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**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Numbers: OA/14318/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 23 December 2015**

**Determination Promulgated
On 5 January 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE A M BLACK

Between

ENTRY CLEARANCE OFFICER (MOSCOW)

Appellant

and

A S

(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Respondent: None

For the Appellant: Mr Duffy, Home Office Presenting Officer

DECISION AND REASONS

1. I refer to the appellant and respondent as they were known in the First-tier Tribunal albeit it is the Entry Clearance Office (Moscow), the respondent in the First-tier Tribunal, who pursues this appeal.
2. The appellant is a citizen of the Russian Federation who had applied for entry clearance as the parent of a child present in the UK, under Appendix FM of the immigration rules. The application was refused on 8 October 2014 and the appellant appealed to the First-tier Tribunal. First-tier

Tribunal Judge Hindson (“the FTTJ”) allowed the appeal on human rights grounds.

3. No anonymity direction was made in the First-tier Tribunal but given the facts of this case, one is appropriate now. I make a direction accordingly.

Background

4. The appellant came to the UK as a visitor in August 2010. Whilst here, she had a sexual relationship with a British man who was married to another woman. Following her return to Russia in 2011, the appellant discovered she was pregnant. Her daughter was born in May 2011 in Russia. The child’s father travelled to Russia and stayed with the appellant for about a week. The appellant and her child were living in impoverished conditions. As a result the appellant and the father of the child, who is British, decided that the child would have a better life with her father and his wife in the UK. Father and child travelled to the UK in August 2012 and the child has lived in the UK since that date. The appellant has not seen her daughter since she left Russia to live in the UK but is in daily contact with her via Skype. She sends correspondence, parcels and money. The appellant wished to join her daughter in the UK because she misses her but does not want her daughter to live with her in Russia; in any event, the father of the child would not agree to the latter course. The father of the child supported the application for entry clearance by the appellant.
5. The application was refused because the appellant did not fulfil the maintenance and accommodation criteria in Appendix FM of the Immigration Rules. The appellant appealed against the decision and, with the consent of the parties, the appeal was decided on the papers. It was allowed on human rights grounds only.
6. The respondent was granted permission to appeal by Deputy Upper Tribunal Judge Mandalia on 24 September 2015 because, although the FTTJ had found the appellant did not satisfy the requirements of Appendix FM, the FTTJ had arguably given inadequate weight to the provisions of the immigration rules when considering whether there were compelling reasons to consider a freestanding Article 8 claim. Furthermore, arguably the FTTJ had failed to give due consideration to the public interest considerations as required by s117B of the Nationality Immigration and Asylum Act 2002. The DUTJ did not grant permission to appeal on the second ground advanced by the respondent, concluding that this amounted to no more than a disagreement with the findings of the FTTJ at paragraphs 14 and 15 of the decision; these were open to the FTTJ on the evidence.

The Hearing

7. The hearing in the First-tier Tribunal was on the papers with the consent of the parties. The appellant was not represented in the First-tier Tribunal and no representative attended before me. I was satisfied that the notice of hearing had been duly served and therefore proceeded with the hearing in the absence of representation for the appellant.

8. I heard the oral submissions of Mr Duffy for the respondent. I reserved my decision at the end of the hearing and this I now give.

Submissions

9. Mr Duffy submitted that the FTTJ should have looked through the lens of the Immigration Rules and given weight to the fact the appellant did not fulfil the accommodation and maintenance criteria in Appendix FM. He accepted that the appellant's circumstances were unusual. However, they were not sufficiently compelling for consideration on human rights grounds outside the Rules. All relevant issues had been addressed with reference to the Rules: the appellant was not a category of person who could not satisfy the Rules at all. Furthermore, the FTTJ had failed to have regard to the public interest factors in s117B of the 2002 Act; in particular he had given no weight to effective immigration control.

Discussion

10. I am satisfied the FTTJ made material errors of law in his findings. He found that the appellant did not meet the accommodation and maintenance criteria in Appendix FM. However, the FTTJ gives no reason for finding (paragraph 18) that "this is one of those infrequent cases that merits consideration under Article 8 outside of the Immigration Rules". He should have identified why he considered that the circumstances of the appellant were such that they had not been fully covered by the criteria in the Immigration Rules. Even if this were not a material error of law, which it is, lacking as it does any reasoning at all, the FTTJ's findings with regard to the proportionality of the interference with the appellant's Article 8 rights are also wanting. He considers at paragraph 19 the "economic consequences of the appellant coming to the UK and the interest of the wider public in controlling costs", weighing this against the "interests of the appellant and, in particular, her daughter. There is no reference at all in this assessment to the public interest factors in s117A-D. Of particular concern, is the lack of any reference to the public interest in the maintenance of effective immigration control (s117B(1)) or the appellant's lack of financial independence (as demonstrated by her inability to fulfil the maintenance criteria in the Rules (s117B(3))). For these reasons, the FTTJ made material errors of law in his findings and the decision cannot stand.
11. I preserve the findings of fact of the FTTJ as regards the appellant and her child in the UK (paragraphs 14 - 16) and remake the decision.
12. There is no challenge to the findings of the FTTJ that the appellant was unable to demonstrate she fulfilled the accommodation and maintenance criteria in Appendix FM. Thus the appeal was dismissed under the Immigration Rules (albeit this was not specifically stated in the decision).
13. Appendix FM has been drafted to address those issues of relevance in applications for entry clearance based on purported interference with one or more persons' human rights. The appellant has been unable to demonstrate she fulfils the maintenance and accommodation criteria for

entry clearance as a parent. I do not consider her circumstances are such that the appeal should be considered outside the Immigration Rules. Her situation, whilst unusual, falls squarely within the circumstances covered by Appendix FM for the grant of entry clearance to the parent of a British child resident in the UK. The appellant gave her consent for the child to come to the UK to live permanently with her father. The appellant has not changed her mind about that arrangement but now wishes to live in the UK herself to be nearer her child. She is employed in Russia as an English teacher and has amassed some savings. It is open to her to continue living and working in Russia until she is able to demonstrate she fulfils the maintenance and accommodation criteria in Appendix FM. Whilst this lengthens the separation of mother and child, this separation was deemed by the child's parents to be acceptable, given the benefits to the child of living in the UK with her father. Contact can be maintained, as now, with the child until the appellant is able to demonstrate she fulfils the accommodation and maintenance criteria in the Immigration Rules. Thus the parents of the child have had the best interests of the child in mind in making their decision to relocate the child to the UK to be with her father, recognising that this would involve the separation of the child from her mother until she fulfils the criteria for entry clearance.

14. For these reasons, I find that the appellant's situation is appropriately covered by the Immigration Rules and that there is no need for consideration outside the Rules. Her appeal on human rights grounds must fail.

Decision

15. The making of the decision of the First-tier Tribunal did involve a material error of law, as set out above.
16. I do not set aside the decision of the First-tier Tribunal to dismiss the appeal under the Immigration Rules. That decision stands.
17. I set aside the decision of the First-tier Tribunal to allow the appeal on human rights grounds and remake it, dismissing the appeal.

Signed

Date

Deputy Upper Tribunal Judge A M Black

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.

Fee Award

The FTTJ made a fee award but, the appeal having now been dismissed there can be no fee award.

Signed

Date 12 August 2016

Deputy Upper Tribunal Judge A M Black