Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/03758/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 13 February 2014	**On 20th May 2014**

Before

UPPER TRIBUNAL JUDGE CONWAY

Between

SYED HASEEB SIBTAIN
(NO ANONYMITY DIRECTION MADE)

Appellant

and

ENTRY CLEARANCE OFFICER – ISLAMABAD

Respondent

Representation:

For the Appellant: Mr Ahluwalia
For the Respondent: Mr Melvin

DETERMINATION AND REASONS

1. The Appellant is a citizen of Pakistan born in 1984. He appealed against a decision of the Respondent made on 14 November 2012 to dismiss his application for entry

clearance as the partner of his spouse pursuant to Appendix FM of the Immigration Rules.

2. The Respondent refused the application under paragraph E- ECP.1.1 of the rules – E-ECP3.1. The Appellant's Sponsor was employed on a salary of £16,645 a year. He did not meet the financial requirements. Thus in order to meet the shortfall the amount of £20,877.50 in savings would be required.

3. The Appellant sought to rely on savings held with Sun Life, MCB Bank Pakistan and Halifax. The Respondent contended that the MCB account showed funds of about £2.75 which were held within the past six months. The Halifax showed funds of £848.41 as at April 2012. No evidence of savings with Sun Life had been produced. The Appellant however relied on a document indicating that his Sponsor could cash in a life assurance policy of £16,289. That did not meet the requirements to be considered as 'cash savings'.

4. He appealed. Following a hearing at Hatton Cross on 8 November 2013 Judge of the First-tier Tribunal Mailer dismissed the appeal under the Immigration Rules and on human rights grounds (Article 8).

5. In his findings he noted that it was accepted that the Appellant could not meet the relevant financial requirement on the basis of the Sponsor's salary which was £16,645. It was accepted that she had to show savings of £20,877. He noted that the Appellant relied on a Sun Life policy constituting a fifteen year savings plan with profits. He found that at date of application paragraph 11A(a) of Appendix FM-SE applied and that cash savings needed to be shown. The Appellant *'did not have savings in a bank account at the relevant date'*.

6. Moving to consider Article 8 ECHR, having found that there was family life he advanced to proportionality. His conclusions are at [48 – 53]. He found that the Sponsor is suffering from depression following the death of her father. She spent several months in Pakistan following his death but then returned to the UK where she has remained. She does not wish to enjoy family life in Pakistan with her husband. The judge noted that she has been employed here.

7. The judge also noted the claim that the Sponsor's earnings have increased. He concluded that if such was so in any future application the Appellant would be likely to meet the relevant financial requirements on the basis of the Sponsor's salary.

8. He found that at date of decision her salary of £16,645 p.a. was *'substantially short of the minimum amount required'*.

9. Further, that the Sponsor had *'elected to retain her investment with Sun Life. She did not even contemplate transferring the paid up proceeds into a cash savings account in her bank account'*.

10. The judge also stated: *'It is not asserted that it would not be possible to achieve the minimum amount. Accordingly, the interference contemplated would be for a short period'*.

No other reasons had been advanced by the Respondent as to why clearance could not be given once the financial requirements had been satisfied.

11. The judge ended by stating that he had regard to the legitimate interest sought to be achieved by the Respondent namely, the maintenance of a fair and consistent immigration policy. There was '*no suggestion that the financial requirement is not rationally connected with the policy sought to be achieved*'.

12. The Appellant sought permission to appeal which was granted by a judge on 7 January 2014.

13. At the error of law hearing before me Mr Ahluwalia directed me to **MM v SSHD [2013] EWHC 1900**. The judge had erred in failing to make reference to that case. In particular, first, the judge failed to have regard to the factors considered by the Administrative Court to be relevant to the assessment of proportionality (**MM** [124]). Second, the Sponsor's earnings were more than £13,400. Third, the Tribunal failed to have regard to the fact that the Sponsor has substantial savings albeit not in the prescribed form. Further, the Tribunal failed to have regard to the fact that at the date of hearing the Sponsor was earning over £19,000 a figure in excess of the sum required by the rules to sponsor a spouse. Such evidence, although it could not be considered in the context of the appeal under the rules, was relevant to the assessment of proportionality. Fifth, the judge erred in finding that the Appellant could make a fresh application. As he now satisfied the rule such made no sense.

14. Mr Ahluwalia did not seek to argue a second point in the grounds (2.3) accepting that such had not been raised before the judge.

15. In reply Mr Melvin submitted that this was a straightforward case. The judgment was sustainable. It did not appear that **MM** was argued before the judge. It was not a material error for him not to take it into account in considering proportionality.

16. I do not consider that the judge made a material error of law. First, while Mr Ahluwalia, who did not appear at first instance was unclear on the matter, Mr Melvin said there was no mention of **MM** in the Presenting Officer's minutes, nor is there mention in the judge's Record of Proceedings. I am satisfied that nothing in respect of that case was argued before the judge. In the circumstances I do not see it to be an error of law for the judge not to have considered a case or submissions not raised before him.

17. The judge correctly concluded that the Appellant did not meet the requirements of the rules, as the Sponsor was unable to provide the necessary evidence of income. However, he went on to consider the case outside the rules under article 8 ECHR. In doing so he ignored the **Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 640 (IAC) guidance more** recently **affirmed in** Shahzad (Art 8: legitimate aim) [2014] UKUT 00085_where the Upper Tribunal held that:

(i) Failure on the part of the Secretary of State to identify in her decision any legitimate aim under Article 8(2) of the ECHR does not prevent a court or tribunal from seeking to do so on the basis of the materials before it.

(ii) "Maintenance of effective immigration control" whilst not as such a legitimate aim under Article 8(2) of the ECHR can normally be assumed to be either an aspect of "prevention of disorder or crime" or an aspect of "economic well being of the country" or both.

(iii) "Prevention of disorder or crime" is normally a legitimate aim both in expulsion cases where there has been criminal conduct on the part of the claimant and in expulsion cases where there have only been breaches of immigration law.

(iv) **MF (Nigeria)** [2013] EWCA Civ 1192 held that the new immigration rules regarding deportation of a foreign criminal are a complete code. This was because of the express requirement in them at paragraph 398 to have regard to exceptional circumstances and other factors.

(v) **It follows from this that any other rule which has a similar provision will also constitute a complete code.**

(vi) Where an area of the rules does not have such an express mechanism, the approach in **(R) Nagre v SSHD** [2013] EWHC and **Gulshan** should be followed: ie after applying the requirements of the rules, only if there may be arguably good grounds for granting leave to remain outside them is it necessary to go on to consider whether there are compelling circumstances not sufficiently recognised under them.

18. In this case the First tier Tribunal judge failed to identify the compelling circumstances not adequately recognised in the rules to justify considering the application outside the rules on the basis of article 8 ECHR, but simply went on to address Article 8 issues following the **Razgar v SSHD [2004] UKHL 27** steps. Such was an error of law. However, it was not material because for the reasons given by the judge it could not be said that the circumstances of the Appellant and Sponsor were compelling or the outcome unjustifiably harsh.

19. In this case in the Article 8 proportionality exercise the judge appeared to find that because she has work here and is depressed following the death of her father it would be unreasonable to expect the Sponsor to go to Pakistan to develop their family life.

20. However, the judge then considered the Sponsor's income Although the Sponsor's earnings at date of decision were above £13,400 the judge was entitled to find that they were *'substantially short of the minimum amount required'*.

21. He took heed of the fact that the Sponsor has savings, the bulk of which is a Sun Life policy. He was correct to find that such did not constitute funds held in a relevant

bank or savings account as required by the rules. He was entitled to take into account in the proportionality exercise that she had not contemplated transferring the paid up proceeds into a bank account the reason, according to her evidence, being that she did not want to surrender a 15 year policy after only 7 years.

22. There is a route for entry as the spouse of a person present and settled in the UK. It is a route that remains open to the Appellant. In respect of that route the claim is that they meet and can now prove that they meet the financial maintenance threshold, even though they could not do so at the date of application. The judge had no discretion to allow the appeal on the basis that they 'almost' met the requirements. The rules are clear and must have been known to the parties before deciding that they wanted to live together in the UK. They are not entitled to settle in the UK simply because that is their choice. They must meet with adequate evidence the requirements of the rules and they must be taken to have known these requirements from the outset of their relationship.

23. I do not see merit in Mr Ahluwalia's submission that at date of hearing the Sponsor was earning around £19,000 and that such was relevant to the assessment of proportionality. The relevant date in considering Article 8 ECHR is date of decision. If it is their case that they would now be able to meet all the requirements it can hardly be disproportionate to provide a route for entry and require the Appellant to meet like all other applicants the rules for proving the Sponsor's finances. The judge was entitled to find that were the finances now sufficient to satisfy the rules (and such remains to be seen) any interference with the right to respect for family life would, pending a further application, be for a short period.

24. The issue in this case is not whether a different judge might have reached a different decision on the facts presented. Rather it is whether the First-tier Tribunal decision was vitiated by a material error of law.

25. I consider, looking at the judge's analysis in the round, that his decision on proportionality was one he was entitled to reach on the evidence before him for the reasons he gave. It cannot be said that no reasonable judge could reach that conclusion or that the decision was erroneous in law.

Decision

The decision of the First-tier Tribunal does not involve the making of a material error of law and the decision dismissing the appeal under the Immigration Rules and on human rights grounds stands.

No anonymity direction is made.

Signed Date

Upper Tribunal Judge Conway