IAC

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/33723/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 4 January 2016	**On 27 January 2016**

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL HUTCHINSON

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

DORINA XHIKA
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr L. Tarlow, Senior Home Office Presenting Officer
For the Respondent: Mr H. Malik, Ropemakers Solicitors

DECISION AND REASONS

The Appeal

1. This appeal is by the Secretary of State against the decision of First-tier Tribunal Judge Howard who in a decision promulgated on 3 July 2015, allowed Ms Xhika's appeal against the decision of the Secretary of State dated 11 August 2014 to refuse Ms Xhika's application for Leave to Remain in the United Kingdom on the basis of her family life in the UK, as the spouse of a person present and settled in the UK.

The First-tier Tribunal did not make an anonymity direction and there was nothing before the panel to suggest that Ms Xhika should be accorded anonymity for these proceedings.

2. Although the applicant at this hearing is the Secretary of State, for the purposes of this decision I refer to the parties as they were in the First-tier Tribunal.

Background

3. The appellant is a citizen of Albania born on 10 September 1984. The appellant entered the UK on 16 May 2013 with leave to remain until 26 July 2014 and made an application for leave to remain as the partner of Roland Rami on 17 June 2014. The respondent refused the appellant's application on 11 August 2014 as it was concluded that the evidence provided by the appellant failed to meet the requirements of Appendix FM-SE in order to demonstrate that the appellant's spouse's income was at least £18,600 (it was stated that it was £19,000). The appellant failed to provide was slips from January to March 2014 and bank statements for the same period as well as a letter from is employer or a contract of employment and a P60. It was also concluded that the appellant could not succeed under paragraph EX.1 or paragraph 276ADE (1) of the Immigration Rules and that there were no exceptional circumstances.

4. The appeal before Judge Howard was dismissed under the Immigration Rules but allowed on human rights grounds. In summary, Judge Howard was satisfied that the requirements of Appendix FM-SE were not met (either at the date of the decision or the date of the appeal). However in considering Article 8 outside of the Immigration Rules the judge was satisfied that removal would be disproportionate.

5. The Secretary of State applied for permission to appeal on the grounds that:

   - The judge had made a material misdirection in law by allowing the appeal under Article 8 but failing to find that there were any exceptional circumstances or insurmountable obstacles preventing the appellant and the sponsor pursuing family life elsewhere.

6. Permission was granted on the basis that there was an arguable error of law due to lack of reasoning in failing to identify any compelling or exceptional circumstances to warrant a grant of leave outside of the Rules and failing to properly consider Section 117B.

7. The appeal came before me.

Error of Law

8. Although the respondent had considered the appellant's case under Appendix FM:EX.1 and found that there were no insurmountable obstacles to the appellant and her partner continuing their family life outside the UK, the judge does not allude to this in his findings.

9. In SS (Congo) [2015] EWCA Civ 387 the Court of Appeal restated that compelling circumstances would have to apply to justify a grant of leave to enter or leave to remain where the evidence Immigration Rules (i.e. the rules in Appendix FM-SE of the Immigration Rules which set out the form of evidence required to substantiate claims that the financial requirements of Appendix FM are met) are not complied with.

10. Although the judge made findings that the requirements of Appendix FM-SE were still not met at the date of hearing, and set out the rationale in MM and others [2014] EWCA Civ 985 that an 'arguable case that there may be good grounds for granting leave to remain outside the rules' he failed to make any finding as to what compelling circumstances justified a grant of leave to remain outside of the Immigration Rules.

11. I have reminded myself that whether the circumstances are described as 'compelling' or 'exceptional' is not a matter of substance and that 'in practice they are likely to be both compelling and exceptional, but this is not a legal requirement' (R (on the application of Sunassee) v Upper Tribunal (Immigration and Asylum Chamber) [2015] EWHC 1604 (Admin)).

12. The judge identified no such circumstances and it cannot be said that the judge's reference to the sponsor only missing the reference to a salary in the employer's letter, can be said to implicitly (or indeed explicitly) be such a circumstance.

13. The judge also failed to properly direct himself in relation to Section 117 of the Nationality, Immigration and Asylum 2002 Act as the judge found that the appellant's presence in the UK has never been unlawful or precarious. Whilst there was no evidence before me to suggest that the appellant's leave has ever been unlawful, it is not correct to say that it has not been precarious. Given that her presence here has always been dependent on a further grant of leave her presence here can only ever be described as precarious; AM (s117B) Malawi [2015] UKUT 0260 (IAC) applied.

14. I was satisfied therefore that the judge materially misdirected himself.

15. I announced the conclusion during the hearing and indicated that I would remake the decision. I indicated that the judge's findings in relation to Appendix FM-SE were preserved.

Remaking of the Decision

16. The appellant's representative submitted an additional bundle which included further payslips. I heard oral evidence from the appellant and her husband who both gave evidence in English. I heard submissions from both representatives. At the end of the hearing I reserved my decision which I now give.

17. Mr Tarlow conceded that nothing was disputed in relation to the factual evidence and that it was clear that the sponsor, a British citizen originally from Kosovo has

lived in the UK for many years (since 1998 when he was a minor) and has been in employment. The sponsor met the appellant whilst the sponsor was on holiday in Albania and the sponsor visited the appellant a couple of times in Albania. The appellant moved to the UK to study and the couple do not have any children. The appellant has a younger brother, a British citizen who lives in the UK with his family. The sponsor originally came to the UK with his brother who also still lives in the UK. Mr Tarlow submitted that although the couple may not wish to go to Albania it is practically possible and there was nothing exceptional in their circumstances and no insurmountable obstacles to family life continuing outside the UK.

18. Mr Malik emphasised that at the time of the application and the appeal the couple were able to show that they met the financial threshold of £18,600 but that there were difficulties for his employer, because of the fluctuating nature of his income, in giving a salary figure. Mr Malik emphasised that the sponsor was close to his brother in the UK as was the appellant to her brother here. Although the appellant has her mother in Albania at the moment they had no more than telephone contact. Mr Malik submitted that the insurmountable obstacles in respect of Section EX.1 were that the relationships in the UK could not be maintained and that removal would have the unnatural result of the marriage ending.

19. Appendix FM, section EX.1 provides as follows:

> 'This paragraph applies if
>
> ...
>
> (b) the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen, settled in the UK or in the UK with refugee leave or humanitarian protection, and there are insurmountable obstacles to family life with that partner continuing outside the UK'

20. The respondent considered that whilst the appellant met the suitability and eligibility requirements under Appendix FM the respondent was not satisfied that it had been shown that there were any insurmountable obstacles to family life in the appellant's home country or elsewhere.

21. Although I accept that neither the appellant nor the sponsor want to live anywhere other than the UK, I am not satisfied that they have demonstrated any insurmountable obstacles to family life elsewhere. Although I accept that the sponsor has never lived in Albania, he has visited on a number of occasions including when he met and visited the appellant. Although I accept that the sponsor is in employment in the UK and relocation might be difficult given his established life here, he was unable to point to anything insurmountable in any difficulties. The appellant has a mother in Albania and there was no evidence to suggest that she would not be able to assist in the process of resettling. The appellant has experience of employment in the UK, as has the sponsor, skills which would assist them in establishing their family elsewhere and the appellant has provided evidence of her qualifications to Masters' level, again which would assist in resettling.

22. I do not accept the sponsor's oral evidence that he would not move to Albania if he was required to do in order to maintain his relationship with his wife. It was also his evidence that he had 'never ever thought of it' and it is difficult in this context to understand how he could reach such a potentially far reaching decision about his relationship without prior consideration. I do not accept that removal will result in the end of their marriage. Although he clearly does not wish to and there may be practical difficulties, at least in the beginning, that does not equate on the evidence to insurmountable obstacles to such a relocation.

23. Mr Malik sought to rely on the relationships that the appellant and the sponsor have in the UK as amounting to 'insurmountable obstacles'. Whilst I accept that both the appellant and the sponsor have adult siblings in the UK and the appellant in particular may be close to his brother given that they moved to the UK together as refugees, the siblings in question are all adults now living independently from each other. The sponsor indicated that his brother has a girlfriend and that he sees him every week. I am not satisfied that it has been demonstrated that either the appellant or the sponsor enjoy family life, for the purposes of Article 8, with their respective siblings. There must be more than normal emotional ties in these circumstances for family life to exist for the purposes of Article 8(1) of the ECHR: Kugathas [2003] EWCA Civ 31 applied. Although I accept that there will still be emotional ties between the sponsor and his brother, including as he indicated their parents were killed in Kosovo, I am not satisfied that their relationship now as adults goes beyond the normal ties of siblings.

24. I am therefore not satisfied that the appellant or the sponsor enjoy family life in the UK other than with each other. Although as I have noted they have private life ties here and relocation will cause some practical difficulties I am not satisfied that it has been shown that there is anything insurmountable in those difficulties. Although again unwilling to consider making an application for entry clearance the appellant and the sponsor were unable to point to anything insurmountable by way of an obstacle to their family life in the appellant making such an application. Although this may entail a temporary separation, the sponsor visited the appellant in Albania before and there was no adequate information to support the claim that he could not do so again. There was no evidence to support the assertion that this would mean he could not meet the financial requirements of the Immigration Rules.

25. I have considered whether a second stage Article 8 assessment is necessary outside of the Immigration Rules but I am satisfied that it is not as the matters relied upon by the appellant and her husband are adequately covered by the provisions of the Immigration Rules.

26. In so doing I have applied the relevant case law including the guidance of the Court of Appeal in In SS (Congo) [2015] EWCA Civ 387:

> 'The proper approach should always be to identify, first, the substantive content of the relevant Immigration Rules, both to see if an applicant for LTR or LTE satisfies the conditions laid down in those Rules (so as to be entitled to LTR or LTE within the Rules) and to assess the force of the public interest given expression in those rules

> (which will be relevant to the balancing exercise under Article 8, in deciding whether LTR or LTE should be granted outside the substantive provisions set out in the Rules). Secondly, if an applicant does not satisfy the requirements in the substantive part of the Rules, they may seek to maintain a claim for grant of LTR or LTE outside the substantive provisions of the Rules, pursuant to Article 8. If there is a reasonably arguable case under Article 8 which has not already been sufficiently dealt with by consideration of the application under the substantive provisions of the Rules (cf *Nagre*, para. [30]), then in considering that case the individual interests of the applicant and others whose Article 8 rights are in issue should be balanced against the public interest, including as expressed in the Rules, in order to make an assessment whether refusal to grant LTR or LTE, as the case may be, is disproportionate and hence unlawful by virtue of section 6(1) of the HRA read with Article 8.'

27. The appellant was unable to point to a reasonably arguable case not sufficiently dealt with under the Immigration Rules including Appendix FM EX.1.

28. I have also considered the guidance from the House of Lords in Chikwamba v SSHD [2008] UKHL 40 and in Hayat (nature of Chikwamba principle) Pakistan [2011] UKUT 444 (IAC) it was held that the significance of Chikwamba is to make it clear that in appeals where the only matter weighing on the respondent's side of an Article 8 proportionality balance is the public policy of requiring an application to be made under the Immigration Rules from abroad, that the legitimate objective will usually be outweighed by factors resting on the appellant's side of the balance. However in my findings this is not a case where the only matter weighing on the respondent's side is the failure to make the application from outside of the UK, as the appellant failed to satisfy the requisite Immigration Rules in relation to the financial requirements, specifically Appendix FM:SE. I rely on Judge Howard's findings that they still did not satisfy FM:SE at the date of the appeal before the First-tier Tribunal. There was no evidence before me to indicate that this has been rectified.

29. Although it was argued that the nature of the sponsor's fluctuating employment meant his employer was unable to provide an annual salary there was no adequate explanation for the continuing failure to meet Appendix FM:SE.

30. The approach to Article 8 in relation to Appendix FM-SE should be the same as under Appendix FM that compelling circumstances would have to apply; this is for two reasons: the evidence rules have the same objective as the substantive rules and similar weight should be given to the respondent's assessment of what the public interest requires and secondly that enforcement of the evidence rules minimises arbitrary unfairness: SS (Congo) applied.

31. Although Mr Malik argued that weight should be given to the fact that the sponsor having shown that he had the requisite income to meet the financial requirements of Appendix FM and the failure to meet the documentary requirements was minor, being a salary requirement on a letter, that was in effect a near-miss argument. It is settled law that such an approach is not permissible in relation to Article 8.

32. The case of Singh v SSHD [2015] EWCA Civ 74 at paragraph 66(2) provides:

> "If the decision-maker's view is straightforwardly that all the article 8 issues raised have been addressed in determining the claim under the Rules, all that is necessary is, as Sales J says, to say so."

I am satisfied that this is such a case.

33. For these reasons I dismiss the appellant's appeal under the Immigration Rules.

Notice of Decision

34. The Judge of the First-tier Tribunal made an error of law and his decision to allow the appeal under Article 8 is set aside. I remake the decision dismissing Ms Xhika's appeal under the Immigration Rules.

Signed Date: 18 January 2016

M. M. Hutchinson
Deputy Judge of the Upper Tribunal