



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/23040/2012

THE IMMIGRATION ACTS

Heard at Bradford
On 6th November 2013

Determination Promulgated
On 16th December 2013

Before

UPPER TRIBUNAL JUDGE ROBERTS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRS FAIZA IFTIKHAR
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr M Steward, Home Office Presenting Officer
For the Respondent: Mr J Holt, of Counsel

DETERMINATION AND REASONS

1. In this appeal the Appellant is the Secretary of State for the Home Department and the Respondent is Mrs Faiza Iftikhar a citizen of Pakistan born 7th October 1988. For ease of reference however I shall refer to the Secretary of State for the Home Department as “the Respondent” and Mrs Iftikhar as “the Appellant”.

2. This is a review of the appeal brought against the Entry Clearance Officer Islamabad to refuse the Appellant entry clearance to the United Kingdom as a spouse to join her husband "the Sponsor" who is a British citizen settled here.

History and Background

3. The Appellant, a Pakistani national born on 7th October 1988, made application for a visa to enable her to join the Sponsor, Qadeer Abbas her husband, in the UK. That application was refused on 2nd October 2012.
4. The refusal decision stated that the ECO was not satisfied that the Appellant had met all the eligibility requirements of Section E-ECP.3.1 of the new Immigration Rules.
5. The grounds of appeal which were detailed, raised human rights grounds namely Article 8 ECHR. The appeal came before First-tier Tribunal Judge Cox and in a reserved determination he dismissed the appeal under the Immigration Rules but allowed it on human rights grounds.
6. In coming to his decision he recorded that the Sponsor is a British citizen and that it had been accepted that the Sponsor is earning £15,210 from his employment at Express Tyres. The Sponsor had adduced evidence on behalf of the Appellant, that he had a further source of income as a sole trader and that his share of the profits for that employment amounted to £5,239 for the last financial year. Judge Cox noted that the Appellant had not mentioned on the visa application form that the Sponsor had an additional source of income and therefore the specified evidence in relation to that income had not been provided when the application was made nor more importantly at the date of decision.
7. The Judge therefore correctly dismissed the application under the Immigration Rules. However when considering whether the Respondent's decision was disproportionate under Article 8 ECHR, he correctly set out that he had to follow the step-by-step approach in **Razgar**. However when assessing proportionality he analysed **MM [2013] EWHC 1900 HCA** and said in paragraph 29 of his determination,

"Although the decision is not binding on the Tribunal, I have found the Judge's reasoning very persuasive. Blake J is the President of the Upper Tribunal and in a lengthy judgment he has considered in detail the relevant case law. I adopt his reasoning in its entirety".

8. Following on from that he said,

"In respect of the present case, in my view it is not simply enough to say that the Appellant can reapply so as to justify the interference with the Appellant and the Sponsor's right to enjoy respect for their family life. The Appellant has already paid a significant fee (over £550) and the Respondent took over three months to make a decision. I find that this is a significant period of time. Especially for a new married couple".

9. The Respondent sought and was granted permission to appeal Judge Cox's decision. Suffice to say that the grounds seeking permission were neatly summed up in paragraph 10 of the grounds which stated,

*"In consequence, the learned Judge engaged in what the Secretary of State submits to have been a clear example of impermissible judicial policy making. In so far as the Tribunal to into account the findings in **MM** it is submitted that they fell into the same legal error".*

10. Permission to appeal to appeal was granted by First-tier Tribunal Judge Baker in these terms,

*"It is arguable that, having concluded that the Sponsor earned an annual income of £5,210, less than the specified gross income at paragraph 18 of the determination and in concluding that the decision to refuse entry clearance was disproportionate, relying on on **MM** [2013] EWHC 1900 High Court Admin and **Mansoor** [2011] EWHC 832 (**Admin**), noting at paragraph 31 of the determination that the Appellant would not be living at or near a subsistence level as the Sponsor earned significantly more than the minimum wage, his conclusions that there was a disproportionate interference with the Appellant and Sponsor's right to respect for their family life was arguably was in error for the reasons stated in the grounds".*

11. Thus the matter comes before me to determine whether the First-tier Tribunal's decision involved an error of law and whether the decision needs to be remade.

The Hearing Before Me

12. I heard representations from both parties, Mr Steward on behalf of the Respondent sought to rely on the grounds seeking permission which essentially state that the First-tier Tribunal Judge fell into error because he relied on and followed "almost to the letter" the decision of the Administrative Court in the case of **MM** [2013] EWHC 1900. Mr Steward said that to do so meant that the Judge fell into error. **MM** is not a binding decision in any event and the Appellant cannot meet the Immigration Rules.
13. As a result the First-tier Tribunal Judge fell into error because when he came to apply the proportionality test in Article 8 he did not give appropriate weight to the public interest as he ought to have done. He did not direct himself appropriately under the **Razgar** test and therefore the Article 8 assessment was made without giving adequate reasoning for his decision. He submitted I should overturn the Judge's decision and remake the decision dismissing the appeal.
14. Mr Holt on behalf of the Appellant advanced that the Judge's approach was entirely correct. His reliance on **MM** was an entirely proper way to treat this appeal.
15. The Judge had found that the Appellant's Sponsor had an income of around £15,200 and that was accepted by the Respondent. No other factual element needs to be relied upon. The decision of the Respondent is disproportionate because the First-tier Tribunal Judge was entitled to follow the reasoning in **MM**.

Has the Judge Erred?

16. I am satisfied I can deal with this matter briefly. MM is not binding on the Tribunal as the First-tier Tribunal Judge correctly recognised. However that judgment remains in force unless and until it is overturned by the Court of Appeal.
17. In those circumstances it was open to the Judge to follow the approach set out by Blake J in MM and to determine the case in the way that he did bearing in mind the unchallenged finding that the Sponsor had £15,200 income per year at his disposal.
18. The grounds seeking permission (which curiously appear to start at ground 5) undoubtedly set out the issues which the Respondent takes with that judgment. No doubt these are the issues which will be aired before the Higher Courts. It is known that the Respondent has sought and been granted leave to appeal the decision in MM to the Court of Appeal. A date has been set. It would be invidious for me to try and pre-empt what that Court will decide.
19. Accordingly so far as the matter before me is concerned the decision of the First-tier Tribunal is upheld.

DECISION

20. The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law. I do not set aside the decision.

The First-tier Tribunal did not make an anonymity order, therefore I make no such order.

Signature
Judge of the Upper Tribunal

Dated

Fee Award

The First-tier Tribunal, although it allowed the appeal made no fee award. No application was made before me regarding a fee award and I see no reason to disturb the First-tier Tribunal's finding on that matter.

Signature

Dated