Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: OA/00419/2014**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 11th December 2015	**On 4th January 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

MRS ASRI DEVITA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Blundell, Counsel
For the Respondent: Mr N Bramble, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Indonesia born on 9th February 1986. The Appellant applied for entry clearance as a partner under Appendix FM of the Immigration Rules. That application was considered under paragraph EC-P.1.1 of Appendix FM. The application was refused by the Secretary of State's Notice of Refusal dated 3rd December 2013.

2. The Secretary of State lodged Grounds of Appeal to the Upper Tribunal on 5th March. I am advised that paragraph 3 of those Grounds of Appeal are not pursued. On 6th May 2015 First-tier Tribunal Judge Lever granted permission to appeal. Judge Lever

noted that the grounds asserted that the Judge erred in allowing third party support to be counted in the income threshold test and erred in not noting a document required was missing and in his assessment of accommodation. Judge Lever noted that the Sponsor was in receipt of disability allowance and was exempt from the financial requirements of E-ECP3.1. However he noted that it was still necessary to show that the Appellant could be adequately maintained and accommodated without recourse to public funds and it was arguable that in the Judge's assessment of accommodation the Judge had erred in finding there was such a prospect of adequate accommodation in light of his findings at paragraph 17. Judge Lever considered the question of adequate accommodation seemed a little speculative and that it was arguable that the Judge had erred in this aspect of the case. It was on that basis that the appeal came before me to determine whether or not there was a material error of law in the decision of the First-tier Tribunal Judge. No Rule 24 response appeared to have been filed on the Respondent's behalf. Whilst this is an appeal by the Secretary of State for the purpose of continuity throughout the appeal process Mrs T Devita is referred to herein as the Appellant and the Secretary of State as the Respondent.

3. It was the Secretary of State's submission that the Judge had erred in taking into account gifts from the Sponsor's parents to mitigate the shortfall in the Appellant's income considered against the level set by the income support threshold and that the First-tier Tribunal Judge had failed to give adequate reasons on making his findings with regard to the adequacy of the Appellant's forthcoming accommodation. In finding that there was an error of law I was satisfied that it was not clear how the Judge has reached her findings and that the correct approach was to set aside the decision of the First-tier Tribunal and to re-list the matter for further consideration. I specifically indicated that at that stage I would expect the Sponsor/Appellant's solicitors to provide sufficient information to show that the Immigration Rules are met and if they failed to do so they may have to accept that the appeal could not succeed.

4. It is on that basis that the appeal comes back before me for rehearing. In this instance the Appellants are represented by their instructed Counsel, Mr Blundell. Mr Blundell has provided a very helpful skeleton in support of his contentions. Further in accordance with my instructions there is produced to me an additional bundle of documents and within that bundle of documents are witness statements from the Sponsor and his parents which are signed and dated 11th December 2015. The Secretary of State appears by her Home Office Presenting Officer Mr Bramble.

Submissions/Discussions

5. As a precursor I am substantially helped by a concession made by Mr Blundell endorsed by Mr Bramble that it is now accepted that in order to meet the financial requirements under the Immigration Rules at the date of decision the Appellant through the funds of her Sponsor was £1.22 short of meeting the requisite requirements of the Immigration Rules. It is further agreed and accepted that subsequent increases to the Sponsor's disability living allowance cannot be taken into account. Despite that it is the submission of Mr Blundell that this appeal can, and should be, allowed under the Immigration Rules. Further it is conceded by Mr

Bramble the grounds of appeal plead a claim pursuant to Article 8 of the European Convention of Human Rights and despite the terms upon which my finding on the error of law was couched he does not object, if it is appropriate, for Article 8 to be raised before me today. It is on that basis that we proceed.

6. It is the submission of Mr Blundell that the Tribunal having made and sustained such findings must consider whether the shortfall in question is cured by the application of the principle of de minimis non curat lex. He submits that that maxim applies and is accepted as applying within the Immigration Rules and he relies on the authorities of *MD (Jamaica) [2010] EWCA Civ 213* and *Miah [2012] EWCA Civ 261*. He submits that the application of the principle to the present case is plainly justified and that the shortfall in question is of no significance and the Tribunal should not be concerned by such a sum particularly in circumstances where the Sponsor has been able to save sufficient money to visit his wife in Indonesia.

7. Mr Blundell further produces proof of ownership of the relevant property where the Sponsor now intends to live as being the property owned by his parents. Mr Bramble does not wish to raise further issue on this point. On the above basis Mr Blundell asked me to allow the appeal.

8. Mr Bramble notes that the approach is based on de minimis principles but points out that the Sponsor has travelled to Indonesia to visit his wife and that the Sponsor's finances are well set out at paragraph 13 of the First-tier Judge's determination. He acknowledges that it is perfectly acceptable for the Sponsor to save money out of his disability living allowance to pay for his trip to Indonesia to visit his wife but submits that he is going into a pool of funds which already have a shortfall in an attempt to satisfy the de minimis rule. He notes the Sponsor's parents will accommodate the couple and submits that if this matter is being construed by pursuant to Article 8 outside the Rules that "near-miss" principles cannot be applied. He concludes by stating that the final decision is one he wishes to leave to me.

Findings

9. Following the acceptance that under the financial requirements of the Rules the Appellant cannot succeed. I am invited by Mr Blundell to still allow the appeal under the Rules applying the principle of de minimis non curat lex as backed up by the authorities of *MD (Jamaica)* and *Miah*. It matters little whether the shortfall at date of decision was £1.12 or £1.22. I accept the point made by Mr Blundell and indeed the de minimis point was not raised previously before the First-tier Tribunal nor has the Judge addressed the issue therein. Mr Blundell is correct in his legal assertion that the "near-miss" is not the same as the de minimis principle or if a departure from a Rule is truly de minimis the Rule is considered to have been complied with. The starting point for the near-miss argument is that the Rule has not been complied with. The approach set out by the Court of Appeal in *MD ((Jamaica)* reflects perfectly reasonably on the manner in which the Rule should be adopted here. In *MD (Jamaica)* Dyson LJ stated:

> "I see nothing absurd in giving the Rule its plain and ordinary meaning. The case of the applicant who submits his application one day late is catered for by

an application of the principle de minimis non curat lex (the law is not concerned with very small things). ... there is no reason not to give the language of the Rule its plain and ordinary meaning."

10. In such circumstances applying similar principles the de minimis rule can be applied here. There always has of course to be a cut off but a shortfall of £1.22 per week at the date of decision (and now I anticipate well met) cannot possibly reflect a proportionate basis for refusing this appeal bearing in mind the effect such refusal will have on the family life of the Sponsor and the Appellant. In such circumstances the application of the principle to the present case is justified. The shortfall in question is of no significance and the Tribunal need not be concerned by such a sum particularly I note in circumstances whether family life of the Appellant and Sponsor is at stake and that the Sponsor has already shown that he is able to save sufficient money to visit his wife in Indonesia. For all the above reasons the appeal is consequently allowed under the Immigration Rules.

Notice of Decision

The Appellant's appeal is allowed under the Immigration Rules thus remaking the decision of the First-tier Tribunal Judge.

No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge D N Harris

TO THE RESPONDENT
FEE AWARD

No application is made for a fee award and none is made.

Signed Date

Deputy Upper Tribunal Judge D N Harris