Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/10537/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 19th August 2014	**On 26th August 2014**

Before

UPPER TRIBUNAL JUDGE KING TD

Between

ENTRY CLEARANCE OFFICER - CHENNAI (MADRAS)

Appellant

and

MRS FATHIMA SHIYANA MOHAMMED SINAN

Respondent/Claimant

Representation:

For the Appellant: Mr C Avery, Home Office Presenting Officer
For the Respondent/Claimant: No Legal Representative but Sponsor attends.

DETERMINATION AND REASONS

1. The claimant in this case is a citizen of Sri Lanka born on 24th April 1980. She applied for leave to enter the United Kingdom as the spouse of the sponsor in an application dated 24th December 2012. That application was refused by a decision dated 20th March 2013 and upheld by the Entry Clearance Manager on 29th October 2013.

2. The claimant sought to appeal against that decision, which appeal came before First-tier Tribunal Judge Shamash on 19th May 2014. The appeal was allowed both in respect of the Immigration Rules and in respect of Article 8 of the ECHR.

3. The Entry Clearance Officer sought to appeal against that decision on the basis that the documentation submitted by the appellant in support of the maintenance requirements did not meet the specific Rules and also that the guidance in **Gulshan** was not applied in respect of Article 8.

4. Permission to appeal was granted and thus the matter came before me for determination.

5. The sponsor was unrepresented at the hearing.

6. In many ways this is an unfortunate situation because, as the First-tier Tribunal Judge indicated in the determination, there is little challenge to the fact that the sponsor was earning the requisite funds at the time of the application and subsequently. Numerous documents were produced showing the finances of the sponsor.

7. The difficulty facing the sponsor was that, as clearly set out in the decision letter of 20th March 2013, namely that the format of the letters from his employers did not meet the requirements as set out in paragraph 2(b) of FM-SE of the Immigration Rules.

8. Such Rules require the sponsor to provide a letter from the employer or employers to issue the wage slips at paragraph 2(a) confirming:-

   (i) the person's employment and gross annual salary;

   (ii) the length of their employment;

   (iii) the period over which they have been or were paid the level of salary relied upon in the application; and

   (iv) the type of employment (permanent, fixed term contract or agency).

9. There was a letter from Shell Cluster confirming that the sponsor was employed since April 2011 but did not confirm whether this is on a permanent basis. The letter did not confirm his gross income or when he had started being paid at that rate.

10. Similarly there was a letter from Churchill Services to the fact that the sponsor had been employed since 2011. That letter only stated the number of hours he worked and the hourly rate. The employer had not confirmed when this rate of income started or the gross annual income.

11. It was because of these defects that the application had been refused.

12. It seems to me that the Judge, although noting the concerns, nevertheless took the view that there had been at no stage any assertion that the sponsor did not earn over £18,600 in the period of time prior to the application nor that he failed to meet the financial requirements. The Judge was satisfied from all the letters, P60s and wage

slips produced that that income was in place at the time of the application and remains so to the present day. Undoubtedly the Judge was right to take that view but, as Mr Avery, who represents the respondent, pointed out, there has to be the evidence presented in the way as outlined under the Immigration Rules.

13. The fairness of the financial requirement and the way in which it should be established was considered by the Court of Appeal in **MM (Lebanon) & Ors [2014] EWCA Civ 985**.

14. It seems to me that that challenge is one that is meritorious in the sense that, if the Regulations made under statute require evidence in a particular form, then it should be provided in that form.

15. As I indicated to the sponsor that should not have proved a difficult obstacle in any event.

16. He is still with Shell Cluster and with Churchill Services.

17. There should be little difficulty, it would seem to me, in letters from those employers being prepared in the correct form setting out,particularly in relation to the date of application that prior to that application he had earned with them a particular sum, setting out his earnings since April 2011 and in particular within the twelve months immediately preceding the application. Each letter can set out the length of his employment and the nature of employment and how much he has been paid. That is all mirrored to some extent in the payslips and P60s that have been presented but that is not good enough to meet the Rules.

18. It would also be helpful in this case for those employers also to confirm what the sponsor has been earning since the application and to date, once again setting that out in terms of a gross annual salary and whether he is on a permanent or fixed term contract or agency.

19. Challenge is also made to the approach taken to Article 8 by the Judge. Once again I have considerable sympathy with the way in which the Judge was seeking to approach the matter. However, it has been stressed by the senior courts that Article 8 should not be used to circumvent the otherwise demanding requirements of the Immigration Rules. Therefore the fact that someone meets the spirit of the Rules does not necessarily, without more, led to a successful application of Article 8 ECHR.

20. The approach taken in **Gulshan** and in **Nagre** ,whilst to some extent criticised by the Court of Appeal in **MM,** offers much judicial discussion as to the precise ambit and operation of Article 8, when viewed through the prism of the Immigration Rules. Generally the approach to be taken, if the claimant did not meet the Immigration Rules, would be to look to see if there was something compelling outside of those Rules, which would render non-admission into the United Kingdom unduly harsh.

21. It is entirely apparent from paragraph 29 of the determination that the Judge had such matters generally in mind but perhaps did not express them in the way that they should possibly be expressed.

22. As indeed the sponsor was at pains to make clear to me he earns now some £26,000 a year, well over the minimum that is required by the Rules.. He has adequate accommodation as indeed was found by the Judge and not challenged. He now has a small child and it is clearly important to him and to his family that they come together without delay. The Judge noted that the process of appeal has taken an inordinate length of time to be resolved.

23. There is a paucity of information as to the situation and circumstances of the claimant and of her child in Sri Lanka. No doubt that could be addressed by further evidence. It seems to me, however, that the challenge which was made by the Entry Clearance Officer to the approach to Article 8 has some merit though perhaps not quite in the terms as relied upon in the written grounds.

24. In the circumstances therefore and with some reluctance I set aside the decision of the First-tier Tribunal Judge for the decision to be remade.

25. Having regard to the reality of further evidence and of findings of fact to be made, I direct , in line with paragraph 7 of the Senior President's Practice Direction, that the matter should be reheard before the First-tier Tribunal.

26. I indicated to the sponsor that he should address the concerns expressed in the refusal letter with particularity and to obtain the necessary statements from his employers as required by the Rules. I also suggested to him that it might be prudent to get further evidence about his child and the circumstances of the claimant and why the claimant would say that it was unduly harsh that they remain in Sri Lanka rather than coming to the United Kingdom.

27. So far as the Immigration Rules are concerned there was a finding that the sponsor satisfied the Rules as to accommodation. No challenge has been made to that and in those circumstances that is a finding that should remain.

28. Given the delay in this matter it was with some relief that an early date for a hearing has been established, namely 26th September 2014. The sponsor should therefore seek to address the evidential concerns as speedily as he is able.

Signed Date

Upper Tribunal Judge King TD