



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: OA/00911/2013

**THE IMMIGRATION ACTS**

Heard at Field House  
On 11 March 2014  
Extempore judgment

Determination Promulgated  
On 25 March 2014

Before

UPPER TRIBUNAL JUDGE COKER  
UPPER TRIBUNAL JUDGE DAWSON

Between

ENTRY CLEARANCE OFFICER

Appellant

and

SORAYYA BAHMANYAR

Respondent

**Representation:**

For the Appellant: Mr S Walker, Senior Home Office Presenting Officer  
For the Respondent: Ms Revill, Immigration Law Specialist Association

**DETERMINATION AND REASONS**

1. This is the appeal by the Entry Clearance Officer against the decision of the First-tier Tribunal who allowed the appeal on Article 8 grounds of Sorayya Bahmanyar against a decision of the entry clearance officer refusing her entry clearance as the spouse of Ibriham Peik. The First-tier Tribunal heard the appeal on 4 November 2013 and in a

determination promulgated on 11 November 2013, Judge Doran found that the appellant before her did not meet the requirements of the Immigration Rules as set out in Appendix FM when read with Appendix FM-SE but allowed the appeal under Article 8 for the reasons that he set out in his determination.

2. Those reasons were in essence that the couple would meet the requisite financial requirements of the Rule because there was a gross annual salary of £21,840. That was a specific finding evidenced by documentary evidence before Judge Doran.
3. The Secretary of State was given permission to appeal the decision on the grounds, rather curiously, that MM [2013] EWHC 1900 (Admin) had been improperly used to supplant the Rules so as to find the for appellant under Article 8 but also commented that it was arguable that if the appellant could so easily demonstrate the requisite income required then no disproportionality arose in requiring her to apply again with the prescribed evidence.
4. Although MM is mentioned in the judgment of First-tier Tribunal Judge Doran, that in fact does not appear to be the basis on which the decision was reached. It was on the basis that the financial criteria were met in terms of amount. The difficulty was that the criteria were not met in terms of the evidential basis for those criteria on the basis of the Rules the judge considered to be in force at the date of decision.
5. Mr Walker for the Secretary of State has very helpfully provided us with copies of the relevant requirements of the Rules in force at that time and, as is well known, these Rules have changed with regularity. It is quite complex to know which Rules apply at which date of application and which at the date of decision. It is clear from the copy Rules provided by Mr Walker that under the Rules in force at the date of the decision the subject of appeal before the First-tier Tribunal, there was a discretion for the Entry Clearance Officer to consider evidence before him and to take all of that evidence into account in deciding whether or not to allow the appeal. Although the Rules state that the Entry Clearance Officer should normally refuse an application which does not provide the evidence specified in the Appendix, there is a discretion that where evidence is produced and it is reasonable then the Entry Clearance Officer can exercise discretion and allow the appeal.
6. Mr Walker has very properly confirmed that had the Entry Clearance Officer applied the Rules in force at the date of decision, given the documentary evidence that was available to him, this appeal would have succeeded under the Immigration Rules. The complication with this appeal is that the appeal was dismissed by the First-tier Tribunal under the Rules and allowed under Article 8. There was no "cross appeal" by Ms Bahmanyar. Mr Walker has very carefully and properly sought, with our agreement, to amend his grounds seeking permission to appeal to identify that had the Immigration Rules been properly applied by the judge (and the Entry Clearance Officer) then the appeal would have been allowed. He is not able to withdraw his appeal, but consented to an amendment and refinement of his grounds seeking permission to appeal such that the correct decision was that the appeal by Ms

Bahmanyar against the refusal to grant her entry clearance to come to the UK should have been allowed under the Rules. Therefore, although it was allowed under Article 8, the final outcome of the appeal was correct, namely that entry clearance should be granted by the Entry Clearance Officer to enable Ms Bahmanyar to join her husband in the UK because she and he meet the requirements of the Immigration Rules.

7. We will allow the appeal of the Secretary of State on the basis that there was an error of law in allowing the appeal on Article 8 grounds but with reference to the amended grounds the decision of the First-tier Tribunal is set aside and the appeal by Ms Bahmanyar, is allowed under the Immigration Rules.

Signed

Date 20<sup>th</sup> March 2014

Upper Tribunal Judge Coker