Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: OA/13267/2013**

THE IMMIGRATION ACTS

Heard at Field House	**Determination promulgated**
On August 21, 2014	**On August 27, 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

Between

ENTRY CLEARANCE OFFICER

Appellant

and

MS THI THUY DUNG NGUYEN

Respondent

Representation:

For the Appellant:	Mr Deller (Home Office Presenting Officer)
For the Respondent:	Mr Martin, Counsel, instructed by Nag Law Solicitors

DETERMINATION AND REASONS

1. Whereas the respondent is the appealing party, I shall, in the interests of convenience and consistency, replicate the nomenclature of the decision at first instance.

2. The appellant, born February 2, 1988, is a citizen of Vietnam On May 16, 2013 the appellant applied for entry clearance as a spouse.

3. The respondent refused her application on June 4, 2013 on the basis he/she was not satisfied the requirements of Appendix FM and in particular the application was refused for failing to satisfy:-

   a. Section E-ECP 2.6 and 2.10 of Appendix FM (genuine and subsisting relationship)
   b. Section E-ECP 3.1 of Appendix FM (financial requirements required under Appendix FM-SE)

4. On June 14, 2013 the appellant appealed under Section 82(1) of the Nationality, Immigration and Asylum Act 2002. The respondent reviewed the grounds of appeal but maintained the refusal.

5. The matter was listed before Judge of the First-tier Tribunal Khan (hereinafter referred to as "the FtTJ") on May 14, 2014 and in a determination promulgated on May 30, 2014 he found the Immigration Rules had not been met but allowed the appellant's appeal under article 8 ECHR on the grounds that refusal was disproportionate.

6. The respondent appealed that decision on June 4, 2014. Permission to appeal was granted by Judge of the First-tier Tribunal McDade on July 2, 2014. She found the FtTJ may have erred because the FtTJ had failed to identify compelling circumstances not sufficiently recognised under the Rules.

7. The sponsor was not in attendance.

SUBMISSIONS ON ERROR OF LAW

8. Mr Deller relied on the grounds of appeal and submitted the FtTJ erred by allowing the appeal on article 8 grounds.

9. Mr Deller submitted the FtTJ recognised that the appellant did not meet the Immigration Rules and in particular she failed to satisfy the requirements of Appendix FM-SE with regard to submitting the required financial information and she failed to demonstrate the sponsor satisfied the £18,600 threshold contained in the Rules. Having refused the appeal under the Immigration Rules the FtTJ failed to identify what compelling circumstances as set out in R (on the application of) Nagre v SSHD [2013] EWHC 720 (Admin) and Gulshan [2013] UKUT 00640 (IAC). In particular the FtTJ erred because:-

a. He considered the appeal based on what Blake J said in MM [2013] EWHC 1900 (Admin). This approach was wrong for two reasons namely he should have followed the approach in Nagre and Gulshan and secondly, the Court of Appeal had clarified the Immigration Rules in MM (Lebanon) & Ors, R (on the application of) v Secretary of State for the Home Department & Anor [2014] EWCA Civ 985. The Court of Appeal made it clear that the Rules were fair and it was not for judges to apply a different figure or a different way of calculating income.

b. The fact it was a "near miss" was not a good reason to consider the appeal under article 8. The decision in Miah [2012] EWCA Civ 261 confirmed there is no such thing in law as a near miss.

c. An available remedy was to reapply and provide the correct documents.

10. Mr Martin submitted there was no error in law. He referred me to paragraphs [73] and [160] of MM (Lebanon) and reminded me that the Immigration Rules were there to codify what was required to be admitted as a spouse but he submitted that whereas in the case of a deportation the Rules were a complete code this was not the case in a settlement application. He submitted the FtTJ was entitled to consider the appeal outside of the Rules because he had identified circumstances that merited consideration. In particular, he had provided documents that showed his income was above the £18,600 threshold but those documents did not satisfy Appendix FM-SE. In addition, he had not failed to comply with substantial requirements of the rules but merely procedural requirements and in these circumstances Miah did not apply. The respondent could have requested further information or assumed the rules were met based on the evidence before her. The FtTJ accepted the marriage was genuine and subsisting and he accepted the evidence of income. The economic well-being of the country was not affected in these circumstances and it was open to him to consider the appeal outside of the Rules and to allow the appeal.

11. Mr Deller responded to these submissions and submitted it was not justifiable to distinguish between substantive and procedural rules. Appellants had previously argued that the if something was not in the Rules then it was not binding and the Supreme Court in R (on the application of Alvi) (Respondent) v Secretary of State for the Home Department (Appellant) [2012] UKSC 33 upheld this submission. The appellant had not met the

requirements of the Rules and there was nothing else about this case that should have led to a Gulshan consideration.

ERROR OF LAW ASSESSMENT

12. The FtTJ had the advantage of hearing oral evidence in this appeal and he also had the benefit of listening to submissions made by the appellant's representative.

13. At the hearing the sponsor adopted his witness statement and gave further evidence on the state of his relationship with his wife and his financial circumstances. In closing submissions the respondent pointed out that the claimed turnover was not reflected in the bank statements and the accountants did not meet the requirements of Appendix FM-SE. The appellant's representative stated the sponsor could not meet Appendix FM-SE paragraph 7 because in relation to the twelve month bank statements as well as his personal bank statements he could not show the money from the business went into the business account and he also accepted the accountant had not confirmed they were regulated with the appropriate professional body. The appellant's representative specifically relied on paragraphs [124], [139] and [153] of MM (Blake J) and argued the appeal should be allowed under article 8 ECHR.

14. The FtTJ recognised in paragraph [12] of his determination the difficulty the appellant faced. However, he did exactly what the Court in MM (Lebanon) made clear judges should not do namely he looked at the sponsor's financial circumstances and substituted his own approach to how the Rule should have been applied.

15. Despite Mr Martin's efforts to persuade me that the decision contained no material error I am satisfied that there were two errors in the FtTJ's approach and by implication Mr Martin's submissions. Firstly, the courts in MM (Lebanon, Gulshan and Nagre set out the correct approach to be taken. The FtTJ did not follow this approach. Having refused the application under the Immigration rules the FtTJ immediately considered the appeal under article 8. This is an error in law. Secondly, by following Blake J's reasoning in MM he also erred because the Court of Appeal found the Rules were fair. The FtTJ allowed the appeal because he found the refusal disproportionate because the Rules were unfair because in his view the sponsor met the requirements albeit not in the manner specified in the Rules.

16. I therefore find the FtTJ materially erred in his approach to this case with regard to article 8 ECHR.

17. I invited both parties to make any final submissions on whether this was firstly a case which should be considered outside of the Rules and even if it was whether refusal would be disproportionate.

SUBMISSIONS

18. Mr Deller had nothing to add to what he had already said and relied on those submissions.

19. Mr Martin submitted there was difference between a substantive and procedural requirement. The FtTJ found the sponsor had an income over £18,600 and whilst Appendix FM-SE ensured consistency in decisions there were exceptions that could be considered and the Rules were not a complete code. There was no economic reason to refuse the application and the case should be considered outside the Rules as refusal would be unjustifiably harsh in light of the fact the sponsor was British, the relationship was genuine and the appellant had delayed submitting her application whilst she satisfied the English language requirement. He submitted the appeal should be allowed under article 8.

CONSIDERATION OF SUBSTANTIVE APPEAL

20. The issues in this appeal were as follows:-

    a. As the Appellant did not meet the Immigration Rules were they a complete code?
    b. If not, were there compelling reasons to consider it outside of the Immigration Rules that would result in unjustifiably harsh consequences for him.
    c. If the case was considered outside of the Rules was it proportionate to refuse her entry.

21. Both the sponsor and appellant were aware of the Rules when this application was submitted. I say that because the appellant delayed her application to gain an English language certificate and the sponsor provided documents that he believed satisfied the Rules.
22. The FtTJ found the appellant could not satisfy Appendix FM because he had failed to demonstrate he met the financial requirements as set out in the Rules and he had also failed to prove the accountants, who provided him with his accounts and a letter confirming themselves as his accountants, had failed to show they were regulated as required.

23. Mr Martin has submitted that these are procedural requirements and not substantive requirements. I disagree.

24. The Rules clearly set out what has to be done to be admitted. The requirements for a successful entry clearance application are carefully set out in the Rules. The Court of Appeal in MM (Lebanon) reiterated those Rules were not disproportionate.

25. The requirement for an accountant to be properly regulated is not merely procedural but substantive. The aim of that Rule was to ensure that accounts and letters from accountants could be relied on without further query about their credentials. The appellant and sponsor were aware of the Rules but did not address this fault either before the First-tier judge or myself.

26. The Rules also provide various routes that enable a person to meet the financial requirements. These take account of people who are retired and live on savings, people who are employed and of course self-employed people.

27. The appellant was aware of what was needed and he of course chose not to pay his monies into his bank account and to use cash generated for whatever purpose. The rules are there so that anyone wanting to bring a spouse into this country knows what has to be shown. There is no difficult calculation because the Rules set out what has to be produced.

28. The appellant and sponsor did not meet the Rules and the FtTJ quite rightly made that finding.

29. I am invited to consider the appeal under article 8 ECHR. The Courts in MM (Lebanon) & Ors, R (on the application of) v Secretary of State for the Home Department & Anor [2014] EWCA Civ 985 considered the approaches in Gulshan [2013] UKUT 00640 (IAC) and Nagre [2013] EWHC 720 Admin and confirmed the approach to be taken.

30. The Court of Appeal in MM examined numerous authorities and stated:

> "128. … In Nagre the new rules were themselves attempting to cover, generally, circumstances where an individual should be allowed to remain in the UK on Article 8 grounds… Nagre does not add anything to the debate, save for the statement that if a particular person is outside the rule then he has to demonstrate, as a preliminary to a consideration outside the rule, that he has an arguable case that there may be good grounds for granting leave to

> remain outside the rules. I cannot see much utility in imposing this further, intermediary, test. If the applicant cannot satisfy the rule, then there either is or there is not a further Article 8 claim. That will have to be determined by the relevant decision-maker.
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> 134. Where the relevant group of Immigration Rules, upon their proper construction, provide a "complete code" for dealing with a person's Convention rights in the context of a particular IR or statutory provision, such as in the case of "foreign criminals", then the balancing exercise and the way the various factors are to be taken into account in an individual case must be done in accordance with that code, although references to "exceptional circumstances" in the code will nonetheless entail a proportionality exercise. But if the relevant group of Immigration Rules is not such a "complete code" then the proportionality test will be more at large, albeit guided by the Huang tests and UK and Strasbourg case law.
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> 159. … It seems clear from the statement of Lord Dyson MR in MF (Nigeria) and Sales J in Nagre that a court would have to consider first whether the new MIR and the "Exceptional circumstances" created a "complete code" and, if they did, precisely how the "proportionality test" would be applied by reference to that "code".
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> 162. … Firstly, paragraph GEN.1.1 of Appendix FM states that the provision of the family route "takes into account the need to safeguard and promote the welfare of children in the UK", which indicates that the Secretary of State has had regard to the statutory duty. Secondly, there is no legal requirement that the Immigration Rules should provide that the best interests of the child should be determinative. Section 55 is not a "trump card" to be played whenever the interests of a child arise…"

31. I have to consider whether a refusal would result in unjustifiably harsh consequences for the individual such that refusal of the application would not be proportionate.

32. Based on the facts of this case I am unable to find good arguable grounds or compelling circumstances not sufficiently recognised under Appendix FM, where refusal would result in unjustifiably harsh consequences for the appellant. I am satisfied the rules are a complete code in this application and the

failure to satisfy them is something that the appellant and sponsor could have addressed.

33. In these circumstances I find there is no basis to allow this appeal under article 8 ECHR.

DECISION

34. There is a material error of law and I set aside the original decision under article 8ECHR.

35. I have remade the article 8 decision and I dismiss the appeal under Article 8 ECHR.

36. Under Rule 14(1) The Tribunal Procedure (Upper Tribunal) Rules 2008 (as amended) the appellant can be granted anonymity throughout these proceedings, unless and until a tribunal or court directs otherwise. No order has been made and no request for an order was submitted to me.

Signed: Dated:

Deputy Upper Tribunal Judge Alis

TO THE RESPONDENT

I reverse the fee award made in the First-tier because I have refused the appeal.

Signed Dated:

Deputy Upper Tribunal Judge Alis