Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/08925/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 30 June 2014	**On 9 July 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE E B GRANT

Between

Mrs Zobia Iqbal

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: The sponsor Mr Hussain appeared for his wife
For the Respondent: Mr I Jarvis, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is an appeal by the Secretary of State for the Home Department (hereinafter referred to as the respondent) against a determination of FTTJ S.J. Pacey promulgated on 17 April 2014 in which she allowed the appeal of Zobia Iqbal (hereinafter referred to as the appellant) against refusal of entry clearance as the spouse of the sponsor.

2. On 20 May 2014 FTTJ Clayton found that

" It was accepted that the appellant could not fulfil the requirements of Appendix FM. The appeal fell to be dismissed under the Immigration Rules.

Gulshan [2013] *UKUT 000640 (IAC) states that an Article 8 assessment should only be carried out where there were compelling circumstances not recognised by the Rules. Gulshan further states that an appeal should only be allowed where there were exceptional circumstances.* ***Nagre v SSHD*** *[2013] EWHC 720 endorsed the Secretary of State's guidance on the meaning of exceptional circumstances that is where refusal would lead to an unjustifiably harsh outcome.*

The judge accepted that neither the appellant nor respondent had contended there were "insurmountable obstacles" and found no leave ought to be granted outside the Rules on the basis of exceptional circumstances. He contradicted his findings by taking into account evidence of the sponsor's income which was not before the ECO and stating that a variety of factors made the respondent's decision disproportionate and irrational under the law relating to refugees and the constitutional rights of British citizens. I find that the judge arguably misdirected himself. There is therefore an arguable error of law"

3. Thus the matter came before me. The appellant was unrepresented but her husband the sponsor attended. He had with him further pay slips as evidence of his employment. He had not thought to bring his bank statements with him. As someone without the assistance of a solicitor he had no legal submissions to make in response to the grounds seeking permission to appeal.

4. Mr Jarvis submitted that the Secretary of State's complaint concerned the approach of the FTTJ outside of the Rules. The application failed under the Rules, Appendix FM read with Appendix FM–SE because the appellant did not file with her application the specified evidence in this case the sponsor's bank statements. Even at this hearing the sponsor has still not provided the relevant pay slips to corroborate payslips as required by Immigration Rules. The Rules identify a six month period back from date of application in entry clearance cases. The Rules, unlike points based visa applications, do not prohibit someone providing evidence from that period at their appeal hearing. This was not done before the FTTJ. In paragraph 7 of the determination the FTTJ goes on to apply **Gulshan [2013]** UKUT 000640 (IAC) but is wrong in her application. Furthermore the FTTJ hasn't understood the Rules. The entry clearance requirements for entry clearance as a spouse if not met on account of the income requirements of the Immigration Rules (maintenance and accommodation) do not lead to EX.1. The FTTJ mistakenly misses the point that for an entry clearance case EX.1 is not applicable. The appellant is not someone who is being removed but is a person who can make another application.

5. The FTTJ found that there were no exceptional circumstances and no insurmountable obstacles and in terms of how the law is structured that should have been the end of the appeal. But the FTTJ then erred in law and went on to a third stage to allow the appeal on the basis of evidence heard by her that the appellant now met the requirements of the rules. She came to this conclusion from the sponsor's payslips and overlooked the requirements set out in Appendix FM-SE for bank statements to have been filed corroborating the income claimed to have been earned. There are only two steps to be considered. The first is Appendix FM. Only if FM is not met and there are compelling circumstances should an FTTJ go on to assess the appeal outside of the Rules.

6. Cases like **Gulshan [2013]** UKUT 000640 (IAC) show those terms such as exceptional or unjustifiably harsh are compliant with Article 8 jurisprudence. In MF **(Nigeria)** [2013] EWCA Civ 1192 the Court of Appeal said Secretary of State's position on what exceptional meant was lawful and compliant with Article 8 jurisprudence.

7. The FTTJ, in having established third level of enquiry has misunderstood the nature of rules and language of rules. The judge also speculated about the future saying what would happen if the appellant made a fresh application. But binding authority including **SB (Bangladesh)** says it is unlawful for judge to speculate what might happen in an EC application.

8. Mr Jarvis's final point was that the FTTJ judge centred on and misunderstood **MM [2013]** EWHC 1900. MM was an in-country case where the consequences of separation by removal were looked at by Blake J. This is not comparable with an entry clearance case where the appellant can make a fresh application showing compliance with the Immigration Rules. This is a case in which parties could not show required level of maintenance because they did not provide the evidence the rules required either with application or at the hearing. The appeal should not have been allowed on Article 8 grounds outside of the Immigration Rules. The remedy for the appellant was to make a fresh application properly supported with evidence as to the income requirements of the Immigration Rules.

Decision

9. The appellant could not succeed under the Immigration Rules because she had not supplied with her application the required specified evidence (bank statements) to demonstrate that her sponsor earned a sum equivalent to or in excess of the income threshold of £18,600 set by the Immigration Rules. This sum was not struck down by Blake J in **MM [2013]** EWHA 1900 who found that it was not appropriate to strike down the financial requirements of the Immigration Rules. The FTTJ correctly dismissed the appeal under the Immigration Rules.

10. The FTTJ allowed the appeal on human rights grounds. Before she found for the appellant she found that there was no contention on behalf of the appellant that there were any insurmountable obstacles and she said there was no evidence before her to show that leave should be granted outside of the Immigration Rules on the basis of exceptional circumstances. In coming to these findings she was correct.

11. It is clear from paragraph 8 of her determination that the FTTJ considered the reference to the Migration Advisory Committee referred to in paragraph 124 of MM. Blake J found at paragraph 140:

> "In my judgment, the aim of transparency cannot justify an agglomeration of measures that cumulatively very severely restrict the ability of many law abiding and decent citizens of this nation who happen not to earn substantial

incomes in their employment from living with their spouses in the land of their nationality. Transparency can be best achieved by clarity as to the kinds of documents required to demonstrate the relevant facts rather than a blanket rule preventing receipt of data that may well be sufficient and reliable. The most obvious way of proving the earning capacity of the spouse is a job offer. In the past one problem has been the timing of the offer with respect to the processing of the application, but there is no reason why historic failure to process applications speedily should frustrate the ability of a couple to live together; again in my judgment the answer lies in the discharge of the burden of proof and not an unnecessarily austere exclusionary rule. Here again checks after twelve months may well be proportionate and informative as that would afford a reasonable opportunity for the spouse with skills to have attended selection interviews and demonstrated requisite skills".

12. In the appeal before the FTTJ this was not a case where the appellant was saying that the Immigration Rules set too high an income threshold for her and the sponsor to meet. Her case was that they met the income requirements of the Immigration Rules. The appellant was required to provide specified evidence in the form of bank statements to confirm the sponsor's earnings. She failed to do so. There was no evidence of exceptional circumstances before the Judge from which she could reasonably find the appeal required consideration outside of the Immigration Rules. In allowing the appeal outside of the Immigration Rules the FTTJ erred in law and I set aside her decision.

Conclusions:

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

I set aside the decision

I re-make the decision in the appeal by dismissing it

Anonymity

The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Fee Award Note: this is **not** part of the determination.

No fee award was made by the FTTJ. There is no jurisdiction for me to make one.

Signed

7 July 2014

Deputy Judge of the Upper Tribunal