Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/09630/2013

THE IMMIGRATION ACTS

Heard at Field House, London	**Determination Promulgated**
On 7th May 2014	**On 20th may 2014**

Before

UPPER TRIBUNAL JUDGE ROBERTS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRS ZAREENA BEGUM
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr Jack, Home Office Presenting Officer
For the Respondent: Mr Chohan, of Counsel

DETERMINATION AND REASONS

1. For ease of reference I shall refer, throughout this determination, to the Secretary of State as the "The Respondent" and the Respondent Zareena Begum as "the Appellant".

2. The appeal is brought by the Respondent against a decision of the First-tier Tribunal (Judge Boyes) which in a determination promulgated on 21st February 2014 allowed the Appellant's appeal against an ECO's decision of 20th March 2013, refusing to grant her entry clearance to come to the United Kingdom with a view to settlement as the spouse of her Sponsor Mr Choudhary Muhammad Bashir "the Sponsor". The appeal was allowed under Article 8 ECHR.

3. The Appellant is a citizen of Pakistan born 1st January 1947. Her application for entry clearance was refused because the ECO concluded firstly that she and the Sponsor were not related as claimed and secondly she could not meet the financial requirements of Appendix FM of the Immigration Rules.

4. After considering the evidence before him the First-tier Tribunal Judge found he was satisfied the Appellant and the Sponsor are related as claimed and theirs is a subsisting marriage. That finding is not challenged and therefore stands.

5. The Judge then went on to consider the financial requirements of Appendix FM. In paragraphs 25 to 28 of his determination he says as follows.

> "***The Financial Requirements***
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> A box is ticked on the visa application form to state that the Sponsor is receiving a disability related benefit. However, no evidence has been provided of this and it has not been referred to elsewhere within the evidence. I am therefore not satisfied, on the balance of probabilities, that the Appellant is exempt from the financial requirements of Appendix FM.
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> £142.70 per week can be seen going into the Sponsor's Barclays Bank account. This equates to £7,420.40 per annum. The Sponsor and Appellant therefore do not have sufficient income to meet the financial requirements. In terms of savings the closing balance on the Sponsor's Barclays Bank statement on 17th December 2012 was £4,417.94 after a cash deposit of £4,000 made on 10th December 2012. No evidence or information has been provided as to the source of the £4,000. I also note that cash deposits of £1,000 and £2,000 were made on 6th August 2012. This left a balance on the account of £3,305.65. I do not have a full set of statements: they run from 2nd to 12th July and then jump to 30th July running through to 3rd September before jumping to 12th October 2012. The balance varies widely on the account for example on 21st November 2012 it had a much smaller balance of £139.26. The Appellant has produced evidence that she has a savings bond issued on 10th September 2008 for the sum of 1,000,000 Pakistani rupees. The proof provided from the bank is dated 26th December 2012. These funds are roughly equivalent to £5,575. I accept that that (sic) Appellant has these savings. However, I am not satisfied, on the evidence before me, that the Sponsor has savings of around £4,000 as I do not have a full set of bank statements before me to demonstrate that the £4,000 in the Sponsor's account were his own funds. This means that the savings available to the couple at the date of decision was £5,575 which was insufficient to meet the requirements of Appendix FM.
>
> Whilst the Appellant (sic) has not provided evidence that he is in receipt of housing benefit and council tax benefit I accept that this is very likely in view of the fact that he

is in receipt of pension credit (guarantee credit) which ordinarily entitles an individual to the maximum amount of both.

The Appellant therefore does not meet the financial requirements of Appendix FM".

6. Having concluded that the Appellant could not meet the requirements of Appendix FM of the Immigration Rules, the Judge went on to consider Article 8 ECHR claim.

7. He noted that the Sponsor is in receipt of pension income of £142.70 per week. There was no reliable evidence that the sponsor had savings of £4000 as claimed. He did accept the appellant has savings of around £5000. The Sponsor suffers from a serious medical condition and heart problems. The Appellant has problems with her hearing and her eyesight but the Judge noted that the sponsor claimed he would be able to maintain his wife if she came to UK. He told the Judge that "all they need is a piece of bread each". The Judge further noted that the sponsor said in evidence that his wife would look after him. He allowed the appeal under Article 8 and in his findings/conclusions said the following:

> "Notwithstanding that, it would appear that from the information before me, that he applied to stay under the regularisation of an overstayer's scheme which was put in place prior to the coming into effect of the Human Rights Act. He was granted indefinite leave to remain and has had that now for around ten years. He has had, and continues to suffer from serious health problems which require medical intervention and monitoring on a regular basis and is prescribed a wide range of medications. I do not know whether or not he could access the same level of treatment in Pakistan, I think it probably likely that he could, although I also consider it likely that there would probably be disruption to his treatment and monitoring initially if he were to move to Pakistan. If he remains in the UK and his wife joins him here I think it likely that she will, provide additional care and support for him which may well lessen the nursing and social care that he otherwise may require as time goes on. In that respect the burden on public funds may be reduced. Considering the length of time that the Sponsor has lived in the UK, the various medical conditions that he suffers from, the fact that the couple appeared to have funds to provide them with a basic standard of living above the basic benefit threshold for an adult couple, and as that would be subject to further scrutiny before the Appellant would be permitted to settle prior to which she would not have access to welfare benefits in her own right, I consider that the Respondent's decision to exclude the Appellant from the UK is unjustified and disproportionate. The decision therefore contravenes Article 8 of the ECHR".

8. The Respondent sought and was granted permission to appeal. Thus the matter comes before me to determine whether the First –tier Tribunals decision needs to be set aside for legal error and remade.

9. Before me Mr Jack appeared on behalf of the Respondent and Mr Chohan for the Appellant. Mr Jack relied upon the grounds seeking permission. He said that the Judge had materially misdirected himself in law because the Appellant's case failed under the requirements of the Immigration Rules. An Article 8 assessment should only be carried out therefore where there are compelling circumstances, not recognised by the Rules. This was not the case here. No exceptional circumstances

had been put forward to show that the Respondent's decision, would be unduly harsh within the meaning of the Article 8 jurisprudence.

10. He referred me to the case of *Haleemudeen v Secretary of State for the Home Department* [2014] EWCA Civ 558 and said that the guidance contained in that decision strengthened the Respondent's case. In particular paragraph 64 of that decision said, when discussing whether the Secretary of State's decision would be found to be a proportionate interference with an Appellant's rights, that the provisions of Appendix FM undoubtedly constitute a formidable hurdle for an appellant to overcome.

11. Mr Jack further submitted that the Appellant's case is very similar to the facts found in *Gulshan (Article 8 – new Rules – correct approach) Pakistan* [2013] UKUT 640 (IAC).That case deals with the concept of what constitutes exceptional circumstances and explains that to embark on a freewheeling Article 8 analysis unencumbered by the Rules is not the correct approach. He asked that I find an error of law, set aside the decision and remake it, dismissing the appeal.

12. Mr Chohan submitted that on the facts of this appeal it would be exceptionally and unjustifiably harsh to deny the Appellant entry clearance. The sponsor and wife are apart as she is in Pakistan. He accepted that the Judge had found that should she be granted entry clearance there would, in all probability, be further recourse to public funds. Nevertheless this would be offset by the Appellant providing care for her husband, such as to enable him to leave his hospital bed. He referred me to the medical evidence which confirmed that following his coronary bypass, the Sponsor required help on his discharge from hospital. The sponsor is not a well man and his wife would provide care for him.

13. I did enquire of Mr Chohan if he had any further medical evidence since the sponsor had apparently left hospital following his cardiac surgery which had taken place as far back as February 2013. Mr Chohan said he accepted that the Sponsor had been released from hospital; this was evidenced by the fact that he had attended the Appellant's appeal hearing at Hatton Cross on 7th January 2014. He had nothing further to add which could assist.

14. I am satisfied that the First-tier Tribunal Judge erred in his approach to Article 8. *Gulshan* identified that Article 8 assessments should only be carried out when there are compelling circumstances not recognised by the Rules. I accept that the Sponsor is ill there is ample medical evidence to support this. It is hard however to understand the Judge's findings, or reasons for finding, that there are exceptional and compelling circumstances within the meaning of the Article 8 jurisprudence. At paragraph 48 the Judge sets out that the Sponsor suffers medical problems and then speculates.

> "He has had, and continues to suffer from serious health problems which require medical intervention and monitoring on a regular basis and is prescribed a wide range of medications. I do not know whether or not he could access the same level of treatment in Pakistan, I think it probably likely that he could, although I also consider

> it likely that there would probably be disruption to his treatment and monitoring initially if he were to move to Pakistan. If he remains in the UK and his wife joins him here I think it likely that she will, provide additional care and support for him which may well lessen the nursing and social care that he otherwise may require as time goes on. In that respect the burden on public funds may be reduced".

15. The Appellant and Sponsor have lived apart for many years in the sense that the Sponsor has visited her only on occasions and remitted money to her. The Judge himself in his findings on that point said "The fact that they have chosen to spend most of their married life apart on different continents ,has been a lifestyle that they have chosen". The appellant comes well short of meeting the financial requirements under the Immigration Rules. For her to gain entry to the UK would, as the First-tier Tribunal Judge recognised, cost the UK tax payer both in terms of extra public funds for the couple and in terms of medical help which the Appellant as a 67 year old with hearing and sight problems would require. The Judge's finding that this financial burden on public funds may be offset by the provision of support to the sponsor in terms of nursing and social care is not based on any sustainable evidence. The Judge has speculated in reaching that finding.

16. The evidence before me shows that the sponsor and appellant have lived separate lives for many years. The appellant remains in Pakistan in the Sponsor's house. She lives there with the couple's son and his wife. The Sponsor visits, telephones the appellant and sends her remittances. The sponsor has managed to remain in the UK alone without the appellant's support, despite his past medical history. There is nothing compelling or exceptional in the circumstances of this appeal such as to show that the respondent's decision to refuse the appellant entry clearance is a disproportionate one under Article 8 ECHR.

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 and I remake it as follows. This appeal is dismissed.

No anonymity direction is made

Signature **Dated**
Judge of the Upper Tribunal

I have dismissed the appeal and therefore there can be no fee award.

Signature **Dated**