IAC-FH-AR-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/15129/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 19th April 2016	**On 28th April 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE DAVIDGE

Between

THE ENTRY CLEARANCE OFFICER

Appellant

and

TAHIRA SADDIQA
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Ms King, counsel instructed by Dean Manson solicitors
For the Respondent: Mr I Jarvis, HOPO

DECISION AND REASONS
EXTEMPORE JUDGEMENT

1. The Appellant in the proceedings before me was the Respondent in the First-tier Tribunal and for convenience I shall refer to the parties as they were known in the First-tier Tribunal.

2. The Respondent complains that First-tier Tribunal Judge Iqbal in a decision promulgated on 1st October 2015 erred in law when allowing the appeal of this female Pakistani Appellant who had applied for entry clearance as a partner of her husband, Mr Zahir Ahmed, under Appendix FM of the Immigration Rules.

3. The grounds of the Respondent's appeal assert that the judge was wrong in finding that at Appendix FM-SE there was discretion available to the Respondent to forgive the Appellant her failure to meet the substantive requirements of the Rules in respect of finances: in particular at Appendix FM-SE documents to support self-employment must cover a twelve month period. The Appellant in this case relied on the Sponsor's self- employment of only six months.

4. I am satisfied that the ground is made out in that regard. The position is set out at Appendix FM-SE where a discretion is allowed to consider additional documentation to supplement evidence already submitted with the application. The Specified Evidence Rule sets out the timeline of the window that an Appellant has to provide documentary evidence for. Evidential flexibility goes to an opportunity to amplify the evidence submitted with the application referencing to that particular period. There is nothing in the evidential flexibility Rule which would allow for the Respondent to take a view that a different window should be applied in a particular circumstance. No circumstances appertaining to the family life position of the couple were relied on, so as to show that the Respondent should have taken a different view, outside of the requirements of the rule. The simple point is that the Appellant did not meet the evidential requirements of the rules and her application was bound to fail.

5. The judge was concerned that the Respondent had failed to make any decision for a year after the application had been submitted, apparently awaiting the outcome of the Court of Appeal case in MM, a case which both representatives acknowledged before me was unlikely to have any material impact on her position, and was not relied upon by her.

6. The Respondent's grounds challenge the judge's conclusion that the requirements of fairness dictated that because of this delay the Respondent should have extended the window to include the subsequent continuing self employment, so that the Appellant did not need to make a fresh application. The Respondent argued before me that that the delay did not cause any procedural unfairness for the Appellant.

7. I find merit in that submission. The Appellant was unable to provide the specified evidence when she applied. At the point when her husband had been in self employment for 12 months, the unchallenged evidence is that the Appellant would have had the required specified evidence necessary to support an application. The fact that the Respondent waited did not prevent, as the judge appears to have thought, the Appellant taking steps to regularise her position by making a fresh application. The Appellant was not bound to wait, not least, as this is an out of country application the

Appellant had the option of making a fresh application. In short her application was premature, but the Respondent putting the case on hold pending the outcome of MM, did not result in any gross procedural unfairness.

8. It follows from my consideration that I am satisfied that the judge has fallen into an error of law such that the decision must be set aside and remade.

9. For all the reasons that I have set out above I am satisfied that the Entry Clearance Officer's refusal is correct and the Appellant's rules based appeal is without merit and is dismissed.

10. The Appellant submitted before me today that even if the Respondent's challenge on error of law from misdirection in respect of evidential flexibility was made out, the unfairness of delay meant that the appeal could succeed on my remaking the decision under Article 8. For the reasons I have already set out I find no merit in that submission, to the point that the Appellant's appeal is also dismissed on Article 8 ECHR grounds.

Notice of Decision

11. The Entry Clearance Officer's Appeal is allowed. I have set the decision of the First-tier Tribunal aside and remade the decision and dismissed the Appellant's Appeal on Immigration Rules and Article 8 grounds.

12. No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge Davidge

TO THE RESPONDENT
FEE AWARD

On remaking the decision I have dismissed the Appellant's appeal and therefore there can be no fee award.

Signed Date

Deputy Upper Tribunal Judge Davidge