



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/14812/2013

THE IMMIGRATION ACTS

Heard at North Shields
On 22 August 2014
Given extemporary in court on the 22 August 2014.

Determination Promulgated
On 3 September 2014

Before

UPPER TRIBUNAL JUDGE RICHARD CHALKLEY

Between

MRS BEGUM MST JASMIN

Appellant

and

ENTRY CLEARANCE OFFICER, DHAKA

Respondent

Representation:

For the Appellant: Mr Marfat, Newcastle Legal Centre

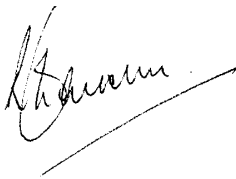
For the Respondent: Mr C Dewison, Senior Home Office Presenting Office

DETERMINATION AND REASONS

1. The Appellant in this appeal is a citizen of Bangladesh, who was born on the 1 February, 1988. She made application for entry clearance as a partner of Mr Mohammed Bodrull Chowdhury (“the Sponsor”) under Appendix FM of Statement of Changes in Immigration Rules, HC 395, as amended (“the immigration rules”).
2. The Respondent refused the application on the 13 June, 2013, under Appendix ECP.1.1 of Appendix FM, on the basis that the Appellant and her Sponsor had failed to demonstrate they had genuinely formed a relationship and that they had failed to demonstrate that they intended to live permanently together as their spouses. The Entry Clearance Officer was also not satisfied that the Sponsor had demonstrated that he meets the financial requirements of the rules, which show a gross income of at least £18,600 per annum.

3. The judge recorded at paragraph 4 of her determination that the Entry Clearance Officer was not satisfied that there would be adequate accommodation for the appellant and sponsor. The Entry Clearance Officer subsequently reviewed the decision on the 18 February, 2014 and conceded that the relationship between the couple was subsisting. At paragraph 27 of the determination the judge found that the accommodation was adequate and decided that the issue for her, therefore, was whether the Sponsor satisfied the financial requirements to show an income of at least £18,600 per annum.
4. The sponsor gave oral evidence at the hearing and explained that he had a second job which he had started some seven months prior to the hearing. The judge recorded his salaried income from East India Take-away as being £12,875 per annum. She noted a P.60 which had been adduced in evidence, stated that the Sponsor had earned, during the tax year commencing April 2012, ending April 2013, the sum of £2,971.20 from his second employment with Elachi Crook, as at the 5 April 2013. She concluded that the Sponsor did not fulfil the financial requirements set out in the Immigration Rules and dismissed the Appellant's appeal.
5. In dismissing the Appellant's appeal, the judge failed to take into account the second income which had been pursued by the Sponsor for five months before the date of the application, because the judge found it had only been pursued for some five months and she believed that under the requirements of the rules, it had to have been established for six months. The Appellant challenged the judge's decision and First-tier Tribunal Judge Gillespie granted permission to appeal.
6. At the hearing before me Mr Dewison accepted that there was a clear error of law in the judge's determination, in that she should have taken into account the second income even though it was not for a period of six months or more. However, he suggested that the error was not material.
7. For the Appellant, Mr Marfat suggested that the decision was wrong in law because the judge failed to consider the second income. He agreed with me that the Sponsor's salaried income up to the date of the decision of the Entry Clearance Officer totalled £13,008 per annum, earned from the East India Take-away in accordance with the evidence provided by HM Customs and Revenue, together with the sum of £595 per month which the Sponsor had been earning for five months. He suggested that the rules required that the second income had to be calculated on the basis of twelve months, because it was looking forward.
8. I explained that it was a requirement of the rule that the earnings had to be the *actual* earnings of the Sponsor *during the previous twelve months* immediately prior to the application. He accepted and agreed with me that the total earnings of the Sponsor during the previous twelve month period immediately preceding the date of the Entry Clearance Officer's decision, was a little under £16,000. In actual fact the figure is £15,979, so that the Sponsor could not meet the financial requirements of Appendix FM of the rules.
9. However, submitted Mr Marfat, at the time of the judge's decision there was in existence a decision of the Upper Tribunal decision of the Administrative Court decided by the Former President of the Tribunal, Mr Justice Blake in *MM, R (On the Application Of) v The Secretary of State for the Home Department* [2013] EWHC 1900, which suggested if certain factors were met, and I am not sure that they were in this case in any event, the requirements of the rules breached Article 8 of the European Convention of Protection of Human Rights and Fundamental Freedoms. He said that had the judge properly calculated the figures as at the date of her hearing as being £15,979, then taking into account the Administrative Court's decision in *MM* she should have allowed the appeal.

10. Mr Marfat accepted that the Court of Appeal decided that the Administrative Court's decision in *MM* was wrong law. What the Administrative Court said in *MM*, never has been the law. While Judge Bircher might very well have been bound by the decision, because at that time it had not been overturned by the Court of Appeal, her decision would have been wrong in law and it would no doubt have prompted the Secretary of State to have appealed the decision.
11. I have concluded therefore that was an error in the determination and it was an error of law, but it was not one that could possibly have affected the outcome of the appeal, because even if the judge had properly taken into account the full extent of the second income of the Sponsor, the appellant would still not have met the financial requirements of the rules. For all these reasons I uphold her decision.



Signed

Upper Tribunal Judge Chalkley