



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: OA/13569/2013

**THE IMMIGRATION ACTS**

Heard at Field House  
Oral determination given following hearing  
On 2 September 2014

Determination Promulgated  
On 18 September 2014

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

ENTRY CLEARANCE OFFICER - ISLAMABAD  
(PORT REF: ISLAMABAD/1713839)

Appellant

and

MR MUHAMMAD RAMEEZ

Respondent

**Representation:**

For the Appellant: Ms J Isherwood, Home Office Presenting Officer  
For the Respondent: No representation

**DETERMINATION AND REASONS**

1. This is the Entry Clearance Officer's appeal against a decision of First-tier Tribunal Judge Pirotta which was made in a determination promulgated on 5 February 2014 following a hearing at Birmingham on 29 January 2014. For ease of reference

throughout this determination I shall refer to Mr Rameez who was the original appellant as “the claimant” and to the Entry Clearance Officer who was the original respondent as “the Entry Clearance Officer”.

2. The facts can be stated very briefly. The claimant who is a citizen of Pakistan was born on 28 March 1992. In February 2013 he married Mrs Mahmood who is a British citizen living in the United Kingdom and he applied to enter the United Kingdom as her spouse. In order to satisfy the requirements of the Immigration Rules it was necessary for him among other matters to supply evidence in a prescribed form to show that the sponsor had income above the threshold of £18,600. It is accepted and the judge found that this requirement was not technically satisfied. For this reason the application was refused.
3. On appeal the judge while finding that the requirement was not technically met did find at paragraph 18 that “[the sponsor] has established in this appeal by equally probative evidence that the facts are as stated and that she does meet the income threshold stipulated in Appendix FM”. The judge gave her reasons for this decision at paragraphs 24 and 25 as follows:
  - “24. The decision to refuse entry on the basis of the Appendix FM criteria is not unreasonable in the circumstances when made but the persistence of that decision is not proportionate and there ... exists sufficient compelling, compassionate circumstances to conclude that it would be unreasonable to require the appellant to make a fresh application which would be bound to succeed. The decision to require the appellant to meet the criteria of Appendix FM in a fresh application interferes with her Article 8 rights to private and family life with the appellant.
  25. To require a fresh application would involve further delay and expense, merely to comply with the strict criteria of the Immigration Rules. Delay and further expenses in these circumstances would breach the rights of the appellant and sponsor to Article 8 rights to private and family life and would not be justified or proportionate to the policy of immigration control or the fair application of entry criteria to all applicants.”
4. On behalf of the Entry Clearance Officer Ms Isherwood submits that there being a requirement under Appendix FM(SE) to supply evidence in specified form, the appeal was bound to fail under the Rules and that in order for such an appeal to succeed under Article 8 there had to be a finding that this case was out of the ordinary; it was not open to the judge just to ignore the requirements of the Rules and the decision accordingly had to be set aside and re-made.
5. In my judgment this is plainly right. I have regard also now as I must to the decision of the Court of Appeal in the recently decided case of *MM & Others* [2014] EWCA Civ 985 in which it was made clear that the Secretary of State had been entitled to impose requirements under the Rules and that for an Article 8 claim to succeed there had to be circumstances beyond the fact that the failure to meet the requirements of

the Rules was technical. It is clear in this case that the judge's finding that the decision on the basis of the Rules was not proportionate is not adequately reasoned and was not open to her.

6. I must make one other observation with regard to this determination. At paragraph 7 the judge states that "it is for the appellant to satisfy me on the balance of probabilities that at the date of the decision appealed he was able to meet the requirements of the Rules applicable to him" but then at paragraph 17 she goes on when setting out her findings to state that "I am satisfied to the lower level of proof required of an appellant that...". While nothing turns on this in the circumstances of this appeal that is not a correct statement of the law. The test was not whether or not the judge was satisfied "to the lower level of proof required of an appellant" but as the judge had stated correctly at paragraph 7 the standard of proof was the balance of probabilities. I am obliged to make this observation because in another determination which was recently considered by another judge of the Upper Tribunal, the judge has made the same error in precisely the same terms. The judge had also referred at paragraph 7 to the burden of proof being "on the balance of probabilities" yet in paragraph 17 had referred to being satisfied to the "lower level of proof required of an appellant". It seems that the judge may be using a template which is not appropriate when considering entry clearance cases and if this is the position this should not occur in the future.
7. It follows that I must re-make the decision and I do so having regard to the judgment of the Court of Appeal in *MM & Others* referred to above and in particular to the observation at paragraph 137 to the effect that a British citizen does not have a right to a family life *in the UK*. There is in my judgment nothing that is exceptional in this case and no reasons have been put before me as would justify allowing this appeal under Article 8 in circumstances where it is bound to fail under the Rules.
8. I should state that before this appeal was heard the claimant's solicitors wrote to the Tribunal stating that the claimant wished to "withdraw the matter from the Upper Tribunal as "the family have decided to submit a fresh application". This letter was put before a judge of the Upper Tribunal (not myself) and a response was sent to the claimant's solicitors stating that the request to withdraw the appeal "misconstrues the nature of the appeal with which the Upper Tribunal is seized" because it was the Entry Clearance Officer who had been granted permission to appeal the determination allowing the appeal and this is what was now before the Upper Tribunal. The solicitors were informed that the hearing would proceed as listed and that it was a matter for the claimant as to whether or not he wished to concede the appeal. Under Rule 17 of the Tribunal Procedure (Upper Tribunal) Rules 2008 by Rule 17(2) "Notice of withdrawal will not take effect unless the Upper Tribunal consents to the withdrawal" (except in circumstances which do not apply in this case). In light of the response which was sent to the claimant's solicitors and the matters set out within this determination I do not consent to this appeal being withdrawn, but will re-make this decision and dismiss the claimant's appeal.

9. Before concluding my determination, it is appropriate to record that on behalf of the Entry Clearance Officer Ms Isherwood informed the Tribunal that there was no reason now why a fresh application which the Tribunal has been told the claimant intends to make should not be considered on its merits and if, as the judge considered was likely to be the case, the requirements of the Rules are now satisfied and this is demonstrated in the specified form, there does not appear to be any reason why such a fresh application should not be successful. However, that is not a matter for me.

### **Decision**

**I set aside the determination of First-tier Tribunal Judge Pirotta as containing a material error of law and substitute the following decision:**

**The claimant's appeal is dismissed both under the Rules and under Article 8.**

Signed:

Date: 15 September 2014

Upper Tribunal Judge Craig