Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/18593/2016**

THE IMMIGRATION ACTS

Heard at Bradford	**Decision & Reasons Promulgated**
On 19 October 2018	**On 31 October 2018**

Before

UPPER TRIBUNAL JUDGE HEMINGWAY

Between

MR HAROON FERAZ
(ANONYMITY NOT DIRECTED)

Appellant

and

ENTRY CLEARANCE OFFICER (REF: SHEFO/266068)

Respondent

Representation:

For the Appellant:	Mr B Caswell	(Counsel)
For the Respondent:	Mr A McVeety	(Senior Home Office Presenting Officer)

DECISION AND REASONS

1. This is the claimant's appeal to the Upper Tribunal from a decision of the First-tier Tribunal (the tribunal) which it made on 13 December 2017, whereupon it dismissed his appeal from a decision of an Entry Clearance Officer of 28 June 2016, refusing to grant entry clearance to enable him to come to come to the United Kingdom (UK) in order to join his UK based sponsor with a view to settlement.

2. This decision is short because there was a comprehensive level of agreement between the parties before me as to whether the tribunal's decision contained an error of law (it was agreed that

it did); whether the tribunal's decision should be set aside (it was agreed that it should) and how the decision ought to be remade.

3. To explain, the claimant's appeal had come before the tribunal, for oral hearing, on 11 October 2017. Both parties were represented at that hearing. The claimant was successful in satisfying the tribunal that, as at the date of application, he met the requirements of the Immigration Rules concerning financial matters as contained in Appendix FM to the Rules and, with respect to specific evidence of such compliance, FM-SE (those being the only matters which had been placed in issue by the entry clearance officer). Such is apparent from what it said at paragraph 8.2 of its written reasons. I did raise with the parties the possibility that it might have been deciding that the substantive requirements were met but the evidential requirements contained in Appendix FM - SE were not. But both representatives took the view that that was not the case and I am content to so conclude.

4. Concluding that compliance with the Rules at the date of application was not sufficient, of itself, for the tribunal to be able to allow the appeal. That is because a claimant can no longer succeed in an appeal by demonstrating that a decision of an entry clearance officer is not in accordance with the Immigration Rules. The appeal was brought under Article 8 of the European Convention on Human Rights (ECHR) on the basis that the decision was unlawful under section 6 of the Human Rights Act 1998 (see section 84(2) of the Nationality, Immigration and Asylum Act 2002). But, it had been decided in *Mostafa (Article 8 in Entry Clearance)* [2015] UKUT 00112 (IAC) that an ability on the part of a claimant to satisfy the Immigration Rules, whilst not the question to be determined by the tribunal on appeal, was capable of being a weighty though not determinative factor when deciding the proportionality part of an Article 8 assessment.

5. The tribunal, though, whilst accepting compliance as at the date of application, took the view that since this was a human rights appeal it was required to undertake a full consideration as to whether or not all of the requirements of the Immigration Rules were met as at the date of the hearing of the appeal. It decided, on the basis of the material before it, that it could not be so satisfied. It dismissed the appeal on that basis.

6. I suggested to the parties that whilst it might have been open to the tribunal to take into account what the position with respect to compliance with the rules was as at the date of hearing, it was nevertheless required to factor into its Article 8 deliberations the compliance that it had decided there had been as at the date of application, and that it had not done that. Mr McVeety agreed with that and accepted that, on that basis, the decision should be set aside. Mr Caswell, initially, sought to argue that the tribunal had not been permitted to take into account the situation as at the date of hearing at all. His initial argument was that, since the tribunal had decided that the rules were met as at the time of application, it had no alternative but to allow the appeal under Article 8 (at least that is how I understood his argument). But it became apparent that he was basing that argument upon the wording contained within a previous version of section 85 of the Nationality, Immigration and Asylum Act 2002. The relevant part now in force reads as follows:

> " **85. Matters to be considered**
>
> (1) An appeal under section 82(1) against a decision shall be treated by the Tribunal as including an appeal against any decision in respect of which the appellant has a right of appeal under section 82(1).
>
> (2) …
>
> (3) …

> (4) On an appeal under section 82(1) against a decision the tribunal may consider any matter which it thinks relevant to the substance of the decision, including a matter arising after the date of the decision."

7. I do not agree with Mr Caswell's initial submission because, in my view, the current wording of section 85(4) as set out above permits a tribunal to have regard to post-decision matters of relevance and, in an Article 8 context, I consider that any change of a material nature concerning compliance with the rules might well have such relevance. Further and in any event, following *Mostafa*, cited above, it is not the case in any event that mere compliance with the Rules of itself is determinative in the context of an Article 8 appeal.

8. Having regard to all of the above I decided to set aside the tribunal's decision because, notwithstanding that the tribunal had the ability to take post-decision matters into account so long as they had relevance to the substance of the decision, this tribunal erred by effectively disregarding the previous compliance with the rules at the time the Secretary of State required compliance for the purposes of those Rules. Notwithstanding any change that there might have been that was a factor of relevance.

9. There was then a discussion as to whether or not the decision could be remade before me. In the end both representatives urged me to do that. As part of that process Mr Caswell provided me with additional documentation concerning the sponsor's financial situation. Having considered it Mr McVeety said he accepted that, as at the date of the hearing before me, the financial requirements were met. It had been demonstrated that the sponsor was receiving carer's allowance (with the consequence that it was only necessary for her to beat the income-support entitlement level for an equivalent family) and that her income was, indeed, such as to beat it. It was the case, therefore, that the claimant had demonstrated compliance with the Immigration Rules as at the date of application and then similar compliance as at the date of the hearing before me which was, by that stage, concerned with the remaking of the decision.

10. In those circumstances Mr McVeety accepted that the appeal ought to succeed under Article 8 grounds. I agree and I have remade the decision to that effect.

Decision

The decision of the tribunal involved the making of an error of law and is set aside.

The Upper Tribunal goes on to remake the decision in these terms: the claimant's appeal from the decision of the entry clearance officer of 28 June 2016 is allowed on human rights grounds.

Signed: Dated: 29 October 2018

Upper Tribunal Judge M R Hemingway

Anonymity

I make no anonymity directions. None was sought.

Signed: Dated: 29 October 2018

Upper Tribunal Judge Hemingway

TO THE RESPONDENT
FEE AWARD

I make no fee award.

Signed: Dated: 29 October 2018

Upper Tribunal Judge Hemingway