Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/11146/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 14th April 2016	**On 18th April 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE MANDALIA

Between

THE ENTRY CLEARANCE OFFICER – KINGSTON

Appellant

and

MR DWAYNE ANTHONY FAULKNOR
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr. C Avery; Home Office Presenting Officer
For the Respondent: No appearance

DECISION AND REASONS

1. This is an appeal by the Entry Clearance Officer against a decision by First-tier Tribunal Judge Carroll promulgated on 6th October 2015 in which he allowed an appeal against the respondent's decision of 18th August 2014 to refuse the

application made by the respondent for entry clearance as a partner under Appendix FM of the Immigration Rules.

2. The appellant is the Entry Clearance Officer, and the respondent to this appeal, is Mr Dwayne Faulknor. However for ease of reference, in the course of this decision I shall adopt the parties' status as it was before the First-tier Tribunal. I shall in this decision, refer to Mr Faulknor as the appellant, and the Entry Clearance Officer as the respondent.

3. There was no appearance before me, by or on behalf of the appellant. A letter was faxed to the Tribunal by Global Immigration Solutions, on 13th April 2016 in which it is stated that they have been instructed that "... Mr Faulknor no longer wishes to pursue this appeal, and accordingly we will not be attending the hearing scheduled for tomorrow, 14 April 2016". A letter in reply was sent to Global Immigration Solutions by fax informing them that "... the appeal being considered is that of the Home Office ...". The letter from the Tribunal makes it clear that the appeal cannot therefore be withdrawn and the hearing will proceed in the absence of Mr Faulknor. The appellant and or his representatives are plainly aware of the hearing and are aware that the matter will be heard in their absence if they do not attend.

4. By way of background, on 3rd April 2014 the appellant applied for entry clearance under paragraph EC-P.1.1 of Appendix FM to the Immigration Rules. That was in fact the second application made by the appellant. A previous application made in January 2011 had been refused, and First-tier Tribunal Judge Simpson dismissed an appeal against that refusal in February 2012.

5. The application made on 3rd April 2014 was refused for the reasons set out in a Refusal of Entry Clearance decision dated 18th August 2014. Broadly put, the respondent accepted that the appellant did not fall foul of the suitability requirements and accepted that the relationship requirements were met. The respondent was not satisfied that the appellant met the income threshold

requirement and the related evidential requirements set out in Appendix FM-SE. The respondent set out the evidential requirements and concluded that not all of the specified evidence had been provided in support of the application.

6. The appellant appealed and the Entry Clearance Manager reviewed the decision. The decision to refuse the application was maintained for the reasons set out in the Entry Clearance Manager's decision of 11th February 2015.

The decision of First-tier Tribunal Judge Carroll

7. The First-tier Tribunal Judge set out at paragraphs [1] to [4], the background. He records that she heard the evidence of the sponsor who adopted the contents of her witness statement. At paragraph [6], the Judge states:

> *"It is not disputed by the appellant that he is unable to meet all the requirements of Appendix FM with regard to the specified evidence but it is, nevertheless, his case that the sponsor is generating a personal income in excess of the minimum earning threshold of £18,600."*

8. At paragraph [8] of the decision, the Judge states:

> *"I am satisfied, in the light of all of the evidence before me that, in the financial year which relates to the application giving rise to the decision under appeal, the sponsor had an overall gross annual income of £23,550, substantially in excess of that required by Appendix FM. That income is not, however, shown in the sponsor's personal bank statements. Mr Allen, on behalf of the appellant, drew my attention to the Immigration Directorate Instructions at Annex FM1.7, specifically paragraph 3.2.1, as follows…."*
>
> *….*
>
> *In the case of this appellant, I am satisfied that his sponsor meets the level of the specified financial requirement and that the presence of the appellant in the United Kingdom will not place any burden upon the public purse"*

9. The findings made by the Judge in that paragraph are far from clear. It seems that the Judge accepts that the evidential requirements in Appendix FM-SE are not met, but finds that the sponsor has a gross annual income of £23,500. That being in excess of the income threshold set out in Appendix FM.

10. The Judge went on at paragraph [11] to state:

> *"The genuineness of the relationship between the appellant and the sponsor is not in dispute. They enjoy a family life together. The sponsor has a well-established private life in the United Kingdom. She works as a senior practitioner in child protection issues. Her work commitments mean that she is not able to travel on a regular basis to Jamaica to see the appellant, quite apart from cost considerations. In the light of all of the evidence, I am satisfied that her income exceeds the minimum threshold requirement and I find that the respondent's decision under appeal gives rise to a disproportionate breach of the Article 8 rights of the appellant and the sponsor."*

11. It would seem that the Judge therefore allowed the appeal on Article 8 grounds. Whether the appeal was also allowed under the Immigration Rules is not clear.

The grounds of appeal

12. The respondent advances three grounds of appeal. First, having concluded that the appellant and his sponsor have not met the evidential requirements set out in appendix FM-SE, the Judge erred in law in allowing the appeal on article 8 grounds without identifying the "compelling circumstances" that justify the grant of leave to enter where the requirements of the immigration rules are not met. In any event the Judge has had no regard to the statutory duty to consider the matters is set out in s117B of the Nationality, Immigration and Asylum Act 2002.

13. Second, in reaching her decision as to the sponsor's earnings, the Judge failed to consider the matters set out in the decision of the Entry Clearance Manager, and

does not identify the withdrawals made from the corporate bank account of the Company, by way of drawings, wages and dividends for the sponsor's own use.

14. Third, the Judge failed to give reasons why he found at paragraph [11] that the respondent's decision under appeal gives rise to a disproportionate breach of the Article 8 rights of both the appellant and the sponsor.

15. Permission to appeal was granted by First-tier Tribunal Judge McDade on 7th March 2016. The matter comes before me to consider whether or not the decision of First-tier Tribunal Judge Carroll involved the making of a material error of law, and if so, to remake the decision.

Discussion

16. It is useful to begin by setting out the relevant requirements of Appendix FM-SE:

> **Evidence of Financial Requirements under Appendix FM**
>
> A1. To meet the financial requirement under paragraphs E-ECP.3.1., E-LTRP.3.1., E-ECC.2.1. and E-LTRC.2.1. of Appendix FM, the applicant must meet:
>
> (a) The level of financial requirement applicable to the application under Appendix FM; and
>
> (b) The requirements specified in Appendix FM and this Appendix as to:
>
> (i) The permitted sources of income and savings;
>
> (ii) The time periods and permitted combinations of sources applicable to each permitted source relied upon; and
>
> (iii) The evidence required for each permitted source relied upon.

17. As I have set out, at paragraph [6] of his decision, the Judge states:

> *"It is not disputed by the appellant that he is unable to meet all the requirements of Appendix FM with regard to the specified evidence…"*

18. The First-tier Tribunal Judge concludes at paragraph [8] that he is satisfied that the appellant meets the level of the specified financial requirement. Having made that finding, it is not entirely clear whether the Judge allowed the appeal under the Immigration Rules. If he did, in my judgement the Judge erred by not adequately considering the evidential requirements of Appendix FM-SE. If the Judge allowed the appeal under the Immigration Rules, the Judge erred in allowing the appeal having concluded that the substantive maintenance requirement was met simply by reference to his analysis of the evidence before him as to the sponsor's income. In those circumstances, if the appeal has been allowed under the immigration rules, in my judgement there is a material error of law in the decision of the First-tier Tribunal and the decision is set aside.

19. In any event, the Judge wen on to consider the appeal on Article 8 grounds, and it is plain from what is said at paragraph [11] that the Judge found that the respondent's decision gives rise to a disproportionate breach of the Article 8 rights of the appellant and the sponsor.

20. The relevance of an appellant's inability to meet the evidential requirements and the approach to Article 8 in light of Appendix FM-SE, was considered by the Court of Appeal in **SS (Congo) [2015] EWCA Civ 387**. Their Lordships held:

> "*50. The present appeals concern not only the LTE Rules in Appendix FM which set out the substantive conditions which have to be satisfied in relation to the minimum income requirements for a sponsor, but also the Rules in Appendix FM-SE which stipulate the form of evidence required to substantiate claims that the substantive financial requirements under Appendix FM have been met. Appendix FM-SE deals with matters such as the types of bank statements, payslips, income, savings and so forth which will be regarded as acceptable. In addition, section A1.1(b) states, "Promises of third party support will not be accepted", and stipulates the highly circumscribed forms which support from third parties is required to take.*
>
> *51. In our judgment, the approach to Article 8 in the light of the Rules in Appendix FM-SE should be the same as in respect of the substantive LTE and LTR Rules in Appendix FM. In other words, the same general position applies, that compelling circumstances would have to apply to justify a grant of LTE or LTR where the evidence Rules are not complied with.*

> *52 This is for two principal reasons. First, the evidence rules have the same general objective as the substantive rules, namely to limit the risk that someone is admitted into the United Kingdom and then becomes a burden on public resources, and the Secretary of State has the same primary function in relation to them, to assess the risk and put in place measures which are judged suitable to contain it within acceptable bounds. Similar weight should be given to her assessment of what the public interest requires in both contexts.*
>
> *53 Secondly, enforcement of the evidence rules ensures that everyone applying for LTE or LTR is treated equally and fairly in relation to the evidential requirements they must satisfy. As well as keeping the costs of administration within reasonable bounds, application of standard rules is an important means of minimising the risk of arbitrary differences in treatment of cases arising across the wide range of officials, tribunals and courts which administer the system of immigration controls. In this regard, the evidence Rules (like the substantive Rules) serve as a safeguard in relation to rights of applicants and family members under Article 14 to equal treatment within the scope of Article 8 : compare AJ (Angola) , above, at [40], and Huang , above, at [16] ("There will, in almost any case, be certain general considerations to bear in mind: the general administrative desirability of applying known rules if a system of immigration control is to be workable, predictable, consistent and fair as between one applicant and another; the damage to good administration and effective control if a system is perceived by applicants internationally to be unduly porous, unpredictable or perfunctory; … the need to discourage fraud, deception and deliberate breaches of the law; and so on …"). Good reason would need to be shown why a particular applicant was entitled to more preferential treatment with respect to evidence than other applicants would expect to receive under the Rules. Moreover, in relation to the proper administration of immigration controls, weight should also be given to the Secretary of State's assessment of the evidential requirements needed to ensure prompt and fair application of the substantive Rules: compare Stec v United Kingdom , cited at para. [15] above. Again, if an applicant says that they should be given more preferential treatment with respect to evidence than the Rules allow for, and more individualised consideration of their case, good reason should be put forward to justify that."*

21. The reason that the appellant does not fulfill the requirements of the Immigration Rules is because the evidential requirements set out in Appendix FM-SE are not met sufficiently to establish that the substantive maintenance requirement is met. No compelling circumstances are referred to, by the Judge to justify a grant of leave to enter where the Immigration Rules are not complied with.

22. In my judgment, the Judge has given inadequate reasons for his conclusion that the respondent's decision gives rise to a disproportionate breach of the Article 8 rights of the appellant and the sponsor. I set out below the head note in **Budhathoki (reasons for decisions) [2014] UKUT 00341 (IAC)**;

> *"It is generally unnecessary and unhelpful for First-tier Tribunal judgments to rehearse every detail or issue raised in a case. This leads to judgments becoming overly long and confused and is not a proportionate approach to deciding cases. It is, however, necessary for judges to identify and resolve key conflicts in the evidence and explain in clear and brief terms their reasons, so that the parties can understand why they won or lost."*

23. This amounts to an error of law. The judge has not adequately explained his reasons, so that the respondent can understand why, in the absence of any compelling circumstances identified, the respondent's decision gives rise to a disproportionate breach of the Article 8 rights of the appellant and the sponsor. The appellant is required to demonstrate good reason why he is entitled to more preferential treatment with respect to the evidence, than other applicants would expect to receive under the Rules. No such reasons were advanced or identified in the decision of the First-tier Tribunal.

24. Whether the appeal has been allowed under the immigration rules, and upon Article 8 grounds, or upon Article 8 grounds alone, in my judgement there is a material error of law in the decision of the First-tier Tribunal and the decision is set aside.

Remaking the decision

25. The appellant has failed to take part in the hearing before me. It was conceded by the appellant before the First-tier Tribunal that the evidential requirements of Appendix FM-SE are not met. The appeal under the Immigration Rules fails and is dismissed.

26. Insofar as Article 8 is concerned, looking at the matter through the five Razgar questions, I would answer them therefore as follows. (1) There is no question of a proposed removal in this case, but only of whether the appellant is to be given leave to enter. Plainly refusal of such leave is an interference with the exercise of the right to respect for the appellant and his sponsor's family life. (2) The interference will have consequences of such gravity as potentially to engage the operation of article 8. (3) Such interference would be in accordance with law, namely pursuant to the applicable immigration rules (subject of course to the ultimate outcome of the article 8 issue). (4) and (5) These questions of justification and proportionality are, often taken together. As Strasbourg and domestic jurisprudence has consistently emphasised, states are entitled to have regard to their system of immigration control and its generally consistent application, and a requirement that an entrant should meet the maintenance requirement is an ultimately fair and necessary limitation on what would otherwise become a possibly overwhelming burden on all of its citizens.

27. For the reasons that I have already set out above, in my judgement, the appellant has failed to establish that there are other non-standard and particular features of the case, that are of a compelling nature to show that the refusal of entry clearance is disproportionate to the legitimate aim of immigration control.

28. **s117 Nationality Immigration and Asylum Act 2002** is also a factor to be taken into account in determining proportionality. **s117A(2)** requires me to have regard to the considerations listed in sections 117B and 117C. I am conscious of my statutory duty to take these factors into account when coming to my conclusions. Maintenance of fair and effective immigration control is in the public interest. Similarly, it is in the public interest, and in particular in the interests of the economic well-being 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.

29. In my judgement, the reason that the appellant is unable to satisfy the requirement of the immigration rules is relevant to the public interest matters that I am required to take into account in an assessment of proportionality. In the absence of any countervailing factors weighing in favour of the appellant, in my judgement the refusal of entry clearance does not result in a disproportionate interference with the applicant and her sponsor's right to a family life.

30. The appeal on Article 8 grounds is therefore dismissed.

Notice of Decision

31. The decision of the First-tier Tribunal is set aside. I remake the decision and the appeal is dismissed both under the Immigration Rules and on Article 8 grounds.

32. No anonymity direction is applied for and none is made.

Signed Date

Deputy Upper Tribunal Judge Mandalia

FEE AWARD

As I have set aside the decision of the First-tier Tribunal and dismissed the appeal there can be no fee award.

Deputy Upper Tribunal Judge Mandalia