Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/17137/2013

THE IMMIGRATION ACTS

Heard at Birmingham	**Decision & Reasons Promulgated**
On 30 March 2016	**On 12 April 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE MAHMOOD

Between

ENTRY CLEARANCE OFFICER-ISLAMABAD

Appellant

and

MRS GHAZALA TAUSEEF
(ANONYMITY ORDER NOT MADE)

Respondent

Representation:
For the Appellant: Mr Richards, Senior Home Office Presenting Officer
For the Respondent: Mr Ashraf Ali, representative at Ash Immigration Services

DECISION AND REASONS

1. This matter comes before me pursuant to permission having been granted by Upper Tribunal Judge Pitt dated 5 December 2014. The appeal relates to a decision by First-tier Tribunal Judge Grimmett sitting at Sheldon Court, Birmingham whereby a Decision and Reasons was promulgated on 14 July 2014. The Judge at the First-tier Tribunal had allowed the appeal against the Entry Clearance Officer's decision to refuse entry clearance to join a British spouse.

2. The Entry Clearance Officer appealed against the First-tier Tribunal Judge's decision. For ease of reference I shall continue to refer to the parties as they were before the First-tier Tribunal despite this being an appeal by the Entry Clearance Officer. Two particular matters are relied upon in the grounds of appeal namely that there was a material misdirection in law because:

   (1) The Judge failed to have regard to the requirements of Appendix FM-SE. Further the Judge failed to follow the need to consider matters as at the date of application. The calculations in respect of maintenance showed that the requirements were not met;
   (2) The findings in respect of Article 8 were infected by the incorrect findings relating to the Rules.

3. At the hearing before me Mr Richards said that essentially the appeal dealt with a narrow point. The Judge had heard evidence. The issue of funds was put in issue. She made a finding that at the date of entry clearance the requirements were met. That ignored the fact that for Appendix FM the evidential requirements had to be met at the time of the application. The Judge had not turned her mind to that and it is right to say that in terms of materiality she did go on to allow the appeal under Article 8 but it is clear from reading her determination the maintenance finding was a factor which weighed in favour of the Appellant in terms of the proportionality assessment and its analysis. Mr Richards submitted that there were material errors of law and that therefore the decision ought to be set aside.

4. Mr Ali said in his submissions that there was no error of law. He said we agree with Judge Dineen who had initially refused permission to appeal. The Judge was entitled to come to her decision. In **Ali and Bibi** at the Supreme Court there was a similar approach and I would be familiar with that. There needs to be a certain amount of flexibility with Article 8 and come to some conclusions.

5. In response to my question as to whether the £18,600 requirement in respect of maintenance was met at the time of application for entry clearance, at the time of decision or at the time of hearing, Mr Ali said that the £17,147.75 figure needed to be carefully considered. That was because, even by the time of the review by the Entry Clearance Manager, you can take into account 6 months of income. There were other documents before the Judge. Mr Ali said we accept that the Judge could have written it better. He said that in respect of paragraph 10 what the Judge was trying to say was that overtime could be considered. That referred to two months of income and not 6 months.

6. In so far as Article 8 was concerned, the Judge went onto consider Article 8 and there were compelling reasons. The Judge had said that even if she was wrong about maintenance there were compelling reasons for the appeal to be allowed under Article 8. He said the compelling reasons were (1) the Sponsor had lived in the UK for some 25 years, (2) His family were here, (3) His employment and (4) His family circumstances.

7. Mr Ali said that the Rules were not intended to catch people out. A lot of people were caught out in respect of income. For example countries like Yemen. For that reason the Supreme Court has asked for further submissions in the English language case. It will be 8 or 9 month before the Supreme Court gives its decision in **MM**.

8. In reply Mr Richards said that to underline his submissions in respect of maintenance the Judge had fundamentally misread the employer's letter. It said that overtime was readily available. It did not say that the Sponsor has availed himself of it. In relation to Article 8 it was quite clear from paragraph 14 that it was not necessary and not proportionate. She had said that the Appellant had met the Rules, but that was wrong and therefore it infects the Article 8 assessment too. In response to my question Mr Richards said that paragraph 15 in terms of proportionality only really referred to the cost of a reapplication and that was not the point of proportionality. In reality the submissions being made were akin to near miss and I would know that the Court has frowned up such a course again and again.

9. I permitted Mr Ali to have the last word, despite it not being his appeal and he said that the Judge had applied **Gulshan** as she had said that there were compelling reasons.

10. I had reserved my decision.

11. I allow the Entry Clearance Officer's appeal. I do so because of four reasons.

12. Firstly, Appendix FM-SE to the Immigration Rules requires that there be a minimum income requirement of £18,600 gross income per annum. At the time of the application the Sponsor's income was £17,147.75 gross per annum. That was not sufficient to meet the Rules. This figure of £17,147.75 came from the Sponsor, from his P60. The shortfall was £1452.75.

13. Secondly the Judge had erred in concluding that the availability of overtime meant that the income was £18,600 or more. As Mr Richards highlights the employer's letter states, "He is in a full time position and on an annual salary with the option of increasing his working hour per month in the form of overtime which is readily available".

14. Thirdly, I am unable to accept Mr Ali's submissions that the Judge did not word things well but that "she meant to say" that the income for the latest 6 months meant that the £18,600 requirement was met. In fact she did not say that. Not even in oblique terms. She made it clear at paragraph 10 of her decision that she had considered the payslips for March 2013 and April 2013 and that showed a gross income of £3,285.45. When that was calculated it showed an annual income of some £19,472, but I cannot accept that the Judge's calculation for two months somehow can be transposed to income for 6 months. Indeed as Mr Ali agreed this point now being raised by him was not raised in a Rule 24 Reply or otherwise. Even it had been, it

seems clear to me to be wrong in any event because it cannot be that two months of income can become 6 months income. There is no reason to suppose that the payslips for, say December 2012 (£1381.25) and January 2013 (£1381.25) can be upgraded to what was earned in March 2013 and April 2013. In April 2013 the income was £1648.25. In March 2013 it was £1636.91 and in February 2013 it was £1487.50. For the previous three months it was £1381.25 per month and therefore identical amounts. Even on Mr Ali's submissions, this does not get near £18,600 if extrapolated through to 12 months. It comes to £17,833.40 for 12 months. Still well short of £18,600. The calculations for 6 months are not any more help to the Appellant either. The simple fact is that there were not enough earnings in that year, whether considering the whole year or just the last 6 months.

15. Fourthly, the Judge materially erred when she said at paragraph 14 that at the time of the decision "the Appellant and her husband met all the requirements of the Immigration Rules". This is a material error of law because at the time of the application (or even at the time of the decision or the date of the review by the Entry Clearance Manger-both dates contended for by Mr Ali) the maintenance requirements were not met. It is clear that Article 8 does not provide the Tribunal with a general dispensing power. Mr Ali's reference to the Sponsor having lived in the UK for 25 years and that he has a job, his home and family here are not compelling reasons in a legal sense although of course I accept they are on a human level. Those are factors which will apply to most settlement cases. Paragraph 15 of the Judge's decision cannot save the material error made in paragraph 14.

15. I make it clear, as I indicted during the hearing, I am quite sympathetic to this couple's situation. The real focus of the initial refusal of entry clearance was whether or not there was a genuine and subsisting marriage. The Judge was very impressed with the Sponsor as a witness. She found in clear terms that the marriage was genuine and subsisting. I can see though how the Judge was side tracked by the oblique reference to maintenance in the Respondent's decision. Having succeeded on the genuine marriage aspect, I can well understand that then having to deal with maintenance was somewhat of a surprise for the Appellant. However, as the Entry Clearance Officer's decision makes clear, "regardless of the minimum income requirement" the application had been refused on that fundamental basis. That did not mean that no other part of Appendix FM-SE needed to be satisfied. The decision made clear that maintenance was always an issue that the Appellant had to satisfy. There was never any concession in respect of it by the Respondent. The fact that the Judge was impressed with the Sponsor as a witness did not overcome the requirement to meet all aspects of the applicable Immigration Rule.

16. Nor do I consider that there is any aspect of the Supreme Court's decision in **Ali and Bibi v Secretary of State for the Home Department** which can assist the Appellant in relation to the Immigration Rules or in respect of Article 8. I am also aware that the Supreme Court has heard appeals in respect of the minimum income requirement but I have to apply the law as it stands. It is entirely a matter for the Appellant, but armed with the Judge's very favourable findings and if his income situation really is

as Mr Ali suggests, then the perhaps speedier course suggested in the Entry Clearance Officer's grounds of appeal that there be a new application for entry clearance will perhaps be discussed after my decision. Of course I am not making any suggestions of what applications, if any, the Appellant should make.

Notice of Decision

The First-tier Tribunal's decision contains a material error of law and is therefore set aside.

I remake the decision and dismiss the Mrs Tauseef's appeal against the Entry Clearance Officer's decision to refuse entry clearance.

No anonymity order is made.

Signed Date 30 March 2016

Deputy Upper Tribunal Judge Mahmood