Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/10774/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 15 January 2015	**On 26 January 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS

Between

MOHSIN ABBAS SYED
(ANONYMITY ORDER NOT MADE)

Appellant

and

ENTRY CLEARNCE OFFICER,
ISLAMABAD

Respondent

Representation:

For the Appellant: Mr Slatter of Counsel instructed by Abbott Solicitors
For the Respondent: Mr Whitwell, Home Office Presenting Officer

DECISION AND REASONS

1. This appeal comes before me today in order to re-make the decision in the appeal under Article 8 of the European Convention on Human Rights pursuant to a decision finding an error of law following the hearing at Field House on 9 September 2014. The error of law decision is a matter of record and is appended hereto, should be read as part of the decision herein. The background facts are set out in the 'error of law' decision and I do not propose to re-rehearse them now. I do no more than outline the salient features.

2. The appeal is against the decision of the Respondent dated 8 April 2013 to refuse to grant entry clearance as a partner. As this is an entry clearance decision the relevant date for consideration and assessment - even in respect of Article 8 - is the date of the respondent's decision – see **AS (Somalia) v Secretary of State for the Home Department [2009] UKHL 32**. This does not mean that post-decision evidence is to be excluded insofar as it pertains to matters at the date of decision.

3. The Appellant's partner, the sponsor, is Mrs Raqia Shah, date of birth 28 August 1991. The Appellant and the sponsor were married in Pakistan on 29 August 2008. The couple now have two children, the first being born on 18 April 2013 - so just after the Respondent's decision that is the subject of this appeal.

4. I pause to note that considerable reference has been made to the family circumstances with regard to the position of the children, the family life enjoyed between the children and the wider family in the United Kingdom, and the relationship between the children and their father – the Appellant - who remains in Pakistan. Such references were made both before the First-tier Tribunal and in the witness statements that have been filed before the Upper Tribunal and signed today by each of the sponsor and her mother, Mrs Ghulam Sahaira Bano Shah. However Mr Slatter, presumably duly instructed notwithstanding the emphasis placed on the witness statements, invites me to disregard the children altogether in considering Article 8 as neither had been born at the date of the Respondent's decision. The only possible relevance is that the sponsor's pregnancy at the date of decision and the subsequent births of two children underscore that this is a genuine marital relationship.

5. In this latter context Mr Whitwell accepts that a genuine relationship exists, and it is not contested that family life existed at the date of the Respondent's decision as between the Appellant and the sponsor. Indeed it is not contested that the Respondent's decision frustrated the wish for the couple to cohabit in the United Kingdom. In effect there is no dispute that the first two **Razgar** questions may properly be answered in the Appellant's favour. There is no apparent issue in respect of the third and fourth **Razgar** questions and so ultimately the focus under Article 8 is on the fifth **Razgar** question of proportionality.

6. Mr Slatter's principal submission today is that at the date of the Respondent's decision the sponsor was earning at a gross rate of £21,444 which exceeded the requirement under the Rules of £18,600. Whilst Mr Slatter does not seek to persuade me to allow the case under the Rules he argues that I should have regard to the Rules as a context for considering Article 8. In effect, if the Appellant meets the substantive financial requirements, the public interest should not defeat his application because of evidential defects in the application for entry clearance. To that extent Mr Slatter

sought to explore in examination-in-chief the sponsor's employment history and earnings.

7. I heard evidence both from the sponsor and the sponsor's mother. Each adopted their witness statements signed today at the Tribunal - the sponsor's mother's witness statement being adopted subsequent to some minor amendments at paragraph 16. Little further was asked of the sponsor's mother who did not give any specific evidence in relation to the sponsor's income. The sponsor was, however, asked a number of questions both in examination-in-chief and in cross-examination in respect of her history of employment and her earnings. I have made a note of the evidence in the Record of Proceedings which is on file and I have had regard to all that has been said at the hearing before reaching my decision.

8. As indicated above it is now argued that at the date of the Respondent's decision the sponsor was earning at a gross rate of £21,444 which exceeded the requirement under the Rules in respect of sponsoring a partner. This level of income is however under the rate if a child were to be included - which would be a rate of £22,400 - and so, of course, if I were to be taking into account the imminent birth of the first child shown post-decision to have been a successful live birth, Mr Slatter's principal submission would not be open to him.

9. Although I emphasise that I am not and indeed am not being invited to determine the case under the Rules, I agree it is pertinent to consider them as a starting point.

10. Mr Slatter acknowledges that the application for entry clearance was deficient by reference to the evidential requirements of Appendix FM-SE. Further, he also acknowledges that on the basis of the materials addressed in the First-tier Tribunal decision, the analysis at paragraph 40 of that decision that found the funds insufficient to meet the £18,600 threshold was open to the First-tier Tribunal Judge. However, he states that additional materials are now available, as it were to 'fill the gaps', and in this context reliance is placed in particular on the documents that appear at pages 54 and 56 of the Appellant's bundle filed before the Upper Tribunal.

11. The document at page 54 is a letter from Shabab Restaurant dated 4 February 2014 itemising the sponsor's pay in the period 1 August 2012 to April 2013. The document at page 56 (it is really a document over pages 55 and 56) is a bank statement for an account held by the sponsor which shows in particular a 'Faster Payment' credit on 8 August 2012 from Shabab Restaurant in the sum of £1,426.16.

12. The relevant Rules under Appendix FM-SE - which I again emphasise I am not applying but to which I am nonetheless having regard - require at paragraph 2 that certain documents are submitted in support of any claimed income. In particular there is a requirement to provide wage slips, a letter from the employer, and personal bank statements corresponding to the same period as the wage slips. The relevant Rules are a matter of record and I do not propose to set them out in detail here.

13. As was explored at the hearing today there is a disconnection between the wage slips and the bank statements. In particular the weekly rate shown on the payslips does not equate with the monthly rate shown in the bank statements. So, for example many of the payslips show a weekly payment by cheque in the sum of £356.54 - which would equate to a monthly income of £1,545; however the bank statements show monthly payments of £1,426.16. Necessarily there is also a disconnection between the wage slips and the employer's letter because the employer's letter details payments at the same level as the bank statements.

14. These were matters explored with the sponsor in oral evidence. In this context I found the sponsor to be a vague and inconsistent witness in respect of her employment and earnings, essentially for the following reasons, which formed part of Mr Whitwell's submissions.

15. Over and above the disconnection between the rates of pay there is also a disconnection in that the wage slips suggest weekly payment and the bank statements suggest monthly payment. Further there is an inconsistency as to payment method, the wage slips indicating payment by cheque whereas the bank statements indicate payment by bank transfer. The sponsor, in my judgment, struggled to offer any adequate explanation for any of these discrepancies. She suggested that she had asked for the method of payment to be altered from weekly cheques to monthly payments into her bank account because she wished to be paid more promptly and did not wish to await the clearing of any cheque that she might pay in. As Mr Whitwell points out, this does not stand up to scrutiny. Having to wait for payment at the end of the month involves waiting longer for money than having pay received weekly and waiting a few days for cheques to be cleared. In any event this explanation does not explain why it continued to be the case that wage slips were issued showing payment on a weekly basis by cheque. The sponsor suggested that this was because this was the way other employees were paid and that the same practice continued for her. Without more I do not accept that explanation. Further the supposed change of method of payment seemingly resulted in the sponsor receiving a monthly wage lower than that that she had previously received. She stated that she had not questioned this with her employer, who is also her uncle (the restaurant being a family business). I do not find this credible or plausible. In my judgment, had the sponsor suffered the loss of income suggested on

the face of the documents, it is a matter that she would have raised with her uncle in order for some explanation, even if not remedy.

16. Furthermore, I found the sponsor to be extremely vague in describing her duties in the restaurant which she claims to manage. For example when asked about her role in respect of the wages of the other employees she simply said that it was her job to pass them their wage slips once those had been calculated by her uncle; she otherwise described duties which were essentially those of a waitress. While she subsequently added that she also had a role in ordering in food, I formed the impression that she was making up her evidence as she went along in this regard. In the circumstances I do not find her credible in respect of the duties she undertakes in her place of work.

17. The evidential requirements of the Rules are there to allow appropriate scrutiny by a decision-maker. In my judgment it does not behold the Appellant now effectively to bypass those requirements by submitting materials that when considered alongside the oral testimony of the sponsor lead to considerable doubts as to the nature of the sponsor's employment and whether her rate of pay has been artificially inflated. The failure to meet the evidential requirements is not a mere procedural mishap that can readily be disregarded in an Article 8 submission, but must be considered as something more substantive that does indeed sound – albeit not inevitably determinatively - in Article 8 as being an element of the system of immigration control (and thereby a part of the relevant 'public interest').

18. Be that as it may, and in any event in all the circumstances of this particular case, I do not accept that it has been demonstrated on a balance of probabilities that the sponsor was genuinely being paid *as remuneration for employment* at a rate in excess of the requirements of the Rules at the date of the Respondent's decision.

19. The primary factual premise for Mr Slatter's Article 8 submission is thereby not made out. What is left?

20. I remind myself of the observations that I made in the decision in respect of 'error of law', in particular at paragraph 15(iii) and (iv) with regard to the necessity to identify circumstances not sufficiently recognised under the Rules in order to succeed on an Article 8 claim outside the wording of the Rules; and that otherwise there was a risk of disregarding the requirements of the Immigration Rules for no identifiable reason beyond the fact of the frustration of the wish to enjoy married or family life in the United Kingdom. Given that I am being invited to exclude the children from consideration, it seems to me that nothing of substance has been advanced to indicate why the Appellant and the sponsor should have an exception made in their

particular case. Even if I were able, or invited, to give consideration to the circumstances of the children I find nothing remarkable in those circumstances. Although reference has been made in the witness statements to the children suffering from ailments those are matters that are said to be only of one week standing and there is no supporting medical evidence in respect of either.

21. Mr Slatter has made reference to what he described as 'an historical injustice point' by reason of the circumstance that the sponsor had not sponsored the Appellant as her partner at any earlier time because when they were married she was only 17 and the Rules imposed an age restriction. For that point to be made good it would be necessary to show that but for the way in which the Rules were then drafted, the Appellant would have been in a position to meet the requirements of the Rules, in particular in regard to the financial requirements. No such evidence has been put before me to suggest that that is so, and in the circumstances I do not consider the point in respect of what is suggested to be an historical injustice is pertinent to the facts of this particular case.

22. For completeness I should note that no particular submission has been made by either representative in respect of Part 5A of the 2002 Act. I have nonetheless had regard to the provisions of sections 117A-117D, but consider that they add or detract nothing of substance from the analysis set out above.

23. In all of the circumstances I find that the Respondent's decision was entirely proportionate and that it did not breach the Article 8 rights of either the Appellant or the sponsor, or any other person.

24. Further, I am unable to identify any other basis to conclude that the decision was not in accordance with the law.

Notice of Decision

25. The appeal is dismissed.

The above represents a corrected transcript of an ex tempore decision given at the hearing on 15 January 2015.

Signed Date: 25 January 2015

Deputy Upper Tribunal Judge I A Lewis

APPENDIX

TEXT OF 'ERROR OF LAW' DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Jackson promulgated on 1 April 2014 allowing Mr Syed's appeal against the decision of the Entry Clearance Officer ('ECO') dated 8 April 2013 to refuse to grant entry clearance as a partner.

2. Although before me the ECO is the appellant and Mr Syed the respondent, for the sake of consistency with the proceedings before the First-tier Tribunal I shall hereafter refer to Mr Syed as the Appellant and the ECO as the Respondent.

Background

3. The Appellant is a national of Pakistan born on 5 March 1984. On 29 January 2013 he applied for entry clearance as the husband of Ms Raqia Fatima Shah ('the sponsor'). The application was refused for reasons set out in a Notice of Immigration Decision dated 8 April 2013 with particular reference to paragraphs S-EC.2.2(b), and E-ECP.2.6 and 2.10 of Appendix FM of the Immigration Rules.

4. The Appellant appealed to the IAC.

5. The First-tier Tribunal Judge rejected the Respondent's case under paragraph S-EC.2.2(b) (determination at paragraph 31), and found that the Appellant met the requirements of paragraphs E-ECP.2.6 and 2.10 (paragraph 34).

6. However, during the course of the hearing the Judge raised an issue in respect of the financial requirements of the Rules, with particular reference to paragraph E-ECP.3.1(a)(i) and the required documentary evidence under Appendix FM-SE. Having directed herself to the decision in **Kwok on Tong**, the Judge gave directions in this regard. (See paragraph 35.) In the event there was no response to those directions received by the Judge (paragraph 36). The Judge went on to determine the issues now raised under paragraph E-ECP.3.1(a)(i); she concluded that the Appellant had not provided all of the relevant specified evidence pursuant to paragraph 2 of Appendix FM-SE (paragraph 39), and in any event concluded that it had not been shown that the sponsor's income met the substantive requirement of paragraph E-ECP.3.1(a)(i) (paragraph 40). Thus the appeal was refused under the Immigration Rules.

7. However, the First-tier Tribunal Judge allowed the Appellant's appeal under Article 8 of the ECHR for the reasons set out at paragraphs 41-44 of the determination.

8. The Respondent sought permission to appeal which was initially refused by First-tier Tribunal Judge Cheales on 20 May 2014, but subsequently granted by Upper Tribunal Judge Freeman on 22 July 2014.

9. There has been no application for permission to appeal by the Appellant against the First-tier Tribunal's decision under the Immigration Rules. Further, there has been no Rule 24 response filed in respect of the Respondent's challenge to the decision under the ECHR.

Consideration: Error of Law

10. In my judgement there is a lack of clarity in the First-tier Tribunal Judge's reasoning in respect of proportionality such as to amount to an error of law requiring the decision to be set aside in this regard.

11. Before addressing the specific reasoning at paragraph 44, it is convenient to make some preliminary observations in respect of the sponsor's income and the financial requirements under the Rules, and in respect of the Judge's consideration of the so-called 'intermediary test' disapproved of in **MM (Lebanon) [2014] EWCA Civ 985** (paragraphs 128-129).

12. In respect of the sponsor's income, I note the following:

(i) Under the Rules the required income figure was £18,600 (E-ECP.3.1(a)(i) – set out at paragraph 2 of the determination, and emphasised at paragraph 38).

(ii) E-ECP.3.1(a)(ii) and (iii) impose additional income requirements of £3800 for the first child and £2400 for each further child. The Judge made no reference to these additional requirements. In so far as the Judge was determining the appeal by reference to the circumstances at the date of the Respondent's decision (8 April 2013) – as indeed she was required to do - such additional requirements were not engaged because the sponsor and the Appellant's first child had not yet been born. The Appellant's first child was born on 18 April 2013 (determination at paragraph 16).

(iii) However, notwithstanding that the requirement to determine the appeal by reference to the circumstances at the date of the Respondent's decision also applied to any consideration of the case by reference to the ECHR, the Judge plainly at paragraphs 41-44 gave very particular consideration – and attached significant weight to – the presence of the Appellant's British citizen son in the UK.

(iv) In this context by reference to the date of the Respondent's decision it could not be said in particular, as the Judge said at paragraph 42 - "*there is established family life between the Appellant and the Sponsor and also between the Appellant and his child born on 18 April 2013 in the United Kingdom. The refusal of entry clearance as an interference with that family life…*".

(v) Even if it were the case that in the context of Article 8 the Judge was entitled to consider that at the date of the Respondent's decision the birth of a child to the sponsor was imminent, and therefore a proper matter for consideration as a circumstance pertaining at the date of decision, in my judgement it would then have been incumbent to have regard to the greater financial requirements imposed by the Rules – even in the context of an Article 8 assessment. I find that it is clear that the Judge had no regard to such a consideration. (For the avoidance of any doubt, when I state in this context '*have regard to*', I do not mean '*impose as a requirement*'. Rather, it is incumbent upon a decision-maker to take into account the requirements of the Rules as a starting point when considering Article 8 beyond the letter of the Rules.)

(vi) The Judge did, nonetheless, set out with some considerable care and clarity her analysis of the sponsor's income as shown by the supporting evidence: see paragraph 40. The alternative totals calculated – £15,392 and £11,560 - are substantially short of the requirements under the Rules, even allowing for a further two months salary to be added to the latter figure.

13. In respect of the 'intermediary test', I make the following observations.

(i) The Judge applied the 'intermediary test': see paragraph 41. She need not have done so. The fact that she did, however, is immaterial because she did not adversely determine the appeal by application of this unnecessary step.

(ii) However, in considering the intermediary test the Judge had regard to matters that post-dated the Respondent's decision. Whilst it might be said that it was appropriate to have regard to the imminent birth of the Appellant's first child, the expected birth of a further child in August 2014 could not have been a relevant consideration at the date of decision, conception not having taken place until late 2013 some seven or eight months after the Respondent's decision.

(iii) The Judge also had regard to **MM [2013] EWHC 1900 (Admin)** - "*as to the potential for the maintenance requirements to constitute an unjustified and disproportionate*

interference with the ability of spouses to live together". The decision in **MM** was overturned by the Court of Appeal: see **MM (Lebanon)** (cited above).

(iv) Although the intermediary test was an unnecessary step, the introduction by the Judge in considering such a test of the matters at (ii) and (iii) above was to introduce into her overall consideration irrelevant factors.

14. Paragraph 44 of the determination is in the following terms:

"*Although the Sponsor and her son have shown that they are able to visit the Appellant in person and maintain regular contact with the Appellant through modern means of communication, I find that the refusal of entry clearance would amount to a disproportionate interference with the family life of the Appellant, the Sponsor and their son. I have found that family life has been established, that the best interests of the child are to be brought up by both parents in the same country and the Respondent has conceded as a matter of principle that it is not reasonable to expect British Citizen children to leave the United Kingdom. In those circumstances, it would not be proportionate to expect family life to continue in Pakistan (by the Sponsor and her son relocating there) and the refusal of entry clearance would therefore be a disproportionate interference with family life. It is not necessary in this case to go on to consider whether the maintenance requirement alone would constitute a disproportionate interference with family life as suggested in MM. I allow the Appellant's appeal under Article 8 of the European Convention on Human Rights.*"

15. I find that paragraph to be inadequately reasoned. I note the following:

(i) The first and last sentences do no more than to state the Judge's conclusion. (This is an observation, not a criticism.)

(ii) The use of the word 'would' in "*…I find that the refusal of entry clearance would amount to a disproportionate interference…*" and "*…the refusal of entry clearance would therefore be a disproportionate interference…*", appears further to indicate that the Judge did not confine her consideration to the circumstances at the date of the Respondent's decision, but was looking to a continuing refusal of entry clearance at the present time and thereby evaluating the case by reference to the circumstances at the date of the hearing. (See also the observations at 12(iii) and (iv), and 13(ii) above.) This was an error of law.

(iii) The substance of the paragraph – the second and third sentences - adequately explains that the effect of the refusal of entry clearance is to interfere with the family life of the Appellant, his wife, and child. In so doing the Judge does not identify any factor present in this case that is not an inherent aspect of a consideration under the Rules. An application for a partner, or indeed a parent, to enter the UK is premised on the UK partner or child being a British citizen or settled or a refugee or a person with humanitarian protection. Similarly, any such

application is necessarily premised on the existence of family life, by virtue of the relationship. The Judge thereby failed to identify any 'compelling circumstances not sufficiently recognised under the Rules' – notwithstanding her self-direction to that effect at paragraph 5 of the determination.

(iv) In any event, whilst the Judge states her conclusion that it would not be proportionate to expect family life to continue in Pakistan by relocation of the sponsor and her son, this is really to do no more than identify that the decision interferes with family life. It does not in itself render the decision to refuse entry clearance disproportionate. The Judge's use of the word 'proportionate' in the second sentence is not explained, and in my judgement is misplaced. Moreover, I find that the Judge does not offer any explanation as to what it is about the Respondent's decision – or more particularly the Appellant's circumstances - that does render it disproportionate. The effect of the Judge's decision is to disregard the requirements of the Immigration Rules for no identifiable reason beyond the fact of the frustration of the wish to enjoy family life in the UK. Without more that does not constitute disproportionality.

(v) The Judge's reference to **MM** is confusing. In stating that it is not necessary to consider whether the maintenance requirements "*alone*" would constitute a disproportionate interference with family life, it is unclear as to whether or to what extent the Judge has considered such matters cumulatively.

(vi) In any event, as identified above, I am not satisfied that the Judge has had due regard to the financial requirements of the Rules as a starting point for a consideration of proportionality. If the Judge did not have due regard to the Rules as a starting point that is an error. If the Judge did have regard to the financial requirements, it is unclear whether she did so by reference to the now overturned High Court decision in **MM**. Or whether in doing so in circumstances where she had regard to the situation subsequent to the birth of the Appellant's son, she had due regard to the additional financial requirements imposed by E—ECP.3.1(a)(ii). The lack of clarity of reasoning in this regard is, in my judgement, an error of law.

16. In all such circumstances I find that the First-tier Tribunal Judge materially erred in her approach to the appeal under Article 8. I conclude that the decision of the First-tier Tribunal in that regard must be set aside. The decision under the Rules is not the subject of any cross-challenge and stands.

Remaking the Decision / Future Conduct of the Appeal

17. Both representatives acknowledged that in the event that I were to find an error of law, the appeal was suitable for further consideration by the Upper Tribunal.

18. Mr Graham indicated that if the decision were to require to be remade he would wish to call both the sponsor and the sponsor's mother to give further evidence. No interpreter is required: English is the first language of both. No particular directions were sought by either party: standard directions will suffice.

Notice of Decision

19. The decision of the First-tier Tribunal Judge under the Immigration Rules is unchallenged and stands.

20. Mr Syed's appeal remains dismissed under the Immigration Rules.

21. The decision of the First-tier Tribunal Judge under the ECHR contained material errors of law and is set aside.

22. The decision in the appeal on human rights grounds is to be re-made before the Upper Tribunal.