did involve the making of an error of law. The decision

to allow the appeals under the Immigration Rules is accordingly set aside.

I remake the Decision on the appeals so as to dismiss the appeal under the Immigration Rules, and to allow the appeals on Article 8 grounds.

Direction regarding anonymity – Rule 14 Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until the Tribunal directs otherwise the Appellants are granted anonymity throughout these proceedings. No report of these proceedings shall directly or indirectly identify them. This direction applies both to the Appellants and to the Respondent. Failure to comply with this direction could lead to proceedings being brought for contempt of court.

Deputy Upper Tribunal Judge JM Holmes
Dated 22 July 2016