Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/03862/2013

THE IMMIGRATION ACTS

Heard at Birmingham Sheldon Court	**Determination Promulgated**
On 13th June 2014	**On 31st July 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MRS SALMA BEGUM
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER - ISLAMABAD

Respondent

Representation:

For the Appellant: Mr Ishtiaq Ali (Counsel)
For the Respondent: Mr Neville Smart (HOPO)

DETERMINATION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Sangha promulgated on 14th December 2013, following a hearing at Birmingham Sheldon Court on 3rd December 2013. In the determination, the judge dismissed the appeal of

Mrs Salma Begum, who applied for, and was granted subsequently, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a citizen of Pakistan who was born on 3rd March 1994. She appeals against the refusal by the Entry Clearance Officer in Islamabad to refuse her application for entry clearance to join her spouse, Mr Imtiaz Mohammed, a person present and settled in the UK, as his partner, under Appendix FM of the Immigration Rules, in a decision that was decided on 27th November 2012.

The Appellant's Claim

3. The Appellant's claim is that her sponsoring husband, Mr Imtiaz Mohammed, is working at Foreign Car Spares, in Saltley in Birmingham, since 5th March 2012, as a clerical assistant, and has earnings of £19,565 per year. This is a permanent job. He receives weekly wage slips. His wages are deposited on a weekly basis into his Santander current account. He has savings of £4,300. He was also paid in cash, but did not have any Santander account showing such payments into his account from 2012. He also did not have his P60 for the year 2012. However, one was handed in for 2012 at the hearing. The Appellant was able to meet the financial threshold requirement test under the Immigration Rules such that she should be allowed entry to join her husband in the UK.

The Judge's Findings

4. The judge observed how the Appellant had to show an income of at least £18,600 gross per annum, and that she was relying upon her husband's income as an office clerk with Foreign Car Spares Limited, where he had been employed since 5th March 2012. A letter from Foreign Car Spares dated 28th December 2012 confirmed that the Appellant was working there on a full-time basis and that his gross pay was £382.50 per week as an office clerk. There was the Sponsor's P60 for the year ending 5th April 2012. This showed that his salary in that employment was £914.66 and his employment with RMS Staffing Services Limited was confirmed here.

5. The judge was not satisfied that the Appellant's income showed a minimum earning of £18,600 per annum gross. This is because his P60 for the year ending 5th April 2012 showed that his total salary in the employment with Foreign Car Spares Limited was a mere £1,033.60, and a P60 for the tax year ending 5th April 2013 with respect to the Sponsor's employment with Foreign Car Spares Limited showed that he had £17,790.50. This P60 was postdecision evidence. In the same way there was a letter dated 27th September 2013 from Foreign Car Spares Limited, which confirmed that he had been employed by them since 5th March 2012, in a permanent position, "as a clerical assistant and his gross salary is £19,565.00. However, this is inconsistent with the P60 that he has produced" (para 16). The appeal was dismissed.

Grounds of Application

6. The grounds of application state, inter alia, that the judge was wrong (at para 16) to say that "the P60 is clearly postdecision evidence and in any event if I did take it into account it still does not meet the threshold of £18,600." This is because the judge, in so stating, failed to take into account the employer's letter from Foreign Car Spares Limited, dated 7th January 2014, which clearly stated that the applicant was paid a rate of £6.08 per hour from 5th March 2012 and his hourly rate was later changed to £9 per hour, on 20th August 2012. Therefore, the Appellant's P60 dated April 2013 would have a lower overall figure.

7. On 10th March 2014, permission to appeal was granted on the basis that the judge ought to have taken into account Article 8 considerations of his own motion by reason of Section 6 of the Human Rights Act 1998, even if, following the High Court judgment in **MM [2013] EWHC 1900**, the judge felt that the Appellant could not succeed under the Immigration Rules.

Submissions

8. At the hearing before me on 13th June 2014, Mr Ali, of Counsel, appearing on behalf of the Appellant, submitted that Article 8 had been overlooked by the judge, even though it had been specifically pleaded in the skeleton argument submitted before the judge. Under Section 6 of the Human Rights Act, a decision by a public authority must be compatible with human rights obligations. Mr Ali accepted that the judge had summarised the evidence at paragraphs 15 to 16 of the determination quite accurately.

9. He also accepted that the Appellant could not meet the requirement of providing evidence in a way that conformed with "specified evidence" obligations. However, the Article 8 considerations had to be looked at in the context of what the High Court said in **MM [2013] EWHC 1900**. What was clear from that judgment was that the Sponsor's status as a British citizen was not insignificant. Secondly, it was simply not correct that the Appellant's income was £17,700, as found by the judge, because there had been an error, and a letter subsequently in January 2014 that confirmed this from the employers.

10. For his part, Mr Smart submitted that Article 8 had not been mentioned before the judge. The Tribunal was the product of a statute. The jurisdiction was a product of statute. The judge could not enter into considerations that had not been raised before him. Second, Mr Smart drew to my attention the recent Court of Appeal judgment in **Sarkar [2014] EWCA Civ 195**. This case dealt with the issue with respect to matters that had not been raised in the Tribunal below. The Court of Appeal referred to the judgment in **Kizhakudan [2012] EWCA Civ 566**. This decided that one error of law on the part of the First-tier Tribunal is sufficient to give the Upper Tribunal jurisdiction to re-make the decision and deal with all the live issues.

11. The Court of Appeal explained that, "the court in that case held that the Upper Tribunal had a discretion to consider an Article 8 claim, even though it might not have been properly raised before the First-tier Tribunal" (para 15). Mr Smart submitted that this position only crystallised once there had been a finding of an error of law. If there was no finding of an error of law then this Upper Tribunal did not have the jurisdiction to look at Article 8 considerations.

12. In reply, Mr Ali referred to the High Court judgment in **MM** and explained that this was directly relevant. He said that this claim was not simply about Article 8. The facts had been wrongly appraised by the judge because the Appellant did have earnings above £18,600. Finally, on 19th August 2013, a daughter by the name of Balqees, was born to the Appellant in India, and a letter of 21st March 2014, from the Home Office refers to this, upon the application of the Appellant. This was a consideration that should be taken into account.

Error of Law

13. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law, such that it falls to be set aside under Section 12(1) of **TCEA [2007]**. The First-tier Tribunal should have considered Article 8 of its own motion by reason of Section 6 of the Human Rights Act because this was a "**Robinson**-obvious" point. Second the judge does not consider the significance to be attached to the status of the Sponsor as a British citizen, given that this was specifically highlighted by Blake J. in **MM [2013] EWHC 1900**.

Re-Making the Decision

14. I re-made the decision on the basis of the findings of the original judge, the evidence before him, and the submissions that I have heard today. I am allowing this appeal for the following reasons. First, I allow this appeal because in **MM [2013] EWHC 1900** Blake J held that, "British citizens were in a different class to foreigners generally, as they had a constitutional right of residence in their own country as well as a human right to marry, found a family, and have respect accorded to their family life" (para 123). The status of the Sponsor as a British citizen carries weight. The Respondent has been unable to explain why it is justified to restrict the right of Imtiaz Mohammed to be joined by his wife from Pakistan. Were an appropriate "justification" to be given, it is certainly conceivable that the Respondent could prevent this couple from living together. However, none is forthcoming.

15. Second, the evidence shows that the Appellant does succeed on the basis of being able to show a gross income of £18,600 because a letter dated 7th January 2014 from Foreign Car Spares Limited confirmed that the Appellant was paid a rate of £6.08 per hour from 5th March 2012. The P60 from April 2013 would have a lower figure for this reason. This is a matter that is clearly relevant to Article 8. Third, also relevant to Article 8 is the fact that the Appellant's wife has now given birth to a daughter, Balqees. This is a family unit. The best interests of the child are served by having access to both parents, not least to the breadwinner in the family, who is the sponsoring father of the child.

16. Accordingly, the decision of the Respondent is an interference by a public authority with the exercise of the Appellant's right to respect for family life. It will have consequences of such gravity as to engage the operation of Article 8. The interference is not in accordance with the law if the Appellant succeeds by being able to show a reliance on income above £18,600. The interference is not necessary in a democratic society. Finally, the interference is disproportionate to the legitimate public end that is sought to be achieved. For all these reasons, this appeal is allowed.

Decision

17. The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. I re-make the decision as follows. This appeal is allowed.

18. No anonymity order is made.

Signed Date

Deputy Upper Tribunal Judge Juss 23rd June 2014