



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

Appeal Number: OA/16089/2014
OA/16117/2014

THE IMMIGRATION ACTS

Heard at Field House

On 2nd June 2016

**Determination
Promulgated**

On 3rd June 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE MANDALIA

Between

THE ENTRY CLEARANCE OFFICER - ISTANBUL

Appellant

and

**MARIE ANGELA ORS
MR ETHEM ORS
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellants: Mr. I Jarvis; Home Office Presenting Officer
For the Respondent: Mr J Walsh; Instructed by Morgan HAS Solicitors

DECISION AND REASONS

1. This is an appeal by the Entry Clearance Officer against a decision by First-tier Tribunal Judge Walker promulgated on 29th September 2015 in

which he allowed the appeals against the respondent's decisions of 18th November 2014 to refuse the applications made by Mrs Marie Ors and her son Ethem Ors for entry clearance as a partner and child under Appendix FM of the Immigration Rules.

2. The appellant is the Entry Clearance Officer, and the respondents to this appeal are Mrs Marie Ors and Mr Ethem Ors. 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 refer to Mrs Marie Ors and Mr Ethem Ors as the appellants, and the Entry Clearance Officer as the respondent.
3. By way of background, Mrs Marie Ors applied for entry clearance under paragraph EC-P.1.1 of Appendix FM to the Immigration Rules. Her son, Ethem Ors applied for entry clearance under paragraph EC-C.1.1 of Appendix FM to the Immigration Rules. The applications were refused for the reasons set out in a Refusal of Entry Clearance decision dated 18th November 2014 served upon each of the appellants. Broadly put, the respondent was not satisfied that the appellants met the income threshold requirement by reference to 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.

The decision of First-tier Tribunal Judge Walker

4. The First-tier Tribunal Judge set out at paragraphs [1] to [4], the background. At paragraphs [5] to [11] he sets out the relevant burden and standard of proof. At paragraph [11], the Judge states:

"The circumstances relating to the claims under the ECHR are to be assessed as at the hearing date. I may consider evidence about any matter which I think relevant to the substance of the decisions, including

evidence which concerns a matter arising after the date of the decision (NIAA 2002, Section 85(4)).”

5. At paragraph [12] of the decision, the Judge sets out a summary of the reasons given by the respondent for the refusal of the applications. The Judge’s findings are to be found at paragraphs [22] to [27] of the decision. The Judge found the appellants sponsor to be credible and consistent, and having considered the evidence before him, the Judge found at paragraph [27] that the sponsor’s income is as claimed and is evidenced by the P60 and payment of income tax.
6. 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’s income is in excess of the income threshold set out in Appendix FM. The Judge went on at paragraph [28] to state:

“I therefore accept that the Sponsor has met the financial requirements of paragraph E-ECP.3.3.”

7. The Judge therefore allowed the appeal under the immigration rules and did not consider the appeal on Article 8 grounds.

The grounds of appeal

8. The respondent advances one ground of appeal. That is, it was not open to the Judge to make a finding that the income threshold requirement is met under the immigration rules in the absence of the specified evidence. The Judge failed to consider the matters set out in the decision of the respondent identifying the absence of the specified evidence set out in paragraph 9 of Appendix FM-SE.
9. Permission to appeal was granted by First-tier Tribunal Judge Lever on 11th April 2016. The matter comes before me to consider whether or

not the decision of First-tier Tribunal Judge Walker involved the making of a material error of law, and if so, to remake the decision.

10. Before me, Mr Jarvis submits that Appendix FM-SE expressly sets out the specified evidence that an applicant needs to provide to meet the requirements of Appendix FM. He submits that the appellant relied upon the sponsor's income from employment and/or shares in a limited company based in the UK, in which the sponsor is a director and shareholder, and thus the evidence set out at paragraphs 9(b) to (d) was required in support of the application. He submits that in reaching his decision, the Judge failed to focus upon the requirements of Appendix FM-SE and made his decision simply by reference to his own view that the income requirements were met, having had regard to the sponsor's P60 for the tax year ending 5th April 2015. Mr Jarvis submits that the Judge erred in taking a personal view without having proper regard to the evidential requirements that are expressly set out in Appendix FM-SE.
11. Although not a ground set out in the respondent's grounds of appeal, Mr Jarvis also submitted that the Judge erred at paragraph [11] of the decision that the claims under the ECHR are to be assessed as at the hearing date. Whilst it is perfectly clear from the decision of the House of Lords in **AS (Somalia) [2009] UKHL 32** that consideration of Article 8 in respect of an out of country entry clearance appeal is to occur at the date of the decision and not the date of the hearing, the Judge allowed the appeal under the immigration rules without any consideration of the claim under the ECHR.
12. Mr Walsh rightly in my view, conceded that the evidential requirements set out in Appendix FM-SE were not met by the appellants. By way of illustration, he accepted that the appellants had failed to provide the Company Tax Return CT600 for the last full financial year and evidence this has been filed with HMRC, or the corporate/business bank

statements covering the same 12-month period as the Company Tax Return CT600. Similarly, the appellants had not provided a current appointment report from Companies House as required by paragraph 9(b)(vi) of Appendix FM-SE or one of the documents set out at paragraph 9(b)(vii) of Appendix FM-SE. As to the dividends received by the appellant, Mr Walsh accepted that the appellants had not provided all of the documents set out at paragraph 9(d) of Appendix FM-SE.

13. Mr Walsh submits that notwithstanding the absence of some of the documentary evidence required by Appendix FM-SE, the Judge had found the sponsor to be a credible witness and had exercised his discretion in reaching the finding that the sponsor's income is as claimed and that the appellants have met the financial requirements.

Discussion

14. 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;
 - 0 (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.

15. In my judgement the Judge erred by not adequately considering the evidential requirements of Appendix FM-SE. 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.
16. I reject the submission made by Mr Walsh that it was open to the Judge, having found that the sponsor was a credible witness, in the exercise of discretion, to find that the financial requirements of the immigration rules are met. In considering whether the appellants could succeed under the immigration rules the Judge failed to make any reference to the relevant parts of Appendix FM and Appendix FM-SE of Immigration Rules either directly or in substance.
17. The Judge was aware that the respondent had refused the applications because the evidence required under Appendix FM-SE had not been provided with the application. The Judge notes, in summary form, the reasons for refusal at paragraph [12] of his decision. However, in his findings at paragraph [22] to [27] of the decision, he does not refer to any of the evidential requirements set out in Appendix FM-SE. It was important for the Judge to do so because to meet the level of financial requirement applicable to the applications under Appendix FM, the appellants must meet the requirements specified in Appendix FM and Appendix FM-SE, as to the permitted sources of income and savings, the time periods, and the evidence required for each permitted source relied upon.
18. It follows that in my judgment, the decision of the First-tier Tribunal discloses a material error of law and the decision of the First-tier Tribunal is set aside.
19. Having allowed the appeal under the immigration rules, the Judge did not go on to consider the appeal on Article 8 grounds.

20. The decision needs to be re-made and I have decided that it is appropriate to remit this appeal back to the First-tier Tribunal, having taken into account paragraph 7.2 of the Senior President's Practice Statement of 25th September 2012 which states;

'7.2The Upper Tribunal is likely on each such occasion to proceed to re-make the decision, instead of remitting the case to the First-tier Tribunal, unless the Upper Tribunal is satisfied that;

(a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or

(b) the nature or extent of any judicial fact-finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.'

21. In my view the requirements of paragraph 7.2(a) and (b) apply. The Judge has failed to set out and consider in his decision any of the evidence that was before him as to the appeal on Article 8 grounds. The nature and extent of any judicial fact-finding necessary with regard to the claim claim under Article 8 will be extensive. The parties will be advised of the date of the First-tier Tribunal hearing in due course.

Notice of Decision

22. The decision of the First-tier Tribunal is set aside.
23. The matter is remitted to the First-tier Tribunal for hearing afresh.
24. No anonymity direction is applied for and none is made.

Signed

Date **3rd June 2016**

Deputy Upper Tribunal Judge Mandalia

FEE AWARD

The First-tier Tribunal made no fee award. As I have set set aside the decision of the First-tier Tribunal and remitted the matter for re-hearing I make no fee award.

Signed

Date **3rd June 2016**

Deputy Upper Tribunal Judge Mandalia