Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/08559/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 8th December 2017	**On 26th January 2018**

Before

UPPER TRIBUNAL JUDGE FRANCES

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRS HATICE KARATAY
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr D Clarke, Home Office Presenting Officer
For the Respondent: No Representation and No Appearance

DECISION AND REASONS

1. Although this is an appeal by the Secretary of State for the Home Department I shall refer to the parties as in the First-tier Tribunal. The Appellant is a citizen of Turkey born on 10 February 1961. Her appeal against the refusal of entry clearance was allowed by First-tier Tribunal Judge Abebrese on 22 February 2017.

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2. The Secretary of State appealed on the ground that the judge erred in law in finding that the financial requirements could be met. Appendix FM-SE states that third party support will only be accepted in the form of income from a dependent child who has turned 18, remains in the same UK household as the applicant and continues to be counted towards the financial requirements under Appendix FM. The Rule required that the child live in the same household as the applicant which was not the case. If 'applicant' can also relate to 'sponsor' then the judge erred in law in failing to make findings regarding whether or not the Sponsor lived with his son.

3. In relation to the English language requirements the judge failed to make any findings on how the Appellant's medical condition prevented her from taking an English language test.

4. Permission was granted by First-tier Tribunal Judge Robertson on 11 September 2017 for the following reasons: "Pursuant to the provisions of Appendix FM-SE at paragraph 1(b)(ii) 'income from an dependent child who was turned 18 remains in the same UK household as the applicant and continues to be counted towards the financial requirement under Appendix FM. This is a provision that the judge was aware of [23]. However, it is arguable as submitted in the grounds, that the judge did not consider whether the Sponsor's son, Mr Kenan Karatay, was still dependent on him or a member of his household. The reasons given by the judge at [24] for preferring the evidence of the Sponsor and his son do not amount in terms to a finding that the provisions of Appendix FM-SE at paragraph 1(b)(ii) are met. As permission is granted on this ground the Respondent is not precluded from arguing the English language point raised in the grounds.

5. The Appellant did not attend the hearing and was not represented. Enquiries were made and an email was sent, at 11.56am on 8 December 2017, from the Appellant's representative apologising for late confirmation of non-attendance. The email states: "Please find our client's instructions as he does not wish us to attend the hearing as of this morning. I have enclosed confirmation on his instructions in this matter. I have also emailed the Tribunal to confirm we cannot attend. I appreciate if the judge can make the decision considering the applicant's application in favour of our client as our client has a genuine relationship as a married couple. He is a pensioner with a private pension and state pension in the UK. Our client is receiving high rate of Class A retirement pension. The applicant's husband also has savings which he is able to support his wife's application. In our appeal we have submitted the relevant evidence and our advocate has given information which show that our client has a good character. Their intention is to live in the UK. The applicant's family are all in the UK and the applicant and her husband wanted to spend their life with their children in the UK. Please be advised, that the applicant's husband is in Turkey with her." There was a letter dated 3 December 2017 from Mustafa Karatay stating that he did not require a representative to represent him on Friday 8 December 2017.

6. There was no application for an adjournment and it is clear from the email that the Appellant did not require her representatives to attend court in order to pursue her

appeal and that the Sponsor was not going to be present at the appeal hearing because he is in Turkey with the Appellant. Accordingly I am satisfied that the Appellant and her representatives are aware of the hearing date. There was no reason to adjourn the appeal and I proceed in the Appellant's absence.

7. Mr Clarke submitted that there was an error of law in the decision of the First-tier Tribunal because the Appellant was unable to rely on the income from the Sponsor's son in relation to the financial requirements. The documentary evidence showed that Mr Mustafa Karatay lived at [ ] London [ ] whereas his son in his statement stated that he is the proprietor of [ ] Colchester [ ].

8. On the evidence before the judge it was clear that the Sponsor's son did not live in the same household as either the Appellant or the Sponsor. Further, his son was born on 1 September 1965 so he could not be said to be a dependent child given that he appears to run his own business and lives at a different address.

9. Accordingly, I find that the judge erred in law in taking into account the £550 per month which the Sponsor's son contributed to the Appellant and Sponsor's household. It is clear from Appendix FM-SE that he was not a dependent child who had turned 18 and who remained in the same UK household of either the Appellant or the Sponsor. His income could not taken into account in assessing whether the Appellant satisfied the financial requirements of the Immigration Rules.

10. I find that the judge made an error of law in taking into account income from the Sponsor's son in calculating whether the Appellant satisfied the financial requirements of the Immigration Rules; £550 per month could not be taken into account.

11. Given that the appeal fails on this ground there is no need to determine whether the Appellant had to satisfy the English language requirement and Mr Clarke did not make submissions on this point and there were no submissions from the Appellant. It is apparent from the evidence before the First-tier Tribunal Judge that there was no reason why the Appellant should not have to take an English language test and on the evidence before me she does not qualify for one of the exceptions.

12. There was no challenge in the grounds of appeal to the judge's finding that the relationship was genuine and subsisting. Accordingly, I find that the judge has erred in law in relation to the financial requirement and the English language test. The ECO was entitled to refuse entry clearance on the basis that the Appellant did not have sufficient funds and she was not exempt from taking an English language test.

13. The judge erred in law in taking into account income that he was not entitled to do and in irrationally concluding that the Appellant was entitled to benefit from the exceptions to taking an English language test when there was insufficient evidence before the judge to show that the Appellant had satisfied that requirement. I set aside

the decision of 22 February 2017 and I remake it. The Appellant's appeal against the refusal of entry clearance is dismissed.

Notice of decision

The Respondent's appeal is allowed.

The Appellant's appeal against the refusal of entry clearance is dismissed.

No anonymity direction is made.

J Frances

Signed Date: 25 January 2018

Upper Tribunal Judge Frances