



IAC-BH-PMP-V1

**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: OA/06325/2013

THE IMMIGRATION ACTS

**Heard at Bennett House, Stoke
On 8th October 2014**

**Determination Promulgated
On 11th November 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE GARRATT

Between

**INDERJIT SINGH
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr H Samra, Solicitor of Harbans Singh & Co

For the Respondent: Mr A McVeety, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Before the Upper Tribunal the Secretary of State becomes the appellant. However, for the avoidance of confusion and ease of reference, I shall refer to the parties as they were before the First-tier Tribunal.

Error on a Point of Law

2. On 20th February 2014 Judge of the First-tier Tribunal Bird gave permission to the respondent to appeal against the determination of Judge of the First-tier Tribunal Cox in which she allowed the appeal on human rights grounds against the decision of the

respondent to refuse entry clearance as a partner in accordance with the provisions of Appendix FM of the Immigration Rules.

3. Permission was granted because Judge Bird thought it arguable that the judge had not followed the intermediary tests set out in *Gulshan* [2013] UKUT 00640 (IAC) before proceeding to allow the appeal on Article 8 outside the Immigration Rules particularly by failing to identify any compelling circumstances enabling the Article 8 appeal to succeed.
4. The appellant submitted a Rule 24 response arguing that the judge's consideration of the appellant's claims outside the Immigration Rules by applying the decision of Blake J in *MM* [2013] EWHC 1900 (Admin) was not wrong and that the judge was entitled to find that the sponsor's income exceeded the income threshold requirements set out in the Rules of £18,600 in any event.
5. Mr McVeety submitted that, as the decision of Blake J in *MM* had now been overturned by the Court of Appeal in *MM* [2014] EWCA Civ 985, the determination was in error on a point of law. He further argued that the appeal should be dismissed on re-making as the appellant had failed to meet the financial requirements of the Rules which had not, in themselves, been found to be disproportionate.
6. Mr Samra argued that the judge had not relied upon the High Court decision in *MM* because, at paragraph 65 of the determination, she had found that the income of the sponsor was sufficient because it exceeded the amount specified in the Rules, even if receipt of that income had not been proved as required by the Rules.
7. Mr McVeety argued that the judge had plainly applied the decision of Blake J in *MM* to allow the appeal on Article 8 grounds and this amounted to a material error.
8. I indicated that I was satisfied that the determination showed an error on a point of law such that it should be re-made. That was because the judge's determination is clearly built around the decision of Blake J in *MM* on the basis that, although the appellant could not succeed under the Rules, she was able to show income figures sufficient to meet the amount required under the Rules and thus the respondent's decision was disproportionate. Whilst the judge was not wrong, at the time, to consider the High Court decision in *MM* that has been overturned by the Court of Appeal on the basis that the Rules are not disproportionate in themselves.

Re-making the Decision

9. Mr Samra conceded that the appellant could not succeed under the Rules, particularly the specific requirements for documentary proof set out in Appendix FM-SE at paragraph 2 requiring bank statements corresponding with the same period as wage slips to be produced to show that salary had been paid into an account in the name of the sponsor. That was because the sponsor was paid in cash. He argued that such a requirement was disproportionate when receipt of pay for a self-employed person did not have that requirement. Mr Samra also reminded me of the circumstances of the appellant's application including the fact that the parties had lived together in the United Kingdom in 2012 before the appellant returned to India to make his application on 11th October.

Conclusions and Reasons

10. The appellant cannot succeed under the Rules because the income information provided by the sponsor, even if the amounts involved exceed the £18,600 annual income requirement, had not been proved in the manner required by the Rules in Appendix FM-SE. In this respect Mr Samra is wrong to suggest that it is unfair for those who are employed to prove their income by receipt in a bank account when the self-employed do not need to do so. Paragraph 7 of Appendix FM-SE makes a similar requirement for self-employed to show their income from such employment has been paid into a bank account in their name. Additionally, the Rules can now be regarded as not disproportionate in themselves. The requirement for income from employment to be received into a bank account is reasonable in order to avoid any irregularities which might arise with payment in cash and the production of unreliable wage slips. The respondent is entitled to take reasonable steps to be satisfied that income claimed is income received. This appeal cannot succeed under the Rules.
11. As to Article 8 issues in general I apply the five stage *Razgar* [2004] UKHL 27 tests. There is no longer any need for intermediary tests before consideration outside the Rules. Whilst the respondent's decision can be said to be a breach of the parties' Article 8 rights to live together in a family as husband and wife and that such an infringement has consequences of such gravity as potentially to engage the operation of Article 8, I am unable to conclude that the decision is disproportionate for the reasons which follow.
12. In reaching my conclusion I should point out that no issue has been taken with the judge's conclusion that the parties were in a genuine relationship despite the respondent's contention to the contrary. I have assumed that the parties are in a subsisting relationship albeit living apart.
13. The evidence put before the First-tier Tribunal showed that the sponsor was aware that the appellant was in the United Kingdom illegally shortly after she had met him in November 2010. She was not, at that stage, divorced from her first husband. The appellant then left the United Kingdom in September 2012 to return to India where the parties married in September 2012. They had lived together in the United Kingdom for a short period before his departure. The parties have maintained contact with each other by modern methods of communication since and the sponsor visited India and the appellant in October 2013.
14. These circumstances lead me to conclude that the parties were clearly aware that they had no right to live together in the United Kingdom despite their marriage unless they could comply with the Immigration Rules in their new format applicable at the date of application in October 2012. The parties knew or ought to have known of the specific requirements of the Rules they were required to meet but did not. However, the parties can now re-apply providing the evidence required is in the format specified to ensure the grant of entry clearance for the appellant. If the sponsor is paid in cash then no doubt she will make arrangements to be paid into her bank account as the Rules require for proof of such income. Any further separation which will be brought about because of the need to take steps to comply with the Rules will not lead to a disproportionate breach of Article 8 rights as the parties can continue their relationship in the same way as they have done since the appellant returned to India.

15. For the reasons given above I conclude that the respondent's decision is not disproportionate and so the appeal is dismissed on human rights grounds.

NOTICE OF DECISION

The decision of the First-tier Tribunal contained an error on a point of law such that it should be re-made. I re-make the determination by dismissing it on immigration and human rights grounds.

Anonymity

Anonymity was not requested before the First-tier Tribunal nor do I consider it appropriate before the Upper Tribunal.

Signed

Date

Deputy Upper Tribunal Judge Garratt

10th November 2014

TO THE RESPONDENT
FEE AWARD

As I have dismissed this appeal there can be no fees award.

Signed

Date

Deputy Upper Tribunal Judge Garratt

10th November 2014