



**Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/12823/2014**

THE IMMIGRATION ACTS

**Heard at Field House
On 28 January 2016**

**Decision & Reasons Promulgated
On 11 February 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

**NATALIA MARKINA
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellant: Ms H Sheizon of Kadmos Consultants Ltd.

For the Respondent: Mr C Avery, Senior Home Office Presenting Officer.

DECISION AND REASONS

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. The Secretary of State for the Home Department brings this appeal but in order to avoid confusion the parties are referred to as they were in the First-tier Tribunal. This is an appeal by the Secretary of State against a decision of First-

tier Tribunal Judge Blake, promulgated on 13 August 2015, which allowed the Appellant's appeal on Article 8 ECHR grounds only.

Background

3. The Appellant was born on 7 March 1961 and is a national of Russia. On 8 October 2014 the Secretary of State refused the Appellant's application for entry clearance as the partner of a person present and settled in the UK.

The Judge's Decision

4. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Blake ("the Judge") dismissed the appeal under the immigration rules, but allowed the appeal on article 8 ECHR grounds.

5. Grounds of appeal were lodged and on 11 December 2015 Judge Robertson gave permission to appeal stating *inter alia*

"The Judge found that the appellant could not meet the specified evidence requirements of the immigration rules, but was able to establish that she "would be able to meet the financial requirements" and allowed the appeal under article 8 for the reasons set out in para [131-139]. As submitted in the grounds of application, it is difficult to see how the financial requirements would be met if the evidence required to establish that they can be met was not supplied. Furthermore, it is arguable that where an appellant is in fact able to make an application supported by the evidence, exceptional circumstances have not been established for the grant of leave under article 8 (SS(Congo) [2015] EWCA Civ 387)"

The hearing

6. (a) Mr Avery, for the respondent, told me that the Judge had made material errors of law because, after finding that the appellant could not meet the provisions of either appendices FM or FM-SE, the Judge did not then set out compelling circumstances which would merit consideration of article 8 out-with the rules. Mr Avery explained that the Judge made clear findings that the appellant cannot meet either the substantive requirements of appendix FM or the evidential requirements of appendix FM SE.

(b) At [124] and [125] the Judge takes guidance from SS (Congo) [2015] EWCA Civ 387, and between [126] and [139] considers the appellants case out-with the immigration rules. Mr Avery told me that the crux of the argument that the decision is tainted by a material error of law is to be found at [136] & [137]. There, he argued, the Judge says that the effect of the respondent's decision is that the appellant and sponsor will have to rearrange their finances and apply afresh. He argued that that amounts to an inconvenience rather than either exceptional or compelling circumstances, so that on the basis of SS (Congo) there is no reason to consider the appellants article 8 ECHR rights out-with the rules, and insufficient reason to allow the appeal under article 8 ECHR. He urged me to set aside the decision and to remake the decision by dismissing the appellant's appeal

7. For the appellant, Ms Scheizen told me that the decision is a well-reasoned decision which does not contain errors of law, material or otherwise. She told me that the decision demonstrates a carefully considered balancing exercise and fully explains why that balancing exercise came down in the appellant's favour. She told me that the Judge took correct guidance from SS Congo before concluding at [132] that the preservation of fair and effective immigration control and the protection of the economic well-being of the UK did not dictate that the appellant's exclusion was necessary. She told me that at [139] the Judge specifically finds that this case engages compelling circumstances which merit consideration of article 8 ECHR out-with the immigration rules. She urged me to dismiss the appeal and allow the decision to stand.

Analysis

8. The focus in this appeal is on [125] to [139] of the decision. The respondent argues that because the appellant cannot meet the evidential requirements of appendix FM- SE, and because at [121] the Judge found that the appellant "*... could not comply with the strict requirements of the rules*", then the Judge could not make the finding at [131] that "*... the appellant would be able to meet the financial requirements*", and should not have gone on to consider article 8 ECHR out-with the rules because compelling circumstances are not made out.

9. At first sight, there may appear to be a contradiction between [121] and [130] & [131], but an holistic reading of the decision indicates that there is neither a contradiction nor an ambiguity. What the Judge says at [121] is that the appellant "*... could not comply with the strict requirements of the rules.*" The Judge goes on to emphasise that the appellant does not meet the evidential requirements set out in appendix FM-SE.

10. [130] and [131] narrate factors which the Judge weighs up in assessing proportionality for article 8 ECHR purposes. For the reasons given in the decision, the Judge finds that, as a matter of fact, the appellant's income exceeds the threshold set by the financial requirements, but that the appellant cannot discharge the burden of proving that she fulfils the requirements of the immigration rules because she has not produced the documents required in FM-SE. The Judge factors that finding (that is a matter of fact the appellant can satisfy the financial requirements of the rules) as one element of the proportionality assessment. In doing so the Judge acknowledges that it is the evidential requirements of appendix FM SE which prevent the appeal from meeting with success under the immigration rules.

11. The determinative question in this appeal is whether or not the Judge was correct to consider article 8 ECHR out-with the immigration rules. Parties are agreed that if there is a material error of law in this decision, it will be found between [125] and [139].

12. At [125] the Judge correctly takes guidance from [51] of SS (Congo), and identifies "*... That compelling circumstances would have to apply ... Where the evidence rules are not complied with*". Mr Avery argued that the facts, as the

Judge found them to be in the remaining paragraphs of the decision, do not amount to “*compelling circumstances*”. He told me that the Judge’s findings of fact merely identify an inconvenient situation.

13. At [128] the Judge declares that he considers whether there were exceptional circumstances to justify allowing the appeal out-with the rules. Between [129] & [138] the Judge discusses the impact of the respondent’s decision on both the appellant and sponsor, & finds that, were it not for the evidential requirements, the rules would be satisfied. He weighs that finding against the purpose of immigration control, and then sets out the disruption caused to the married life of the appellant and sponsor by the respondent’s decision.

14. The Judge finds that the sponsor has to reorganise his business arrangements and finances; that the decision causes separation between spouses; that the sponsor feels that he is being driven from the UK; that the appellant is on the cusp of having to return to Russia; and that the appellant and sponsor are only able to pursue married life when they meet temporarily in Spain.

15. Weighing each of those matters the Judge finds at [139] that the facts and circumstances of this case amount to exceptional circumstances. Deciding what amounts to exceptional (or compelling) circumstances is the job of the Judge at first instance, and is exactly what this Judge has done. The respondent may disagree and view the circumstances as less than compelling, but deciding whether the impact of the respondent’s decision raises compelling or exceptional circumstances is a question for the First-tier Judge. In reaching his conclusions, the First-tier Judge has manifestly applied the correct test in searching for compelling or exceptional circumstances.

16. It is not an arguable error of law for a First-tier Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for a First-tier Judge to fail to deal with every factual issue under argument. Disagreement with a First-tier Judge’s factual conclusions, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. In Green (Article 8 - new rules) [2013] UKUT 254 (IAC) the Tribunal said that “*Giving weight to a factor one way or another is for the fact finding Tribunal and the assignment of weight will rarely give rise to an error of law*”.

17. In Shizad (sufficiency of reasons: set aside) [2013] UKUT 85 (IAC) the Tribunal held that the Upper Tribunal would not normally set aside a decision of the First-tier Tribunal where there has been no misdirection of law, the fact-finding process cannot be criticised and the relevant Country Guidance has been taken into account, unless the conclusions the judge draws from the primary data were not reasonably open to him or her.

18. The Judge carefully considered each strand of evidence placed before him. He carefully records the submissions that were made and then, after correctly

directing himself in law, makes reasoned findings of fact before reaching conclusions which were manifestly open to the Judge to reach.

19. I find that the Judge's decision, when read as a whole, sets out findings that are sustainable and sufficiently detailed and based on cogent reasoning.

CONCLUSION

20. No errors of law have been established. The Judge's decision stands.

DECISION

21. The appeal is dismissed. The decision of the First-tier Tribunal stands.

Signed

Date 5 February 2016

Deputy Upper Tribunal Judge Doyle