Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: OA/05953/2013

THE IMMIGRATION ACTS

Heard at Laganside Courts Centre, Belfast on 12 June 2014	**Determination Promulgated on 16 June 2014**

Before

The President, The Hon. Mr Justice McCloskey

Between

ENTRY CLEARANCE OFFICER (ISTANBUL)

Appellant

and

TANER KARAALP

Respondent

Representation:

Appellant:	Mrs M O'Brien, Senior Home Office Presenting Officer
Respondent:	Unrepresented

DETERMINATION AND REASONS

1. This appeal has its origins in a decision made by the Entry Clearance Officer (Istanbul), the Appellant herein, dated 5th February 2013, whereby the Respondent's application for clearance to enter the United Kingdom as the partner of Clare Karaalp (hereinafter "*the sponsor*") was refused. The refusal was based on two grounds. The first was the Respondent's failure to demonstrate a genuine and subsisting

relationship with the sponsor and an intention to live together permanently. The second was the Respondent's failure to satisfy the requirement of a minimum income of £18,600. The application, at its zenith, demonstrated that the sponsor has an income of £17,160 per annum. The first of these grounds of refusal was withdrawn subsequently in a review decision by the Entry Clearance Manager, dated 18th July 2013. The second ground of refusal was upheld. With effect from 9th July 2012, the minimum income threshold for a partner applying under Appendix FM has been £18,600.

2. The sponsor's appeal to the FtT was determined as a paper exercise. The Judge upheld the Appellant's decision on the basis of non-compliance with the financial requirement, stating in [8]:

> "*Although the Appellant satisfied all of the other requirements of Appendix FM it follows that the appeal must be dismissed under the Immigration Rules.*"

The Judge then turned to consider the appeal under Article 8 ECHR. His conclusion was, in terms, that the impugned decision represented a disproportionate interference with the right to respect for family life enjoyed by the Respondent and the sponsor, his spouse. The essence of the Judge's reasoning was that the extent of the failure to satisfy the financial requirement of the Rules was of narrow dimensions.

3. At the initial hearing conducted on 14 April 2014. I considered the terms in which permission to appeal had been granted, together with the representations made to this Tribunal by the sponsor, who attended and was unrepresented. Mrs Karaalp stated that she is a British citizen, the relationship is of eight years duration, they have been married since October 2008 and she travels to Turkey to visit the Respondent at intervals of approximately three months. They now have a child, aged five months. Mrs Karaalp also drew attention to her income and the support available from her family, which will include, in the future, a one third share of her father's estate in the event of his demise. None of this was in dispute.

4. At the conclusion of the initial hearing, I gave judgment to the effect that there are two clear errors of law in the determination of the FtT. The first is that the Judge had, in substance, recognised and given effect to the discredited "near miss" principle: see Miah – v – Secretary of State for the Home Department [2012] EWCA Civ 261. As stated by Stanley Burnton LJ, the potency of the public interest in maintaining firm and effective immigration control is not diluted in cases where the failure of the person concerned to satisfy the requirements prescribed by the Rules is a narrow one. The second error of law is that the Judge failed to conduct an adequate proportionality assessment. There was no identification of the public interest in play and no consideration was given to the governing principles. Furthermore the Judge did not conduct the necessary scrutiny of the history and reality of the relationship between the Respondent and the sponsor. The proportionality assessment was further infected by the intrusion of the immaterial consideration that if the sponsor's

case had come within one of the specified exceptions the Respondent's application would have satisfied the Rules. I considered the materiality of these errors of law to be unmistakable.

5. Thus I ruled that the decision of the FtT be set aside, to be remade in this forum.

6. At the further hearing conducted on 12 April 2014, the Appellant's sponsor, Mrs Karaalp (his spouse), was, once again, unrepresented. She made a brief, but focused, submission the chief ingredients whereof were fairness, proportionality and hardship. On behalf of the Secretary of State, it was submitted that this appeal can succeed only on Article 8 ECHR grounds and only if it is demonstrated that the impugned decision interferes disproportionately with the right to respect for family life enjoyed by the members of the unit concerned. It was further submitted that the birth of their child, now aged six months, cannot be taken into account in determining this appeal. I concur with each of these submissions.

7. As on the last occasion, Mrs Karaalp, once again, made a most favourable impression in her presentation to the Tribunal. She did not fabricate or overstate anything. In considering whether the impugned decision is disproportionate, I take into account the following factors. It is abundantly clear that Mrs Karaalp and her parents are responsible, upstanding, self-sufficient members of the community. Mrs Karaalp has secure employment with favourable prospects of advancement. This will continue indefinitely. She lives independently of her parents in a fully furnished privately rented flat. The parental support is substantial . Given her security of employment, her lifelong ties with this country and the factors of upheaval and uncertainty, particularly relating to the availability of adequate alternative employment, I accept Mrs Karaalp's reasons for preferring to continue to live in Northern Ireland, albeit separated from her Turkish husband. I further find, based on the evidence given, that if were to reside in Northern Ireland he would have favourable prospects of securing employment here.

8. As a consequence of the impugned decision this married couple will continue to be separated by thousands of miles. The interference with their right to respect for family life is both profound and acute. It is a credit to both that their relationship has survived since its initiation, eight years ago. While it endures, it does so in the most unsatisfactory of circumstances in which family life has been significantly impaired and reduced for both. This devoted and responsible couple find themselves in a truly wretched situation, which is more likely than not to endure indefinitely. Finally, in the assessment of proportionality, I take into account that the failure to satisfy the minimum income threshold prescribed by the Immigration Rules was of modest dimensions (£18,00 – v - £17,160). I also take into account that this is plainly a genuine, subsisting and loving relationship.

9. While I recognise the legitimate aims in play, namely the maintenance of firm immigration control and the promotion of the economic wellbeing of the country, the

latter is plainly diluted to a significant extent in this particular factual matrix. Cases of the present kind are usually of the borderline variety and the present appeal is no exception in this respect. The Court is the final arbiter of proportionality. Given the findings and factors highlighted above, I conclude that the impugned decision constitutes a disproportionate interference with the right to respect for family life enjoyed by this married couple.

DECISION

10. Accordingly, I remake the first instance decision by allowing the appeal under Article 8 ECHR. It follows that the decision of the ECO will have to be remade in terms reflecting this judgment, subject to any admissible novel facts or considerations.

Signed:

THE HON. MR JUSTICE MCCLOSKEY
PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
Date: 12 June 2014