



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: OA/09823/2013

**THE IMMIGRATION ACTS**

Heard at Field House  
On 13 February 2014

Determination Promulgated  
On 19 February 2014

Before

MR JUSTICE JAY  
UPPER TRIBUNAL JUDGE O'CONNOR

Between

SEDIGHEH NEMATI

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Miss A Seehra  
For the Respondent: Ms J Isherwood, Home Office Presenting Officer

**DETERMINATION AND REASONS**

1. This is an appeal against a determination of the First-tier Tribunal, Judge Ross presiding, which was promulgated on 11 October 2013 allowing the appeal on human rights grounds of the appellant, Mrs Sedigheh Nemati, who on 23 February 2013 applied for settlement in the United Kingdom on the basis of her marriage to

the sponsor, Mr Hassan Nameti. As I have said the appeal was allowed on human rights grounds but dismissed under the Immigration Rules. I will need to come back to the significance of that in a moment.

2. As for the background facts, the appellant is a national of Iran. We know from his witness statement that the sponsor, Mr Nemati was born presumably in Iran on 20 May 1975 but is now a British national. We do not know what date he became a British national or indeed when he came to the United Kingdom. The parties met in Dubai on 27 January 2012 and they got married on 4 November 2012 equally in Dubai. There was then an application for entry clearance under the Rules. The application was made on 23 February 2013, we think in Abu Dhabi rather than in Dubai. We gather that from paragraph 20 of the First-tier Tribunal's determination but in all events not a huge amount turns on that point given the relative geographical proximity of those countries.
3. The application for entry clearance fell to be considered under Appendix FM to the Immigration Rules. According to paragraph 10 of the determination, although there is an issue as to the accuracy of this which Miss Seehra has raised, the requirements which were in issue were that the appellant had to demonstrate a gross annual income of at least £18,600 gross, had to provide a P60 for the relevant period or periods, wage slips covering a period of six months prior to the date of the application and the appellant also had to show that she had passed an English language test in speaking and listening at a minimum of level 1. Plainly this required the production of a certificate which the appellant did not have.
4. On 26 March 2013 the application was refused on the basis that the Entry Clearance Officer was not satisfied that the evidence provided met the Rules. The Entry Clearance Officer was also not satisfied that the appellant had passed the relevant English language test.
5. It is clear from the papers that at some stage that decision was reviewed by the Entry Clearance Manager who stated, and this is set out in paragraph 4 of the determination, that whereas he appreciated the compassionate circumstances in this case to which we will come in a moment the fact remains that the appellant failed to meet the requirements of the Rules.
6. The appeal against that decision was made on 9 June 2013 under Section 82 of the Nationality, Immigration and Asylum Act 2002 and was brought on the basis that the decision of the Entry Clearance Officer under the Rules was erroneous and moreover, and in any event, there was a claim under Article 8 of the Convention. In short it would be an unjustified and disproportionate interference with human rights to maintain the exclusion of the appellant from the United Kingdom.
7. The evidence before the First-tier Tribunal regarding compliance with the Rules was that the sponsor husband had been working as an accounts assistant with a company called Graphcrown Limited. Payslips were produced showing gross monthly income of £1,700 equating to £20,400 per annum, that exceeds the threshold in the

Appendix. However as at the date of the application and the decision the sponsor had not been working for one year. His P60 for the year ending 5 April 2012 stated that he had earned £1,200 and that for the year ending 5 April 2013 showed £16,431 net. That second P60 postdated the decision.

8. As for the English language requirement the appellant as we have said did not pass the test but she said that she had been suffering from stress. We will return to that point in due course but she did pass the test in July 2013 which was after the date of the application and of the decision.
9. The First-tier Tribunal recognised that the case could not succeed under the Rules, whether under Appendix FM or paragraph 276ADE. He proceeded to consider the case under Article 8 of the Convention. The First-tier Tribunal took into account the fact that the appellant and the sponsor now satisfied the Rules, that it would be oppressive for the appellant to make a further application in Abu Dhabi and that the sponsor was suffering from epilepsy exacerbated by stress. Further, the First-tier Tribunal said- see the final sentence of paragraph 19 - that he took into account the decision of the House of Lords in Chikwamba v Secretary of State for the Home Department [2008] UKHL 40 in which it was made clear that it was no answer to an Article 8 claim to say that the appellant should return to his home country and make an application from there.
10. The First-tier Tribunal's conclusion on the Article 8 point was set out in paragraph 20. Regard was had to the fact that the sponsor clearly does earn more than the amount required by the Secretary of State presumably because regard could be had to postdecision evidence which clearly demonstrated that. Regard was also had to the fact that as the First-tier Tribunal said the evidence shows that the then appellant does now meet the English language requirement but did not do so at the time of the refusal which was recognised technically to be the relevant time. There were other factors prayed in aid which, given the submissions advanced to us we should cover in slightly more detail.
11. The first of these related to the health of the sponsor. The medical evidence was that he was suffering from epilepsy - see page 12 of the respondent's bundle - and that his fits are triggered by stress. Dr Rasheed, the author of the quite short medical report stated it must have been the position that Mr Nameti lived alone but is at risk of harm during a fit and then we see this expression of opinion "I think having his wife with him would be a mental and emotional support to him as well as helping him with any physical problems which could occur as a result of him fitting". So that was evidence which probably the First-tier Tribunal could take into account since it was available before the Entry Clearance Officer.
12. I am somewhat perplexed by the reference in paragraph 20 of the First-tier Tribunal's determination to the suggestion that the appellant suffers from epilepsy, I think that that must be a typographical error and it should refer to the sponsor but anyway that was the first piece of evidence.

13. The second piece of evidence was that the appellant was suffering from stress on her own account. That in part explained her failure to pass the English language test before the date of the Entry Clearance Officer's decision and that there are also family problems and pressures. According to paragraph 3 of the determination the delay has caused considerable problems within the family and has caused the appellant's family to threaten to divorce the sponsor. Perhaps a clearer way of putting it would be that the appellant's family would be putting pressure on her to divorce the sponsor but the point is nonetheless one that we clearly understand.
14. The third factor, and this again was a factor which was available at the relevant date, is that in order to make a fresh application for entry clearance the appellant would have to travel to Abu Dhabi because the diplomatic and political circumstances currently extant mean that there is no British Embassy in Tehran. According to the First-tier Tribunal the appellant could not travel to Abu Dhabi alone and we clearly accept that for all sorts of obvious reasons and she would have to persuade a member of her family to go with her. Apparently there was reluctance to pursue the appeal any further and there would be further delay and expense. All that was clearly understood by the First-tier Tribunal.
15. Having concluded that this was a genuine marriage which was subsisting, that there was adequate accommodation and that the requirements of the Rules were now met, the First-tier Tribunal's conclusion was that it was not proportionate in the circumstances to require this appellant to make another application. There are exceptional circumstances and the Article 8 claim was allowed. It is against that finding that the Secretary of State appeals.
16. The preliminary issue which we need to consider is the attempt made by Miss Seehra to seek to assail the finding which was against her client, namely that the immigration appeal was dismissed. A Rule 24 response was filed by the claimant, strictly speaking the respondent to this appeal today taking a number of points but many of them but not all of them relate to the case under the Rules which was dismissed and which was not separately appealed.
17. Miss Seehra in oral argument said that paragraph 10 of the determination sets out the wrong requirements of the Rules and that paragraph 12 of the determination is inexplicable because the Home Office Presenting Officer did not take an issue in relation to the absence of a P60 but the difficulty with that submission is twofold. First of all paragraph 12 of the determination is clear and for whatever reason a finding of fact has been made that there has not been compliance with the Rules for two reasons. First, the English language requirement was not met and secondly that the relevant P60 was not produced. On the face of it, it would be difficult to assail that finding but as it happens it is impossible to assail that finding in the light of the decision of this Tribunal in **Secretary of State for the Home Department v EG & NG (UT Rule 17: withdrawal: Rule 24: scope) Ethiopia [2013] UKUT 00143 (IAC)** where a three judge member of this panel concluded that if one wanted to assail decisions which were adverse to the losing party notwithstanding that the losing party had won on other issues, in that case it was on Article 3, one had to put in a proper notice

of appeal rather than seek to rely on the provisions of Rule 24 of the 2008 Procedure Rules. It follows that it is not open to the claimant to seek to run these arguments under the Rules whether it is the main argument or the alternative argument at paragraph 13 of the response document. The case has to be considered solely in the light of the Secretary of State's appeal under Article 8.

18. It is the essence of the Secretary of State's appeal that the First-tier Tribunal erred in taking into account postdecision evidence and facts, namely, in particular –
  - (a) the fact that the appellant now met the English language requirement, and
  - (b) the fact that the P60 for 5 April 2013 demonstrated that the sponsor now met the requirements of the Rules.

It is clear that those matters were taken into account. It is also clear that other matters were taken into account and we will be returning to the significance of those in due course.

19. It is the submission of the Secretary of State relying on the dictum of Lord Phillips in the case of **AS (Somalia) v Secretary of State for the Home Department [2009] UKHL 32** that in an entry clearance case it is impermissible to take into account postdecision facts or what was described there as a change of circumstances. Quoting from paragraph 9 of the opinion of Lord Phillips:

“In such circumstances it is not illogical to require a fresh application for entry clearance to be made. Where, however, an appeal is made against refusal of leave to enter by an appellant who is within the jurisdiction, consideration must necessarily be given to the position prevailing when the appeal is heard, at least where human rights are in issue as they usually are, for an adverse decision on the appeal will render the appellant liable to deportation.”

20. So it is clear that a distinction was being made between cases where an individual is within the United Kingdom and cases where an individual is seeking permission or leave to enter the United Kingdom. In such cases, even if Article 8 is relied on, regard can only be had to the evidence which was available to the Entry Clearance Officer.
21. There is this refinement that if an appellant relies on matters before an Entry Clearance Officer and then seeks to improve on those self same matters by further evidence, that further evidence may be admissible but what you cannot do is rely on further evidence to bring your case within the Rules whereas at the relevant time your case could not succeed under the Rules.
22. The approach of the House of Lords in **AS (Somalia)** is also borne out by the relevant provisions of the 2002 Act – see in particular Section 85, sub-Section 4 and Section 85A, sub-Section 2 - it is only in entry clearance cases so far as is material to this appeal that postdecision facts fall properly within account. It therefore follows that an error of law has been perpetrated by this First-tier Tribunal in taking into account

postdecision facts and postdecision facts which are clearly material to the outcome. The decision therefore cannot stand and must be set aside. We are in a position to re-take the decision today on the available evidence because it is plainly in the interests of justice that we do so. No one submitted that the matter should be remitted to a First-tier Tribunal for re-determination and I think it is fairly obvious that that would be an unjust and disproportionate result since it would cause further delays. It is far practicable if we can, which we are to deal with the appeal for ourselves on the available evidence.

23. The points which the appellant is entitled to continue to rely on are the points summarised in paragraph 20 of the First-tier Tribunal to which we have already made reference and which Miss Seehra pressed very strongly upon us. It is her submission that it would be unjustifiable or disproportionate, I am not sure it matters which, to require a fresh application to be made to the Entry Clearance Officer in Abu Dhabi. There are exceptional circumstances here which merit a more lenient approach and one which does not mandate stricter requirements to the Rules. There are health problems, there are cultural issues, there are threats of the possibility of the break-up of a relationship which the First-tier Tribunal has recognised at the moment is genuine and subsisting and to require the appellant to travel to Abu Dhabi, albeit not impossible, would be oppressive in all the circumstances of this case. So conducting the balancing exercise for ourselves under Article 8 which is that which is required, Miss Seehra strongly submits that the outcome should be the same. Ms Isherwood for the Secretary of State submits that that would not be right in all the circumstances, that the evidence of threats is weak, she submits. It is also the case that the sponsor has remained in the United Kingdom all these years with epilepsy without the assistance it seems of anybody, still less the appellant, who of course is not here. Furthermore, the Immigration Rules are there for a purpose and it is the policy of the law, Ms Isherwood submits, that compliance with those Rules should be required unless there is an unjustifiably harsh outcome, to use the language of some of the cases in this Tribunal and Higher Courts.
24. We have weighed up those submissions very carefully and we come to the following conclusions.
25. It is the policy of the law to require compliance with the Immigration Rules which are there for a purpose. Entry Clearance Officers in the paradigm case are in a position to assess the evidence wholly satisfactorily and the Rules are not there to be circumvented unless it can be shown that to require compliance with them would amount to an unjustifiably harsh outcome. The parties married knowing that they had to meet the Rules. They may have been optimistic as regards the financial requirements of the Rules but they knew or must have known that they could not satisfy the English language requirements since they did not have a certificate, all of that was known about or should have been known about.
26. As for travel to Abu Dhabi, it is not the finding of the First-tier Tribunal that that would be impossible, it is the finding of that Tribunal that this would be difficult. We accept and understand that but we are not talking about vast geographical

distances, applications can be made online to the Entry Clearance Officer and interview appointments of course are given and there is no reason why frankly the sponsor cannot travel to Abu Dhabi to assist his wife in the making of her application. We fully understand the strength of the compassionate circumstances which have been prayed in aid here and it is not necessary for us to repeat them but we have come to the conclusion that they are not so strong as to take this case out of the run of the mill case where, as the Entry Clearance Manager recognised, thousands of applicants have to go through the process every year.

27. So, conducting the Article 8 balance for ourselves accepting that the point is not wholly clear-cut we do come to the conclusion that it would not be unjustifiable or disproportionate to require a fresh application to be made under the Rules at the Entry Clearance Office in Abu Dhabi rather than to allow this case on a more freewheeling basis under Article 8 of the Convention. So the upshot is that although the decision of the First-tier Tribunal is set aside on the error of law we have identified the claim under the Human Rights Act, in particular with reference to Article 8 of the Convention, is refused.

Signed

Date

Mr Justice Jay