Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/01491/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 10 July 2014	**On 24 July 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

MRS NIDA SHAKIL

Appellant

and

ENTRY CLEARANCE OFFICER - ISLAMABAD

Respondent

Representation:

For the Appellant: Ms Watterson, Counsel, instructed by Mondair Solicitors
For the Respondent: Mr E Tufan, Specialist Appeals Team

DETERMINATION AND REASONS

1. The appellant appeals to the Upper Tribunal from the decision of the First-tier Tribunal dismissing her appeal against a decision by an Entry Clearance Officer to

refuse her entry clearance as the spouse of a British national. The First-tier Tribunal did not make an anonymity order, and I do not consider that such an order is required for these proceedings in the Upper Tribunal.

2. The appellant is a national of Pakistan, whose date of birth is 18 November 1989. She submitted an application form in October 2012. She wished to travel to the UK on 15 October 2012. She had previously been refused a visa for the UK on 18 October 2011, as the ECO was "not satisfied." She was related to her sponsor outside marriage, as he was her cousin. She had first met him on 29 November 2009 in Jhelum, and their relationship had begun on 10 December 2009. She had last seen him in Pakistan in June 2011. They had lived in a marital relationship within Pakistan from 10 December 2009 to 20 March 2010, and from 30 March 2011 to 5 June 2011. Her sponsor had a child, S, by a previous relationship. The child S lived with her mother, and her husband was not responsible for her financial support.

3. Her sponsor was a self-employed businessman trading as "Ajaz Valetting." He had been engaged in this business activity since 15 July 2011.

4. On 15 November 2012 an Entry Clearance Officer in Islamabad gave his reasons for refusing the appellant's application. Firstly, he was not satisfied that the appellant was eligible for entry clearance as a partner. She had not provided the only acceptable evidence of a United Kingdom divorce, which was a decree absolute. So he was not satisfied that her sponsor's previous relationship had broken down, and they were able and genuinely intended to marry in the UK.

5. Secondly, her sponsor was not exempt from the financial requirements as defined by paragraph E-ECP.3.3. In order to meet the financial requirements of the Rules, her sponsor's income from self-employment and other income in the last full financial year, or as an average of the last two financial years, needed to be at least £18,600 per annum.

6. She said that her sponsor's gross income before tax in the last full financial year as Ajaz Valetting was £16,098. She also said that her sponsor received a rental income in the past twelve months of £6,000 before tax. But she has not submitted all the required documentation listed in Appendix FM-SE to demonstrate either her sponsor's rental income or his income from self-employment in the past twelve months. So her application was refused under paragraph EC-P.1.1(d) of Appendix FM of the Rules.

7. In her grounds of appeal to the First-tier Tribunal, the appellant said that the sponsor's previous marriage had been under Islamic law, "not in a British marriage law". Her sponsor had been given a divorce under Islamic law, which could be seen by the submitted documents.

8. With regard to the financial requirements, she was now enclosing:

> All the new relevant documentary evidences i.e. self-tax assessments, tax returns and evidence of the amount of payable/paid, letter from HM Revenue and Customs for

confirmation of unique tax payer reference (UTR), letter from accountant, latest audited accounts for the period ended July 2012, mortgage statements, letter from Smart Move Property Solutions who has acting as letting agents for my sponsor, tenancy agreements, bank statements as proof of rental income receiving by my sponsor.

9. In light of these documents, the ECO's objection was totally baseless and the requirements of Appendix FM were satisfied. The appellant also asked for her appeal to be considered under Article 8 ECHR.

The Hearing before, and the Decision of, the First-tier Tribunal

10. The appellant's appeal came before Judge Jessica Pacey sitting at Sheldon Court, Birmingham, on 23 January 2014. Mr Ali of Counsel appeared on behalf of the appellant, and Ms Owens, Home Office Presenting Officer, appeared on behalf of the Entry Clearance Officer. The judge received oral evidence from the sponsor, Mr Ajaz Shakil. In his witness statement dated 15 January 2014, he said he had been born in Peterborough on 15 April 1969. He was previously married to a British national who had been born in Pakistan. They had married on 19 October 1997 in Peterborough in accordance with Islamic marriage law. They were never married in accordance with English law, because Islamic marriages conducted in the UK were not recognised in the UK as valid. They had separated in March 2009, and he had divorced his Islamic wife on 29 December 2010. Although this was after he had married the appellant, it did not affect the validity of his marriage to her, as it was an Islamic marriage, and Islam allowed polygamy.

11. He had one child from his previous marriage, his daughter S who had been born on 3 March 2003. He did not see S as her mother had remarried in 2012. But he hoped that one day their contact would resume. After his relationship with his first wife broke down, he decided to remarry and his family had arranged the marriage with the appellant. This marriage was solemnised on 10 December 2009 in Jhelum.

12. He was self-employed as a car valetor. He ran a mobile car wash. His turnover was over £30,000 a year. In the tax year ended 2012, his profit was £18,524. His total income for taxation purposes in that tax year was £20,431. In the tax year for 2012 to 2013, his profit from his car valeting business was £18,536 and he had rental income of £1,945. This gave rise to a total income of £20,481.

13. It was true that unfortunately they had not provided some of the so called specified evidence. They had relied on advice that the appellant's maternal uncle had received from a local solicitor in Pakistan. He was certain the Entry Clearance Officer would have access to his details from HMRC and that should anything else be required the Entry Clearance Officer would contact them to request it. He was now attaching his self-assessment tax returns for the tax year that was relied on in the appellant's application, together with various documents from HMRC and his accountants. He was also attaching bank statements, evidence of title in relation to his residential and rental properties, mortgage statements and evidence of rental income. If the Entry Clearance Officer had requested these instead of refusing his wife's application, they

would have provided this evidence and there would have been no need for the waste of the court's time or their time. Over fourteen months had elapsed since his wife's application was refused, and it was over sixteen months since they applied. Such a long delay had caused a lot of worries and stress to both of them.

14. He felt that the refusal of Nida's application was against their right to respect for family life. His father had passed away in 1991. His mother was elderly and as the only child he had to take care of her. His mother's health had deteriorated in the last couple of years and she was suffering a lot from not being able to live in a full family. He could not leave his mother in the UK alone, as she required daily support and care. So when he had visited Pakistan in the last couple of years his mother had always travelled with him. One of the reasons he had not visited his wife since 2012 was that his mother was not fit any longer to travel such a long distance.

15. He was not prepared to move to Pakistan to live with Nida in Pakistan because of his family here, his friends here, his business and properties here, the socio-economic and safety situation in Pakistan, and the lack of adequate medical assistance in Pakistan.

16. Although Nida and he were managing to maintain their family life via calls and visits, this was not suitable as a long-term solution. It was always meant to be only a temporary arrangement until Nida joined her in the UK.

17. In her subsequent determination, Judge Pacey accepted that the sponsor had obtained an Islamic divorce on 29 December 2010, following an Islamic marriage, and therefore under British law he had not been married before he had married the appellant. They were therefore free to marry.

18. She turned to the issue of the sponsor's earnings. She accepted that as the sponsor was paid in cash, he would not necessarily pay all that income into his bank account. However, the Rules were precise and mandatory and required that income be shown as paid into a bank account, and they required that audited accounts be provided. She had a letter from HMRC to the sponsor, providing the UTR. However the letter was dated 6 12.12 and was, it appears, written in response to a telephone call made on the sponsor's behalf on 23.11.12. Both dates were after the date of application and the date of decision. She had the sponsor's accounts for the period ending 31.7.12. These were however clearly stated to be unaudited.

19. The judge reminded herself of the guidance given in **Gulshan (Article 8 – New Rules – Correct Approach) [2013] UKUT 640 (IAC)** at paragraph 24.

20. The judge held that no evidence had been presented to her that there were good grounds for granting leave to remain outside the Rules. This was the second application made by the appellant, and it was therefore reasonable to suppose that she would have taken the greatest care to ensure that the current application was correct in all details. She argued that an agent had wrongly advised her. There was no evidence of this having been the case. In any event, the instructions provided with the form were to her mind clear and there could have been no room for confusion.

21. She accepted the sponsor had the rental income claimed, as he had provided the requisite evidence. On the balance of probabilities, and on the totality of the evidence, she found the appellant had not discharged the burden of proof in relation to her sponsor's financial circumstances. She therefore dismissed the appeal under the Rules.

The Application for Permission to Appeal to the Upper Tribunal

22. The appellant's solicitors applied on her behalf for permission to appeal to the Upper Tribunal. Ground 1 was that the judge had erred in law in holding that there was a requirement for the appellant to provide audited accounts in respect of the sponsor's business.

23. Ground 2 was that the judge had erred in law in excluding the evidence relating to the UTR. The evidence provided appertained to facts before the date of the decision, and therefore did not amount to postdated evidence.

The Grant of Permission to Appeal

24. On 23 April 2014 First-tier Tribunal Judge Heynes granted permission to appeal on the ground that it was an arguable error of law in that there was no finding by Judge Pacey as to the sponsor's income.

The Rule 24 Response

25. On 10 June 2014 a member of the Specialist Appeals Team settled a Rule 24 response on behalf of the respondent. The respondent's case was that the Judge of the First-tier Tribunal directed herself appropriately. The grounds of appeal had no merit and did no more than disagree with the cogent findings of the judge. Appendix FM-SE clearly stipulated what documents were required. It was stated by the judge at paragraph 15 of her determination that various documents had not been submitted. The judge had reached a conclusion open to her based on the evidence, the Rules and relevant case law, and her determination did not disclose any error.

The Hearing in the Upper Tribunal

26. At the hearing before me, Ms Watterson conceded that the appeal was rightly dismissed under the Rules. She submitted that the judge had erred in law in her approach to an alternative claim under Article 8, and that on the particular facts of this case, the decision under Article 8 should be re-made in the appellant's favour.

Discussion

27. At the time when the appellant made her application, and also at the date of decision, paragraph 7 of Appendix FM-SE provided as follows:

> In respect of self-employment in the UK as a partner, as a sole trader or in a franchise all of the following must be provided:

(d) Each partner's unique tax reference number (UTR) and or the UTR of the partnership or business.

(f) Monthly personal bank statements for the same twelve month period as the tax returns showing that the income from self-employment has been paid into an account in the name of the person or in the name of the person and their partner jointly.

(h) One of the following documents must also be submitted:

(i) the organisation's latest annual audited accounts with:

(1) the name of the accountant clearly showing; and

(2) the accountant must be a member of an accredited accounting body ...

28. Shortly after the refusal decision, a number of changes to Appendix FM-SE, including changes to paragraph 7, were introduced by HC 760. One of the changes which came into force on 13 December 2012 was the deletion of paragraph 7(h)(i). In its place was substituted the following:

(i)(aa) That the applicant's business is a registered company that is required to produce annual audited accounts, the latest such accounts; or

(bb) if the applicant's business is not required to produce annual audited accounts, the latest unaudited accounts and an accountant's certificate of confirmation, from an accountant who is a member of a UK recognised supervisory body (as defined in the Companies Act 2006);

29. The judge was bound to apply the Rule as it stood at the date of decision, and therefore she did not err in law in finding that the appellant had failed to comply with the requirement to provide audited accounts.

30. It is to be noted that paragraph 7(h), both in its original and its amended form, gives the applicant a series of alternative options. Accordingly, instead of providing a document which satisfies the requirements of sub-paragraph (i), in theory an applicant can provide a document which satisfies the requirements of sub-paragraph (ii). But in the appellant's case, the only conceivable way in which he could comply with paragraph 7(h), given the nature and extent of his business activities, was the provision of audited accounts.

31. I note from the judge's manuscript Record of Proceedings that Counsel for the appellant raised the question of evidential flexibility in his closing submissions. As submitted by Ms Watterson before me, the change to paragraph 7(h)(i) introduced in December 2012 can be read as a recognition that the earlier Rule was too onerous, and possibly unworkable. This in turn lends support to an argument that in retrospect the Entry Clearance Officer should have exercised discretion not to apply the requirement for the specified document, in accordance with the evidential flexibility provision contained in paragraph 1(k) of Appendix FM-SE. The version of

this sub-paragraph which appears in Phelan, 8th Edition (which provides a snapshot of the Rules as they stood on 5 September 2012) states inter alia as follows:

> Where the specified documents cannot be supplied (e.g. because they are not available in a particular country or have been permanently lost), the case worker has discretion not to apply the requirements of the specified documents or to request alternative or additional information or documents to be submitted by the applicant.

32. Ironically this version of sub-paragraph (k) was deleted on 13 December 2012, and thus a relaxation in the Rules was counterbalanced by the tightening up of the evidential flexibility policy, at least as codified in paragraph 1 of Appendix FM-SE. However, an equivalent evidential flexibility provision remained in the IDIs for "Family members under Appendix FM of the Immigration Rules – Annex FM Section FM 1.7, financial requirement" at paragraph 5.2. This provides as follows:

> Caseworkers should normally refuse an application which does not provide the specified documents. However, where documents have been submitted, but not as specified, and the caseworker considers that, if the specified documents were submitted, it would result in a grant of leave, they should contact the applicant or their representative in writing or otherwise to request the documents he submitted within a reasonable timeframe.

33. While the issue of evidential flexibility was raised before the First-tier Tribunal, it was not argued before the First-tier Tribunal that the appellant did, or could, surmount the preliminary hurdle of establishing that the Entry Clearance Officer should have exercised evidential flexibility in circumstances where a significant number of specified documents had not been provided with the application.

34. The thrust of Mr Ali's submissions before the First-tier Tribunal was that the sponsor had *now* provided all the specified documents which he was able to provide, and that he had a good excuse for not providing the remainder, namely (a) bank statements which showed him being credited with his net income from self-employment; and (b) audited as opposed to unaudited accounts. But it was not the judge's role to exercise evidential flexibility. She had to apply the Rules. So there was no error in her finding that the appellant did not qualify under the Rules, and she also did not err in finding that the decision of the Entry Clearance Officer was otherwise in accordance with the law.

35. Ms Watterson submits that the judge erred in law in her Article 8 assessment because she did not have regard to the decision of Mr Justice Blake in **MM**. Ms Watterson submits the interference is plainly disproportionate in circumstances where the sponsor does in fact meet the financial requirements, as evidenced by the HMRC documentation; and there are serious difficulties in the sponsor relocating to Pakistan for the reasons given by him in his witness statement. But the guidance given in **Gulshan**, to which the judge makes express reference in her determination, takes into account the decision in **MM**. So the judge cannot be said to have overlooked the implications of **MM**, which in any event has now been overturned by the Court of Appeal.

36. Moreover, Mr Justice Blake did not find that the evidential requirements in Appendix FM-SE were themselves unlawful, or even disproportionate. The ratio of **MM**, as interpreted by **Gulshan**, is simply that for British national spouses, or spouses who are refugees, an insistence on a minimum income threshold of £18,600 per year might in some cases be disproportionate. But, unlike the claimants in **MM**, the problem here is not an inability on the part of the appellant to meet the income threshold of £18,600 a year, but simply an historic failure to comply with the evidential requirements to show that her sponsor has an income of at least £18,600 per year. Accordingly, as submitted by Mr Tufan, the solution is for the appellant to make a fresh application, which complies with Appendix FM-SE. Since the option of making a fresh application is readily available to the appellant, the earlier refusal does not have consequences which are unjustifiably harsh.

37. Ms Watterson accepts that this is a reasonable option for the appellant, save that there is a lingering uncertainty about her ability to comply fully with Appendix FM-SE. She no longer has to provide audited accounts, but she remains unable to provide bank statements for the sponsor that show him receiving his stated income from his self-employment, and she is never going to be able to do so in the future.

38. The solution is for the appellant to invoke evidential flexibility principles as part of her fresh application. It can be expressly acknowledged that the sponsor's bank statements do not show the receipt of income (for the good reason and excuse recognised by Judge Pacey in her determination), and the Entry Clearance Officer can be invited instead to take into account documentary evidence from other sources, including HMRC, of the sponsor's annual income.

Decision

39. For the above reasons, I find that the decision of the First-tier Tribunal did not contain an error of law such that the decision should be set aside and re-made. Accordingly, this appeal to the Upper Tribunal is dismissed.

Signed Date

Deputy Upper Tribunal Judge Monson