



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/10446/2013

THE IMMIGRATION ACTS

Heard at Bradford
On 8th May 2014

Determination Promulgated
On 30th May 2014

Before

UPPER TRIBUNAL JUDGE D E TAYLOR

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SHAHIDA SARWAR

Respondent

Representation:

For the Appellant: Mrs R Pettersen, HOPO
For the Respondent: Mr Saleem of RKS Solicitors

DETERMINATION AND REASONS

1. This is the Secretary of State's appeal against the decision of Judge Jones made following a hearing at Bradford on 28th January 2014.

Background

2. The Claimant is a citizen of Pakistan born on 9th May 1982. She applied to come to the UK as a spouse but was refused under paragraph EC-P.1.1 of Appendix FM. The Entry Clearance Officer stated that she had said that her Sponsor was self-employed as a private hire driver since August 2010, but she did not state his gross income before tax in the last full financial year and did not submit the specified documents. Many of the HMRC documents were in the financial year between 2010 to 2011 and she had only submitted two months of personal bank statements. In view of the fact that she had not provided the specified evidence for the specified period as stated in Appendix FM/SE of the Immigration Rules, he was not satisfied that she met the financial requirements. The application was refused under paragraph EC-P.1.1(d) of Appendix FM of the Immigration Rules E-ECP3.1.
3. The judge recorded that it was the Sponsor's evidence that he had been self-employed as claimed as a taxi driver earning £13,170 per annum and had additionally been employed part-time by S and J working as a rent collector and earning a gross income of £6,500 per annum.
4. The judge said that the Presenting Officer in the case had had oversight of the papers provided and, having considered them, accepted that the only problem with the appeal was that some of the Sponsor's income had not been paid into the bank by him. There were additional documents relevant to the date of decision in the Claimant's bundle from his employers and from the accountant.
5. The requirement of the Rules was that for the sums of money to be paid into the bank account to avoid any suggestion that the claimed income was not in fact being earned. The Sponsor's claims were not disputed, and the judge understood that he might well not choose to pay all of his income from this source into the bank, it being clearly outside his knowledge at the time that he should do so in order to comply with the Rules. There was ample evidence of the claimed income and that between the two incomes, for a sufficient period preceding the application, the financial requirements of the Rules were made out.
6. The judge wrote as follows.

“Mr Saleem noted the references made by Mr Sobowale as to the exacting requirements of the Rules. Mr Saleem reminded me of the courts taking the view that this may be, to the extent of any non-compliance here, to be unfair and unjust when there is plenty of evidence which supports the claimed income. Mr Saleem cited the authority of MM and Others v SSHD [2013] EWHC 1900 submitting the requirements of the Rule were indeed too onerous and that the sensible view here is that the claimed income relevant to date of decision has been made out on the balance of probabilities. If I were unable to find for the Appellant under the Rules I was reminded that the Sponsor is a British citizen who has a wife abroad, and that under Article 8 it would be disproportionate to expect him to give up his life and work in the UK and join his wife in Pakistan in all the circumstances of this appeal.”

7. The judge then stated that on the totality of the evidence he found that the Appellant had discharged the burden and standard of proof placed upon her in the proceedings.

He wrote:

“I make such finding because applying the appropriate standard evidence that persuades me that at the relevant time in question the Sponsor’s income as claimed as a self-employed taxi driver and part-time employment collecting rent were as claimed and met the financial threshold required. The Sponsor gave credible evidence which remained consistent and reliable to the appropriate standard even though he was carefully and closely cross-examined.

I am also against the appropriate standard persuaded by the credible and reasoned evidence of the Sponsor that he used the cash he was paid per month by S and J to save to send for his mother’s use in Pakistan (£250) and the rest for his out of pocket expenses and so no reason (then) to pay this into his bank first. The issues as to the slight omission do not negate my overall finding that the Sponsor’s claimed income met the Rules at the time of application bearing in mind the judgment of Blake J paragraph 126 in MM.

Appeal allowed.”

The Grounds of Application

8. The Secretary of State sought permission to appeal on the grounds that the judge had materially misdirected himself in law. The Rules of specified evidence are comprehensively set out in Appendix FM/SE as to what types of evidence are required, the periods they cover and the format they should be in. The Tribunal had no regard to this and its findings are unsustainable. Furthermore it is clear that the Tribunal has not had appropriate regard to the relevant date. For Appendix FM the significant date is the date of application not the date of the decision and the significant evidence is from the specified period before that date. It is not clear what the Sponsor’s actual gross income was at the date of application.
9. It is implicit from paragraph 11 that by relying on MM the Tribunal accepts that the Appellant cannot satisfy the conditions of the Rules. Whilst noting that MM is a persuasive authority the judgment does not dispute the Secretary of State’s entitlement to set a minimum income threshold with the aim of ensuring that those who chose to establish their family life in the UK should have the financial ability to support themselves and their migrant partner and do not become a burden on the tax payer. In MM the judge usurped the role of the democratically accountable decision maker in the formulation of policy and had insufficient regard to the width of discretion afforded to the Secretary of State in formulating policy. In relying on MM the Tribunal has erred likewise. If Mr Justice Blake had applied the proper principles to his assessment of proportionality he would have been compelled to the conclusion that the interference in the Article 8 rights of applicants and their families caused by the material provisions of the new Rules was proportionate. The Rules pursue a

legitimate aim and are rationally connected to that aim striking a balance between the interests of applicants and their families and the wider interests of society as a whole. There was nothing arbitrary about the balance struck by the Secretary of State and in relying on MM the Tribunal was relying upon an unsafe authority and its conclusions could not stand.

Submissions

10. Mrs Pettersen relied on her grounds and submitted that the Appellant ought to have made a properly documented application. The judge had not been clear as to whether the appeal had been allowed under the Rules and his decision ought to be overturned.
11. Mr Saleem submitted that the Sponsor's income on self-employment had been accepted by the Presenting Officer at the hearing. With respect to the second job, he had provided all of the specified evidence set out in paragraph 2 of the "Evidence of financial requirements" under Appendix FM save for 2(f), namely monthly personal bank statements corresponding to the same period as the wage slips at paragraph 2(c) showing that the salary had been paid into an account in the name of the person or in the name of the person and their partner jointly. The judge had plainly been aware of what the issue in the appeal was and had been satisfied that the income was as claimed. Since the Claimant met the substantive requirements of the Rules it would be disproportionate to require her to make a further application.
12. By way of reply Mrs Pettersen submitted that the judge had not in fact addressed the issue of proportionality, had not gone through the proper Razgar test and, as previously submitted, it was open to the Claimant to make a fresh application.

Findings and Conclusions

13. The reasoning in this determination is somewhat opaque. Nevertheless as the grounds acknowledge, it is implicit that, in relying on the decision in MM the judge accepted that the Claimant could not meet the requirements of the Immigration Rules.
14. Paragraph 2(f) states that, in respect of salaried employment in the UK all of the following evidence must be provided, inter alia,

"Monthly personal bank statements corresponding to the same period as the wage slips at paragraph 2(c) showing that the salary has been paid into an account in the name of the person or in the name of the person and their partner jointly."
15. The Sponsor accepts that he did not pay the second salary into his account because he was unaware that he should do so. He did put regular sums into the account but not the salary itself since he used some of the money for other purposes. He therefore does not comply with the requirements of the Immigration Rules, a fact clearly recognised by the judge.

16. Accordingly, although he did not spell it out, the appeal had to be dismissed under the Rules.
17. The grounds then attack the judge's reasoning with respect to Article 8. It is fair to say that the reasoning is compressed. Nevertheless it is clear what the judge's thinking was. He was entirely satisfied that the substantive requirements of the Rules were met. It is not right to say, as the grounds do, that it is not clear that the Rules were met during the specified period before the date of application. Mrs Pettersen did not dispute Mr Saleem's submission that the P60, the wage slips, the letter from the employer who issued the pay slips and the signed contract of employment, had all been provided. On that basis the judge was entitled to conclude as he did that the substantive requirements of the Rules were met.
18. As the grounds acknowledge MM was a persuasive authority before the judge, and whilst the substance of that judgment deals with the levels of maintenance required under the Rules, it was open to the judge to cite it in support of his conclusion that, since the substantive requirements of the Rules had been met, it would be disproportionate for entry clearance to be refused.

Decision

19. The Claimant's appeal is dismissed with respect to the Immigration Rules. However, with respect to Article 8, the judge's decision stands.

Signed

Date

Upper Tribunal Judge Taylor