Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/06176/2015

THE IMMIGRATION ACTS

Heard at North Shields **Decision & Reasons Promulgated**
On 8th August 2017 **On 14th August 2017**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

AMNINDER KAUR
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Miss J. Weatherall, Counsel instructed on behalf of the Appellant
For the Respondent: Miss Petterson, Senior Presenting Officer

DECISION AND REASONS

1. The Appellant appeals with permission against the decision of the First-tier Tribunal (Judge Kempton) who, in a determination promulgated on 26th July 2016 dismissed the Appellant's application for entry clearance as the spouse of her Sponsor and husband pursuant to the provisions of Appendix FM to the Immigration Rules.

© CROWN COPYRIGHT 2017

2. The background is set out in the determination. The Appellant is a citizen of India. In 2012 the Appellant married her husband, a British citizen. The Appellant then applied for entry clearance as the spouse of her husband, the Sponsor, under the provisions of Appendix FM to the Immigration Rules on the 3rd June 2015. In a notice of a decision made on the 19th August 2015, that application for entry clearance was refused under paragraph EC-P.1.1 of Appendix FM of the Immigration Rules. The reasons for refusing the application can be summarised as follows. The Entry Clearance Officer was not satisfied that the Appellant and the sponsor were in a genuine and subsisting relationship or that they intended to live together permanently in the UK. It was said that the only evidence of the marriage in 2012 were wedding photographs. There was no other evidence to support them having been in touch with one another. It is said they last saw each other on 7 May 2015 but there was no evidence to support that statement. This application was refused under EC-P.1.1(d) and EC-ECP2.6 and 2.10. In addition it was refused because the Appellant had failed to provide the specified evidence to establish that the Appellant met the financial provisions of Appendix FM, paragraph E-ECP.3.1 because she did not supply the evidence required by the provisions of Appendix FM-SE. As to the English language requirement, the Appellant had not provided the mandatory three summary sheets.

3. The Appellant submitted Grounds of Appeal on the 9th September 2015. Those grounds made a number of assertions relating to the Immigration Rules and entry clearance as a partner. This included evidence relating to their relationship and marriage and reference at page 6 to a copy of the sponsors passport to show that he came to India on a visit on 23 April 2015 and they lived together until 7 May 2015. Other evidence referred to them being in touch using mobile telephone calls. There was also a suggestion in the grounds of appeal, which were drafted by the Appellant in person that they were in a genuine relationship and that she wished to join her husband and live with him. The skeleton argument of Miss Weatherall at paragraph 2 makes reference to the sponsor setting out in the grounds of appeal the following statement "how am I to comply with the minimum income requirements while at the same time maintaining my marriage with the Appellant and visiting in India."

4. The appeal came before the First-tier Tribunal (Judge Kempton) on 15th July 2016. In a decision promulgated on 26th July 2016, the judge dismissed the appeal under the Immigration Rules. The judge at paragraph [15] of the determination, made reference to the Immigration Rules which had been set out in full earlier in the determination. The judge made reference to the sponsor's income and that he should be able to meet the financial criteria but only on the basis that he provided the specified documents. There was also reference to the lack of clarity as to his self-employment. The judge went on to state that it was a case where "a legal representative or to assist the Appellant sponsor prior to making the next application in order to ensure that all the necessary documents are lodged with the application right the outset, in an effort to avoid any further delay."

5. It is paragraph 16 of the determination brings the appeal before the Upper Tribunal. At that paragraph the judge stated "there is no need at this point to consider the right family life under Article 8, the application ought to be capable of being determined in the future in terms of the Immigration Rules."

6. As can be seen from the determination and the application form the Appellant had no legal representation and the sponsor had advanced the case in person. Rather than make a fresh application , grounds of appeal were issued on 24 August 2016. First-tier Tribunal Judge (EM Simpson) granted permission to appeal to the Appellant. I need not set out the grant of permission in full as it is in the papers. However it made reference to the decision being a "human rights appeal" under the new provisions and section 82 which came into force on 6 April 2015. Judge Simpson went on to state that this was a human rights appeal and as the Appellant was not legally represented, judge Simpson looked at the matters raised with "greater exactitude." Judge Simpson then recorded paragraph 16, which I have referred to above and cited the decision of the Tribunal in Mostafa (Article 18 entry clearance) [2015] UKUT 00112. Judge Simpson concluded as follows: "the judge's omission to decide the Appellant's appeal an Article 8 human rights grounds amounted to an arguable error of law as the basis of her appeal continued to remain unresolved."

7. Thus the appeal came before the upper Tribunal. The Appellant was now represented by solicitors and by Counsel, Miss Weatherall. She had provided a written skeleton argument in which it was said that the Appellant had raised Article 8 grounds and in the light of the decision of the Supreme Court in MM(Lebanon) and others v the Secretary of State for the Home Department [2017] UKSC 10 which found that there was no objection in principle to the MIR but that it must not preclude the application of Article 8 ECHR in individual cases. She cited paragraph 19 of that decision. Thus she invited the Tribunal to find that the first-tier Tribunal Judge erred in law failing to consider Article 8 outside of the rules.

8. In the event of an error of law being found, at paragraph (ii) she submitted that the Upper Tribunal remitted the outstanding issue of Article 8 to a differently constituted First-tier Tribunal. In her oral submissions before me, she made reference to the decision in MM (Lebanon) having clarified matters relating to Article 8 and that this had not been available to the judge when reaching a decision but that it did support her submission that the Appellant's case should be considered under Article 8.

9. Miss Petterson relied upon the rule 24 response which made reference to the judge having directed himself to the requirements of the Immigration Rules (paragraph 5) and at paragraph 6 that the judge directed himself the fact that this is a human rights appeal and consider section 117 of the 2002 Act. At paragraph 7 it is submitted that there are "no compelling circumstances" that would warrant consideration of the appeal outside the

rules. There is also reference in the rule 24 response to the law but no reference to the decision of MM (Lebanon)(as cited).

10. Miss Petterson submitted that paragraph 16 did not deal with the issue but that the original grounds did not go into any depth other than "I want to join my husband". In any event, she submitted that Judge Kempton did make reference to another remedy.

11. Having heard the parties make their submissions, I gave an oral decision that I had reached the conclusion that I agreed with the grant of permission of Judge Simpson and that there had been no consideration of Article 8 outside of the rules and this was a material error of law. In the decision of ***MM (Lebanon) & ors [2017] UKSC 10***, handed down in February this year, their Lordships ruled that the MIR requirement is acceptable in principle. The case also made reference to the scope at the 'second stage' of an appeal to go beyond the Immigration Rules and determine whether the refusal of entry clearance or leave to remain was a disproportionate interference with **Art 8** rights, if the only reason for the refusal was a failure to meet the minimum income threshold or provide the documentation.

12. In calculating the income available to a couple, the Rules did not allow 'third party support' to be taken into consideration, or the potential earnings of the overseas spouse. But at the 'second stage', an appellate Tribunal could judge for itself whether such alternative sources of income would realistically be available. As the Supreme Court put it, this was part of "*the careful evaluative exercise required by Article 8*." So the result of ***MM (Lebanon)*** was that it would be perfectly possible for a family case to fail under **Appendix FM**, which was expressly intended by the Government to comply with **Art 8**, but to succeed under **Art 8** outside the Rules, because there would in fact be enough money to support the couple and any children without recourse to public funds.

13. The Supreme Court indicated that the Immigration Directorate Instructions needed revision in order to take account of alternative sources of funding, and indeed that the Rules themselves might need to be amended "*to ensure that decisions are taken consistent with the duties under the Human Rights Act.*" The Rules also needed to make it clear that the '**section 55 duty**' must be taken into account in family reunion applications.

14. A new **GEN.3.1** has been inserted into **Appendix FM** from 1st August 2017 to deal with applications where the financial requirement cannot be met from the sources specified by the existing rules. Thus, where –

"it is evident from the information provided by the applicant that there are exceptional circumstances which could render refusal of entry clearance or leave to remain a breach of Article 8 … because such refusal could result in unjustifiably harsh consequences for the applicant, their partner or a

relevant child, then the decision-maker must consider whether such financial requirement is met through taking into account the sources of income, financial support or funds set out in paragraph 21A(2) of Appendix FM-SE."

15. The appeal was on human rights grounds and as can be seen above, the ability to meet the rules is a relevant consideration when taking account of the public interest. However whilst the judge considered the rules and compliance with them, there was no consideration of Article 8 and whether there was family life (where there was evidence in the papers) and looking at the issue of proportionality and whether there were any circumstances which may give rise to justifiably harsh consequences for the appellant or her spouse such as to make the decision to refuse to grant entry clearance disproportionate. The human rights ground was the only ground of appeal. It does not appear that the presenting officer made any submissions in this regard and there was evidence that did challenge the entry clearance officers consideration of whether there was in fact "family life" by stating that there was no genuine and subsisting relationship, in the grounds of appeal. At page 6 of those grounds, the Appellant challenged that assessment by making reference to their marriage, how they kept in touch and maintain their relationship and that there had been a visit made to India whereby the parties live together. That evidence was indicative of family life being established between the parties and therefore brought into play the Article 8 considerations.

16. I have set out earlier that Miss Weatherall submitted that the correct course to take was to remit the decision to a differently constituted First-tier Tribunal. I invited the parties to consider an alternative way forward which was to remit the appeal to be completed by Judge Kempton. This was not a case in which it could be said that there was any unfairness on the judge's part, which both advocates agreed was the position, and that the error identified was to have not completed the determination by considering Article 8. Both advocates agreed that that was the most appropriate way forward and therefore steps were taken to provide an early listing on 12 September 2017.

17. I therefore remit the appeal to the FTT (Judge Kempton) who will decide the appeal in accordance with the jurisprudence and the law and in the light of the evidence of the sponsor and any additional evidence that may be filed on the Appellant's behalf. The Appellant has now secured legal representation and Miss Weatherall indicated that there would be witness statements provided making reference to the relationship and the evidence in support of the Article 8 claim and any clarification of the sponsor's employment which would be served no later than seven days before the adjourned hearing as listed.

Notice of Decision

The decision of the FTT involved the making of an error on a point of law; it is remitted to the FTT (Judge Kempton) to hear the appeal.

No anonymity direction is made.

Signed Date: 8/8/2017

Upper Tribunal Judge Reeds