Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/10002/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 5 February 2015	**On 10 February 2015**

Before

UPPER TRIBUNAL JUDGE MOULDEN

Between

MRS FATIHA MOUMEN
(No Anonymity Direction Made)

Appellant

and

ENTRY CLEARANCE OFFICER - RABAT

Respondent

Representation:
For the Appellant: Mr R Pennington-Benton of counsel instructed by Duncan Lewis & Co
For the Respondent: Mr E Tufan a Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Morocco who was born on 3 February 1980. She has been given permission to appeal the determination of First-Tier Tribunal Judge R G Handley ("the FTTJ") who dismissed her appeal against the respondent's decision of 28 February 2013 to refuse her entry clearance to the UK for settlement with her husband and sponsor under the provisions of Appendix FM of the Immigration Rules.

2. The respondent accepted that the appellant was exempt from meeting the requirements of paragraph E-ECP 3.1 as the sponsor was in receipt of Disability Living Allowance (DLA). In these circumstances the appellant would normally have to show that the sponsor was able to maintain and accommodate the two of them and any dependents adequately in the UK without recourse to public funds. However, the sponsor was in receipt of Employment Support Allowance ("ESA") as well as DLA and the respondent said that he was entirely financially reliant on public funds. The respondent "was not satisfied that you and your sponsor are able to maintain and accommodate yourselves and any dependents adequately in the UK without the course to public funds". The application was refused.

3. The appellant appealed and the FTTJ heard the appeal on 24 September 2014. Both parties were represented and the sponsor gave evidence. The FTTJ found that the sponsor was in receipt of DLA and exempt from satisfying the financial requirements in Appendix FM of the Immigration Rules. The appellant had to show that they were able to maintain and accommodate themselves in the UK without recourse to public funds. Whilst the FTTJ had before him a letter from the Criminal Injuries Compensation Authority confirming that the sponsor's compensation was assessed at £500,000, there was no evidence to show that this had been paid to his Deputy. There was nothing in the bank statements submitted to show any large sum which might reflect this level of compensation.

4. The FTTJ accepted that at the date of the application the sponsor was receiving DLA of £131.50 per week. This was not a means tested benefit and the sponsor was not obliged to use it in any particular way. He was also receiving DSA of £119.85 per week giving a total income of £251.35 per week. At the date of the application the rate of Income Support was £111.45 per week.

5. The FTTJ said that the sponsor claimed not to pay rent for the property he lived in. He had produced a probationary Tenancy Agreement which indicated that he was obliged to pay rent and other charges. The FTTJ found that there was no documentary evidence before him to support the claim that the sponsor did not have to pay rent.

6. The FTTJ found that the appellant had not established that she and the sponsor could be maintained adequately without recourse to public funds. Because of his findings that it had not been established that the sponsor did not have to pay rent or that he had received and had available to him substantial compensation from the Criminal Injuries Compensation Authority the appellant had not established that they would have available to them at least £113.70 per week, which was the required income support level for a couple.

7. The FTTJ found that the appellant and the sponsor formed their relationship in the knowledge that she would need to make an application for entry clearance to the UK to join him. They had kept in touch with each other on a regular basis. There was little evidence to show that the sponsor could not relocate to Morocco because of his health problems. It was concluded that Article 8 was not engaged. The FTTJ

dismissed the appeal under the Immigration Rules and on Article 8 human rights grounds.

8. The appellant applied for and was granted permission to appeal. The grounds submit that the FTTJ erred in law. Firstly, he failed to take into account the respondent's policy "Immigration Directorate Instructions, Chapter 8, Section FM 1.78: Maintenance". The respondent had failed to make a calculation detailing the actual financial position of the sponsor. As a result there were insufficiently clear reasons for refusing the application and the appellant was in no position to address the reasons for refusal. Secondly, the FTTJ failed to apply the correct standard of proof. On the documentary evidence before the FTTJ it was more probable than not that the sponsor had no obligation to pay rent for the property he occupied. The letter from the Criminal Injuries Compensation Authority, an agency of the UK government, should have been accepted as sufficient evidence that the sponsor had received compensation of £500,000. Thirdly, the FTTJ had failed sufficiently to take into account the personal circumstances of the appellant and the sponsor in particular the sponsor's physical and mental problems and the lower standard of healthcare in Morocco when considering whether it was reasonable to expect the sponsor to relocate to Morocco.

9. On 28th of January 2015 the appellant's representatives sent to the Upper Tribunal a skeleton argument, an index of the documents to be relied on, an application pursuant to Rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 ("the Procedure Rules") seeking permission to rely on additional documentary evidence, a supplementary bundle containing additional documentary evidence and an archived version of the relevant portions of the Immigration Rules in force at the date of the respondent's decision (28 February 2013).

10. The sponsor and his mother attended the hearing before me. In reply to my question and after taking instructions, Mr Pennington-Benton informed me that the sponsor's mother had attended the hearing before the FTTJ but had not given oral evidence. I confirmed with him that the 123 page bundle on the Tribunal file was the one before the FTTJ.

11. Mr Pennington-Benton submitted that it was common ground, accepted by the FTTJ, that the sponsor had a total benefits income of £251.35 per week (which Mr Pennington-Benton calculated to be £492.70 per month). In addition he submitted that the FTTJ should have found that the claimant had an additional income of £20,000 a year because page 40 of the appellant's bundle before the FTTJ, which was part of the order made by the Court of Protection showed that "the Deputy may withdraw a sum not exceeding £20,000 a year from the funds of (the sponsor) for his use and benefit without needing to obtain the prior approval of the Court of Protection". This equated to £385 per week.

12. Mr Pennington-Benton submitted that, had he properly applied the standard of the balance of probabilities, the FTTJ should have come to the conclusion that the

sponsor had received compensation of £500,000, all or a substantial part of this was available to him and he had an additional income in the region of £385 per week.

13. Mr Pennington-Benton submitted that the additional documentary evidence now produced made it clear that all the sponsor's rent was paid for him by the local authority although, in reply to my question, he accepted that what appeared to be the case was that the local authority paid approximately £106.61 by way of Housing Benefit and the sponsor paid the balance of approximately £7.53 per week.

14. He argued that the Procedure Rules permitted fresh evidence to be submitted and that this evidence was relevant to consideration of whether there had been an error of law. The reasons why the evidence now submitted had not been submitted earlier were contained in paragraph 12 of the application. The refusal letter should have detailed the financial calculations. It did not make it clear to the appellant why the application was being refused and what further information might be required.

15. I was asked to find that the FTTJ had erred in law, to set aside the decision and to remake it myself with no further evidence required other than that in the supplementary bundle. Alternatively, if I thought it necessary it would be possible to call the sponsor's mother who was his Deputy appointed by the Court of Protection.

16. Mr Tufan submitted that it was clear that in the refusal the respondent was putting maintenance and accommodation in issue. In addition to maintenance there was the question of whether the sponsor's landlord would let the sponsor and the appellant live together in the accommodation provided. There was a lack of clarity as to the landlord's position and as to the rent. Housing Benefit was means tested and could be affected by any income which the sponsor received from any Criminal Injuries compensation.

17. Mr Tufan argued that the application and appeal failed because the appellant had failed to provide the sort of documentary evidence which was clearly required in order to establish the financial position. Whilst it might now have been provided in the supplementary bundle it was not before the FTTJ and there could be no error of law by failing to consider material which was not before the respondent or the FTTJ. I was asked to find that there was no error or no material error of law and to uphold the determination.

18. In his reply Mr Pennington-Benton submitted that the question of accommodation or the landlord's permission for the appellant to live with the sponsor was never raised as an issue by the respondent. The appeal was about maintenance, nothing more. The only issue was whether the sponsor had enough income. He argued that on the evidence it could now be seen that the sponsor had more than enough.

19. I reserved my determination.

20. There is nothing in Rule 15(2A) of the Procedure Rules to indicate that fresh evidence not before the First-Tier Tribunal may be admitted specifically for the purpose of considering whether there was an error by the FTTJ. The reasons given for the late

submission of this evidence and why it was not submitted to the respondent or the FTTJ was that the appellant was not aware of the detailed reasons for refusal of her application and therefore had difficulty in addressing these. Whilst I accept that the reasons given by the respondent were not as clear as they could have been I find it was sufficiently clear that the main issue was the question of the adequacy of maintenance. The appellant has experienced representatives and it should have been clear to them that the adequacy of maintenance was in issue and that it was necessary to produce oral and documentary evidence to substantiate this.

21. In a case where the sponsor has serious mental and physical health difficulties and the Court of Protection had appointed his mother to be his Deputy I find it surprising that, whilst I am told that she attended the hearing before the FTTJ, she was not called to give evidence. If she is managing his affairs it might be expected that she would be able to shed light on the position as to his compensation, how this was applied, what income if any was derived from it and what rent was paid and by whom.

22. It may be that the documentary evidence now contained in the supplementary bundle provides satisfactory answers to the questions which led the FTTJ to the conclusion that there were gaps in the evidence which meant that the sponsor's financial position was not shown with sufficient clarity for the appellant to establish that the maintenance requirements were met. The new documentary evidence begs the question of why it was not submitted earlier. There is no suggestion that it was unavailable.

23. In Ahmed (benefits: proof of receipt; evidence) Bangladesh [2013] UKUT 84 (IAC) the summary prepared by the authors of the determination states:

> "(1) In an entry clearance case involving the issue of adequacy of maintenance, it will in general assist the First-tier Tribunal or, on appeal, the Upper Tribunal if, as part of the submission, a calculation is supplied which reflects the comparison between the applicant's and sponsor's combined projected income if the applicant for entry clearance were in the United Kingdom on the one hand and, on the other, the amount required to provide the maintenance at a level that can properly be called adequate.
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> (2) Income received and the projection for the figures which the applicant and sponsor have to be able to find should be expressed on a consistent and arithmetically accurate basis. Benefit is usually calculated on a weekly basis but is often paid fortnightly (employment support allowance and income support) or four-weekly (child benefit), while tax credits are calculated on a daily figure and paid in general weekly (child tax credit) or fortnightly (working tax credit). A month under the Gregorian calendar is not the same as four weeks and wrongly taking a four-week period of income as equating to a month risks a potentially significant detriment to an applicant for entry clearance.

(3) It is always essential that regard is had to the benefit rates applicable at relevant times; eg in entry clearance cases, the rates in force at the date of decision. The calculation of the benefit threshold figure is an academic exercise, but establishing the benefits which a sponsor and the applicant will actually be receiving on the applicant's arrival is far from it. The most compelling evidence of receipt of income by way of social security is likely to be proof of receipt of funds into a person's bank account. Notices of award are intrinsically less reliable. The position of tax credits is particularly complex.

(4) It would assist if entry clearance application forms were to include questions designed to elicit the information described above and if decisions of entry clearance officers included a calculation described in (1) above."

24. Neither the Immigration Directorate Instructions cited in Mr Pennington-Benton's skeleton nor the case of Ahmed support his argument that the refusal letter should have set out detailed financial calculations made by the respondent. On the contrary, Ahmed emphasises the need for the appellant's representatives to provide detailed financial calculations. If detailed financial calculations had been provided it would be reasonable to expect that they would be supported by relevant documentary evidence.

25. The FTTJ set out the correct burden and standard of proof in paragraph 6 of the determination. I can find no indication that this was not applied.

26. I find that on the evidence before him it was open to the FTTJ to make the findings he did both in relation to any compensation which might be payable to the claimant and the situation in relation to the rent for his accommodation. Whilst was accepted that the sponsor had been the victim of a very serious assault with serious consequences for his physical and mental health it was open to the FTTJ to say that he had little detailed evidence about this. Again, it may be that the sponsor's mother who is his carer and Deputy might have been able to shed more light on this. Although she attended the hearing before the FTTJ she did not give evidence.

27. I have not been asked to make an anonymity direction and can see no good reason to do so.

28. I find that the FTTJ reached conclusions open to him on all the evidence. There is no error of law. It may be, although I reach no conclusion in relation to this, that the evidence now submitted in the supplementary bundle, perhaps with further evidence, would satisfy an Entry Clearance Officer. If so the appellant's remedy may be to make a fresh application.

Signed:..... Date: 8 February 2015
Upper Tribunal Judge Moulden