Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA160242014

THE IMMIGRATION ACTS

Heard at Newport	**Decision & Reasons Promulgated**
On 4 May 2016	**On 25 May 2016**

Before

UPPER TRIBUNAL JUDGE STOREY
UPPER TRIBUNAL JUDGE GRUBB

Between

ENTRY CLEARANCE OFFICER, ISTANBUL

Appellant

and

ALI UGURLU

Respondent

Representation:
For the Appellant: Mr I Richards, Home Office Presenting Officer
For the Respondent: Mrs C Ugurlu, the sponsor

DETERMINATION AND REASONS

1. This is an appeal by the Entry Clearance Officer against a decision of the First-tier Tribunal (Judge Malone) allowing the appeal of Mr Ali Ugurlu (hereafter "the claimant") against the ECO's decision taken on 24 November 2014 refusing him entry clearance as the partner of Christine Ugurlu, a British citizen present and settled in the UK, under section E-ECP of Appendix FM of the Immigration Rules (HC 395 as amended).

2. The ECO appeals with leave granted by the First-tier Tribunal (Judge P J M Hollingworth) on 12 October 2015.

The Judge's Decision

3. The judge dismissed the claimant's appeal under the Immigration Rules. He accepted that the relationship between the claimant and his wife (whom he referred to as "Ms Sage") was a genuine one but he did not accept that the claimant had established the required gross annual income of £18,600 at the date of application on the basis of the "specified documents" required by Appendix FM-SE.

4. Having reached that finding, the judge went on to consider the claimant's case under Art 8 outside the Rules. Having cited a number of authorities and referred to s.117A and s.117B of the Nationality, Immigration and Asylum Act 2002 ("the NIA Act 2002"), at para 42 the judge accepted that the claimant and sponsor enjoyed family life and that the ECO's refusal interfered with that family life. The judge said this:

> "I find the Appellant enjoys family life with Ms. Sage. I find that the ECO's refusal interferes with that family life. It has resulted in their being kept apart for over six months. On the basis that the Appellant and Ms. Sage did enjoy a genuine relationship, the ECO did not suggest that it would be reasonable to expect Ms. Sage to go and live in Turkey with the Appellant, thereby avoiding any interference."

5. At para 43, the judge concluded that the ECO's decision was in accordance with the law and in pursuance of a legitimate aim.

6. At paras 44-53, the judge considered the issue of proportionality. The judge concluded that there were "compelling reasons" such that the refusal of entry clearance was disproportionate. He said this:

> "44. I turn to consider the question of proportionality. I acknowledge that the maintenance of effective immigration controls is in the public interest. The Appellant speaks English to the requisite standard. When he was in the United Kingdom, he worked here, albeit illegally. As will appear from what I set out below, I am satisfied that, were the Appellant to be granted leave to enter the United Kingdom, he and Ms. Sage would be wholly financially self-sufficient and independent. I bear in mind s.117B(4)(b); the Appellant's relationship with Ms. Sage was established when the Appellant was in the United Kingdom unlawfully.
>
> 45. I am required by s.117A(2) to have regard to all the matters set out in s.117B. That I have done. However, while satisfying all the matters set out in s.117B does not result in an applicant succeeding, failure to satisfy one of the matters does not result in failure. Each case has to be considered on its own facts. The matters set out in s.117B are ones to which I must "have regard".
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> 46. In addressing proportionality, I have borne in mind the Appellant's past immigration history. It shows he has overstayed in this country for a not inconsiderable period.

47. I have dismissed this appeal under the Immigration Rules (3.1) because the Appellant failed to satisfy the rigours of Appendix FM-SE.

48. I note that while the ECO did not expressly accept the claim Ms. Sage earned a gross annual income of £18,500, he did not reject it. Equally, the ECM did not reject the claim that Ms. Sage earned an additional £1,300 per month from her work as a bank nurse.

49. In addressing Article 8, neither the ECO nor the ECM had regard to Ms. Sage's P60 for fye 5 April 2014, albeit the ECM acknowledged the document wrongly as being for fye 5 April 2015. The P60 showed a gross annual income of £19,953.13. There was no reason for me to doubt the genuineness of the P60.

50. I find it probable that as at date of application, Ms. Sage earned a gross annual income in excess of £18,600. There was no evidence to suggest that her income would have fallen from that for fye April 2014.

51. I therefore ask myself whether there are "compelling reasons" to justify my allowing this appeal. Is the ECO's decision disproportionate (see SS Congo): paragraph 40).

52. In addressing Article 8 in leave to enter cases, whether an applicant has satisfied the requirements of the Immigration Rules illuminates the Article 8 balancing exercise (see Mostafa: paragraph 18).

53. After careful consideration, I have come to the conclusion that when the Appellant's failure to satisfy the evidential requirements set out in Appendix FM-SE is balanced against the hardship caused to both the Appellant and Ms. Sage by the ECO's refusal, in circumstances where I have found it probable that Ms. Sage earned the requisite annual amount under the Immigration Rules, there are compelling reasons why the Appellant should be granted leave to enter the United Kingdom outside the Immigration Rules on human rights grounds. I find the ECO's decision is disproportionate. It would be idle to require the Appellant to incur all the cost of making another entry clearance application and be further separated from Ms. Sage while it was awaiting resolution."

7. Accordingly, the judge allowed the appeal under Art 8.

The Appeal to the Upper Tribunal

8. Before us, the sponsor attended on behalf of the Claimant and the Entry Clearance Officer was represented by Mr Richards.

9. Mr Richards relied upon the grounds of appeal which he developed in his oral submissions. Mr Richards submitted that the judge had erred in law in a number of respects in considering the claimant's case outside the Rules.

10. First, he submitted that although the judge had made reference to s.117B at para 45 of his determination, thereafter he had failed properly to have regard to the public interest in effective immigration control given that the claimant could not succeed under the Rules.

11. Secondly, Mr Richards submitted that the judge had, in effect, erroneously treated the claimant's case as a "near miss" and had found a breach of Art 8 in effect on that basis.

12. Thirdly, Mr Richards submitted that the judge had been wrong to find that there were "compelling reasons" given that the claimant had not shown (and continued before the judge to be unable to show) that he met the requirements of the Rule on the basis of the specified documentation in Appendix FM-SE. Mr Richards submitted that the judge was wrong to find that there were "compelling reasons" simply on the basis that on the evidence, even though not satisfying the requirements of Appendix FM-SE, the claimant could show that the sponsor's income exceeded £18,600. That was not a compelling reason for allowing the appeal.

Error of Law

13. The proper approach to the application of Art 8 outside the Immigration Rules (in the non-deportation context) is a jurisprudentially well trodden path both in the Court of Appeal (see, e.g. R(Nagre) v SSHD [2013] EWHC 720 (Admin); Singh and Khalid v SSHD [2015] EWCA Civ 74; (both removal cases); and SS (Congo) and others v SSHD [2015] EWCA 387 (an entry clearance case)) and in the Upper Tribunal (see, e.g. Forman (ss 117A-C considerations) [2015] UKUT 412 (IAC)).

14. We do not here need to set out the principles in any detail. It suffices to identify that there is a two stage process and the general approach. First, a decision must be made whether an individual succeeds under the Immigration Rules. If he has a right of appeal on that ground, he will succeed. If he can only appeal on human rights grounds, complying with the Rules will be a "weighty" but not determinative factor in assessing proportionality providing Art 8.1 is engaged on the basis of a sufficiently serious interference with the individual's private and family life (see, Mostafa (Article 8 in entry clearance) [2015] UKUT 112 (IAC**)** and Kaur (visit appeals; Article 8) [2015] UKUT 487 (IAC)).

15. Secondly, if the individual does not succeed under the Rules, then consideration must be given to whether the individual can succeed outside the Rules under Art 8. In order to do so, the jurisprudence is clear that the individual must establish "compelling circumstances" having regard to all the circumstances including those already considered under the Rules. That approach is applicable in both removal cases (see, e.g. Nagre) and in entry clearance cases (see, e.g. SS (Congo)). Equally, it is clear that, so far as relevant to the individual case, a judge must "have regard" to the statutory factors set out in s.117B of the NIA Act 2002 in substance (see, e.g. Bossade (ss.117A-D-interrelationship with Rules) [2015] UKUT 415 (IAC) and Forman (ss 117A-C considerations) [2015] UKUT 412 (IAC)) but is not confined to those factors in considering the public interest (see, e.g. Rajendran (s117B - family life) [2016] UKUT 138 (IAC) and Bossade).

16. In our judgment, whilst Judge Malone applied the 2 stage approach, he erred in law in a number of respects.

17. First, in concluding that there were "compelling reasons" the judge failed properly to carry out the balancing exercise taking into account the strong public interest in effective immigration control given that the claimant could not succeed under the Rules.

18. Although the judge made reference to "effective immigration controls" (see para 44), he appears at para 52 wrongly to approach the case as if the claimant has satisfied the requirements of the Immigration Rules (see, e.g. his reference to Mostafa [2015] UKUT 00112 (IAC) - a case where the appellant met the requirements of the Rules).

19. The claimant simply could not establish that he met the financial requirements based on the required documentation under Appendix FM-SE. In SS (Congo), the Court of Appeal recognised that the evidential rules in Appendix FM-SE were no less a reflection of the public interest than were the substantive requirements of the Rules themselves (see [50]-[53]). Here, the fact that the claimant could establish on the basis of evidence not complying with Appendix FM-SE (namely the sponsor's P60) that she had a gross annual income in excess of £18,600 did not negate the public interest reflected in the fact that the claimant still could not succeed under the Immigration Rules.

20. Secondly, and linked to that reasoning, the judge effectively allowed the claimant's appeal on the basis that the compelling circumstances (or as he calls them "reasons") were that the appellant had, in effect, met the substance of the Rules and it was a "near miss" because the necessary documentation was not produced. In para 53, the judge does refer to "hardship" caused to the sponsor and claimant by the ECO's refusal, but there was no evidence before the judge of any hardship apart from that necessarily flowing from the fact that until the claimant obtained entry clearance the sponsor and claimant would not be able to live together and their contact would be limited to visits and other forms of distance contact. His decision must, therefore, rest upon a view that the Rules are effectively met and, to the extent they were not, it was a 'near miss' based on the technicality of the documentation required under Appendix FM-SE.

21. In SS (Congo), the Court of Appeal identified the error in concluding that a "near miss" case amounted, in itself, to compelling circumstance to justify the grant of entry clearance outside the Rules. At [55], Richards LJ (delivering the judgment of the Court) said this:

> "… the fact that an applicant may be able to say that their case is a 'near miss' in relation to satisfying the requirements of the Rules will by no means show that compelling circumstances exist requiring the grant of LTE outside the Rules. A good deal more than this would need to be shown to make out such a case. The respondents' argument fails to recognise the value to be attached to having a clear statement of the standards applicable to everyone and fails to give proper weight to the judgment of the Secretary of State, as expressed in the Rules, regarding what is needed to meet the public interest which is in issue. The 'near miss' argument of the respondents cannot be sustained in the light of these considerations and the authority of *Miah v Secretary of State for the Home Department* [2012] EWCA Civ 261, especially at [21]-[26]."

22. That said, the Court of Appeal recognised that a "near miss" argument was not necessarily "wholly irrelevant to the balancing exercise required under Art 8" (see [56]). The court identified the relevance as follows at [56]:

> "If an applicant can show that there are individual interests at stake covered by Article 8 which give rise to a strong claim that compelling circumstances may exist to justify the grant of LTE outside the Rules, the fact that their case is also a 'near miss' case may be a relevant consideration which tips the balance under Article 8 in their favour. In such a case, the applicant will be able to say that the detrimental impact on the public interest in issue if LTE is granted in their favour will be somewhat less than in a case where the gap between the applicant's position and the requirements of the Rules is great, and the risk that they may end up having recourse to public funds and resources is therefore greater."

23. At [57], the court rejected the arguments put forward by those seeking entry in the cases before the court that "improvements in the position of their sponsors" which were "on the horizon" as to their financial position provided anything other than "very weak support" for their claims to entry clearance. The court said this:

> "The Secretary of State remains entitled to enforce the Rules in the usual way, to say that the Rules have not been satisfied and that the applicant should apply again when the circumstances have indeed changed. This reflects a fair balance between the interests of the individual and the public interest. The Secretary of State is not required to take a speculative risk as to whether the requirements in the Rules will in fact be satisfied in the future when deciding what to do. Generally, it is fair that the applicant should wait until the circumstances have changed and the requirements in the Rules are satisfied and then apply, rather than attempting to jump the queue by asking for preferential treatment outside the Rules in advance."

24. In our judgment, Judge Malone was wrong, therefore, to find "compelling circumstances" based, in effect, upon the fact that the claimant could establish, but not in accordance with Appendix FM-SE, that her income reached the substantive level set out in the Rules. That, in itself, was not a "compelling circumstance" to outweigh the public interest reflected in the fact that the requirements of the Rules were not met.

25. Thirdly, unusually in an entry clearance case s.117B(4)(b) of the NIA Act 2002 applied in that "little weight" should be given to a relationship formed with a qualifying partner that is "established by a person at a time when the person is in the United Kingdom unlawfully". Here, the claimant had previously been in the UK unlawfully. During that time he established his relationship with the sponsor before leaving the UK for Turkey on 22 August 2014. Of course, even if s.117B(4)(b) did not apply because the individual seeking entry clearance had not been in the UK or had not established the relationship whilst in the UK, nevertheless that would be a highly relevant factor – namely that the relationship was formed whilst he was unlawfully in the UK – under the Strasbourg jurisprudence (see, e.g. Rodrigues da Silva and Hoogkamer v Netherlands [2007] 44 EHRR 34 and Jeunesse v Netherlands, app.no.12738/10 (CJEC, GC)). Although the judge stated (at para 44 of his determination) that he had in mind s.117B(4)(b) in carrying out an assessment of

whether there were "compelling circumstances" to outweigh the public interest, the judge failed to have proper regard to the fact that the relationship is entitled to "little weight".

26. Fourthly, in para 53 the judge was wrong to state that it was "idle" to require the claimant to incur the cost of making another entry clearance application. It is not clear to us why it was "idle" to require the claimant to satisfy the requirements of the Rules including the evidential requirements in Appendix FM-SE. We can only understand the judge's reasoning to be, perhaps by analogy with the approach in removal cases where an individual can establish that on return to seek entry clearance he would meet the requirements of the Rules, that there is no good reason to require him to do so (see Chikwamba v SSHD [2008] UKHL 40). In this case, the claimant did not establish before the judge that he did, or would, meet the financial requirements of the Rules. The public interest remained that, as a generality, the requirements of the Rules must be met in substance and on the evidential basis required by Appendix FM-SE.

27. For these reasons, therefore, Judge Malone's decision to allow the claimant's appeal under Art 8 involved the making of an error of law. It cannot stand and we set it aside.

Remaking the Decision

28. We now turn to remake the decision under Art 8.

29. We apply the two-stage process to Art 8.

30. As regards the Rules, the claimant cannot succeed under the Rules as he cannot establish he met the financial requirements of Appendix FM on the basis of 'specified documents' set out in Appendix FM-SE.

31. We turn then to consider Art 8 outside the Rules. This is an entry clearance case and so engages the positive obligations of the State under Art 8 to respect an individual's private and family life but, as the case law recognises, any analysis must draw heavily on the approach in negative obligation cases looking at Art 8.1 (for engagement of art 8) and Art 8.2 (for any justification for a breach of Art 8.1) (see, e.g. SS(Congo) at [39(ii)] citing the relevant Strasbourg jurisprudence). It is helpful to consider the 5-stages set out in Razgar [2004] UKHL 24.

32. First, the judge found that the claimant and sponsor enjoyed family life and that it would not be reasonable to expect the sponsor to live in Turkey with the claimant. Mr Richards did not seek to challenge that finding and we accept it.

33. Secondly, we also accept that the ECO's refusal would interfere with the future enjoyment of family life between the claimant and sponsor sufficiently seriously to engage Art 8. Although, the sponsor told us that she was able to visit her husband about twice a year depending on her holiday entitlement, we accept that

qualitatively the sponsor and claimant would not be able to enjoy family life as husband and wife.

34. Thirdly, there is no doubt that the ECO's decision is in accordance with the law and is in pursuance of a legitimate aim, namely the economic well-being of the country and for the prevention of disorder or crime.

35. Fourthly, we must consider the issue of proportionality and in order to establish that the refusal of entry clearance is disproportionate, the claimant must establish "compelling circumstances" sufficient to outweigh the public interest reflected in s.117B(1) of the NIA Act 2002, namely the "maintenance of effective immigration controls".

36. As regards the claimant's ability to speak English, the judge found that the appellant speaks English to the requisite standard (see para 44). That finding was not challenged by Mr Richards. The public interest criterion in s.117B(2) does not, therefore, adversely impact upon the appellant. However, the fact that he speaks English does not add any, or any significant weight to the claimant's case (see AM (S 117B) Malawi [2015] UKUT 260 (IAC)).

37. Further, given the judge's finding that the sponsor has a gross annual income of £19,953.13 – which was not disputed by Mr Richards – we accept that the claimant is likely to be "financially independent" as set out in s.117B(3) of the NIA Act 2002. But, again, that adds little positively to the appellant's claim (see Forman (ss 117A-C considerations) [2015] UKUT 412 (IAC)).

38. We have regard to s.117B(4), namely that the relationship formed between the claimant and sponsor was established at a time when the claimant was in the UK unlawfully and therefore is entitled to "little weight".

39. The judge does not refer to any evidence, and we were not referred to any evidence, that the impact upon the sponsor and claimant of the ECO's refusal of entry clearance gave rise to any greater hardship or any greater impact than inevitably follows from the fact that they are separated as a result of the claimant's inability to meet the requirements of the Immigration Rules.

40. We do not consider this to be a "near miss" case simply on the basis that the claimant failed to produce the required documentation under Appendix FM-SE. But, even if it were, that in itself, following SS (Congo), could not amount to "compelling circumstances" sufficient to outweigh the public interest.

41. Carrying out the balancing exercise inherent in the issue of proportionality, the public interest in effective immigration control is engaged in this case. We accept that, subject to a successful future application for entry clearance, the sponsor and claimant will be unable to carry on the normal family life of a married couple living together. Nevertheless, even taking into account the positive aspects of the claimant's case, the circumstances are not, in our judgment, sufficiently "compelling" to outweigh the public interest.

42. It may well be that the changed (more favourable) financial circumstances of the sponsor, coupled with the Entry Clearance Officer's acceptance that the relationship is 'genuine and subsisting' may hold out greater hope of success in any future application for entry clearance but that is a matter for the Entry Clearance Officer, in the light of any evidence presented, and not for us.

43. For these reasons, the claimant has failed to establish on a balance of probabilities that the ECO's decision breaches Art 8 of the ECHR.

Decision

44. For the above reasons, the decision of the First-tier Tribunal to allow the claimant's appeal under Art 8 involved the making of an error of law. We set that decision aside.

45. We remake the decision dismissing the claimant's appeal under Art 8.

46. The judge's decision to dismiss the claimant's appeal under the Immigration Rules was not challenged and stands.

Signed

A Grubb
Judge of the Upper Tribunal
Date 25th May 2016

TO THE RESPONDENT
FEE AWARD

No fee award is payable as the appeal has been dismissed.

Signed

A Grubb
Judge of the Upper Tribunal
Date 25th May 2016