Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/09945/2013

THE IMMIGRATION ACTS

Heard Centre City Tower, Birmingham
On 17 June 2015

Determination Promulgated
On 6 July 2015

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL M ROBERTSON

Between

ENTRY CLEARANCE OFFICER, NEW YORK

Appellant

And

MRS HARDEEP KAUR MANOTA
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr D Mills, Senior Presenting Officer
For the Respondent: Mr P Jagra, the Sponsor

DETERMINATION AND REASONS

Introduction

1. The Appellant in this appeal was the Respondent at the First-tier Tribunal hearing on 10 April 2015. However, for ease of reference, the Appellant and Respondent are hereafter referred to as they were before the First-tier Tribunal. Therefore Mrs Manota is referred to as the Appellant and the Secretary of State is referred to as the Respondent.

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2. The Respondent was granted permission to appeal against the decision of First-tier Tribunal Judge Hunter (the Judge), who dismissed the Appellant's appeal under the Immigration Rules, because the Appellant could not meet the financial provisions of Appendix FM-SE in relation to the income of the Sponsor, and allowed it under Article 8 ECHR on the basis that: (i) the Sponsor's income only fell short of the financial requirements by £250; (ii) on the authority of **MM v SSHD [2013] EWHC 1900 (Admin)**, he found that refusal of the application on the basis of an inability to meet the financial requirements amounted to a disproportionate interference with the rights of British national sponsors and refugees to enjoy respect for family life.

3. In the grounds of application, it is submitted that the Judge materially misdirected himself in law because:

   a. As stated in the grounds at paras 1 – 7, 9 – 11 and 13, **Gulshan [2013] UKUT 00640 (IAC)** makes it clear that an Article 8 assessment should only be carried out where compelling circumstances not covered by the Rules are established. **R (Nagre) v SSHD [2013] EWHC 720 (Admin)** provided that such compelling circumstances would only be established if the refusal would lead to an unjustifiably harsh out come. The Judge had not established such compelling circumstances, thereby failing to apply the correct test, and had failed to provide reasons as to why it would be unjustifiably harsh for the Appellant and the Sponsor to continue family life in Canada. It is submitted that the income requirements are within the Immigration Rules and there was no prejudice to the Appellant in the application of the law. It is submitted that the Judge failed to make findings on whether the Appellant could have made a further application, so that any separation was only temporary. There was no analysis by the Judge of why the Appellant could not submit a further application.

   b. In **MM v SSHD [2013] EWHC 1900 (Admin)**, the Judge usurped the role of the democratically elected decision-maker in the formulation of policy and had insufficient regard to the width of discretion afforded to the Secretary of State in formulating policy. If he had applied the proper principles of proportionality, he would have been compelled to the conclusion that the interference in the Article 8 rights of applicants and their families caused by the material provisions of the Immigration Rules was proportionate. The Judge thereby erred in relying on **MM**.

4. The Upper Tribunal granted permission on the basis that "It is indeed arguable that the judge gave no reasons for why he considered that there was an arguably good case for consideration outside the rules on Article 8 grounds or why he found the circumstances warranted a grant of leave on that basis. It is also arguable that when assessing proportionality he failed to consider the fact that the appellant could make a fresh application for entry clearance if her sponsor's income now met the maintenance requirements and to consider why it would be disproportionate to expect her to do so. The requirements are in place for a reason and arguably Article 8 cannot be used to circumvent them."

The hearing

5. Mr Parminder Singh Jaghra, who attended the hearing, is the Sponsor and a lay representative. It was explained to him that the Judge had found that his wife could not meet the provisions of the Immigration Rules for a grant of entry clearance as his spouse and the Judge had therefore allowed the appeal on Article 8 grounds, that the Respondent had appealed against that decision on the basis that the Judge had erred in the way in which the law was applied in reaching this decision and that permission had been granted by the Upper Tribunal because it appeared that the Judge had misapplied the law. When asked if he had a copy of the grounds of application and the grant of permission, he said that he had not. Copies were supplied to him and he was given time to read them. The hearing proceeded when he confirmed that he had read those documents and that he was able to deal with the issues which were raised in them.

6. Mr Mills provided a copy of **SS (Congo) [2015] EWCA Civ 387**, and referred to paragraphs 40 – 41, submitting that whilst in the grounds there was reference to the earlier case of **Gulshan**, **SS (Congo)** had confirmed that where an appellant could not succeed under the Immigration Rules, compelling circumstances must be established for allowing an appeal under a free standing Article 8 assessment which was unconstrained by the Immigration Rules. In the Appellant's case, the Immigration Rules were not met and Article 8 was considered. Mr Mills submitted that firstly, the Judge erred in law in placing reliance on **MM**; the Court of Appeal had disagreed with the analysis of the Judge in **MM** in which he stated that the Rules and income requirements did not strike a fair balance between British citizens and their spouses. The Court of Appeal found the opposite and reliance on **MM** rendered the decision unsafe.

7. Mr Mills further submitted that the Judge gave absolutely no consideration to the ability of the Appellant to re-apply; she was a little short of meeting the income threshold and, as specifically provided in **SS (Congo)** it was fair and proportionate to refuse where it was being argued that the Appellant could not meet the requirements at the date of decision but could now meet the requirements. In allowing the appeal under Article 8 because she was only a little short of the income threshold, the Judge used the near miss principle and in **SS (Congo)**, at paragraphs 54 – 56, it was established that narrowly missing the threshold was not a determinative factor. He submitted that the decision was unsafe, that it should be set aside and that it should be remade on the basis of the evidence before me.

8. The Sponsor submitted that he understood that the Immigration Rules were not met because his income was a little short of the threshold (he said that he was £200 short), but he submitted that he had money in a savings account and in shares and pension schemes, and that he also received about £600 per month in bonuses, although this had not been explained to the Judge, who made the decision on the evidence that was available to him. The Sponsor submitted that he thought that this additional income could be taken into account and his income would then be over the threshold and that is why he had appealed on Human Rights grounds. He stated that he and

his wife had previously been married and had got divorced because of the distance between them but had decided to remarry and to re-apply would mean that the separation between him and his wife would be prolonged. He stated that the separation had caused a strain on the relationship between him and his wife, that they had waited two years for a decision, and that they were both 32 years of age and they needed to consider their future. H also stated that he lived with his mother at present, that she was 61 years of age and was under the care of the hospital, and that if his wife came to the UK his mother could retire.

9. Mr Mills made no further submissions by way of reply and both he and the Sponsor accepted that if I found that the Judge had materially erred in law in reaching his decision, I would remake the decision on the basis of the evidence before me.

Decision and reasons

10. The only evidence the Judge had before him was the documentary evidence; the Appellant had requested a decision on the papers and the Respondent had not requested an oral hearing. In relation to the Immigration Rules, specified evidence must be provided with the application. There was simply no documentary evidence before me that the Appellant had submitted the requisite evidence of the Sponsor's savings with her application and, as accepted by the Sponsor, there was no such evidence before the Judge. There was also no evidence before the Judge to establish that the savings of the Appellant complied with the provisions of paragraph 11 of Appendix FM-SE. There can therefore be no error of law in relation to the Judge's decision under the Immigration Rules.

11. As to the assessment under Article 8, as the decision in **MM** was found to be legally flawed by the Court of Appeal on the issue relied on by the Judge (that is that the combination of the features relating to the maintenance requirements of the Immigration Rules resulted in a disproportionate interference with the rights of British citizens and their spouses), it was legally flawed at the date of the Judge's decision and, in the absence of any other compelling circumstances being identified by the Judge for allowing the appeal under Article 8, it follows that, as submitted by Mr Mills, the Judge's decision is unsafe and must be set aside. The only other reason identified by the Judge was that it was unreasonable to expect the Sponsor to live in Canada. He did not, as submitted in the grounds of application, consider that the Appellant could make a further application and whether it would be disproportionate interference with her rights and those of the Sponsor to require her to do so. This too is a material error of law as it was capable of making a difference to the outcome of the appeal.

12. I therefore set aside the decision if the Judge and remake the decision under Article 8 as follows:

13. I note from the decision that although the notice of refusal is said to have been issued on 8 January 2013 (and this could not have been the case because the on-line application was not submitted until March 2013), the Appellant in the grounds of appeal before the First-tier Tribunal stated that the notice of refusal was dated 8 April

2013. As the application was made in March, the time it took to process the application was no more than one month. I can only consider the circumstances appertaining at the date of decision. The Entry Clearance Manager in his review of the decision accepted that there is a genuine and subsisting relationship between the Appellant and the Sponsor and that they intend to live together permanently such that there is an interference with their Article 8 rights. However, such interference will not have consequences of such gravity as to potentially engage the operation of Article 8 when the only consequence is a temporary separation of between 2 – 4 months whilst a further application is being processed. This is particularly so when it is the Sponsor's evidence that he himself had savings, evidence of which he had not submitted. Even taking into account the Sponsor's evidence that the continued separation between them was causing a strain on their relationship, the evidence was that due to the processing times, the consequences of the decision did not amount to compelling circumstances for allowing the decision under Article 8. As to the Sponsor's mother's medical condition, there was simply no evidence before me of her health as at the date of decision. It would appear from the Sponsor's evidence that his mother would only retire if his wife was granted entry clearance, which would indicate that her condition is not such as to result in retirement through ill – health. I find that Article 8 is not engaged in this case and there are no compelling circumstances for granting leave outside the Immigration Rules.

Decision

14. There are material errors of law in the determination of Judge Hunter as set out above such that the determination falls to be set aside on the Article 8 rounds only. For the reasons set out above, I remake the decision to dismiss the Appellant's appeal under Article 8.

15. The Respondent's appeal is allowed.

Anonymity

16. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and immigration Tribunal (Procedure) Rules 2005 and I see no reason why an order should be made pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed Date

M Robertson
Sitting as Deputy Judge of the Upper Tribunal

TO THE RESPONDENT

In 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.

As I have dismissed the Appellant's appeal, I make no fee order.

Signed Dated

M Robertson
Sitting as Deputy Judge of the Upper Tribunal