Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: OA/06425/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 20 May 2014	**On 17 July 2014**

Before

UPPER TRIBUNAL JUDGE PITT

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SUNITA GURUNG

Respondent

Representation:

For the Appellant: Mr Nath, Senior Home Office Presenting Officer
For the Respondents: Mr Sowerby, instructed by Ash Norton Solicitors

DETERMINATION AND REASONS

The Appeal

1. This is an appeal by the Secretary of State against a determination promulgated on 12 March 2014 of First-tier Tribunal Judge S Lal which allowed the Article 8 appeal of the respondent.

2. For the purposes of this determination, I refer to the respondent as the claimant and to the Secretary of State as the respondent, reflecting their positions as they were before the First-tier Tribunal.

3. The background to this matter is that the claimant is a national of Nepal who applied for entry clearance to join her British husband.

4. The application was refused as it was not found that the maintenance requirements contained in Appendix FM of the Immigration Rules were met. The claimant accepted that she could only show an income of £15,836 for the sponsor rather than the required amount of £18,600. In so far as it found the decision under the Immigration Rules on maintenance to have been made correctly, the decision of Judge Lal stands.

5. Judge Lal allowed the appeal under Article 8 of the ECHR. He set out the correct test of "compelling circumstances" in the first of the two paragraphs numbered [9]. In both of the paragraphs numbered [8], he refers to the case of MM and Others v SSHD [2013] EWHC 1900 (Admin) and appears to consider it relevant to the Article 8 assessment here. At the second paragraph numbered [9] he sets out the five Article 8 questions from Razgar [2004] UKHL 27 (whilst referring to that case as "Ranger").

6. At [10] the decision refers to the 12 year old British son of the claimant and sponsor living with the sponsor in the UK. The sponsor's evidence was that caring for the son limited his ability to work and so meet the maintenance requirements and Judge Lal suggests that this "may well be the type of situation envisaged by Blake J in the MM case."

7. At [11], Judge Lal refers to the couple's second child, also British, who lives with the claimant and goes on to state that the decision was disproportionate given "this particular family unit in terms of its present constitution."

8. It was my view that the Article 8 proportionality assessment discloses a number of errors. Judge Lal did not properly apply the ratio of MM as he did not identify which, if any, of the relevant factors set out by Blake, J at [124] of MM applied here such that the maintenance requirement could be said to be disproportionate. The difficulty of the sponsor in earning enough to meet the maintenance requirements as he cares for his son is not one of those factors.

9. There is also the absence of any consideration of the inability to meet the Immigration Rules and take this as a central, starting point; see Haleemudeen v SSHD [2014] EWCA Civ 558.

10. Further, Judge Lal refers to the second British child living with her mother but nothing in the material before me that suggested that the case was put forward on the basis that the claimant should be granted entry clearance in order for the younger British child for whom she is primary carer to be able to exercise her rights as a EEA citizen in line with the principles in C-34/09 Ruiz Zambrano and C-256/11 Murat Dereci. It is difficult in any event to read the very general statement at [11] that "this

particular family unit in terms of its present constitution" as a decision that the appeal should succeed under Article 8 in the light of Zambrano and Dereci.

11. It was my conclusion that the matters set out above amounted to an error on a point of law such that the Article 8 proportionality decision of Judge Lal had to be set aside and re-made. I proceeded to do so.

12. The maintenance requirements here were not met. That is my starting point in the Article 8 assessment and without exceptional or compelling circumstances it is sufficient for the decision to be found proportionate. It was not shown to me how the factors at [124] of MM could assist this applicant to the extent that in her case the maintenance requirements could be considered to be disproportionate. The evidence about the family circumstances here is somewhat limited and did not show me that it was the refusal of entry clearance to the claimant that was preventing the younger British child from exercising her rights as an EEA citizen. The documents relied on by the claimant really say nothing about this. It did not appear to me that the sponsor being a single parent was a matter which could attract much weight, either, certainly not so as to be considered to be a compelling or exceptional factor. Without more, I did not find there to be compelling circumstances here indicating that the decision was disproportionate.

13. I therefore re-make the Article 8 appeal as refused.

Decision

16. The decision of the First-tier Tribunal discloses an error on a point of law and is set aside.

17. I re-make the appeal, refusing it under Article 8 of the ECHR.

Signed: Date: 27 June 2014
Upper Tribunal Judge Pitt