The Upper Tribunal
(Immigration and Asylum Chamber) **Appeal number: OA/05288/2014**

THE IMMIGRATION ACTS

Heard at Manchester	**Promulgated**
On March 26, 2015	**On March 30, 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

Between

ENTRY CLEARANCE OFFICER

Appellant

and

MRS HUMERA SHAFIQ
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
Appellant Mr McVeety (Home Office Presenting Officer)
Respondent Represented by the Sponsor, Sajid Ali

DETERMINATION AND REASONS

1. Whereas the original respondent is the appealing party, I shall, in the interests of convenience and consistency, replicate the nomenclature of the decision at first instance.
2. The appellant is a citizen of Pakistan who sought entry clearance as a spouse on October 30, 2013. The respondent refused her application on March 18, 2014, as she had not satisfied all of the requirements of paragraph EC-P1.1 of Appendix FM of the Immigration Rules.
3. The appellant appealed on April 17, 2014, under section 82(1) of the Nationality, Immigration and Asylum Act 2002. Additional evidence was

submitted with the grounds of appeal and the entry clearance manager reviewed that decision on October 22, 2014 and conceded the relationship was a subsisting relationship and reviewed the financial situation because no firm decision had been because of the pending Court of Appeal decision in MM (Lebanon) [2014] EWCA Civ 985. An amended refusal letter was issued dated October 22, 2014 in which the respondent submitted the appellant had failed to demonstrate she met the requirements of Appendix FM-SE because she failed to produce the sponsor's bank statements as required by the Immigration Rules.

4. The matter came before Judge of the First-tier Tribunal Williams (hereinafter referred to as the "FtTJ") on December 2, 2014 and in a decision promulgated on December 17, 2014 he allowed her appeal under article 8 outside of the Immigration Rules. He found her claim under the Immigration Rules failed.

5. The respondent lodged grounds of appeal on December 30, 2014 submitting the FtTJ had erred. She argued that the FtTJ wrongly took into account Section 117B(6) of the 2002 Act, which only applied in removal cases and appeared to allow the appeal simply because the FtTJ considered the claim was akin to a near miss albeit those words were not used. Insufficient reasons for allowing the appeal were given.

6. On February 6, 2015 Judge of the First-tier Tribunal Plumptre gave permission to appeal finding the FtTJ had erred by having regard to Section 117B(6) of the 2002 Act and possibly for allowing the appeal as a near miss because he failed to give adequate reasons why refusal of entry clearance would result in unjustifiably harsh outcomes.

7. The matter came before me on the above date and the sponsor represented the appellant.

ERROR OF LAW SUBMISSIONS

8. Mr McVeety submitted the FtTJ wrongly considered Section 117B(6) in his public interest assessment and failed to balance in his proportionality assessment that the appellant did not meet the Rules. Paragraphs [29] and [30] of the FtTJ's determination did not demonstrate a fair proportionality assessment.

9. Mr Ali accepted he failed to show money going into a bank account but maintained the FtTJ considered all the issues and properly allowed his wife's appeal.

ERROR OF LAW ASSESSMENT

10. When the FtTJ heard this appeal he found the appellant did not meet the Immigration Rules because she failed to produce evidence that he had received his wages as provided for by the Rules. The FtTJ confirmed in paragraph [12] of his determination that the appeal had to fail because he had no discretion when the Rules were not met.

11. The FtTJ decided this was a case that fell outside of the Rules for article 8 purposes and the respondent has not challenged this approach.

12. The respondent's challenge is to what the FtTJ took into account and his proportionality assessment. Mr McVeety submitted that his proportionality assessment was deficient and the FtTJ attached weight to Section 117B(6) of the 2002 Act.

13. In considering the FtTJ's approach I have had regard to his determination and note the positive findings made in paragraphs [14] and [15] of the determination. These findings would have been matters he considered in his article 8 assessment.

14. The FtTJ reminded himself of the case of MM (Lebanon) [2014] EWCA Civ 985 and earlier cases. He then gave reasons in paragraph [20] to explain why he felt he could deal with this appeal outside of the Rules and in particular he referred to the fact that the family members in the United Kingdom would be unable to maintain any meaningful private or family life by visiting the appellant in Pakistan.

15. Mr McVeety submits that this is the total assessment of the article 8 claim and this failed to have regard to all of the relevant factors.

16. The FtTJ did apply the test set out in Razgar [2004] UKHL 00027 and in considering the issue of proportionality he had regard at paragraph [28] to the relevant provisions of the Immigration Rules as to where the balance of proportionality ought to be struck and in particular he took the Rules to be his starting point and he had to consider by what margin the appellant failed to meet the Rules. He found the sponsor was a credible witness and accepted he earned the money he did and he had a sufficient income to both support and accommodate his wife.

17. The FtTJ erred by placing weight on Section 117B(6) because this only applied where removal is planned. Mr McVeety invites me to find that this amounted to an error in law but I do not believe that finding should be looked at in isolation to the remainder of his decision.

18. In paragraph [30] he noted he also had to have regard to subsections (3) to (5) of section 117B but he failed to remind himself to have regard to subsection (1) of section 117B which states" the maintenance of effective immigration control is in the public interest. He also had regard to Section 55 of the Borders, Citizenship and Nationality Act 2009.

19. The FtTJ does err in having regard to Section 117B(6) but there is no dispute that the appellant has a genuine and subsisting relationship with her husband and other child who live in the United Kingdom. Whilst the FtTJ does not specifically mention Section 17B(1) the FtTJ is aware of the fact he has to have regard to whether the Immigration Rules were met because he says as much in paragraph [28] of his determination.

20. The FtTJ made positive findings about the level of income and in considering the level of compliance with the Immigration Rules he was satisfied the income claimed exceeded the minimum requirements.

21. In Mostafa (Article 8 in entry clearance) [2015] UKUT 00112 (IAC) the Tribunal made clear in paragraph [24] that "it will only be in very unusual circumstances that a person other than a close relative will be able to

show that the refusal of entry clearance comes within the scope of Article 8(1). In practical terms this is likely to be limited to cases where the relationship is that of husband and wife or other close life partners or a parent and minor child and even then it will not necessarily be extended to cases where, for example, the proposed visit is based on a whim or will not add significantly to the time that the people involved spend together. In the limited class of cases where Article 8 (1) ECHR is engaged the refusal of entry clearance must be in accordance with the law and proportionate. If a person's circumstances do satisfy the Immigration Rules and they have not acted in a way that undermines the system of immigration control, a refusal of entry clearance is liable to infringe Article 8."

22. The FtTJ was therefore required to consider whether the sponsor's circumstances satisfied the Immigration Rules and whether they acted in a way that undermined the system of immigration control. If it is demonstrated that they had then a refusal of entry clearance could infringe Article 8.

23. The problem for the appellant in this appeal is the Rules, whilst not a complete code, set out what had to be shown. The appellant did not meet those Rules. The respondent brought in the requirements of Appendix FM-SE to enforce immigration control and as Section 117B(1) makes clear the maintenance of effective immigration control is in the public interest.

24. The FtTJ should have attached more weight to this issue and this omission coupled with his error in considering Section 117B(6) and the guidance in Mostafa (case was not before the FtTJ) I have conclude the FtTJ did err in his assessment.

25. The FtTJ concluded that because he believed the sponsor earned what he claimed that this appeal could succeed under article 8. This is effectively applying a near miss policy which cases such as Miah & Ors v SSHD [2012] EWCA Civ 261 made clear was wrong.

26. I therefore find that there is an error in law.

27. In remaking the decision I have had regard to all of the evidence given and the findings made. The FtTJ made positive findings and there has been no challenge by the respondent to those findings.

28. In considering public policy I find:

    a. Immigration control is in the public interest.

    b. The appellant's wife has passed the relevant English test.

    c. The sponsor is working as evidenced by his pay slips. The FtTJ was satisfied he earned what he claimed.

29. I also have to have regard to the fact the Immigration Rules were not satisfied and the position was incapable of being rectified as this is an entry clearance application.

30. There are three children. The eldest child (10) lives with his father in the United Kingdom but the youngest two children (7 and 4) returned to

Pakistan in 2013 and have lived with their mother in Pakistan prior to the application being made.

31. The Tribunal in Mostafa raised the bar in entry clearance applications but having considered all of the findings along with the matters above it seems that this appellant can fall within the limited group of persons whose article 8 rights would be infringed if she was refused entry. Whilst I accept and acknowledge the Rules were not met there was evidence from the employer and tax paperwork that confirmed the appellant's income. The proposed application is not based on a whim and will add significantly to the time that the family will spend together.

32. The appellant did not seek to frustrate the respondent by staying in this country. She returned to Pakistan and took the difficult decision to take two of the children with her because of their ages. She has not acted in a way that undermines the system of immigration control because the evidence available suggests she has had regard to the Rules.

33. Having considered all of the above matters including those highlighted by the respondent I find that to refuse the appellant entry under article 8 would be disproportionate.

DECISION

34. There was a material error. I have set aside the original decision and remade it. I have allowed the appeal under article 8 ECHR after a full consideration of all of the factors.

35. The First-tier Tribunal did not make an anonymity direction pursuant to Rule 14 of The Tribunal Procedure (Upper Tribunal) Rules 2008 and I see no reason to alter that order.

Signed: Dated: **March 26, 2015**

Deputy Upper Tribunal Judge Alis

TO THE RESPONDENT
FEE AWARD

Although I have allowed the appeal I reverse the original fee award because the application failed under the Immigration Rules.

Signed: Dated: **March 26, 2015**

Deputy Upper Tribunal Judge Alis