



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/08789/2015

**THE IMMIGRATION ACTS**

Heard at Bradford  
On 25<sup>th</sup> June 2018

Decision & Reasons Promulgated  
3 July 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE ROBERTS

Between

ENTRY CLEARANCE OFFICER - ISLAMABAD

Appellant

and

MARYAM BIBI  
(ANONYMITY DIRECTION NOT MADE)

Respondent

**Representation:**

For the Appellant: Mr Diwnycz, Senior Home Office Presenting Officer  
For the Respondent: Mr Ahmed, Counsel

**DECISION AND REASONS**

1. The Entry Clearance Officer “the ECO” appeals with permission against the decision of a First-tier Tribunal (Judge B Cox) allowing the appeal of Maryam Bibi against the

ECO's decision of 15<sup>th</sup> September 2015 refusing her entry clearance as the spouse of Shaaf Ahmed "the Sponsor".

2. For the sake of clarity I shall throughout this decision refer to the ECO as "the Respondent" and to Maryam Bibi as "the Appellant" thereby reflecting their respective positions before the First-tier Tribunal.

### **Background**

3. The Appellant is a citizen of Pakistan born 1<sup>st</sup> July 1990. The Sponsor is a British citizen born 1<sup>st</sup> May 1993. The Appellant and Sponsor married in Pakistan and thereafter the Sponsor returned to the UK where he works. (I note that the FtTJ recorded at [13] that the Sponsor has been working for his employers since 06.12.1993, but this date is self-evidently incorrect.)
4. On 25<sup>th</sup> April 2015 the Appellant applied for an entry visa to enable her to settle in the UK with her husband. The application was refused by the ECO on 15<sup>th</sup> September 2015 on 3 grounds;
  - i. documents relating to the Sponsor's employment with reference to the Sponsor's P60 and final pay slip for 2014/2015 were deemed to be non-genuine, following checks made by the ECO at HM Revenue & Customs in the UK;
  - ii. the Sponsor's employer's letter from Ahmed and Sahama Ltd, submitted as part of the specified documents, did not state the period over which the Sponsor had earned the level of salary relied upon in the application; and
  - iii. the property inspection report for the proposed accommodation for the Appellant and Sponsor in the UK was deemed not to be independent, in that it had been provided by the firm of solicitors retained by the Appellant for her visa application.

### **FtT Hearing**

5. When the appeal came before the FtT, the judge set out the background to the appeal and correctly noted that the only avenue of appeal available to the Appellant was an Article 8 family/private life one. The FtTJ noted that the refusal by the ECO centred on the Appellant's inability to satisfy the Rules as set out above.
6. The judge made several relevant findings after (a) hearing evidence from the Sponsor, whom he found to be wholly credible, (b) considering the documentary evidence submitted from both HMRC and the Sponsor concerning his employment record, and (c) considering a new accommodation report.
7. He discounted the ECO's reliance on a DVR which purported to set out HMRC's records for the Sponsor's earnings for the tax years covering 2012 to 2016. He made a finding that defects in the DVR significantly undermined the weight to be attached to it. He found the Sponsor to be a credible witness and noted that copies of correspondence between the Sponsor and HMRC had been provided which clearly

stated that the Sponsor's earnings with his employer, Ahmed and Sahama, were £19,008 for the tax year 2014/15. He therefore made a clear finding that the Sponsor's earnings for the tax year 2014/15 were £19,008 and not £16,461.78 as stated by the ECO. This led the judge to the conclusion therefore that the Appellant met the suitability requirements of the Rules so far as the threshold level of income needed was concerned.

8. With regard to the accommodation requirement, the judge made a finding that the accommodation report had been provided by a professional firm of solicitors regulated by the Law Society and therefore there was no reason to doubt the information provided in it. In addition having heard from the Sponsor, the judge was satisfied that the Appellant would be adequately accommodated if she came to the UK.
9. The judge then looked at the financial eligibility requirements and noted two points. Firstly it was said at [42] that the Presenting Officer had noticed that the bank statement for April 2015 was missing from the Appellant's bundle. The judge discounted that matter because he noted that the ECO had not suggested that any documents were missing.
10. That however was not the end of the matter. A difficulty arose in that part of the ECO's refusal was based on the fact that the letter from Ahmed and Sahama which had been provided as part of the specified documents, did not state when the Sponsor started earning the level of salary relied upon in the Appellant's application. The judge noted that it was accepted by Counsel appearing on behalf of the Appellant that the letter was missing the relevant information. There was then some discussion at the hearing between the parties as to whether the ECO ought to have applied the flexible policy requirements of Appendix FM-SE. Counsel for the Appellant submitted that he should have done so.
11. The judge rejected Counsel's submission stating:

"47. I note that the ECO refused the application for several reasons, as such I am satisfied that the ECO cannot be criticised for not applying the flexible policy requirements of appendix FM-SE.

48. The Appellant's counsel also relied on **Sultana and Others (rules: waiver/further enquiry; discretion) [2014] UKUT 00540 (IAC)**. However, the Tribunal's decision was considering whether the decision was "in accordance with the law" under the previous appeal regime and the present appeal is limited to human rights grounds.

49. On the totality of the evidence, I find that the letter from the Sponsor's employer did not meet the formal requirements of Appendix FM-SE. Accordingly, I am satisfied that the Appellant failed to meet all the requirements of the rules."

12. Having made those findings, the judge proceeded to give consideration to Article 8 ECHR.
13. Contrary to [47 - 49], the judge appeared to backtrack on what he said in those paragraphs. He found that the defect in the Appellant's documents is a "minor" one. Using that finding, his approach appeared to be that the ratio in **Sultana and Others** provided him with a discretion on evidential flexibility. He used that factor as his reasoning for allowing the appeal.
14. There then followed an unclear finding at [57] where the judge said the following;
 

"I allow the Appellant's appeal. In my view a proportionate response to my decision would be for the ECO to give the Appellant an opportunity to submit a further letter from the Sponsor's employer, but I recognise that this is ultimately a matter for the Respondent."
15. Permission to appeal Judge Cox's decision, was sought on two grounds:
  - (i) Firstly it was said that the FtTJ's decision discloses inadequate reasoning for allowing the appeal. The judge found at [49] that the Appellant did not meet the Rules. Despite that finding, the judge simply then goes on to allow the appeal relying on the decision in **Sultana and Others (Rules: waiver/further enquiry; discretion) [2014] UKUT 00540 (IAC)**.
  - (ii) Following on from that the FtTJ materially misdirected himself in law because he misunderstood the ratio in **Sultana**.
16. Permission having been granted by the First-tier Tribunal, the matter comes before me to decide if the decision of the FtTJ discloses material error of law requiring the decision to be set aside and remade.

### **Error of Law Hearing**

17. Before me Mr Diwnycz appeared for the Entry Clearance Officer and Mr Ahmed for the Appellant. Mr Diwnycz in his submissions said that he relied upon the grounds seeking permission. The judge had taken the wrong approach to Article 8 outside the Rules and thus his reasoning was defective by his reliance on the ratio in **Sultana**. Mr Diwnycz in fairness said he had nothing to add to the grounds and thereby accepted that there was no challenge to the judge's findings that the Appellant met the income threshold and the other parts of the rules save for the minor matter of the Sponsor's employer's letter not being in an appropriate form. Further there was no challenge raised to the judge's finding at [53] that:
 

"the absence of the information required under Appendix FM-SE from the Sponsor's employer's letter was a minor defect or omission."
18. Following general discussion with the parties and my canvassing views on disposal of the matter before me, both representatives were of the view that there was no

reason, in the event of error of law being found, why the decision could not be remade by me accepting the evidential findings made by the FtTJ.

19. Mr Ahmed had initially proposed that the decision should simply stand as there was adequate fact finding made but, on being informed by me that I was of the view that the FtT's decision disclosed material error, he indicated that he was content that I remake the decision. He acknowledged that Mr Diwnycz was correct in saying that the relevant consideration centred on whether the judge had made sufficient findings and given adequate reasons to show that he was satisfied that the Appellant had met the substance of the Immigration Rules to the extent that refusing the application was disproportionate under Article 8.

### **Consideration**

20. I am satisfied that Judge Cox erred in his approach to the proportionality assessment under Article 8 ECHR. He involved himself unnecessarily in going down the route of evidential flexibility rather than focusing on the evidence available to him, and thus misdirected himself.
21. I find that it is hard to understand what the judge intends by the comments that accompany his decision at [57]. It renders his decision unclear in that the decision appears to be a qualified one. It is hard to see what the purpose is of saying that the ECO should "give the Appellant an opportunity to submit a further letter from the Sponsor's employer", when he says at [56] that he was satisfied that the Respondent's decision was unnecessary and disproportionate. I therefore set aside Judge Cox's decision. I find that the grounds are made out.

### **Remaking the Decision**

22. I find that I am in a position to remake the decision. I preserve the findings made by Judge Cox including the finding at [53] as set out in paragraph 17 above. In particular I preserve the finding that the Sponsor was employed as claimed and that he earned £19,008 for the tax year 2014/15. The accommodation requirement is satisfied. By reference to those findings I find that the correct approach is the one set out in **Razgar**.
23. I find that Article 8 is clearly engaged in this case and the issue before me is whether the interference with the Appellant and Sponsor's family life is justified when considering the public interest in maintaining immigration control. I keep in mind the principles set out in **Mostafa (Article 8 in entry clearance) [2015] UKUT 0261 (IAC)**.
24. My starting point in this case is simply that in substance the Appellant meets the requirements of the immigration rules. The judge's finding that the omission in the Sponsor's employer's letter is a minor one is unchallenged. The fact that the Appellant can meet the Rules in substance if not in form provides persuasive evidence in her favour. It is hard to see therefore what justification there might be on public interest grounds for denying her entry. In my judgment when weighing

matters, the balance tips in her favour. Accordingly the Appellant's appeal against the ECO's decision refusing her entry is allowed.

**Notice of Decision**

The decision of the First-tier Tribunal promulgated on 8<sup>th</sup> May 2017 is set aside for material error. I remake the decision by allowing the appeal of Maryam Bibi against the ECO's decision, on Human Rights grounds.

No anonymity direction is made.

Signed                                      C E Roberts                                      Date              30 June 2018

Deputy Upper Tribunal Judge Roberts

**TO THE RESPONDENT**  
**FEE AWARD**

The First-tier Tribunal Judge made no fee award. I see no reason to interfere with that finding and it stands.

Signed                                      C E Roberts                                      Date              30 June 2018

Deputy Upper Tribunal Judge Roberts