Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/10525/2013

THE IMMIGRATION ACTS

Heard at: Manchester	**Determination Promulgated**
On: 12th June 2014	**On 6th August 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE BRUCE

Between

Secretary of State for the Home Department

Appellant

and

Jamila Begum
(no anonymity direction made)

Respondent

For the Appellant: Mr Harrison, Senior Home Office Presenting Officer
For the Respondent: Mr Nicholson, Counsel instructed by Sandbrook Solicitors

DETERMINATION AND REASONS

1. The Respondent is a national of Pakistan date of birth 1st January 1976. On the 22nd January 2014 the First-tier Tribunal (Judge Crawford) allowed her appeal against a refusal to grant her entry clearance as the spouse of a person present and settled in the UK.

2. The matter in issue had been whether the Respondent could demonstrate that she met the requirements of the Immigration Rules in respect of maintenance (E-ECP 3.1). Her British husband is living here with his three eldest British citizen children who are all in education. The Respondent and her British citizen son, aged two, live in Hong Kong where she manages the family business.

Because this is an application for entry clearance the Respondent could not rely on any of her own income, nor any projected income that she might earn in the UK. She had to demonstrate that her husband earned enough money. This she submitted she could do with reference to his earnings as the manager of a snooker hall and the rental income he receives on a property that they own.

3. At the appeal hearing Mr Nicholson had conceded that the application had not been supported by all of the documents specified in Appendix FM-SE. The sponsor failed to provide 12 months of payslips because he had only been in full time employment for the 4 months preceding the application being made. Although it could now be shown that the Sponsor did in fact earn over the required amount and had done so for a year it was admitted that the Respondent had not provided the *right* evidence at the *date of application*. On that basis the appeal fell to be dismissed under the Rules and this is what Judge Crawford did.

4. The determination goes on to consider Article 8. It is found that the Respondent and her young son are the only members of this family of six people who are not living in the UK. The sponsor and his three eldest sons are all here. The child who is living with his mother is a British citizen and cannot be excluded from the country. Judge Crawford finds this situation to be an interference with the Respondent's right to family life that cannot be justified. He allows the appeal under Article 8.

5. The grounds of appeal are that Judge Crawford failed to mention Gulshan [2013] UKUT 00640 (IAC) or Nagre [2013] EWHC 720 (Admin) in his determination. It is submitted on behalf of the Entry Clearance Officer that an Article 8 assessment shall only be carried out when there are compelling circumstances not recognized by the Rules. It is further submitted that Gulshan states that an appeal should only be allowed where there are exceptional circumstances.

6. I am not satisfied that either of these grounds of appeal is made out. The propositions identified are not supported by Gulshan or Nagre. The point that both these cases make is this: if there is not a good arguable case to look at Article 8 then *it is not necessary* to do so. Neither case is authority for saying that the court *cannot* go on to look at Article 8 unless the claimant has surmounted some intermediate hurdle of exceptionality. The "exceptionality test" has been comprehensively rejected by the House of Lords in Huang [2007] UKHL 11, by the Court of Appeal in MF (Nigeria) v SSHD [2013] EWCA Civ 1192 and indeed by recent ministerial statements. All that Gulshan and Nagre do is re-emphasise that it is likely that only a small number of cases will succeed outwith the new Rules. The fact that Judge Crawford does not refer to them is

neither here nor there, since he plainly considered this a case with merit on Article 8 grounds. Even if he did not use the words "compelling" or "unjustifiably harsh" it is clear from his conclusions that he found the case to be just that. This was then one of those small number of cases which succeed outwith the Rules.

7. If I am wrong and the decision was defective for a failure to apply a Nagre "test", I am satisfied that such an error is not material since the facts of the case are compelling and do disclose an unlawful interference with family life. This was a family separated only because the sponsor had failed to produce the right bits of paper at the right time. In the vast majority of spouse entry applications that fail on maintenance grounds the Entry Clearance Officer will be able to point to the importance of migrants being financially independent so as to protect the economy. In this case it appears to be accepted by all concerned that the family income in fact exceeds the thresholds set out in Appendix FM. In those circumstances I struggle to see on what Article 8(2) grounds the ECO can justify the decision. Ordinarily the answer would be for the Respondent to re-apply, this time providing all the right bits of paper at the right time. That overlooks the fact that here is a British citizen child currently separated from his father at a crucial point in his development, a situation that is plainly contrary to his best interests. Sending this family away to make a new application is pointless and, to paraphrase Lord Foscote, Kafkaesque. Where this family actually have the right amount of money it cannot be said to be proportionate to expect them to make a fresh application where there is a very young child involved.

8. I do not consider that Judge Crawford erred in proceeding to consider Article 8 because there was a good arguable case for him to have done so. The finding that this interference was a disproportionate lack of respect for the Appellant's family life was one that was open to him on the evidence before the Tribunal.

Decision

9. The decision of the First-tier Tribunal does not contain errors of law such that the decision should be set aside. It is upheld.

10. I would draw to the ECO's attention that the factor that rendered this decision disproportionate is that there is a very young child involved. No doubt the ECO will wish to issue the Respondent with a visa as soon as possible.

Deputy Upper Tribunal Judge Bruce
10th July 2014