



Upper Tribunal
Immigration and Asylum Chamber

Appeal Number: OA/01812/2013

THE IMMIGRATION ACTS

Heard at Field House
On 19 May 2014

Promulgated on:
On 20 May 2014

Before

Upper Tribunal Judge Kekić

Between

**Xuan Toan Dong
(anonymity order not made)**

Appellant

and

**Entry Clearance Officer
Bangkok**

Respondent

Determination and Reasons

Representation

For the Appellant:

Mr Al-Rashid, Counsel

For the Respondent:

Mr P Duffy, Senior Home Office Presenting Officer

Background

1. In a determination promulgated on 31 March 2014, I set aside the decision of First-tier Tribunal Judge Widdup dated 20 January 2014 to allow the appeal for entry clearance as a spouse made by the appellant. I attach the reasons for my decision as an annex to this determination.

2. The appellant is a citizen of Vietnam born on 14 March 1986. He appeals the respondent's decision to refuse to grant him entry clearance as a spouse. He was previously in the UK as a student, married the sponsor and then returned to Vietnam and subsequently made this application. On 19 November 2012 (served on 20 November) the application was refused on the basis that the marriage was not genuine and subsisting, that the maintenance requirements had not been met and that there was a lack of evidence with respect to accommodation. The only live issue now is whether the maintenance requirements have been met. Article 8 was not relied on at the previous hearing and despite my observations on this in my error of law decision, no request to vary the grounds to include it were made by Counsel on 19 May 2014.

Appeal hearing

3. No fresh documentary evidence was submitted prior to the hearing but at the commencement of the hearing I received additional documents. From the respondent: a copy of the rules as they were at the date of the decision. From the appellant: refusal of entry clearance in respect of a fresh application made by the appellant, a letter dated 15 May 2014 from Thi Bich Thuy Nguyen, Manager of Dockland Nails and a letter dated 14 May 2014 from ABFS Ltd.
4. After some preliminary discussion the parties were agreed that in order to succeed the appellant needed to satisfy the court that he could meet the requirements of the rules as highlighted by the ECO in his refusal; i.e. with regard to the concerns over the lack of certain documents required and the credibility of the sponsor's employment with Dockland Nails.
5. I heard submissions from the parties. Mr Al-Rashid sought to persuade me that the appellant had met the requirements of the maintenance rules in that the Tribunal had the sponsor's P60s for the year ending 5 April 2012 in respect of both her employment with Superdry trading as C-Retail and Dockland Nails (DN). He took me through the documents and submitted that the ECO had payslips for 6 months for both employments, that the salary for c-retail was corroborated by deposits into the sponsor's Halifax account and that the DN employment was largely established by deposits into the HSBC account and by the employer's letter.
6. Mr Duffy submitted that he accepted that the requirements of pay slips and bank statements for six months had been met in respect of the c-retail employment but submitted that it had not in respect of the DN employment. There had been concerns on the part of the ECO in respect of the DN employment and the bank statements did not show the payment of the sponsor's salary into her account. That meant that the requirements of 2(f) of FM-SE were not met. Additionally, under 15(b)(i) a sponsor's gross income

must be £18,600 for a period of 12 months prior to the decision although it need only be evidenced by six months' worth of payslips and bank statements. There was no evidence before the court as to the sponsor's income for the 12 months prior to the application therefore the appeal could not succeed on that basis either. Finally, he submitted that the fresh application for entry clearance had no relevance to this appeal.

7. I then heard oral evidence from the sponsor, Nguyat On. She confirmed that she had commenced employment with C-Retail in June or July of 2010 and with DN in April 2012. She had not had other paid employment, apart from with C-retail prior to taking on the work with DN. She worked part time with each. She was paid cash in hand at DN to begin with. The first month she received weekly payments; after that the payments were made monthly. She did not spend it and always deposited the cash and then, if necessary, used her card to pay bills. She was now paid by BACS.
8. The sponsor confirmed that she had been overpaid when she first started working for DN. She had repaid the overpayment slowly; some was deducted from her overtime salary and some from tips.
9. In cross examination the sponsor was asked the source of the cash deposit of £900 in her HSBD account in August 2012. She replied that her mother gave her that money for a holiday. She confirmed that her DN wages had always been paid into the HSBC account.
10. In re-examination the sponsor was asked about several cash payments into her Halifax account in June 2012. She replied they were sums given to her by her father for flights. She was going to Vietnam. She confirmed that the £900 HSBC deposit was definitely for her holiday.
11. In response to my questions, the sponsor said that she had no confirmation from her employer that the monies had been repaid. She herself did not keep a record of what she had paid. She started her repayments about 3-4 months after the commencement of her employment. She made repayments once a month and ceased them about two months ago. She could not say how much had been repaid; the amount varied and sometimes she made no repayments at all. Her manager told her when the amount had been repaid in full.
12. The sponsor confirmed she had worked overtime but said she was paid cash for those days; the money was not added onto her wage slips. She had realised she had been overpaid.
13. When asked why she had not deposited her salary cheques as and when they were received, she replied that she had been lazy.

14. The sponsor confirmed that she had been paid in late September for her October salary. When asked when she had paid in her April – June salaries, she could not give a reply. She said she had not put them in; she did not keep up to date with financial matters.
15. There were no questions arising and that completed the oral evidence.
16. Mr Duffy relied on his earlier submissions which set out why the requirements of the rules could not be met, he suggested there were dubious employment practices ongoing at DN and one of the reasons for the requirement for documentary evidence of employment was so as to prevent appellants relying on unlawful employment.
17. Mr Al-Rashid accepted that the bank statements did not show corresponding payments for all the required six months but submitted that was too strict an interpretation of the rules and it interfered disproportionately with the private lives of the appellant and the sponsor. If someone did not want to pay in a salary that was their business and nothing to do with the ECO. Judge Widdup had found that the sponsor's combined employment amounted to £19,277. There was no requirement for a sponsor to show a salary had been received for up to 12 months; that was just Mr Duffy's interpretation of the rules. Paragraph 15 only served to calculate an annual income; anything else would be a draconian interference with family life. He submitted that the sponsor had not been diligent in paying in her salary and had been unsure about the cash deposits into her Halifax account. In the recent entry clearance application the maintenance requirements were no longer an issue. The whole case should be considered in the round, the relationship was genuine and the sponsor had been back twice.
18. At the conclusion of the hearing I dismissed the appeal and I now give full reasons for doing so.

Conclusions

19. I have carefully considered the documentary evidence before the ECO and before the Tribunal. I accept Mr Al-Rashid's suggestion of following the ECO's concerns in the refusal letter as a starting point. His submission that the absence of any issues raised with regard to the other evidence meant that the ECO was satisfied with it, is, I find, a fair assumption to make and I proceed on the premise that the ECO's concerns were with the documentary evidence as set out in the decision letter and with the genuineness of the employment at DN.
20. With respect to the sponsor's employment, the appellant must provide:
 - P60(s)

- Salary slips for a six month period prior to the date of the application
 - Bank statements showing deposits which confirm the salary payments.
 - The total sum of the income earned from the employment must be at least £18,600 gross.
21. Mr Duffy accepted that the requirements for a P60, salary slips and bank statements in respect of the employment with C-retail had been met. However he argued that the same could not be said of the DN employment and I have to agree with him on that. The sponsor's evidence was that she commenced that employment on 1 April 2012. Her evidence, backed up by a letter from her employer, was that she had been overpaid and that she received £830 a month instead of £756.08. The argument before the First-tier Tribunal had been that this was why the deposits into the HSBC account did not tally with the lower sum shown on the salary slips. The same argument was put to me. I am afraid I do not accept this explanation.
22. I note that the sponsor's evidence to me was that she commenced her repayments of the overpayments three or four months after starting work at DN when the error came to light. However that conflicts with the letter from her employer which is that she was overpaid in error for eight months. Plainly the sponsor could not have been making repayments after three or four months and yet still being overpaid for another four or five months. That makes no sense. It is also not explained how this error of overpayment occurred in the first place. It would have been more believable had the amount on the pay slip also been wrong but it is difficult to accept that month after month salary slips were prepared giving one figure but the sponsor was paid a different, higher sum. Not only would the discrepancy in the sums have been immediately obvious to the manager but also to the sponsor.
23. I also found the sponsor's evidence on how much she repaid to be extremely vague. Despite repeated questions she could not give even an approximate figure of what she paid, or how regularly and I find it lacking in credibility that's he kept no note at all of the sums she paid. I also note that she gave contradictory evidence of how it was paid, stating first that it was deducted from her salary but then stating it was paid in cash to her manager out of her overtime cash in hand payments, or alternatively from tips.
24. Even more peculiar was the sponsor's evidence that she was lazy about paying in her salary so that, according to the evidence, we see nothing deposited from DN until 9 August 2012 even though the sponsor was supposed to have commenced employment with them in April that year. Given that she needed help from her parents to the tune of some £1800 (cash payments made to her Halifax and HSBC accounts) I do not accept she would

have just sat on wage cheques which would have totalled more than that and which she clearly needed if she had indeed been paid as claimed.

25. The evidence shows that there were four cheques deposited into the HSBC account during the period up to the date of the decision in November 2012; that is to say, £830 was deposited on each of the following dates: 9 August, 4 September, 25 September and 6 November. I am told that there were two payments in September because the second one was an early payment for the October salary as the sponsor's employer was going away on holiday. However there is no evidence at all of the cash payments made to her in April, May, June and July. That means over £3000 is unaccounted for. It does not show up in the later statements either and the sponsor's evidence was that she did not spend any of it. If the employment was genuine, then what happened to the sponsor's income between April and July is a mystery. It is also a mystery as to how a cheque for £830 could have deposited on 4 August 2012 when the sponsor did not receive that cheque (as payment for August) until 31 August (see page 33). The deposit could not refer to the July or any of the earlier payments as those were all made in cash. The first cheque payment was received on 31 August yet as stated a cheque for £830 was paid into the account on 4 August. There is also no evidence in October of the deposit for the September salary which should have been received at the end of the month, along with the advance on the October salary. The latter is deposited but not the former.
26. Further, the fact that the sponsor was still receiving £830 in November does not accord with her evidence that she had started repaying the extra amount she had been erroneously been paid, some months earlier.
27. I have considered the letter from ABFS Ltd. but as it relates to the sponsor's income in the period for 2013/14 it is not relevant to evidence as at the date of the decision.
28. For all these reasons I am unable to find that the sponsor was employed as claimed by DN in the six months leading up to the date of the decision. I find that the ECO was right to dispute the claimed employment. The figures just do not tally and the sponsor's evidence has been unsatisfactory and contradictory. There may well be something illegitimate about DN's employment practices, as suggested by Mr Duffy, or the employment may not exist at all. I cannot speculate. What I can say is that there are insufficient deposits in the bank account to demonstrate that the sponsor received the claimed income from DN. Without that employment, she cannot meet the £18,600 threshold.
29. Mr Al-Rashid submitted that the lack of deposits did not matter as that would be too strict an interpretation of the rules. However, there is no issue of

interpretation in this case. The rules are plain as to what is required by way of documentary evidence. The appellant has not shown what he is required to show. On that basis his appeal cannot succeed.

30. It was also submitted that the rules requiring sponsors to pay a cash wage into a bank account violated their private lives. I can see no merit in such a submission. It is fair, in my view, to require independently verifiable evidence of an ability to maintain and it is hardly onerous to show that a salary is paid into an account for a six month period. In any event, however, there is no Article 8 claim before me.
31. I would say that I have doubts with regard to Mr Duffy's submission that paragraph 15 requires a sponsor to have been in employment for at least 12 months prior to an application. It would be illogical to require a sponsor to have been in employment for that period or longer yet to require no evidence of it. However, as the appeal fails under FM-SE, paragraph 2 (f), there is no need to pursue that submission any further.
32. Finally, I was given a copy of the appellant's fresh entry clearance refusal of 28 January 2014 and note that it is on relationship grounds only and not on maintenance but I have no information on the nature of the evidence submitted in support of that application and in any event that is a post decision fact which is not relevant to my determination of this appeal.

Decision

33. The appeal is dismissed on immigration grounds. There is no Article 8 appeal before me.

Signed:

**Dr R Kekić
Judge of the Upper Tribunal**

20 May 2014

ANNEX:

Findings and Conclusions of error of law decision

I have taken into account the submissions made and the determination of the First-tier Tribunal.

It has to be said that this determination is confusing and was probably not helped by the absence of a Home Office Presenting Officer at the First-tier Tribunal hearing.

It is unclear from the determination as to which documents had been adduced with the application (in September 2012) and which were submitted thereafter. Whilst a letter from the appellant's previous representatives listing a number of documents is included in the respondent's bundle, it appears that it was not submitted until the appeal was lodged (see section 3B of the Notice of Appeal) and it is not known if all the documents listed therein were attached to it. The ECO certainly does not appear to have seen the documents listed and the EC Manager who reviewed the decision only refers to documents that are also listed at Section 3B rather than to those included on the list in the letter. A perusal of the refusal notice does however set out the documentary evidence the ECO had before him when the application was made.

The respondent's position is that the appellant failed to meet the requirements of the rules because when he made his application, the specified evidence adduced did not establish that the maintenance requirements of the rules had been met. Mr Al-Rashid submitted that there was no requirement to limit consideration to the documents submitted with the application.

I have considered Appendix FM (E-ECP.3.1, ECP.1.1(d)) and Appendix FM-SE (paragraph D):

EC-P.1.1. The requirements to be met for entry clearance as a partner are that-

- (a) the applicant must be outside the UK;*
- (b) the applicant must have made a valid application for entry clearance as a partner;*
- (c) the applicant must not fall for refusal under any of the grounds in Section S-EC: Suitability-entry clearance; and*
- (d) the applicant must meet all of the requirements of Section E-ECP:*

E-ECP.3.1. The applicant must provide specified evidence, from the sources listed in paragraph E-ECP.3.2., of-

- (a) a specified gross annual income of at least-*

- (i) £18,600;*

.....

Appendix FM-SE - Family members - specified evidence

D. (a) In deciding an application in relation to which this Appendix states that specified documents must be provided, the Entry Clearance Officer or Secretary of State ("the decision-maker") will consider documents that have been submitted with the application, and will only consider documents submitted after the application where sub-paragraph (b) or (e) applies.

(b) If the applicant:

(i) Has submitted:

(aa) A sequence of documents and some of the documents in the sequence have been omitted (e.g. if one bank statement from a series is missing);

(bb) A document in the wrong format (for example, if a letter is not on letterhead paper as specified); or

(cc) A document that is a copy and not an original document; or

(dd) A document which does not contain all of the specified information; or

(ii) Has not submitted a specified document,

the decision-maker may contact the applicant or his representative in writing or otherwise, and request the document(s) or the correct version(s). The material requested must be received at the address specified in the request within a reasonable timescale specified in the request.

(c) The decision-maker will not request documents where he or she does not anticipate that addressing the error or omission referred to in sub-paragraph (b) will lead to a grant because the application will be refused for other reasons.

(d) If the applicant has submitted:

(i) A document in the wrong format; or

(ii) A document that is a copy and not an original document, or

(iii) A document that does not contain all of the specified information, but the missing information is verifiable from:

(1) other documents submitted with the application,

(2) the website of the organisation which issued the document, or

(3) the website of the appropriate regulatory body,

the application may be granted exceptionally, providing the decision-maker is satisfied that the document(s) is genuine and that the applicant meets the requirement to which the document relates.

The decision-maker reserves the right to request the specified original document(s) in the correct format

in all cases where sub-paragraph (b) applies, and to refuse applications if this material is not provided as set out in sub-paragraph (b).

(e) Where the decision-maker is satisfied that there is a valid reason why a specified document(s) cannot be supplied, e.g. because it is not issued in a particular country or has been permanently lost, he or she may exercise discretion not to apply the requirement for the document(s) or to request alternative or additional information or document(s) be submitted by the applicant.

(f) Before making a decision under Appendix FM or this Appendix, the decision-maker may contact the applicant or their representative in writing or otherwise to request further information or documents. The material requested must be received at the address specified in the request within a reasonable timescale specified in the request.

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;

(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.

1. In relation to evidencing the financial requirements in Appendix FM the following general provisions shall apply:

(a) Bank statements must:

(i) be from a financial institution regulated by the appropriate regulatory body for the country in which that institution is operating.

(ii) not be from a financial institution on the list of excluded institutions in Appendix P of these rules.

(iii) in relation to personal bank statements be only in the name of:

(1) the applicant's partner, the applicant or both as appropriate;

.....

(iv) cover the period(s) specified.

(v) be:

- (1) on official bank stationery; or*
- (2) electronic bank statements which are either accompanied by a letter from the bank on its headed stationery confirming that the documents are authentic or which bear the official stamp of the issuing bank on every page.*

.....

(bb) Payslips must be:

- (i) original formal payslips issued by the employer and showing the employer's name; or*
- (ii) accompanied by a letter from the employer, on the employer's headed paper and signed by a senior official, confirming the payslips are authentic;*
- (c) The employment income of an applicant will only be taken into account if they are in the UK, aged 18 years or over and working legally, and prospective employment income will not be taken into account (except that of an applicant's partner or parent's partner who is returning to employment or self-employment in the UK at paragraphs E-ECP.3.2.(a) and E-ECC.2.2.(a) of Appendix FM).*
- (d) All income and savings must be lawfully derived.*
- (e) Savings must be held in cash.*

.....

(h) All documentary evidence must be original, unless otherwise stated.

.....

(k) Where the gross (pre-tax) amount of any income cannot be properly evidenced, the net (post-tax) amount will be counted, including towards a gross income requirement.

(l) Where this Appendix requires the applicant to provide specified evidence relating to a period which ends with the date of application, that evidence, or the most recently dated part of it, must be dated no earlier than 28 days before the date of application.

(m) Cash income on which the correct tax has been paid may be counted as income under this Appendix, subject to the relevant evidential requirements of this Appendix.

(n) In this Appendix, a reference to the "average" is a reference to the mean average.

2. In respect of salaried employment in the UK (except where paragraph 9 applies), all of the following evidence must be provided:

(a) Payslips covering:

- (i) a period of 6 months prior to the date of application if the person has been employed by their current employer for at least 6 months (and where paragraph 13(b) of this Appendix does not apply); or*
- (ii) any period of salaried employment in the period of 12 months prior to the date of application if the*

person has been employed by their current employer for less than 6 months (or at least 6 months but the person does not rely on paragraph 13(a) of this Appendix), or in the financial year(s) relied upon by a self-employed person.

(b) A letter from the employer(s) who issued the payslips at paragraph 2(a) confirming:

(i) the person's employment and gross annual salary;

(ii) the length of their employment;

(iii) the period over which they have been or were paid the level of salary relied upon in the application; and

(iv) the type of employment (permanent, fixed-term contract or agency).

(c) Personal bank statements corresponding to the same period(s) as the payslips at paragraph 2(a), showing that the salary has been paid into an account in the name of the person or in the name of the person and their partner jointly.

.....

2A. (i) In respect of salaried employment in the UK (paragraph 2 of this Appendix), the applicant may, in addition to the payslips and personal bank statements required under that paragraph, submit the P60 for the relevant period(s) of employment relied upon (if issued). If they do not, the Entry Clearance Officer or Secretary of State may grant the application if otherwise satisfied that the requirements of this Appendix relating to that employment are met. The Entry Clearance Officer or Secretary of State may request that the applicant submit the document(s) in accordance with paragraph D of this Appendix.

(ii) In respect of salaried employment in the UK (paragraph 2 of this Appendix), ... the applicant may, in addition to the letter from the employer(s) required under that paragraph, submit a signed contract of employment. If they do not, the Entry Clearance Officer or Secretary of State may grant the application if otherwise satisfied that the requirements of this Appendix relating to that employment are met. The Entry Clearance Officer or Secretary of State may request that the applicant submit the document(s) in accordance with paragraph D of this Appendix.

.....

12A. Where the financial requirement the applicant must meet under Appendix FM relates to adequate maintenance, paragraphs 2 to 12 apply only to the extent and in the manner specified by this paragraph. Where such a financial requirement applies, the applicant must provide the following evidence:

(a) Where the current salaried employment in the UK of the applicant or their partner, parent, parent's partner or sponsor is relied upon:

(i) A letter from the employer confirming the employment, the gross annual salary and the annual salary after income tax and National Insurance contributions have been paid, how long the employment has been held, and the type of employment (permanent, fixed-term contract or agency).

(ii) Payslips covering the period of 6 months prior to the date of application or such shorter period as the current employment has been held.

(iii) personal bank statement covering the same period as the payslips, showing that the salary has been paid into an account in the name of the person or in the name of the person and their partner jointly.

.....

(f) The monthly housing and Council Tax costs for the accommodation in the UK in which the applicant (and any other family members who are or will be part of the same household) lives or will live if the application is granted.

.....

I did not have the advantage of hearing submissions on these rules except in the most general of terms. However, I note that paragraph D of FM-SE came into force by way of HC 760 on 13 December 2012. As the appellant's application and the decision on it both took place before that date, it does not apply to him. In the absence of being directed to any particular section of FM-SE (applicable at the relevant time), I am unable to find that the appellant was required to adduce all the specified documents at the date of application. There is force in Mr Al-Rashid submission that had there been a requirement for the consideration of documents to be limited to those submitted with the application, there would have been no point in an ECM review. I accept Ms Pettersen's submission that a review acts as a safeguard as errors might well occur in the decision making process but in this case the review went well beyond that as the ECM took account of the fresh documentary evidence that had been adduced.

I note that the rules, as applicable from 13 December 2012, do allow for the application of evidential flexibility. It was not argued before the First-tier Tribunal or indeed before the Upper Tribunal that the ECO should have given the appellant an opportunity to adduce additional documentary evidence pertaining to the sponsor's employment prior to making a decision. Given the absence of such an argument, I take that matter no further and in any event, as I stated, paragraph D does not apply to the appellant.

As stated earlier, I found the determination confusing. This is because I am not clear as to the findings made by the judge. At paragraph 20 he states that only five Superdry payslips had been adduced as opposed to the six payslips that were required but, nevertheless, then goes on to find that the appellant (sic) complied with the evidential requirements of the rules concerning her employment. At paragraph 21 he states that the appellant had not worked for Dockland Nails (DN) for six months at the date of the application. He then goes on to find the sponsor's evidence in respect of her earnings from that employment to be unsatisfactory, noting that the payslips did

not accord with the deposits in the bank statements and were not mentioned in the visa application (paragraph 22). In paragraph 23, however, he finds that had the Secretary of State taken the sponsor's annual pay into account for both jobs, she would have seen that the combined income amounted to £19,277 at the date of the application. This finding is repeated in paragraph 26 but in concluding the appeal the judge dismisses the appeal on immigration grounds. I would have been prepared to accept, as Mr Al-Rashid argued, that the judge meant to allow the appeal but dismissed it in error, had he not made the earlier contradictory findings. Moreover, had he meant to allow the appeal on immigration grounds, he would not have needed to go on to allow it on Article 8 grounds nor would he have made the comments he did on the appellant having to make a fresh application under the rules. Essentially, the judge's various findings leave me confused as to what he actually concluded or meant to conclude.

Moreover, contrary to what the judge stated at paragraph 32, and what Mr Al-Rashid stated in his submissions, the ECO did indeed challenge the sponsor's claim to have worked with DN (penultimate paragraph of the refusal decision). The judge made a factual error in finding that the ECO had not disputed that the sponsor worked for that employer.

Additionally there are several anomalies with the sponsor's claimed gross salary with DN; her payslips show one figure and her contract shows another. There were attempts to explain away a third figure which features in her bank statements, but that explanation does not resolve the inconsistencies in the evidence as to her basic pay. Nor is there any explanation for how, if certain payments were made by cheque (according to the payslips) they were paid in as cash and vice versa or why there were numerous months when no deposits were made at all. These difficulties were simply ignored by the judge or else went unnoticed.

The second challenge by the Secretary of State is that the judge erred in allowing the appeal on Article 8 grounds because he did not identify any exceptional circumstances for so doing. I note Mr Al-Rashid's point that he was not required to do so as he had found that the requirements of the rules had been met. However, given the contents of paragraphs 18-20 above, I cannot accept that the judge made a clear finding that the requirements of the rules had been met. In those circumstances, he could not simply allow the appeal on Article 8 grounds, without identifying exceptional circumstances and particularly when Article 8 was not raised in the appellant's grounds of appeal.

Further, the judge erred when he stated in paragraph 32 that the ECO had not challenged the sponsor's employment; I have shown, above, that he had. So the only reason he gave for allowing the appeal on Article 8 grounds was so that the appellant would not have to submit a further application under the rules. No reason is given for why that would be disproportionate. The initial application was decided in less than two months so there are no delays involved. The judge was required to set out reasons why the appellant's appeal should have been allowed on Article 8 grounds where it was dismissed on immigration grounds. He has failed to identify any exceptional

circumstances and Counsel's suggestion that the sponsor's British nationality was an exceptional factor is, I regret to say, a factor commonly seen in such cases. It cannot be described as exceptional.

So although the Secretary of State has not made out her first challenge, that is to say, there was no requirement on the appellant, at the date he made his application, to have submitted all his documents at that date, she succeeds in her second challenge. The judge's confused findings and conclusions on immigration grounds mean that it is wholly unclear whether he found that the appellant had met the requirements of the rules and therefore it follows that in assessing Article 8, the judge was required to identify exceptional factors before proceedings to allow the appeal on that basis.

In view of the wholly unsatisfactory contents of this determination and the lack of clarity in the findings and conclusions with regard to maintenance, I have decided that the decision in that respect, and on Article 8, has to be set aside. Ms Pettersen confirmed that the findings on the genuine and subsisting marriage and accommodation were not challenged and so those findings are preserved. A hearing shall be arranged before the Upper Tribunal to decide whether the maintenance requirements of the rules have been met. Article 8 was not raised in the grounds of appeal to the ECO or in submissions by Counsel at the hearing before the First-tier Tribunal Judge. Unless an application is made for the grounds of appeal to be varied, it cannot therefore be argued at this stage.