IAC-AH-CO-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/19657/2013

THE IMMIGRATION ACTS

Heard at Birmingham Sheldon Court	**Determination Promulgated**
On 20th March 2015	**On 15th April 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MISS ISRA NAWAZ
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER - ISLAMABAD

Respondent

Representation:
For the Appellant: Mr I Hussain (LR)
For the Respondent: Mr N Smart (HOPO)

DECISION AND REASONS

1. The Appellant is a citizen of Pakistan who was born on 7th November 1991. She applied for leave to enter as the partner of Mr Mohammad Khizar, a person present and settled in the UK, under paragraph EC-P.1.1 of Appendix FM of the Immigration Rules. The Notice of Refusal is dated 11th October 2013. In it, the Respondent states that, though the Sponsor married the Appellant in Pakistan on 3rd April 2010, there was inadequate evidence of there being a genuine and subsisting relationship between them, and the phone bills only showed an occasional contact in 2013.

Secondly, the Sponsor, Mr Mohammad Khizar, failed to provide copies of his wage slips relating to his employment with Al Madhina, such that at the date of the application, he could show that he was earning £18,600 (see paragraphs 9 to 10).

The Judge's Findings

2. The judge found that at the time of the ECO's decision, on a balance of probabilities, the Appellant was in a genuine and subsisting relationship with the Sponsor and intended to live together with him. The judge held that, "the Sponsor's evidence about this has always remained consistent and is supported by the contents of the application form submitted by the Appellant" (paragraph 27). The judge also held that "the Sponsor has known his wife all his life as she was his second cousin and it was an arranged marriage" and that he had visited her in Pakistan for two weeks in June 2012, and that they had lived together as man and wife (paragraph 28). The judge held that they had then stayed in touch through daily contact using Skype, Viber and Tango (paragraph 29). The judge was satisfied in relation to these matters.

3. What the judge was not satisfied with, however, was with the Appellant's ability to show that the Sponsor in the UK could meet the financial requirements set out in Appendix FM-SE. Mr Hussain, who represented the Appellant on that occasion as well, accepted that the Sponsor, "at the time of the application had not been in employment for six months and that therefore he had to provide pay slips and bank account statements within the period of twelve months prior to the date of application. There was no dispute that the date of the application was 22nd July 2013. Therefore it was accepted by Mr Hussain that the Rules required him to supply pay slips and bank account statements within ... "the requisite period" (paragraph 35).

4. Mr Hussain had accepted that the Appellant had failed to provide those documents "as at the date of the application but has still not been able to provide them" (paragraph 35). The argument presented by Mr Hussain before the judge was that

> "The case of **DR (Morocco)** allows me to reset the relevant twelve month period during which the bank statements and pay slips are required to a twelve month period prior to the date of the ECO's decision rather than the date of application" (paragraph 26).

The judge concluded that this was not possible. The appeal was dismissed under the Immigration Rules.

5. The judge then went on to consider Article 8 ECHR. He held that,

> "The evidence before me does not establish any good reason why the Sponsor could not have produced the necessary pay slips and bank statements as required under the Rules. The evidence also indicates that there is no reason why the Appellant could not make a further application ..." (paragraph 41).

6. The judge concluded that, "in any event it would have been proportionate to dismiss the Appellant's appeal by reference to the legitimate aim of effective and fair immigration control ..." (paragraph 43).

7. The appeal was dismissed.

Grounds of Application

8. In the Grounds of Appeal, filed on 6th October 2014, it is argued that the judge erred in law in concluding as he did.

9. On 13th November 2014, permission to appeal was granted on the basis that the judge ought to have considered the position under Article 8 following the case of **MM [2014] EWCA Civ 985**.

10. On 2nd December 2014, a Rule 24 response was entered by the Secretary of State to the effect that

> "Appendix FM-SE A1 paragraph 2 requires that pay slips and bank statements should be submitted covering a six month period prior to the date of application or where the person had been employed for less than six months. Then pay slips and bank statements for a period of twelve months prior to the date of the application. It is clear that the Appellant did not meet this requirement as set out at paragraph 35 of the determination".

Submissions

11. At the hearing before me on 20th March 2015, Mr Hussain repeated very substantially the arguments that he had already made before Judge Thorne below. He submitted that, though the Appellant could not show that he could meet the requirements of the Rules at the date of the "application", he could show that he met them at the date of the "decision", both by the decision maker, and by the Tribunal Judge. This was emphasised at paragraph 7 of the skeleton argument submitted by Mr Hussain as well. He submitted that the Tribunal was not bound by an application submitted at the date of the "application" and could go further and look at the application at the date of the decision. He based reliance upon Section 85(c) of the 2002 Act and expressly drew attention to the relevant case of **DR (Morocco)**. Accordingly, the Appellant should have succeeded in his appeal under the Immigration Rules.

12. Second, he drew my attention to **MB (Article 8 – near miss) Pakistan [2010] UKUT 282**, to emphasise that in an Article 8 case, when balanced with the demands of fair and firm immigration control against the disruption of the family or private life of a person if removed for non-compliance with the Immigration Rules, the nature and degree of the non-compliance may well be significant. He submitted that the degree of non-compliance here was minimal given that the Appellant was able to comply by the date of the "decision". He also prayed in aid the case of **Mostafa (Article 8 in entry clearance) [2015] UKUT 00112** and emphasised the principle that "

> "In the case of appeals brought against refusal of entry clearance under Article 8 ECHR, the Claimant's ability to satisfy the Immigration Rules is not the question to be determined by the Tribunal, but is capable of being a weighty, though not determinative, factor when deciding whether such refusal is proportionate to the legitimate aim of enforcing immigration control".

Finally, my attention was also drawn to the case of **Oludoyi [2014] UKUT 00539** which also emphasised the principles applicable in Article 8 cases. Mr Hussain ended by submitting that at the date of the "decision" the Appellant was earning £18,600. His difficulty only arose because at the date of the "application" he had only been working for four months, instead of the required six months, and therefore could not meet with the requirements of the Rules.

13. For his part, Mr Smart submitted that the judge was right to reject the appeal on the basis of a failure to provide specified evidence. This case was not simply about a shortage of pay slips. The bank statements were not there. Other documents were not there. Indeed, even at the date of the appeal hearing before the judge there was a deficiency of evidence before the Tribunal. The requirement of the Rules is that certain documents must be provided with the application. The Appellant could not get round this by choosing to supplant the word "application" in the Rules with the word "decision" which does not appear there.

14. Second, as far as Article 8 is concerned the judge dealt with this. The judge concluded that, whereas Article 8 may well have been engaged, it was perfectly open to the Appellant to make another application, now that the Sponsor was working and earning £18,600, and to require her to do so, was not in any way disproportionate.

15. In reply, Mr Hussain submitted that the date of the application was 22nd July 2013 and that three months had gone by before the decision was given on 11th October 2013. If that was the case, and there had been a material change of circumstance, so that the Appellant was now able to show that her sponsoring husband could comply with the Rules by demonstrating earnings of £18,600, then this should probably be taken into account by the decision maker, and by the Tribunal.

No Error of Law

16. I am satisfied that the making of the decision by the judge did not involve the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision. When the refusal here was first made, it was made both on the basis of a failure to demonstrate a genuine and subsisting marriage as well as a failure to demonstrate compliance with the financial requirements. With respect to the former, very detailed explanations were given both by the Entry Clearance Officer, but also more particularly, by the Entry Clearance Manager on 12th May 2014. For example, the ECM pointed out that the Sponsor had stated that he communicated with the Appellant in Pakistan through Skype, Viber, and Tango. However, the Appellant had stated that the Sponsor stayed in touch with her "via telephone and visit". She made no reference to other forms of communication.

17. Moreover, even the evidence in relation to telephone contact was unsatisfactory and did not demonstrate a subsisting relationship. The judge, however, appears to have taken the view, that because this was a "arranged marriage" where the parties had known each other all their lives, and because "she was his second cousin" (paragraph 28) that the burden of proof with regard to the marriage being a genuine and

subsisting relationship had been discharged. Yet, the basis of this decision was questionable.

18. The Sponsor had only visited the Appellant in Pakistan for two weeks in June 2012. He did not visit more often. The judge accepted the explanation of the Sponsor that he did not do so "as it was too expensive".

19. Furthermore, there was a delay in the "application for her to come and join him because they had to wait until she turned 21 years old and he was earning enough money" (paragraph 28).

20. It is arguable that the judge failed to demonstrate proper rigour in coming to the conclusions that he did with respect to these findings. However, be that as it may, I do not find that any failure in this regard amounts to a material error of law on the judge's part.

21. It is, however, in relation to the judge's decision with respect to the Appellant being able to meet the financial requirements test, that the Appellant appeals in this case. In this respect, however, the judge is absolutely right. The judge sets out the relevant provisions under the Rules, setting out Appendix FM-SE, which states that "all of the following evidence must be provided" and then goes on to specify "a period of six months prior to the date of application if the person has been employed by the current employer ...". The reference here plainly is "to the date of application". The reference is not to the date of "decision" as Mr Hussain argues.

22. Secondly, and no less importantly, the judge was clear that, not only was this evidence not provided at the date of the application, but that it had still not been provided at the time of the hearing (see paragraph 35). Third, Mr Smart helpfully handed me up a copy of Appendix FM-SE, and it is clear that this is the version of the Rules that was applicable between 30th September 2013 and 28th October 2013. It makes it absolutely abundantly clear in relation to "family members – specified evidence" that "in deciding an application in relation to which this Appendix states that specified documents must be provided, the Entry Clearance Officer or Secretary of State ... will documents that have been submitted with the application ... "(see paragraph D(a)). This leaves no doubt that the relevant period was at the date of the application.

23. That only leaves a consideration of Article 8, but the judge properly considered this, and did not consider it to be disproportionate to require the Appellant to apply again, now that the Sponsor is earning £18,600. Any other decision would be a license to applicant's to work for a short period of time, such as four months as is in this case, and then to make an application that circumvents the requirements of the Rules, which require six months of pay slips.

24. I should make it clear, that should there be another application by the Appellant it is important that the question of both the marriage being a "genuine and subsisting" relationship, as well as the requirements of the financial threshold as applicable, are

rigorously applied in this case to the relevant standard of proof, which is on a balance of probabilities.

Notice of Decision

There is no material error of law in the judge's decision. The determination shall stand.

No anonymity order is made.

Signed	Dated
Deputy Upper Tribunal Judge Juss	11th March 2015