



IAC-FH-NL-V2

**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: OA/06109/2014

THE IMMIGRATION ACTS

Heard at Field House
On 29 May 2015
Prepared 29 May 2015

Decision & Reasons Promulgated
On 19 June 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE DAVEY

Between

ENTRY CLEARANCE OFFICER - ISLAMABAD

Appellant

and

**MRS MUZAMMAL SULTANA
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr C Avery, Senior Presenting Officer

For the Respondent: Ms Manjit Dogra, Counsel instructed by Worldwide Solicitors

DECISION AND REASONS

1. In this decision the Appellant is referred to as the ECO and the Respondent is referred to as the Claimant.
2. The Claimant, a national of Pakistan, date of birth 29 December 1992, appealed against the ECO's decision with reference to paragraph EC-P.1.1 of Appendix FM. The application was refused on the basis that the ECO disputed the genuine and

continuing relationship between the Claimant and Sponsor, her husband, in the United Kingdom, Mr Abdul Hamid Nizami. Secondly, the Sponsor's earnings, calculated with reference to paragraph 9 of Appendix FM-SE, had not been properly established with supporting evidence.

3. An appeal came before First-tier Tribunal Judge Freer on 30 January 2015 whose decision was promulgated on or about 6 February 2015. By then it had become apparent that the ECO had applied the wrong consideration to the relevant documentation because the Sponsor's evidence related to him as a 'shareholder' and 'salaried worker' rather than in any capacity as a 'director of a limited company'.
4. Be that as it may, what was clear was that even in the correct capacity, the Sponsor could not provide the required evidence under Appendix FM-SE; required bank statements to evidence the earnings which met the requirements under the Rules in the sum of £18,600. The difficulty arose because the Sponsor was paid in part in cash which was not put through any bank account: There were not the necessary bank statements to evidence the income received as claimed.
5. The fact of the matter was that the Sponsor's income, had it been properly evidenced, would have met the relevant financial threshold. The judge who dealt with the appeal was satisfied that there was a genuine relationship but, unfortunately, as the grounds by the Secretary of State dated 16 February 2015 and the permission of 30 March 2015 by Upper Tribunal Judge Martin show, is that the Claimant through the Sponsor's could not evidence the relevant financial requirements of specified evidence under Appendix FM come what may. Thus when the judge allowed the appeal for the reasons that he did erred in law in failing to deal with that documentary requirements issue.
6. After the grant of permission Ms Dogra provided a Rule 24 response from the Claimant which made plain that it was accepted those requirements of Appendix FM-SC relating to the Sponsor could not be met. However, Ms Dogra had raised the issue in her skeleton argument before Judge Freer that if the judge was satisfied that there was a continuing and durable relationship between the Sponsor and the Claimant, bearing in mind the findings the judge might make in relation to the required level of earnings, she submitted that the appeal should succeed under Article 8 of the ECHR.
7. Despite the judge's error in failing to properly apply the requirements of Appendix FM-SC he never went on to consider the subsidiary Article 8 argument. This was an error. The question is whether it is a material error of law that makes any difference to the outcome.
8. Mr Avery submitted that the Sponsor's unhappy position is to a degree of his own making because he has not run the cash receipts through his bank account. The cash payments must be evidenced and no more or less than that should have happened; whether by a fresh application or otherwise. The Sponsor should have started putting the relevant monies through his bank account and then there would be the

required evidence. Essentially, Mr Avery said what was required was a fresh application with the appropriate evidence that the earnings or receipts went into a bank account: In the light of all other matters being considered the fresh application would be allowed and entry clearance granted. There was no need to have recourse to Article 8 ECHR to try and resolve a practical problem, namely the way the Sponsor was not recording his cash earnings.

9. Ms Dogra said whilst this may be so essentially the Claimant and Sponsor have been unwillingly separated. How it came to pass that this issue has not been dealt with before was not a matter within her knowledge. In any event the circumstances were such as to engage with Article 8 and amount to the kind of compelling circumstances where Article 8 is intended to enable a person who cannot meet the requirements of the Rules to be allowed entry into the United Kingdom.
10. Whilst I have some sympathy for the predicament that the Claimant fell into and the disadvantages that there were both in the original error by the ECO concerning the nature of the application, nevertheless the fact of the matter is that it is a requirement of the Rules that have been approved and adopted. I do not see in the light of the case law typically illustrated by the case of SS (Congo) [2015] EWCA Civ 387 that the problems faced by an individual with the Rules for matters of form are to be circumvented by the application of Article 8 unless there truly are compelling circumstances which show refusal is disproportionate.
11. The Court of Appeal in SS (Congo) also considered the case of one of the Appellants BB (Pakistan) at paragraphs 77-82 of the Court of Appeal decision. It seemed clear in the light of the judgment of Lord Justice Richards that the Appellant, faced with the difficulties of the Sponsor's documentation, was not able to avoid the consequences of the specified evidence requirements; which have similar standing to the other requirements under the Rules.
12. Accordingly I find that the judge's failure to address Article 8 was an error but the failure ultimately is not material to the outcome of the decision because I do not think any Tribunal properly engaging with the issue would have reached the conclusion that the decision, had it been properly made, engaged Article 8 ECHR and would have led to the Claimant's entry into the United Kingdom on that basis.
13. For these reasons I was satisfied that the Original Tribunal had made an error of law. The parties did not object to the matter being remade in the Upper Tribunal. Ms Dogra relied upon her submissions on Article 8 ECHR. However in view of my conclusions on Article 8 I find such a claim on these facts fails.

NOTICE OF DECISION

12. The Original Tribunal's decision was in error of law. The following decision is substituted.
13. The appeal of the Claimant is dismissed.

14. No anonymity order is made.

Signed

Date 10 June 2015

Deputy Upper Tribunal Judge Davey