Upper Tier Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/24887/2012

THE IMMIGRATION ACTS

Heard at Manchester	**Determination Promulgated**
On 15 September 2014	**On 1 October 2014**

Before

Deputy Upper Tribunal Judge Pickup
Between

The ENTRY CLEARANCE OFFICER Islamabad

Appellant

and

Mrs Latifa
[No anonymity direction made]

Claimant

Representation:

For the claimant: Not represented
For the respondent: Ms C Johnstone, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The claimant, Mrs Latifa, date of birth 13.5.81, is a citizen of Pakistan.

2. This is the appeal of the Secretary of State against the determination of First-tier Tribunal Judge Lever promulgated on 10.10.13, who, on human rights grounds, allowed her appeal against the decision of the respondent, dated 20.11.12 to refuse her application for entry clearance to the United Kingdom as a partner under Appendix FM of the Immigration Rules. The Judge heard the appeal on 24.9.13.

3. First-tier Tribunal Judge Campbell refused permission to appeal on 1.11.13. However, when the application was renewed to the Upper Tribunal, Upper Tribunal Judge Goldstein granted permission on 9.6.14.

4. Thus the matter came before me on 15.9.14 as an appeal in the Upper Tribunal.

5. The appellant was not legally represented but the sponsor Mr Talib Nori was present.

Error of Law

6. In the first instance I have to determine whether or not there was an error of law in the making of the decision of the First-tier Tribunal such that the determination of Judge Lever should be set aside.

7. The application had been refused because of failure to comply with the specified evidence requirements of Appendix FM-SE in relation to the sponsor's financial circumstances. The claimant had to demonstrate not only that the sponsor's income met the £18,600 threshold but that the evidence specified had been submitted.

8. Doing the best he could to assist the claimant and the sponsor from the available documents, Judge Lever found that the sponsor's income was no higher than £17,540.44, as evidenced by the P60, and thus fell short of the £18,600 threshold. Further, necessary specified documents, including correct contract of employment, bank statements, etc., had not been produced. The judge thus concluded at §28 that the appellant did not meet the requirements of the Immigration Rules.

9. However, from §29 onwards the First-tier Tribunal considered the appeal under article 8 ECHR, following the Razgar five steps. The judge found that the sponsor's income fell below the £18,600 threshold by only a narrow margin and that had he not had certain days off work because of vehicle problems he would have met the threshold. In the circumstances, Judge Lever concluded that it would be disproportionate to refuse entry clearance and thus allowed the appeal under article 8 ECHR family life.

10. Whilst this determination preceded promulgation of the now well-known principles set out in Gulshan [2013] UKUT 00640 (IAC) and subsequent cases, R (on the application of) Nagre [2013] EWHC 720 Admin, was promulgated in March 2013. There, Sales J found that the regime of rules coupled with the Secretary of State's published policy on exceptional circumstances "…fully accommodates the requirements of Article 8" [§36] and, "…there is full coverage of an individual's rights under Article 8 in all cases by a combination of the new rules and (so far as may be necessary) under the Secretary of State's residual discretion to grant leave to remain outside the Rules." At §30, he stated, "if, after the process of applying the new rules and finding that the claim for leave to remain under them fails, the relevant official or tribunal judge considers it is clear that the consideration under the Rules has fully addressed any family life or private life issues arising under Article 8, it would be sufficient simply to say that; they would not have to go on, in addition, to

consider the case separately from the Rules. If there is no arguable case that there may be good grounds for granting leave to remain outside the Rules by reference to Article 8, there would be no point in introducing full separate consideration of Article 8 again after having reached a decision on application of the Rules."

11. After applying the requirements of the Rules, only if there may be arguably good grounds for granting leave to remain outside them is it necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under them so that the decision is unjustifiably harsh. Judge Lever made no such assessment in his consideration of the appellant's circumstances.

12. It also appears that in allowing the appeal the judge erred in adopting a near-miss approach. In Miah [2012] EWCA Civ 261: Burnton LJ, at §26 stated, "In my judgement, there is no Near-Miss principle applicable in the Immigration Rules. The Secretary of State, and on appeal the Tribunal, must assess the strength of an article 8 claim, but the requirements of immigration control is not weakened by the degree of non-compliance with the Immigration Rules."

13. It is not open to the Tribunal to allow the appeal on the basis of a near miss. In Patel [2013] UKSC 72 Lord Carnwath said:

> "55. Thus the balance drawn by the rules may be relevant to the consideration of proportionality……
> 56. Although the context of the rules may be relevant to the consideration of proportionality….this cannot be equated with a formalised "near-miss" or "sliding scale" principle…..Mrs Huang's case for favourable treatment outside the rules did not turn on how close she had come to compliance with rule 317, but on the application of the family values which underlie that rule and are at the heart of article 8. conversely, a near-miss under the rules cannot provide substance to a human rights case which is otherwise lacking in merit.
> 57. It is important to remember that Article 8 is not a general dispensing power. It is to be distinguished from the Secretary of States' discretion to allow leave to remain outside the rules, which may be unrelated to any protected human right…."

14. In the circumstances, the narrow degree to which the claimant failed to meet the financial requirements of the Rules could not for that reason render the decision of the Entry Clearance Officer disproportionate. It is clear from §31 that the proportionality finding was based "on this very narrow and single issue."

15. I thus find such errors of law in the decision of the First-tier Tribunal that the determination should be set aside and remade.

16. In remaking the decision, I preserve the findings of Judge Lever as to the sponsor's financial circumstances. The income does not meet the required minimum threshold. I further note that the claimant failed to submit bank statements with the application. Judge Lever noted that the contract of employment did not relate to the current employment. The claimant thus does not meet the requirements of the Immigration Rules.

17. Before I can go on to consider the appeal outside the Immigration Rules on the basis of article 8, the claimant has to demonstrate that there are arguably compelling circumstances insufficiently recognised in the Rules which justify granting entry clearance under article 8 ECHR family or private life on the basis that the decision of the Entry Clearance Officer was unjustifiably harsh.

18. In MF (Nigeria) v SSHD [2013] EWCA Civ 1192, the Court of Appeal held that in relation to deportation cases the 'new' Immigration Rules are a complete code but involve the application of a proportionality test. Whether that is done within the new rules or outside the new rules as part of the article 8 general law was described as a sterile question, as either way the result should be the same; what matters is that proportionality balancing exercise is required to be carried out. The Court of Appeal observed that it was inclined to the view that insurmountable obstacles (the test under exception EX1) did not literally mean obstacles which it is impossible to surmount, but implied a reasonableness test. In other words, a proportionality test is required whether under the new rules or article 8. MF (Nigeria) was followed in Kabia (MF: para 398 - "exceptional circumstances") 2013 UKUT 00569 (IAC).

19. In Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 00640 (IAC) the Upper Tribunal set out, inter alia, that on the current state of the authorities:

> (b) after applying the requirements of the Rules, only if there may be arguably good grounds for granting leave to remain outside them is it necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under them: R (on the application of) Nagre v Secretary of State for the Home Department [2013] EWHC 720 (Admin);
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> (c) the term "insurmountable obstacles" in provisions such as Section EX.1 are not obstacles which are impossible to surmount: MF (Article 8 – new rules) Nigeria [2012] UKUT 00393 (IAC); Izuazu (Article 8 – new rules) [2013] UKUT 00045 (IAC); they concern the practical possibilities of relocation. In the absence of such insurmountable obstacles, it is necessary to show other non-standard and particular features demonstrating that removal will be unjustifiably harsh: Nagre.

20. It is illustrative that in Gulshan the Upper Tribunal considered that it was not unduly harsh for a husband who originated from Pakistan but was now a British national, to return to Pakistan with his wife who was seeking leave to remain as his spouse. The panel acknowledged that the couple would suffer some hardship, as he had been in the UK since 2002, he had worked here and was receiving a pension, and housing benefit and other state benefits, some of which could not be transferred to Pakistan.

21. In Shahzad (Art 8: legitimate aim) [2014] UKUT 00085 (IAC), the Upper Tribunal also held:

> (i) Failure on the part of the Secretary of State to identify in her decision any legitimate aim under Article 8(2) of the ECHR does not prevent a court or tribunal from seeking to do so on the basis of the materials before it.
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> (ii) "Maintenance of effective immigration control" whilst not as such a legitimate aim under Article 8(2) of the ECHR can normally be assumed to be either an aspect of

"prevention of disorder or crime" or an aspect of "economic well-being of the country" or both.

(iii) "[P]revention of disorder or crime" is normally a legitimate aim both in expulsion cases where there has been criminal conduct on the part of the claimant and in expulsion cases where there have only been breaches of immigration law.

(iv) MF (Nigeria) [2013] EWCA Civ 1192 held that the new immigration rules regarding deportation of a foreign criminal are a complete code. This was because of the express requirement in them at paragraph 398 to have regard to exceptional circumstances and other factors.

(v) It follows from this that any other rule which has a similar provision will also constitute a complete code;

(vi) Where an area of the rules does not have such an express mechanism, the approach in R (Nagre) v Secretary of State for the Home Department [2013] EWHC 720 (Admin) ([29]-[31] in particular) and Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 640 (IAC) should be followed: i.e. after applying the requirements of the rules, only if there may be arguably good grounds for granting leave to remain outside them is it necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under them.

22. Although the case law continues to develop, the current position is perhaps best expressed in paragraph 135 of R(MM (Lebanon)) v SSHD [2014] EWCA Civ 985:

> "135. Where the relevant group of IRs [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 reference to "exceptional circumstances" in the code will nonetheless entail a proportionality exercise. But if the relevant group of IRs 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."

23. These judgments have made it clear that the question of proportionality must be looked at in the context of the Immigration Rules with no need to go on to a specific assessment under Article 8 if it is clear from the facts that there are no particular compelling or exceptional circumstances requiring that course to be taken. That is an approach consistent with the Court of Appeal in MF (Nigeria) and Huang. Where an area of the Rules does not have an express mechanism, such as found in deportation appeals, the approach should be that after applying the requirements of the Rules, only if there may be arguably good grounds for granting leave to remain outside them is it necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under them.

24. I have considered all the evidence that was before the First-tier Tribunal and the findings of Judge Lever. Whilst it is unfortunate that the sponsor's income fell only

marginally below the threshold, that was not the only failure. There had been significant failure to submit the relevant specified evidence documents with the application to prove the claimed income. I note that the income claimed was significantly higher than that demonstrated by the documents. Whilst the claimant no doubt wishes to be reunited with the sponsor as soon as possible, there is nothing particularly compelling or exceptional about their circumstances. It is incumbent on the claimant to meet the same Rules that apply to all other applicants. Article 8 is not a shortcut to compliance with the Rules and her case under article 8 is not strengthened by the degree to which she failed to meet the Rules. I also bear in mind that if the sponsor's income is as claimed, they can make another application.

25. In all the circumstances, I find no compelling or exceptional circumstances in the evidence before me to justify allowing the appeal under article 8 ECHR family life. Neither do I find the decision disproportionate in light of the matters set out above. I also have regard to section 117B(3) of the 2002 Act, to the effect that it is in the public interest It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons— (a) are not a burden on taxpayers, and (b) are better able to integrate into society. The claimant has not shown that she meets the threshold set to demonstrate financial independence. I also note that in MM (Lebanon) the Court of Appeal in reversing the Upper Tribunal decision held that the financial threshold was not incapable of being proportionate.

Conclusion & Decision:

26. For the reasons set out above, I find that the making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside.

I set aside the decision.

I re-make the decision in the appeal by dismissing it on both immigration and on human rights grounds.

Signed: Date: 29 September 2014

Deputy Upper Tribunal Judge Pickup

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Given the circumstances, I make no anonymity order.

Fee Award **Note: this is not part of the determination.**

In the light of my decision, I have considered whether to make a fee award (rule 23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007).

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: The appeal has been dismissed.

Signed:  Date: 29 September 2014

Deputy Upper Tribunal Judge Pickup