Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: OA/03201/2014**

THE IMMIGRATION ACTS

Heard at Birmingham	**Determination & Reasons Promulgated**
On the 9th July 2015	**On the 7th August 2015**

Before

UPPER TRIBUNAL JUDGE KOPIECZEK
DEPUTY UPPER TRIBUNAL JUDGE MCGINTY

Between

MRS SADAF KALIM

Appellant

and

ENTRY CLEARANCE OFFICER – ISLAMABAD

Respondent

Representation:

For the Appellant: Ms M. Chaggar (Counsel)
For the respondent: Mr D. Mills (Senior Home Office Presenting Officer)

DETERMINATION AND REASONS

1. This is the respondent's appeal against the decision of First-tier Tribunal Judge Hawden-Beal ("Judge Hawden-Beal") promulgated on the 10th December 2014. However, for the sake of clarity, throughout this decision the parties will be referred to as they were referred to at the First-tier Tribunal hearing, such that Mrs Kalim is referred to as the appellant and the Entry Clearance Officer-Islamabad is referred to as the respondent.

Background

2. The appellant is a citizen of Pakistan who was born on the 8th December 1993. She is married to Mr Kalim Ahmed Hussain, a British citizen. On the 7th October 2013 the appellant applied for entry clearance as a partner under Appendix FM of the Immigration Rules HC 395, as amended. The appellant's application was initially refused by the respondent on the 3rd February 2014, but at that stage no final determination was made as to whether or not the appellant met the income threshold and all related evidential requirements pending the outcome of the Court of Appeal case of MM and others, R (on the application of) v Secretary of State for the Home Department [2014] EWCA Civ 985. Thereafter, following the decision of the Court of Appeal her application was re-refused on the 1st October 2014.

3. The respondent was not satisfied that the appellant had provided all of the requisite evidence under Appendix FM-SE, in that the bank statements provided by the appellant did not show the whole of her sponsor's salary being paid into his bank account. Her application was therefore refused under paragraph EC-P.1.1.(d) with reference to paragraph E-ECP. 3.1 of Appendix FM. It was further found that the appellant had not proved that she had passed an English-language test with a provider approved by UKBA, as although the appellant provided a TOIEC English language certificate, the respondent was not satisfied that it was genuine. Therefore the application was also refused under paragraph EC-P.1.1 (d) with reference to paragraph E-ECP 4.1 and paragraph S-EC.2.2 (a) of Appendix FM of the Immigration Rules.

4. The appellant appealed to the First-tier Tribunal (Immigration Asylum Chamber) and that appeal was heard in Birmingham on the 1st December 2014 by Judge Hawden-Beal. In her decision Judge Hawden-Beal found that the respondent had not discharged the burden of showing that the English language certificate was not genuine. She went on to consider whether or not the financial requirements of the Rules had been met at [20] of her decision. She found that the sponsor's wages were not reflected in his bank statement and that although the sponsor regularly deposited £260 per week that did not amount to his net monthly income from the

restaurant where he was employed. Judge Hawden-Beal therefore found that the appellant had not proved that she met all the requirements of Appendix FM and FM-SE of the Immigration Rules. The appellant's appeal was therefore dismissed under the Immigration Rules.

5. Judge Hawden-Beal then went on to find that Appendix FM was not a complete code, insofar as Article 8 was concerned and considered the appellant's claim outside of the Immigration Rules, adopting the five stage Razgar test as set out by the House of Lords in the case of R v Secretary of State for the Home Department (appellant) ex parte Razgar (FC) (respondent) [2004] UKHL 27. In determining the fifth question as to whether or not the decision to remove the appellant was proportionate to the legitimate public aim sought to be achieved, at [25] the First-tier Judge stated that she could not be satisfied that the decision was proportionate:

> "*because it is clear and accepted by the respondent that the sponsor does earn in excess of the financial requirements imposed by Appendix FM because the amended refusal notice only refuses the application under the financial requirements on the basis that the wages are not reflected in the bank statements*".

6. The First-tier Tribunal Judge found that there was no statement to say that the sponsor did not earn in excess of the required amount and that the case could be distinguished from MM on the basis that the appellant will be maintained without recourse to public funds, "as is demonstrated by the sponsor's recognised earnings." She therefore went on to find that the decision to refuse entry clearance would place the UK in breach of its obligations under the 1950 Human Rights Convention. She allowed the appeal therefore on human rights grounds in respect of the appellant's family life under Article 8.

7. In the grounds of appeal, it is argued that the First-tier Tribunal Judge made a material error in law, when, after having found that the appellant did not meet the requirements of Appendix FM-SE as the sponsor's wages were not reflected within his bank statements, then allowed the appeal on Article 8 grounds outside of the Immigration Rules. It is argued that the 'Near-Miss' principle was considered by

Lord Justice Stanley Burnton in case of Miah and others v Secretary of State for the Home Department [2012] EWCA Civ 261, wherein at [25] he stated that:

> "*Moreover, once an apparently bright-line rule is regarded as subject to a Near-Miss penumbra, and a decision is made in favour of a near-miss applicant on that basis, another applicant will appear claiming to be a near-miss to that near-miss. There would be a steep slope away from predictable rules, the efficacy and utility of which would be undermined.*"

8. It is argued that the 'Near-Miss' principle was rejected by the Court of Appeal in Miah, and this this view was endorsed by the Supreme Court in the case of Patel and others v Secretary of State for the Home Department [2013] UKSC 72. The respondent argues that the decision of the First-tier Judge is fundamentally flawed, in that as the appellant did not meet the requirements of the Immigration Rules in respect of the specified evidence, this then did not give her a basis to be granted leave to enter the UK on Article 8 grounds. It is argued that following the Supreme Court decision in Patel, Article 8 should not be used as a means of subverting the criteria for a grant of leave to enter or remain set out in the Immigration Rules and that a 'Near-Miss' under the Rules cannot provide substance to a human rights claim otherwise lacking in merit.

9. Permission to appeal was granted by First-tier Tribunal Judge Plumptre on the 2nd February 2015 on the grounds that it was arguable that the First-tier Judge had erred in applying Article 8 to the mandatory requirements of Appendix FM-SE, and that if the sponsor is paid in cash then all the monies received from employment must be paid directly into a bank account and arguably erred in her analysis of those mandatory requirements. She also considered it was arguable the First-tier Judge erred in law and fact by stating that the respondent accepted that the sponsor earned in excess of the requirements imposed by Appendix FM.

Submissions

10. At the start of his submissions on behalf of the respondent Mr Mills handed up the recent case of The Secretary State for the Home Department v SS (Congo) [2015]

EWCA Civ 387. He submitted that the Court of Appeal had found that the 'Near-Miss' principle was not wholly irrelevant, but that the Court of Appeal had made it clear that the financial evidential requirements of Appendix FM-SE were substantive requirements, rather than merely technical and that there had to be compelling circumstances to justify a grant of leave to enter or leave to remain where the evidential rules were not complied with. He referred us in this regard to [51]. He argued that where the Immigration Rules were not met due to the evidential requirements not being satisfied, it was wrong for the Judge to simply allow the appeal under Article 8 outside of the Immigration Rules. He argued that the Judge's reasoning in [25] of the decision regarding why she had allowed the appeal outside of the Rules was wholly inadequate.

11. He further submitted that the Court of Appeal in SS (Congo) had made the point that it would generally be proportionate to expect people to re-apply, if they failed to meet the requirements of the Immigration Rules, but that this issue had not been considered at all by the First-tier Judge and that there was no evidence of any hardship if the appellant simply had to re-apply. He asked us to set aside the decision and to dismiss the appeal.

12. In her submissions on behalf of the appellant Ms Chaggar submitted that between [21] and [25] the First-tier Tribunal Judge had properly considered Article 8 outside of the Immigration Rules and had properly considered that the decision taken was disproportionate. She argued that the Judge had properly considered the relevant case law including the cases of R (on the application of Nagre) v Secretary of State for the Home Department [2013] EWHC 720 (Admin), Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 640 (IAC) and R (Ganesabalan) v Secretary of State for the Home Department [2014] EWHC 2712 (Admin), and had found that there were arguably good grounds why the case should be considered under Article 8 outside of the Immigration Rules, and that the Immigration Rules were not a complete code in respect of Article 8 considerations regarding family life under Appendix FM. She argued that the Judge had properly found that there was family life existing and that the relationship between the appellant, her husband and son was genuine and subsisting and that they had family life together and that the Judge properly

considered proportionality at [25] of the decision. She argued that the fact that the wages were not reflected within the bank statement was not the only issue considered by the First-tier Tribunal Judge at [21] to [25]. She argued that the Court of Appeal in the case of SS (Congo) had made it clear at [56] of the judgment that the 'Near-Miss' principle was relevant to the issue of proportionality. She further submitted that there had been discussion at the original appeal hearing, as to whether or not the sponsor's income did in fact exceed the financial requirement of £18,600, as specified by the Immigration Rules and that it was apparent from the First-tier Judge's decision that it had been agreed that the sponsor did in fact earn in excess of the requisite amount. She asked us to dismiss the appeal.

Error of Law

13. Support for a 'Near-Miss' principle, was originally propounded in the judgment of Sedley LJ in the case of Pankina v Secretary of State for the Home Department [2010] EWCA Civ 719 at [46], wherein he stated:

> *"It is one thing to expect an applicant to have the necessary academic and linguistic qualifications: here a miss is likely to be as good as a mile. It is another for an applicant to fall marginally or momentarily short of a financial criterion which in itself has no meaning: its significance is as a rough and ready measure of the applicant's ability to continue to live without reliance on public funds. Having £800 in the bank, whether for three continuous months or simply at the date of application, is no doubt some indication of this; but people who are able to meet the test may fall on hard times after obtaining indefinite leave to remain, and others who fail it would, if allowed to remain, never become a charge on public funds. The Home Office has to exercise some common sense about this if it is not to make decisions which disproportionately deny respect to the private and family lives of graduates who by definition have been settled here for some years and are otherwise eligible for Tier 1 entry. If the Home Secretary wishes the rules to be blackletter law, she needs to achieve this by an established legislative route."*

14. However, the existence of a 'Near-Miss' principle was roundly rejected by Lord Justice Stanley Burnton in the Court of Appeal case of Miah and others v Secretary

of State for the Home Department [2012] EWCA Civ 261. At [26] of his judgment, Lord Justice Stanley Burnton stated:

> *"I would dismiss the appeal in relation to the Near-Miss argument. In my judgment, there is no Near-Miss principle applicable to 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."*

15. The existence of a 'Near-Miss' principle was then considered by the Supreme Court in the case of Patel and others v Secretary of State for the Home Department (respondent) [2013] UKSC 72. Lord Carnwath, with whom Lord Kerr, Lord Reid and Lord Hughes agreed, in considering the 'Near-Miss' argument at [56] stated that :

> *"Although the context of the rules may be relevant to the consideration of proportionality, I agree with Burnton LJ that this cannot be equated with a formalised "near-miss" or "sliding scale" principle, as argued for by Mr Malik. That approach is unsupported by Strasbourg authority, or by a proper reading of Lord Bingham's words. 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 also of article 8. Conversely, a near-miss under the rules cannot provide substance to a human rights case which is otherwise lacking in merit."*

He continued to state at [57] that:

> *"It is important to remember that article 8 is not a general dispensing power. It is to be distinguished from the Secretary of State's discretion to allow leave to remain outside the rules, which may be unrelated to any protected human right."*

16. Clarification as to the relevance of a 'Near-Miss' has now been provided by the Court of Appeal in the case of The Secretary of State for the Home Department v SS (Congo) and others [2015] EWCA Civ 387. Lord Justice Richards, giving the lead

judgment of the Court of Appeal when discussing the evidential rules under Appendix FM-SE, between [50] and [53] of his judgment stated :

> *"50. The present appeals concern not only the leave to enter Rules in Appendix FM which set out the substantive conditions which have to be satisfied in relation to the minimum income requirements for a sponsor, but also the Rules in Appendix FM-SE which stipulate the form of evidence required to substantiate claims that the substantive financial requirements under Appendix FM have been met. Appendix FM-SE deals with matters such as the types of bank statements, payslips, income, savings and so forth which will be regarded as acceptable. In addition, section A1.1(b) states, "Promises of third party support will not be accepted", and stipulates the highly circumscribed forms which support from third parties is required to take.*
>
> *51. In our judgment, the approach to Article 8 in the light of the Rules in Appendix FM-SE should be the same as in respect of the substantive leave to enter and leave to remain Rules in Appendix FM. In other words, the same general position applies, that compelling circumstances would have to apply to justify a grant of leave to enter or leave to remain where the evidence Rules are not complied with.*
>
> *52. This is for two principal reasons. First, the evidence rules have the same general objective as the substantive rules, namely to limit the risk that someone is admitted into the United Kingdom and then becomes a burden on public resources, and the Secretary of State has the same primary function in relation to them, to assess the risk and put in place measures which are judged suitable to contain it within acceptable bounds. Similar weight should be given to her assessment of what the public interest requires in both contexts.*
>
> *53. Secondly, enforcement of the evidence rules ensures that everyone applying for leave to enter or leave to remain is treated equally and fairly in relation to the evidential requirements they must satisfy. As well as keeping the costs of administration within reasonable bounds, application of standard rules is an important means of minimising the risk of arbitrary differences in treatment of cases arising across the wide range of officials, tribunals and courts which administer the system of immigration controls. In this regard, the evidence Rules*

(like the substantive Rules) serve as a safeguard in relation to rights of applicants and family members under Article 14 to equal treatment within the scope of Article 8"

17. Lord Justice Richards went on to consider the situation of a 'Near-Miss' case at paragraphs [54] to [56] of his judgment, wherein he stated:

"54. At the hearing, there was debate about the proper approach to be adopted in 'near miss' cases, for example if the sponsor of an applicant for leave to enter could provide evidence of an annual income a little less than the £18,600 required or could provide evidence which might be regarded as similar to (but not the same as) that required under Appendix FM-SE. Mr Payne, for the Secretary of State, made submissions to the effect that 'a miss is as good as a mile' and that the fact that one is dealing with a 'near miss' case should be irrelevant to the Article 8 balancing exercise required. The general position of the respondents, on the other hand, was that great weight should be attached to the fact that there was a 'near miss' by an applicant in relation to the requirements of the Rules.

55. In our judgment, the true position lies between these submissions. Contrary to the argument of the respondents, that fact that an applicant may be able to say that their case is a 'near miss' in relation to satisfying the requirements of the Rules will by no means show that compelling circumstances exist requiring the grant of leave to enter outside the Rules. A good deal more than this would need to be shown to make out such a case. The respondents' argument fails to recognise the value to be attached to having a clear statement of the standards applicable to everyone and fails to give proper weight to the judgment of the Secretary of State, as expressed in the Rules, regarding what is needed to meet the public interest which is in issue. The 'near miss' argument of the respondents cannot be sustained in the light of these considerations and the authority of Miah v Secretary of State for the Home Department [2012] EWCA Civ 261, especially at [21]-[26].

56. However, it cannot be said that the fact that a case involves a 'near miss' in relation to the requirements set out in the Rules is wholly irrelevant to the balancing exercise required under Article 8. If an applicant can show that there are individual interests at stake covered by Article 8 which give rise to a strong claim that compelling circumstances may exist to justify the grant of leave to enter outside the Rules, the fact that their case is also a 'near

miss' case may be a relevant consideration which tips the balance under Article 8 in their favour. In such a case, the applicant will be able to say that the detrimental impact on the public interest in issue if leave to enter is granted in their favour will be somewhat less than in a case where the gap between the applicant's position and the requirements of the Rules is great, and the risk that they may end up having recourse to public funds and resources is therefore greater."

18. We therefore find, in light of the above case law, that if a case is simply a 'Near-Miss', that in itself is insufficient to justify a grant of leave outside of the Immigration Rules on Article 8 grounds. As was said by Lord Justice Richards at [55] of SS Congo:

> *"The fact that an appellant may be able to say that their case is a 'Near-Miss' in relation to satisfying the requirements of the Rules will by no means show that compelling circumstances exist requiring the grant of leave to enter outside the Rules."*

It is therefore necessary for there to be compelling circumstances for leave to be granted outside the Rules, rather than simply the case being a 'Near-Miss' case in respect of the evidential requirements under the Rules. Although we bear in mind that if there are such compelling circumstances to justify the grant of leave to enter outside the Rules, the fact that the case is also 'Near-Miss' may be a relevant consideration which may tip the Article 8 consideration in an appellant, but simply being a 'Near-Miss' case in itself is insufficient.

19. Although in her decision First-tier Tribunal Judge Hawden-Beal at [22] stated that she found that there were arguably good grounds for granting leave to remain outside of the Rules, no adequate reasons were given in that paragraph for such a finding. Indeed at [25] of the decision, when considering the proportionality exercise, the First-tier Judge simply stated:

> *"That leaves the question as to whether it is proportionate to the legitimate public end sought to be achieved and I cannot be satisfied that it is because it is clear and accepted by the respondent that the sponsor does earn in excess of the financial*

requirements imposed by Appendix FM because the amended refusal notice only refuses the application under the financial requirements on the basis that the wages are not reflected in the bank statements."

She went on to find in the same paragraph that:

*"This case can be distinguished from **MM** on the basis the appellant will be maintained without recourse to public funds as is demonstrated by the sponsor's recognised earnings. In the circumstances I find that the decision to refuse entry clearance will place the UK in breach of its obligations under the 1950 Human Rights Convention."*

20. It is apparent when reading the decision that the only reason why the First-tier Judge considered the decision to be disproportionate to the legitimate public end sought to be achieved was because of the fact that the sponsor did, in her judgment, earn in excess of the financial requirement of £18,600, even though the sponsor's wages were not reflected in his bank statements. It is in our judgment clear that the First-tier Judge has relied upon a 'Near-Miss' in respect of the evidential requirements, in that although the appellant had not produced enough documentary evidence to prove her sponsor's income for the purposes of Appendix FM-SE, the fact that Judge Hawden-Beal found that the sponsor did in fact earn in excess of £18,600, was said by her to justify allowing the appeal under Article 8 outside of the Immigration Rules. She did not set out any compelling circumstances said to justify the grant of leave to enter outside the Rules, such that the fact that this was <u>also</u> a 'Near-Miss' case could be a relevant consideration which tipped the balance under Article 8 in the appellant's favour. None are evident in the findings of the First-tier Judge and none were evident in submissions before us. It was simply that having found that in fact the appellant did earn in excess of the £18,600 required, she considered that the appeal should be allowed under Article 8 outside of the Immigration Rules, even though the evidential requirements under the Rules were not met.

21. The First-tier Tribunal Judge thereby materially misdirected herself in law. It was not open to her, as a matter of law, to find that the appeal should be allowed

outside of the Immigration Rules under Article 8, simply because in her judgment, the sponsor did earn more than the requisite £18,600, when the evidential requirements of Appendix FM-SE were not met. The decision of Judge Hawden-Beal therefore contains a material error of law requiring the decision to be set aside.

22. It is therefore necessary for us to re-make the decision. We preserve the findings of Judge Hawden-Beal that the sponsor's wages were not reflected in his bank statements and that although he deposited £260 per week, that did not amount to his net monthly income from the restaurant where he worked, and that in such circumstances the requirement of paragraph 2 (c) of Appendix FM-SE that that there had to be:

> *"personal bank statements corresponding to the same period(s) as the payslips at paragraph 2 (a), showing that the salary had been paid into an account in the name of the person or in the name of the person and their partner jointly"*

was not met, such that the appellant did not meet the specified evidence criteria under Appendix FM-SE, necessary to prove her sponsor's income under the Rules. The appellant's application was properly refused under paragraph EC-P.1.1 (d) of Appendix FM of the Immigration Rules, with reference to paragraph E-ECP.3.1 .

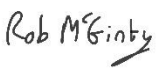
23. We further find that there are no compelling circumstances that exist in this case that would require the grant of leave to enter outside of the Immigration Rules. None are evident in the findings of Judge Hawden-Beal and none were evident in submissions before us. The First-tier Judge's finding that in fact the sponsor did earn in excess of £18,600, does not justify the grant of leave outside of the Immigration Rules and does not mean that the decision was disproportionate to the legitimate public aim sought to be achieved for the purposes of Article 8, in circumstances where the requisite evidence that the sponsor earned the necessary amount had not been provided. We take into account that the need for specified evidence promotes predictability and consistency as between applications for leave to enter.

24. We find that this is simply a 'Near-Miss' case in respect of the evidential requirements in that the appellant had not produced enough documentary evidence to prove her sponsor's income exceeded £18,600 for the purposes of Appendix FM-SE, even if he did in fact earn in excess of £18,600 and that in the absence of any compelling circumstances sufficient to justify the grant of leave to enter outside the Immigration Rules, the appellant's appeal should also have been dismissed under Article 8. We therefore dismiss Mrs Kalim's appeal both under the Immigration Rules and on human rights grounds under Article 8 of the ECHR.

Decision

The decision of the First-tier Tribunal involved the making of an error on a point of law and is set aside. The decision is re-made dismissing the appellant's, Mrs Kalim's appeal, both under the Immigration Rules and on human rights grounds under Article 8 of the ECHR.

Signed Dated 31st July 2015



Deputy Upper Tribunal Judge McGinty