**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: IA/32297/2014

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
|---|---|
| **On 4 August 2015** | **On 24 August 2015** |

Before

**UPPER TRIBUNAL JUDGE GILL**
**DEPUTY UPPER TRIBUNAL JUDGE SAFFER**

Between

**Secretary of State for the Home Department** Appellant

And

**Mobassher Nazir** Respondent
(ANONYMITY ORDER NOT MADE)

Representation:
For the Appellant: Ms J Isherwood, Senior Home Office Presenting Officer
For the Respondent: Mr. A Miah, of Counsel, instructed by Lee Valley Solicitors.

**DETERMINATION AND REASONS**

1. The Secretary of State has been granted permission to appeal to the Upper Tribunal against a determination of Judge of the First-tier Tribunal (Immigration and Asylum Chamber) ("FtT") A.J.M. Baldwin allowing the appeal of Mobassher Nazir (the "claimant") against a decision of the Secretary of State of 31 July 2014 refusing the claimant's application of 30 January 2014 for leave to remain as a spouse of a British citizen.

2. The claimant arrived in the United Kingdom on 21 February 2011 with leave as a student until 31 March 2012. His leave was subsequently extended until 30 January 2014. On 14 October 2013, he married a British citizen.

3. The Secretary of State first considered the application under the relevant requirements for leave as a partner under the 5-year route. She considered that the applicable income threshold under para E-LTRP 3.1 of Appendix FM of the Statement of Changes in the Immigration Rules HC 395 (as amended) (the "IRs") was £18,600 which was the relevant amount for a couple with no children. Although the claimant and his wife had had a child born to them before the Secretary of State made her decision on 31 July 2014, Mr Miah informed us that the claimant did not notify the Secretary of State of the birth of his child, nor did he vary his application for leave. The income threshold for a couple with one child is increased by an additional £3,800 to £22,400.

4. Appendix FM-SE sets out the specified documents to be produced in order the show that an applicant meets the income threshold. In this appeal, we are concerned with the following:

   i) Para 7(b)(i), which required an applicant to submit an annual self-assessment tax return to HMRC. The claimant submitted to the Secretary of State a tax return for the tax year from 6 April 2013 to 5 April 2014.

   ii) Para 7(g), which required an applicant to submit personal bank statements for the same 12-month period as the tax return.

   iii) Para 7(g) which required “evidence of on-going employment” through evidence of Class 2 National Insurance (“N.I.”) contributions.

5. The precise wording of these provisions is as follows:

   ‘7. In respect of self-employment in the UK as a partner as a sole trader or in a franchise all of the following must be provided:

      (a) …

      (b) The following documents for the last full financial year, or for the last two such years (where those documents show the necessary level of gross income as an average of those two years):

         (i) annual self-assessment tax return to HMRC (a copy or print-out); and

         (ii) …

      (f) personal bank statements for the same 12-month period as the tax return(s) showing that the income from self-employment has been paid into an account in the name of the person or in the name of the person and the partner jointly.

      (g) Evidence of on-going self-employment through evidence of payment of Class 2 National Insurance contribution, or …’

6. The Secretary of State found that the claimant did not meet the income threshold requirement, which she assessed to be £18,600 as she was unaware of the birth of the claimant's child.

7. In relation to the evidential requirement in para 7(f), the claimant submitted the following:

i) to the Secretary of State with his application, a bank statement for the period from 8 October 2013 to 6 January 2014 (appendix L of the Secretary of State's bundle); and

ii) at the hearing before Judge Baldwin, a bank statement for the period from 3 February 2014 to 9 April 2014.

8. On the basis of the evidence before her, the Secretary of State concluded that the claimant did not satisfy the evidential requirements in para 7(f) of Appendix FM-SE because he had not submitted bank statements covering the full period of the tax return submitted in respect of para 7(b)(i). She also concluded that the claimant had not provided evidence of Class 2 N.I. payments as required by para 7(g). For these and other reasons (which it is not necessary for us to refer to), she concluded that the claimant did not satisfy the requirements for leave as a partner under the 5-year route.

9. The Secretary of State then considered whether the claimant satisfied the requirements for leave under the 10-year route. These include the requirements of Ex.1 of Appendix FM, which provides:

> **EX.1.** This paragraph applies if
>
> (a) (i) the applicant has a genuine and subsisting parental relationship with a child who-
>
> (aa) is under the age of 18 years, or was under the age of 18 years when the applicant was first granted leave on the basis that this paragraph applied;
>
> (bb) is in the UK;
>
> (cc) is a British Citizen or has lived in the UK continuously for at least the 7 years immediately preceding the date of application; and
>
> (ii) it would not be reasonable to expect the child to leave the UK; or
>
> (b) the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen, settled in the UK or in the UK with refugee leave or humanitarian protection, and there are insurmountable obstacles to family life with that partner continuing outside the UK.

10. The Secretary of State noted that (on the evidence before her) the claimant had no children and she was not satisfied that there were insurmountable obstacles preventing the claimant from continuing his relationship with his wife in Pakistan. She therefore refused his application for leave as a partner under the 10-year route.

11. Before we turn to the judge's determination, we draw attention to the fact that, as will be evident from [7] above, there were no bank statements to cover the period from 7 January 2014 until 2 February 2014 even as at the date of the hearing before the judge.

12. However, Judge Baldwin found that the claimant nevertheless satisfied the evidential requirement in para 7(f). The judge relied upon Sultana and Others (rules: waiver/further enquiry/discretion) [2014] UKUT 00540 (IAC). She accepted the

claimant's explanation that his wife did not pay her earnings into her personal bank account and that this is the reason why she could not provide bank statements showing that she had done so. She said she had no doubt that the claimant's wife earned a sum in excess of that required under the IRs, that the only documentary evidence that not been provided to the Secretary of State were documents that simply did not exist or which could not evidence income for "the good reasons" given by the claimant. She considered that an enquiry of the claimant would have clarified matters for the Secretary of State.

13. In relation to the evidential requirement in para 7(g), the judge accepted the claimant's evidence that on 15 April 2014, he had sent the Secretary of State a letter by recorded delivery with proof of N.I. payments, evidenced by a receipt numbered SF113841470GB issued at 16:37 on 15 April 2014. She noted that the decision letter did not mention receipt of this letter and that the decision letter did not indicate that the document posted on 15 April 2014 had been considered. She said she was satisfied that the letter had been sent by the claimant, as he claimed. She accepted that "*it is likely that it included the N.I. evidence he is likely to have known would be required*" ([20]). At [21], the judge said, inter alia, as follows:

> "The [Secretary of State's] Decision clearly did not take account of the evidence I am satisfied was provided to her on 15.4.14. Had she not lost or mislaid this evidence, I am satisfied she would have looked at the evidence as a whole in a different light and appreciated that it might well be that the only additional evidence she would normally have wished to see was evidence that did not exist and could not be provided for the good reasons set out above ..."

14. The judge therefore allowed the appeal under the IRs but she did not state whether she was doing so in relation to the decision under the 5-year route or the decision under the 10-year route. The latter would have required consideration of whether the claimant satisfied the requirements of para EX.1 which the judge did not consider. It follows that she must have allowed the appeal on the ground that the claimant satisfied the requirements for leave under the 5-year route.

15. At [22], the judge said she had also addressed Article 8 for the sake of completeness. This paragraph reads:

> "For the sake of completeness I address Article 8. The [Secretary of State] has accepted that the [claimant] has a genuine and subsisting relationship with his wife and it is clear that they have a baby and, indeed, had one at the time the [Secretary of State] concluded that the [claimant] had no children in the UK. His wife has always lived in the UK and she has proved she has an income adequate for the three of them. This, I find, is the case whether or not I am right in law in concluding on the facts that the [claimant] meets the requirements of the Rules. His child is a British citizen who, like his mother, has a right to live in the United Kingdom where they were both born. The [claimant] would not appear to have a poor immigration history or criminal convictions and it is very difficult to see what proper purpose would be served by requiring two British citizens to move to another country in which neither has ever lived if they wish to continue meaningful family life with the [claimant]. In a case where I find that neither income nor adverse factors are in issue, it would I conclude be unreasonable and disproportionate to expect them both to move to Pakistan."

16. It is plain from [22] of the determination that the judge was informed that a child had been born to the couple, as she took this fact into account in assessing the Article 8

claim outside the IRs. However, she assessed the evidential requirements of para 7(f) on the basis that the applicable income threshold remained at £18,600. The final sentence of [22] shows that her assessment of proportionality outside the IRs relied upon her own view of what amounted to adequate income in substitution for the view of Parliament in setting the income thresholds.

The judgment of the Court of Appeal in SSHD v SS (Congo) & others [2015] EWCA Civ 387

17. About a month after the determination of the judge, on 23 April 2015 and after the Secretary of State had filed her grounds on 1 April 2015, the Court of Appeal handed down its judgment in SSHD v SS (Congo). At the hearing before us, Mr Miah accepted that Sultana has been superseded by SS (Congo) which we must apply.

18. In SS (Congo), the Court of Appeal held, inter alia, that the evidential requirements in Appendix FM-SE must be satisfied for an application to succeed under the IRs, because the evidential requirements have the same general objective as the substantive rule to which it relates ([52]) and because enforcement of the evidence rules ensures that everyone applying for leave to enter (LTE) or leave to remain (LTR) is treated equally and fairly in relation to the evidential requirements they must satisfy. Good reason would need to be shown why a particular applicant was entitled to more preferential treatment with respect to evidence than other applicants would expect to receive under the IRs ([53]). Compelling circumstances would have to apply to justify a grant of LTE or LTR where the evidential requirements of Appendix FM-SE were not satisfied ([51]).

The Secretary of State's grounds

19. The grounds contend, in summary, that the judge erred in law as follows:

    i) The judge erred in concluding that the claimant satisfied para 7(f) of Appendix FM-SE, given that the claimant had not submitted personal bank statements covering the period covered by the tax return. The judge erred in implying that the Secretary of State would have disapplied the evidential requirement in para 7(f) because the claimant's wife had chosen not to pay any income into her personal bank account. The grounds contend that the obvious possibility is that the income in question was not earned.

    ii) The judge erred in concluding that the claimant satisfied para 7(g) of Appendix FM-SE, in that, she made assumptions of what the Secretary of State might have done had evidence of Class 2 N.I. payments been before her and how the Secretary of State might have viewed the remainder of the evidence.

    iii) In relation to the Article 8 assessment outside the IRs, the grounds contend that the judge erred in law as follows:

        a. she applied an incorrect standard of proof, given that at [14] she stated that the standard of proof was whether there was a real risk of a breach arising.

        b. she had assumed that the requirements of the IRs were satisfied when they were not.

c. she failed to properly apply section 117B of the Nationality, Immigration and Asylum Act 2002 (the "2002 Act").

20. Given the judgment of the Court of Appeal in SS (Congo), we raised the question whether the judge also erred in law in her assessment of the Article 8 claim outside the IRs by failing to consider whether there were compelling circumstances which justify the grant of LTE or LTR where the evidential requirements of Appendix FM-SE were not satisfied (SS (Congo) at [51]).

Assessment

21. At the end of the hearing, the issue arose as to whether the specified documents to satisfy the evidential requirements in Appendix FM-SE had to be submitted with an individual's application to the Secretary of State or whether further evidence submitted to the FtT could be relied upon. Neither party was able to address us on this issue. Accordingly, we gave directions for the parties to submit their written representations on this discrete issue.

22. In her written representations, Ms Isherwood referred us to s.85(4) of the 2002 Act which provides:

> "On an appeal under section 82(1), 83(2) or 83A(2) against a decision the Tribunal may consider evidence about any matter which it thinks relevant to the substance of the decision, including evidence which concerns a matter arising after the date of the decision."

23. Ms Isherwood submitted that the "*substance of the decision*" in the instant case was that the requirements of the IRs had not been met by the provision of the specified evidence. Accordingly, she submitted that the claimant could not rely upon providing such evidence subsequently, to the FtT.

24. It follows that the Secretary of State's position is that, notwithstanding the words "*including evidence which concerns a matter arising after the date of the decision*", specified evidence to satisfy the evidential requirements of Appendix FM-SE must be submitted with the application for leave.

25. It is not clear whether the written representations submitted on the claimant's behalf were settled by Mr Miah or by the claimant's solicitors. In the written representations, it was submitted on his behalf that the Tribunal had considered identical arguments in LS (post-decision evidence, Direction, Appealability) [2005] UKAIT 85. The Upper Tribunal was requested to re-list the mater for oral hearing.

26. We have not considered it necessary to re-convene the hearing, as our decision in the instant appeal is the same whatever the true interpretation of s.85(4), for the following reasons:

i) Mr Miah accepted that the claimant had not submitted to the FtT bank statements to cover the period from 7 January 2014 until 2 February 2014. Accordingly, Mr Miah accepted that, even on the evidence before the judge, the personal bank statements submitted by the claimant did not cover the full period that was covered by the tax return (6 April 2013 to 5 April 2014). Accordingly, even if s.85(4) permitted the claimant to rely upon evidence not submitted to the

Secretary of State in his appeal before the FtT, he did not satisfy para 7(f) of Appendix FM-SE on the evidence before the judge.

ii) Accordingly, whatever the true interpretation of s.85(4), it is plain that the judge erred in law in concluding that the claimant satisfied para 7(f) of Appendix FM-SE.

iii) This error, taken on its own, was plainly material to the judge's decision to allow the appeal under the IRs, whatever the position in relation to para 7(g). This is because the claimant could only satisfy the substantive financial requirements under Appendix FM by satisfying *all* of the relevant requirements in para 7 of Appendix FM-SE. Failure to satisfy para 7(f) of Appendix FM-SE was therefore fatal to his application under the 5-year, route, whatever may be said about para 7(g) of Appendix FM-SE.

iv) Accordingly, the judge's decision to allow the appeal on immigration grounds cannot stand.

v) Whatever the true interpretation of s.85(4), it makes no difference to the re-making of the decision on the claimant's appeal on immigration grounds, for the reasons given at [32] and [33] below.

vi) Accordingly, the Secretary of State is not prejudiced by our not reconvening the hearing. Nor is the claimant since he cannot succeed whatever the true interpretation of s.85(4).

vii) In her assessment of the Article 8 claim outside the IRs, the judge did not have the benefit of the guidance in SS (Congo). She therefore failed to consider (through no fault of her own) whether there were compelling circumstances which justify the grant of LTR where the evidential requirements of Appendix FM-SE were not satisfied. She therefore materially erred in her approach to the Article 8 claim. Furthermore, as we said above, the final sentence of [22] shows that her assessment of proportionality outside the IRs relied upon her own view of what amounted to adequate income in substitution for the view of Parliament in setting the income thresholds, which it was not open to her to do.

viii) Accordingly, we set aside the judge's decision. Given the errors found, the scope of the re-making extends to all grounds (immigration and human rights grounds). This conclusion is reached irrespective of the true interpretation of s.85(4).

ix) On re-making the decision, the claimant's assessment of the Article 8 claim is not dependent on the representations of the parties concerning s.85(4).

27. In relation to para 7(g) of Appendix FM-SE, the judge had before her the following evidence which was not submitted to the Secretary of State with the application for leave:

i) (at page 9 of the appellant's bundle) a bank statement for the period from 1 October 2014 to 30 November 2014 which showed a payment on 14 November 2014 of £74.25 described as "HMRC N.I. Contributi";

ii) (at page 11 of the same bundle) a document issued by HM Revenue and Customs (HMRC) dated 4 October 2014 entitled: "Self-employed Class 2 National Insurance contributions (NICs) due" addressed to the claimant's wife

stating that her total liability for N.I. for the period from "00-04-2014" to 11 October 2014 was £74.25.

28. At the hearing, Ms Isherwood accepted that the evidence set out above was evidence of "*on-going self-employment through evidence of payment of class 2 N.I contributions*" because it was evidence which showed that N.I. contributions were paid following the end of the period to which the tax return submitted relates. Thus, at the hearing, she accepted that it was irrelevant that the judge had speculated or made assumptions about whether the respondent had received evidence of N.I. payments with a letter said to have been posted on 15 April 2014 and about the contents of that letter.

29. However, in her written representations, Ms Isherwood strayed beyond the issue upon which we invited written representations. She submitted that no great significance should be attached to the word *"on-going"* in para 7(g) of Appendix FM-SE, given that consideration by the Secretary of State is restricted to documents provided with the application or subsequently requested in limited circumstances pursuant part D of Appendix FM-SE. In the written representations on behalf of the claimant, there was no response to this aspect of Ms Isherwood's written representations.

30. We are inclined to think that there may be some validity in the Secretary of State's position in this respect, i.e. that "*on-going*" evidence of self-employment "*through evidence of payment of the determination [N.I.] contributions*" must relate to the date of the Secretary of State's decision. We are inclined to think that the substance of the decision in relation to para 7(g) is proof of the payment of N.I. contributions as at the date of the decision, although this would not preclude reliance at the hearing of an appeal upon evidence not submitted to the Secretary of State to show that the requirement was met as at that date of the decision. However, it is not necessary for us to reach a concluded view about this, nor is it necessary for us reconvene the hearing on this issue. This is because the judge materially erred in law for the reasons given at [26] above. The outcome of the decision on the re-making is the same, whatever the meaning of "on-going", for the reasons given at [32] and [33] below.

Re-making of the decision on the appeal

31. We proceeded to hear Mr Miah on the re-making of the decision on the appeal. The parties were sent directions with the Notice of Hearing, para 2 of which informed the parties that they must prepare for the hearing on the basis that, if the Upper Tribunal decides to set aside the determination of the FtT, any further evidence, including supplementary oral evidence, that the Upper Tribunal may need to consider if it decides to re-make the decision, can be considered at the hearing. Para 5 of the directions directed the parties to serve on the Upper Tribunal and the other party no later than 21 days after the directions were sent an indexed and paginated bundle, containing all documentary evidence upon which it was intended to rely at the hearing. No further evidence was filed.

32. Mr Miah only addressed us on the Article 8 claim outside the IRs. He did not request us to re-make the decision on the appeal against the decision to refuse the

application under the 5-year route. In any event, the claimant's appeal against this aspect of the decision cannot succeed, for the following reasons:

i) There were gaps in the bank statements at the date of the decision and as at the date of the hearing before the judge. No further bank statements have been submitted since. Whatever the true interpretation of s.85(4), the claimant cannot satisfy para 7(f) of Appendix FM-SE.

ii) The correct income threshold is £22,400. No evidence has been produced to bridge the gap between the income threshold applied by the Secretary of State and the judge and the correct income threshold. For this reason too, the claimant cannot satisfy para 7(f) of Appendix FM-SE, whatever the true interpretation of s.85(4).

33. Nor did Mr Miah request us to re-make the decision on the appeal against the decision to refuse the application under the 10-year route. In any event, the claimant's appeal against this aspect of the decision cannot succeed, for the following reasons:

i) In order to qualify for leave under the 10-year route, the claimant has to show, inter alia, that he satisfies the requirements in Ex.1 of Appendix FM. Mr Miah informed us that the claimant does not argue that there are insurmountable obstacles to family life being enjoyed in Pakistan. He informed us that there are no illnesses in the family and that there are no special circumstances beyond the fact that the claimant and his wife have a British citizen minor child.

ii) However, the mere fact that their child is a British citizen is insufficient. There is no evidence that it would be unreasonable for the infant child to leave the U.K. It cannot therefore be said that EX.1 is satisfied. Accordingly, Appendix FM is not satisfied.

34. Mr Miah relied upon Article 8 outside the IRs. He asked us to bear in mind that we may be able to take into account the fact that the claimant and his wife now have a child, on which basis he submitted the claimant now satisfies the requirements for leave under the 10-year route.

35. We are not persuaded that it is open to us to consider the Article 8 claim outside the IRs on a basis that was entirely different from the application for leave considered by the respondent. What the claimant seeks to do, by relying upon an assertion that he satisfies the requirements for leave under the 10-year route in support of his Article 8 claim outside the IRs is to use Article 8 to avoid having to make a paid-for application under the IRs. In our view, this would not be appropriate. If he contends that he satisfies the requirements of the IRs on a different basis than that advanced to the Secretary of State in his application of 30 January 2014, the appropriate course of action is for him to make a paid-for application on that basis.

36. However, even if we are wrong in this regard, the reality is that the assertion that the claimant satisfies the relevant requirements for leave under the 10-year route is not supported by any evidence, as we have said above.

37. This means that the only factors relied upon in relation to the Article 8 claim outside the IRs are that the claimant and his wife now have a child. The child is a British citizen as is the claimant's wife. The child is an infant. No evidence has been

adduced to explain why it would be unreasonable to expect family life to be enjoyed in Pakistan notwithstanding that the wife has lived all her life in the UK and is employed here. There are no illnesses in the family. The fact that the wife and child are British citizens is not enough. In all of the circumstances, we find that there are no compelling circumstances which justify the grant of LTR given that the evidential requirements of Appendix FM-SE are not satisfied (SS (Congo) at [51]). We find that the decision to refuse the application for leave on the basis of Article 8 outside the IRs is proportionate.

38. Given the limited extent of the argument before us in relation to Article 8 outside the IRs, we have not found it necessary to assess the Article 8 claim by reference to the five-step approach explained at paragraph 17 of the judgment in R (Razgar) v SSHD [2004] UKHL 27.

**Decision**

The decision of the First-tier Tribunal involved the making of an error on a point of law such that it fell to be set aside. We set it aside. We re-make the decision by dismissing the appeal under the Immigration Rules and on human rights grounds (Article 8).

Signed Date: 20 August 2015
Upper Tribunal Judge Gill