



IAC-PE-SW-V1

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

Appeal Number: OA/18591/2013

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 22<sup>nd</sup> May 2015**

**Decision & Reasons Promulgated  
On 15<sup>th</sup> June 2015**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE LEVER**

**Between**

**MRS LEONARA HOXHA  
(ANONYMITY NOT RETAINED)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr Richardson

For the Respondent: Mr Kandola

**DECISION AND REASONS**

**Introduction**

1. The Appellant born on 24<sup>th</sup> September 1982 is a citizen of Albania. She had made application for entry clearance to the United Kingdom as the spouse of a British national but that application had been refused by the Respondent on 23<sup>rd</sup> September 2013.

2. The Appellant had appealed and that appeal was heard by First-tier Tribunal Judge Fabbro on 20<sup>th</sup> August 2014 and he had allowed the appeal under the Immigration Rules. The Respondent had sought application to appeal that decision and permission to appeal was granted by First-tier Tribunal Judge Fisher on 5<sup>th</sup> December 2014. The matter came before me firstly to decide whether an error of law had been made and that hearing took place at Field House on 23<sup>rd</sup> January 2015. For reasons provided in a decision promulgated on 6<sup>th</sup> February 2015 I found an error of law had been made by the judge and set aside the decision of the First-tier Tribunal and directions were provided in respect of that rehearing. The matter comes back before me in accordance with those directions.

### **The Proceedings - Introduction**

3. As the Sponsor was present I firstly explained to him the nature of the proceedings and the way they would be conducted. I next checked the documents that were available before me in accordance with both the Respondent and Appellant's documentation submitted.
4. At the outset of the hearing Mr Richardson on behalf of the Appellant conceded that the Appellant could not meet the requirements of the Immigration Rules in particular FM-SE which was the basis upon which the matter had been set down for remaking in the first instance. However he said that the matter needed to be considered under Article 8 of the ECHR as that had been pleaded originally and had not been decided by the First-tier Tribunal Judge on the basis that he had allowed the appeal under the Immigration Rules. I accepted that that was an appropriate method of dealing with the case.

### **Evidence**

5. The Sponsor was called to give evidence and provided his name and address as on file. He confirmed his witness statement of 4<sup>th</sup> August 2014 was true and correct. He referred to a mediation agreement in which he had contact with children and explained that during term time they would come to him after school on Monday and he would return them to school Wednesday mornings. He would also see them Saturday mornings. In the school holidays they would generally spend three nights with him. He lived a mile and a half from their mother and their school was near his home. He had taken them twice to Albania and once to Italy and on one of the trips to Albania they had met his current wife.
6. In cross-examination he confirmed the children were aged 12 and 9 years old and that Mondays and Tuesdays were effectively his self-employed days. He said that during the school holidays when he had them essentially over that same period he would not work in a self-employed capacity. As a chef he said that he worked between 50 and 60 hours between 10am and 11pm and his time off was Monday, Tuesday and Saturday mornings. There had been no need to take the mediation contract to court for confirmation as there were no difficulties between himself and his ex-wife in terms of contact arrangements.

7. In closing submissions the Respondent accepted that there was family life with the children but referred me to the case of SS Congo [2015] EWCA Civ 387.
8. In submissions on behalf of the Appellant it was said that there had already been a two year separation between the Sponsor and his wife and I was also referred to extracts from SS Congo.
9. At the conclusion of the hearing I reserved my decision to consider the documents and evidence submitted. I now provide that decision with my reasons.

### **Decision and Reasons**

10. In this case the burden of proof lies on the Appellant and the standard of proof required for both immigration and human rights issues is a balance of probabilities.
11. I confirmed that the only issue under the Immigration Rules related to the income threshold and more importantly proof of that income under FM-SE.
12. As noted above it was accepted by Mr Richardson on behalf of the Appellant that he was unable to produce the documentary evidence as required under FM-SE to prove the self-employed income that he claimed to receive as a painter. That income in the relevant period was said to be £1,400 which took his total income from £17,576 in respect of his main job to a total of income of £18,976.
13. Mr Richardson therefore referred me to Article 8 of the ECHR as being the sole basis upon which the case was put. The Appellant had referred to Article 8 of the ECHR within his Grounds of Appeal to the First-tier Tribunal and again as mentioned above it had not been dealt with by the First-tier Tribunal originally because the judge had allowed the case under the Immigration Rules. It is in my view necessary for me to consider Article 8 of the ECHR outside of the Rules if such is applicable.
14. The Immigration Rules within this field of Appendix FM and more importantly FM-SE do not contain a discretionary element, an individual either meets the strict requirements by production of the necessary documents or does not.
15. Whilst it is understandable that a system is put in place that requires strict proof and essentially operates as a “tick box” or checklist system, such a system does not have the personal or discretionary examination that seems to be required under Strasbourg legislation.
16. The Sponsor has produced evidence both in documentary form and oral evidence on key features of this case which I accept as credible. I have not found at any stage when applying the appropriate standard of proof that I have had concerns as to his veracity. The key features that emerge from that evidence can be summarised as follows:
  - (a) His income level can be properly described as a “near miss”. He has main employment as a chef which provides an income at the relevant time of £17,576.25. He further earns £1,400 per annum as a self-employed painter and decorator. Whilst I do

not suggest he does not earn such monies, on his own admission he cannot produce the required documentation to prove such under FM-SE. I would remark however that he did declare such income as noted at page 178 of the Appellant's bundle within his accountant's documents. It is not a case therefore where he has on the face of it never declared such income or has no proof whatsoever of such claimed income. Hence his total income in the relevant period was £18,976 which placed him above the threshold income level. It is fair to state therefore that this is an example of a "near miss" case perhaps as close to the threshold as could be made.

- (b) The Sponsor has two children aged 12 and 9 years from a previous marriage, both of whom are British citizens. The Sponsor has produced evidence demonstrating regular contact with those children at times that I accept as being credible. In summary he sees them Monday afternoon until 9am Wednesday morning during school terms and Monday to Wednesday during holidays. He further sees them Saturday mornings. He has permission and has taken those children abroad. He has taken them twice to Albania and once to Italy. They met the Appellant on one trip to Albania. If the Sponsor left the UK for any significant period to be with the Appellant he would not see his children nor would it be realistic to suggest they could relocate to Albania with him, given they are at school, UK citizens and of course have substantial contact with their mother who has responsibility for them.

17. I have looked at this case and those two factors in particular in light of the decision in **SS Congo [2015] EWCA Civ 387**. This is at the time of writing the most recent decision on what is a vexed issue regarding the relationship between the new Immigration Rules and Article 8 of the ECHR and applicable tests.

18. Firstly I note paragraph 24 of **SS Congo** where the court said "the minimum income and other requirements of the leave to enter Rules could not be characterised as irrational, inherently unjust or inherently unfair." At paragraph 25 the court continued:

"Contrary to Blake's analysis there will generally be no or only a relatively small gap between the leave to enter Rules as promulgated and the requirements of Article 8 in individual cases, including those Sponsors who are British citizens".

At paragraph 26 the court stated:

"In our judgment it clearly is possible to imagine that there may be some cases in which leave to enter is applied for where the requirements of the Rules are not met but where the circumstances of the individual case have such force in Article 8 terms that the Secretary of State would be obliged to grant leave to enter outside the Rules, in the exercise of her residual discretion".

19. At paragraph 29 the court continued "it is clear therefore that it cannot be maintained as a general proposition that leave to enter outside the Immigration Rules should only be granted in exceptional cases". The court then identified those type of cases where case law indicated that the test should be one of exceptionality referring in particular to deportation cases and applications for leave to remain where the individual's status was precarious and no children were involved.

20. At paragraph 33 the court stated:

“It is accurate to say that the general position outside of the sorts of special contexts referred to above is that compelling circumstances would need to be identified to support a claim for grant of leave to remain outside the new Rules in Appendix FM”.

At paragraph 37 the court stated:

“On the other hand if someone from the UK marries a foreign national or establishes a family life with them at a stage when they are contemplating trying to live together in the UK, but when they know that their partner does not have a right to come there, the relationship will have been formed under conditions of known precariousness. In that sort of case it will be appropriate to apply a similar test of exceptional circumstance before a violation of Article 8 will be found to arise in respect to a refusal to grant leave to enter”.

21. At paragraph 38 it was said:

“Secondly however what is in issue in relation to applications for leave to enter is more in the nature of an appeal to the state’s positive obligations under Article 8. This means the requirements upon the state under Article 8 are less stringent in the leave to enter context than in the leave to remain context”.

22. At paragraph 39(iii) the court referred to a range of factors that the state authorities could have regard to in terms of admissibility. The factors referred to in paragraph 39(iii) are not an exhaustive list but flag up the type of factors that would diminish the need of the state to have a positive obligation to promote family life if by so doing the state as a whole suffers.

23. Paragraph 39(iv) raises, inevitably the interests of a child. The context in which it is raised does not make it clear whether reference is being made to a child applicant for leave to enter or a child indirectly affected by refusal of leave to enter to another. In the case before me the child ingredient is not significantly strong given the children in question are not applying for leave to enter, are not related to the Appellant and have met up once directly. In terms of positive promotion of family life under leave to enter the children are not too significant. Their significance enters the arena if there is a suggestion that the Sponsor could reasonably relocate to Albania to continue family life with the Appellant. If alone he could certainly do so, with the children it is somewhat unrealistic as a medium or long term solution.

24. Paragraph 40 summarises the position that applies in this case with the court stating “in our view the appropriate general formulation for this category is that such cases will arise where an applicant for leave to enter can show that compelling circumstances exist to require the grant of such leave”.

25. I find, whilst it is a reasonably fine balance, that there are compelling circumstances in this case. It is the combination of the “near miss” and in that respect I refer to my analysis of that above and also paragraph 56 of **SS Congo** where reference was made to such matters. The second feature is the family life that the Sponsor enjoys with his children in the UK on the one hand and the family life he wishes to develop and promote with his wife that has been ongoing for some two years. It is the fact the Sponsor essentially must choose between the children or his wife because the

circumstances do not make both concurrently compatible that provides the additional factor. The combination of those two features and the strength of those two features provides a sufficiency of material to say that in my view there are compelling circumstances that would require an examination of this case outside of the Immigration Rules.

26. Any such analysis outside of the Immigration Rules is essentially conducted using the five stage test set out in **Razgar** and in this case as indeed with many cases one arrives fairly swiftly at the fifth stage test of **Razgar** which is a test of proportionality. It is also right that upon an analysis of Article 8 outside of the Immigration Rules that a Tribunal is bound to take account of all aspects of Section 117B of the 2002 Act as indicated in the case of **Dube [2015]**. I have found for reasons provided above that on an analysis of the evidence in this case it would in my view be a disproportionate interference to refuse entry clearance to the Appellant. I have considered the obvious point that as the only factor within the Immigration Rules that went against the Sponsor was his failure to produce documents to support his self-employed income, it would be open to the Appellant to make a fresh application after waiting for about a twelve month period during which time the Sponsor would have the opportunity of verifying through documents that portion of his income. That is one factor that does not make this a case where it could be argued refusal of entry clearance is significantly disproportionate but applying the appropriate test and for reasons outlined I find that a refusal of entry clearance would be disproportionate and accordingly allow this appeal outside of the Immigration Rules under the provisions of Article 8 of the ECHR.

### **Notice of Decision**

27. The appeal is allowed on human rights grounds.
28. Anonymity not retained.

Signed

Date

Deputy Upper Tribunal Judge Lever

### **TO THE RESPONDENT** **FEE AWARD**

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make a whole fee award of any fee which has been paid or may be payable.

Signed

Date

Deputy Upper Tribunal Judge Lever