



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/15146/2013

THE IMMIGRATION ACTS

Heard at Field House
On 23 July 2014

Determination Promulgated
On 31 July 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

**MRS DONOS NEWTON KARANSHIYA
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Mr D Shaw, Counsel instructed by Tamil Community Law Centre

For the Respondent: Mr P Deller, Senior Presenting Officer

DETERMINATION AND REASONS

1. The appellant appeals to the Upper Tribunal from the decision of the First-tier Tribunal dismissing his appeal against the decision by an Entry Clearance Officer to refuse to issue her with entry clearance as the spouse of a person present and settled here. The First-tier Tribunal did not make an anonymity order, and I do not consider that such an order is warranted for these proceedings in the Upper Tribunal.

2. The appellant is a national of Sri Lanka, whose date of birth is 26 July 1984. In her application form, she said she had first met her sponsor in person in July 2011 at the airport in Colombo. Their relationship had begun on 20 June 2008, and had been conducted by telephone and Skype since that date. They had entered into an arranged marriage at St Mary's Cathedral in Colombo on 6 September 2011. She and her sponsor communicated in Tamil. Her sponsor worked as a customer assistant for Tesco. He commenced this employment on 25 February 2012, having previously worked as a staff member for McDonald's Restaurants Limited.
3. At paragraph 3.21 the appellant certified that her sponsor's annual income before tax from his current salaried employment met or exceeded the financial requirement that she had to meet.
4. On 27 June 2013 an Entry Clearance Officer in Chennai refused the appellant's application, as she had not provided the specified documents to show her sponsor's annual income from employment. On the evidence provided, her sponsor's gross income from his employment with Tesco was £0 per annum. This was because she had failed to produce a complete set of six months of payslips which predated the date of application by 28 days or less. The payslip for March 2013 was missing. She had also not provided a letter from her sponsor's employer which satisfied the requirements of the Family Migration Rules as evidence of the sponsor's gross income from his employment.

The Hearing before, and the Decision of, the First-tier Tribunal

5. The appellant's appeal came before Judge Mark Eldridge sitting at Hatton Cross in the First-tier Tribunal. Although the sponsor was present at the hearing, Mr Shaw informed the judge that he did not wish to call any evidence. In his subsequent determination, Judge Eldridge acknowledged that the appellant had now provided her husband's payslip for the most recent month, namely March 2013. She had thus now shown that her husband's total gross earnings were £8,847.50 over six months. This equated to an annual figure of £17,695, which represented a shortfall of £905.
6. The judge went on to consider whether the shortfall could be made up for by savings. He answered this question in the negative. He concluded at paragraph 18 as follows:

The appellant has failed to show she can meet the requirement of the Rules. Even if the missing documents could be overlooked, which they cannot, the income required is more than £900 short and the savings inadequate. The appeal must fail. The appellant cannot meet the financial requirements of Appendix FM.

7. The judge went on to address a submission from Mr Shaw that he should follow the decision of Blake J in **MM**, and find that the requirements of the Rules are excessive and a figure of £13,500 or thereabouts should be applied. Judge Eldridge rejected this submission. He went on to address Article 8 in paragraph 20:

Article 8 was never a ground in this appeal – either in the appeal notice or at the hearing. For the sake of completeness I am bound to say that, even if it had been, I would have found the respondent's decision proportionate. The economic interests of

the country are at the heart of the Rules and the justification for them. I would not have found there were the compelling circumstances envisaged by Sales J in his decision in **R (On the application of Nagre) v Secretary of State for the Home Department** [2013] EWH 720 (Admin) as justifying consideration beyond the Rules. As it is that is not a matter I have to consider.

The Application for Permission to Appeal to the Upper Tribunal

8. Mr Shaw settled the appellant's application for permission to appeal to the Upper Tribunal, arguing that the judge had been wrong to reject **MM** by reference to **Gulshan (Article 8 - new Rules - correct approach)** [2013] UKUT 640. Although **MM** was mentioned in **Gulshan**, it was not overruled and remained the law. Mr Shaw also took issue with the judge's statement in paragraph [20] that Article 8 was never a ground of appeal. He had expressly pleaded in his skeleton argument before the First-tier Tribunal that refusal of the application would be a disproportionate breach of the appellant's and her husband's right to family life.

The Grant of Permission to Appeal

9. On 30 June 2014 First-tier Tribunal Judge Page granted the appellant permission to appeal on Article 8 grounds, holding that all grounds of appeal under Article 8 were arguable.

The Hearing in the Upper Tribunal

10. At the hearing before me, Mr Deller produced the decision of the Court of Appeal in **MM (Lebanon) and others v Secretary of State for the Home Department** [2014] EWCA Civ 985, which overturns the decision of Blake J relied on by Mr Shaw before the First-tier Tribunal. I adjourned the hearing so as to give Mr Shaw an opportunity to consider the ramifications of the Court of Appeal decision. On the resumption of the hearing, Mr Shaw acknowledged that one of the key points he relied upon below fell away. He no longer submitted that the judge should have found the sponsor's income to be adequate, by reference to the "lower appropriate figure" of around £13,500 championed by Blake J in **MM**. But he submitted it was still the case that it was open to the court to find that a refusal on financial grounds was disproportionate. The sponsor's income still fell below the required threshold of £18,600. It was not known when the sponsor's earnings would meet that threshold.

Discussion

11. The judge appears to have been in error insofar as he held that Article 8 had not been raised at the hearing. But the error was not material, as the judge nonetheless addressed the precise point raised by Mr Shaw in his skeleton argument, which was the proportionality of the refusal. He not only went on to address it in paragraph [20], but he had already engaged with the arguments which underpinned the Article 8 claim earlier in his determination: namely, the "near-miss" argument and the reliance on **MM**. I consider that the judge's determination is impeccable, and I can find no fault whatsoever in his reasoning.

12. In granting permission to appeal, Judge Page said it was arguable that the judge should have allowed the appeal under Article 8 because there was only a shortfall of £905 in the required income of £18,600. I disagree. It was not open to the judge to allow the appeal under Article 8 simply because the husband failed to meet the required income threshold by only a small margin.
13. As the judge rightly directed himself in paragraph [20], he could only allow the appeal under Article 8 if the high threshold test set out by Sales J in Nagre, and endorsed by the Upper Tribunal in Gulshan, was met. There was no evidence that there were insurmountable obstacles to family life being conducted by the couple in Sri Lanka, and that was not part of the appellant's case. In the absence of insurmountable obstacles to family life being carried on in Sri Lanka, there would have to have been compelling circumstances not sufficiently recognised by the Immigration Rules to justify a grant of entry clearance to the appellant outside the Rules.
14. It was open to the judge to find that there were not such compelling circumstances on the evidence that was before him. The only compelling circumstance specifically relied on in support of the Article 8 claim was the near miss under the Rules, and that did not constitute a compelling circumstance.
15. It was not the appellant's case before the First-tier Tribunal that her husband would not be able to meet the financial threshold of £18,600 for the foreseeable future. But even if it had been, the judge could only consider the circumstances appertaining at the date of the refusal decision in his Article 8 assessment.
16. The only other relevant evidence bearing upon the assessment of an Article 8 claim outside the Rules was a letter in the appellant's bundle from the appellant's church in Sri Lanka testifying to the appellant's upset at not being granted entry clearance to join her husband in the UK. But the appellant's upset did not constitute an exceptional or compelling circumstance. On the face of it, the interference consequential upon the lawful refusal decision was only temporary in that it was open to the appellant to make a fresh application, relying on more up-to-date evidence of annual earnings. So there was no error on the part of the judge in not specifically addressing this piece of evidence as part of his discussion of a putative Article 8 claim.

Decision

17. The decision of the First-tier Tribunal does not contain an error of law, and accordingly the decision stands. This appeal to the Upper Tribunal is dismissed.

Signed

Date

Deputy Upper Tribunal Judge Monson