



**Upper Tribunal
(Immigration and Asylum Chamber)
OA/12355/2013**

Appeal Number:

THE IMMIGRATION ACTS

Heard at Field House

**Determination
Promulgated**

On 2 June 2014

On 3 June 2014

Before

Deputy Upper Tribunal Judge MANUELL

Between

**Mrs SAKHI ROYA
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mrs P Heidar, Authorised Representative
(AA Immigration Lawyers)

For the Respondent: Miss C Avery, Home Office Presenting Officer

DETERMINATION AND REASONS

Introduction

1. The Appellant appealed with permission granted by First-tier Tribunal Judge McDade on 15 April 2014 against the determination of First-tier Tribunal Judge Paul who had

dismissed the Appellant's appeal against the Entry Clearance Officer's decision dated 13 May 2013 to refuse to grant the Appellant leave to enter under Appendix FM of the Immigration Rules as a spouse and also under Article 8 ECHR in a determination promulgated on 4 February 2014.

2. The Appellant is a national of Afghanistan born on 18 February 1988. Her entry clearance application had been refused because the requirements of Appendix FM and Appendix FM-SE as to her sponsor's finances had not been met.
3. Permission to appeal to the Upper Tribunal as sought by the Appellant was granted because it was considered arguable that the judge had made findings on matters not previously raised in the notice of refusal without giving the Appellant the opportunity to respond.
4. Directions were made by the Upper Tribunal in standard form fixing an error of law hearing. Notice under rule 24 dated 10 May 2014 opposing the onwards appeal was filed and served on behalf of the Secretary of State as the Respondent.

Submissions – error of law

5. Mrs Heidar for the Appellant relied on the grounds and the grant of permission to appeal. In summary she submitted that RM (Kwok On Tong: HC 395 para 320) India [2006] UKAIT 00039 applied. The judge had gone outside the terms of the refusal notice, raised new issues and so should have adjourned the hearing so that the Appellant could provide further evidence. The judge had not had regard to all of the evidence, such as the sponsor's P60. In any event the judge should have allowed the appeal under Article 8 ECHR. There were insurmountable obstacles to the living of family life elsewhere because the sponsor was a refugee.
6. Mr Avery for the Respondent relied on the rule 24 notice. The judge had correctly found that the sponsor had not established that he met the income threshold. There was no unfairness as the judge had looked at the evidence presented. The grounds of onwards appeal were simply a

disagreement with the judge's decision. Nor was there evidence of any compelling circumstances which would have justified allowing the appeal under Article 8 ECHR.

7. In reply, Mrs Heidar reiterated that the Entry Clearance Officer's decision had been unfair and the appeal hearing had also been unfairly conducted.

The no error of law finding

8. The tribunal indicated at the hearing that it found that the judge had not fallen into error of law. The tribunal reserved its determination which now follows.
9. Contrary to the submissions advanced on the Appellant's behalf, the refusal notice issued by the Entry Clearance Officer dated 13 May 2013 made it plain that the sponsor's claimed employment and salary were comprehensively disbelieved, in part as a result of enquiries made. Details of the checks made by the Entry Clearance Officer were provided, which showed that 4 telephone calls had been made in business hours over 2 days to the Appellant's employer, with no answer. The Appellant's Notice of Appeal dated 3 June 2013 challenged those assertions, and offered to provide further supporting evidence of the claimed employment. The issues which the tribunal had to determine were thus clear and the scene was set. The Appellant knew exactly the case she had to meet, which is why the sponsor's employer was called as a witness.
10. The judge helpfully set out those issues at the beginning of his determination at [2] and again at [15]. He summarised the evidence of the sponsor and the sponsor's employer, both of whom were cross-examined when the Respondent's case was put. As he recorded, the judge raised his own concerns with both witnesses and gave the employer the opportunity to produce additional material. At [15] onwards the judge discussed and analysed the evidence which had been presented on the Appellant's behalf, which included the post application P60 which the judge had noted at [4] and [6]. Form P60 is created by an employer, not by HMRC, so there was no reason for the judge to have assigned it special weight. The judge explained in detail why he was unable to accept that the

sponsor's earnings were as claimed. The judge was fully entitled to assess and weigh the evidence provided and to draw conclusions from the absence of basic information. All of those conclusions were rational and open to him.

11. The tribunal finds that the judge conducted the appeal hearing fairly and that there was no error of law as submitted on the Appellant's behalf. It is plain that the experienced judge approached the evidence with an open mind and considered the evidence as a whole.
12. The judge did not set out the text of Appendix FM-SE in his determination and there was no requirement for him to have done so. The relevant law at the date of decision appears in *Phelan (8th edition)* and is lengthy. (It has since been amended.) The judge plainly had in mind the relevant evidential requirements which form a mandatory part of the Immigration Rules.
13. In the tribunal's view the grant of permission to appeal so far as it suggested there was unfairness in the conduct of the hearing was erroneous. The grant made no mention of the judge's approach to the Article 8 ECHR claim. There was no error of law there either.
14. The judge provided at [22] an accurate summary of the correct approach to Article 8 ECHR in the light of Nagre [2013] EWHC 720 (Admin), MF (Nigeria) [2013] EWCA Civ 1192, Gulshan (Article 8 - new rules - correct approach) [2013] UKUT 00640 (IAC) and Shahzad (Art 8: legitimate aim) [2014] UKUT 00085 (IAC). Only if there are arguably good grounds for granting leave outside of the Immigration Rules, i.e., in the discretion of the Secretary of State, is it necessary for the First-tier Tribunal to go on to consider whether there are compelling circumstances not sufficiently recognised under them. Mrs Heidar's submission to the contrary is not supported by current authority. It was thus open to the judge to find at [23] that the Appellant could make a fresh entry clearance application compliant with the Immigration Rules if she wished.
15. In conclusion, the tribunal finds that no error of law was shown in the determination, which accordingly stands unchanged.

DECISION

The making of the previous decision did not involve the making of an error on a point of law. It stands unchanged. The appeal remains dismissed.

Signed

Dated

Deputy Upper Tribunal Judge Manuell

**TO THE RESPONDENT
FEE AWARD**

The appeal was dismissed and so there can be no fee award

Signed

Dated

Deputy Upper Tribunal Judge Manuell