**Upper Tribunal**
**(Immigration and Asylum Chamber)** **Appeal Number: HU/12285/2015**

**THE IMMIGRATION ACTS**

**Heard at Bradford** **Decision and Reasons**
**On 5th September 2017** **Promulgated**
**On 7th September 2017**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE KELLY**

**Between**

**MRS HASEENA ULLAH**
(ANONYMITY NOT DIRECTED)

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: MR Z Raza, Counsel instructed by Marks and Marks Solicitors
For the Respondent: Mr P Nath, Senior Home Office Presenting Officer

**DECISION AND REASONS**

*Introduction*

1. This is an appeal from the decision of First-tier Tribunal O' Keefe, promulgated on the 30th May 2017, in which she dismissed the appeal against the respondent's refusal of her application for entry clearance to the United Kingdom to join her husband, Mr Sana Ullah, who has limited leave to remain as a Tier 1 (Entrepreneur) Migrant. There has not been any application for an anonymity direction and I consider that no useful purpose would be served by making one.

2. The respondent refused the application because the appellant had not proved that her marriage was genuine and subsisting as required by

paragraph 319 of the Immigration Rules. The judge, however, found that the appellant's marriage was in fact genuine and subsisting. Moreover, absent any contra-indication in the respondent's stated reasons for refusal, she assumed that the appellant had met all the remaining requirements for entry clearance under paragraph 319 of the Immigration Rules. She nevertheless concluded that whilst compliance with the requirements of the Rules was a relevant "factor" in determining the appeal, it was not determinative of it. This was because, "the appellant is limited to arguing her appeal on human rights" [paragraph 15]. The judge accordingly conducted a full assessment of the appellant's rights under Article 8 before concluding that the sponsor and the appellant could be reasonably be expected to enjoy married life together in Pakistan.

3. Mr Raza submitted, in the alternative, that the judge had erred in law by (a) not treating fulfilment of the requirements of the Immigration Rules as decisive under the Immigration Rules, (b) failing to attach sufficient weight to the fact that the appellant met those requirements, (c) failing to have sufficient regard to the impact of refusal upon the appellant's relationship with the sponsor. I consider these submissions in turn.

4. Mr Raza submitted that a grant of entry clearance was (as he put it) "mandatory" where the applicant met the requirements of the relevant Immigration Rules. That, however, does not accurately state the legal position. Albeit subject to parliamentary scrutiny under procedures laid down by the Immigration Act 1971, the Immigration Rules ultimately represent nothing more than a declaration by the Secretary of State of her policy in relation to the control of immigration. A decision that fails to abide by that policy will thus be subject to challenge by way of Judicial Review. The First-tier Tribunal, however, did not have jurisdiction to entertain such a challenge by way of an appeal brought under the Nationality, Immigration and Asylum Act 2002. Moreover, it does not follow from the fact that the Tribunal subsequently arrived at a different conclusion concerning the subsistence of the appellant's marriage that the Secretary of State's original decision was factually perverse within the context of the evidence that was available to her at the time when it was made. In short, were this submission to succeed, it would be tantamount to reintroducing grounds of appeal – that is to say, that the decision "is not in accordance with immigration rules" or is otherwise "not in accordance with the law" – that Parliament legislated to remove by the Immigration Act 2014.

5. Turning to the weight to be accorded to the fulfilment of the requirements of the Immigration Rules when assessing the merits of a claim made under Article 8 of the Human Rights Convention, there is in my judgement a distinction to be drawn between those Rules that are expressly stated to represent the Secretary of State's view of the operation of Article 8 and those which are not.

6. Appendix FM declares that "… it reflects how, under Article 8 of the Human Rights Convention, the balance will be struck between the right to respect for private and family life and the legitimate aims [contained within Article 8(2)] and, in doing so, also reflects the relevant public interest

considerations as set out in Part 5 of the Nationality, Immigration and Asylum Act 2002" [see paragraph GEN.1.1]. The fulfilment of its requirements will therefore usually result in a human-rights claim and/or an appeal from its refusal being decided in the appellant's favour. In the latter case, this will not be because the Tribunal holds that the original decision is not in accordance with immigration rules and/or the law, but because it holds it to be incompatible with the Secretary of State's own view of the operation of Article 8 as expressed through the medium of Appendix FM of the Immigration Rules. For the same reason, fulfilment of the requirements of paragraph 276ADE ("requirements to be met by an applicant for leave to remain on the grounds of private life") is also likely to result in an appeal being allowed on the ground that the original decision is incompatible with the appellant's rights under Article 8. This is the basis upon which the judgement of Sales LJ in SS (Congo) [2015] EWCA Civ 387 appears to me to have been predicated.

7. The position is however quite different in the case of other Rules, many of which (including paragraph 319) pre-date the changes made to the Rules in July 2012. Those Rules do not purport to give effect to the United Kingdom's obligations under the Human Rights Convention. Indeed, many of them provide for migration upon purely economic grounds in respect of which the Convention imposes no obligation at all. It is into this category that the present application fell.

8. There is very little authority concerning the weight attaching to the fulfilment of requirements of the Rules falling within this category when making an assessment under Article 8. Indeed, other than a series of Upper Tribunal decisions reported (but not 'starred') shortly after the right of appeal against refusal of applications for entry clearance by family visitors was restricted, I am unaware of any authority at all. Mr Raza relied heavily upon one of the reported family visitor decisions of the Upper Tribunal, namely, Mostafa (Article 8 in entry clearance) [2015] UKUT 00112 (IAC). The headnote to this decision reads:

> *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.*

It should be noted that this was precisely the approach that was in fact adopted by the judge in this appeal (see, in particular, the last two sentences of paragraph 15 as summarised at paragraph 2 above). As she correctly observed, absent her finding that the appellant's marriage was subsisting, there would have been no basis for the engagement of the potential operation of Article 8 at all.

9. More specifically, however, Mr Razar relied upon what he claimed was the judge's failure to consider the impact of refusal of entry clearance upon the appellant's relationship with her husband. However, the very fact that the judge considered whether the appellant's married life could reasonably be expected to be enjoyed in Pakistan (rather the United Kingdom) is sufficient

to demonstrate that this is not the case. In asking herself this question, the judge was adopting an approach that is supported by a long line of distinguished and high authority, including Abdulaziz, Cabales and Balkandali v United Kingdom [1985] ECHR 7 (paragraph 67}, Huang v Secretary of State for the Home Department [2007] UKHL 11 (paragraph 20), E B Kosovo v Secretary of State for the Home Department [2008] UKHL 41 (paragraph 12), and SS (Congo) [2015] EWCA Civ 387 (paragraph 39(v)). It is an approach that necessarily involves consideration of the impact of refusal upon the marital relationship.

10. Mr Razar also argued that the inevitability of the appellant making a further application, which would likely succeed, was a relevant factor in considering this question. However, the principles considered in the decision of Chikwamba [2008] UKHL 40 are only engaged where *the reason for refusal* is that an in-country application is more appropriately made from abroad. That is obviously not the case here. It is true that this principle was to some extent extended by the Supreme Court in Agyarko [2017] UKSC 11 to situations where an applicant has been residing unlawfully in the UK but would have been certain to have been granted lawful residence had he applied for it. However, that is not the case here either.

11. Finally, Mr Raza submitted that given the appellant's compliance with the requirements of the Immigration Rules, there was no public interest in the exclusion of the appellant from the United Kingdom. However, that submission is predicated upon an assumption that Article 8 is engaged in the first place. Whilst the judge appears to have decided this case on the basis of the proportionality of the decision to exclude the appellant from the UK, it would have been equally open to her to find that the potential operation of Article 8 was not engaged in the first place. This is because a State has the right to control the entry of non-nationals into its territory, and the duty imposed by Article 8 cannot therefore be considered to extend to a general obligation on the part of a Contracting State to respect the choice by family members of the country of their family residence and to accept a non-national family member for settlement in that county. This principle was established by the European Court of Human Rights in Abdulaziz, Cabales and Balkandali v United Kingdom (above). It was reiterated by the Supreme Court in MM Lebanon [2017] UKSC 10, to which the judge made express reference at paragraph 21 of her decision.

12. I therefore hold that the appellant did not make any material error of law in the determination of this appeal.

**Notice of Decision**

The appeal is dismissed.

Anonymity is not directed

Signed Date: 6th September 2017

Judge Kelly

Deputy Judge of the Upper Tribunal