Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA152372014

THE IMMIGRATION ACTS

Heard at Bradford	**Decision & Reasons Promulgated**
On 5th May 2016	**On 23rd May 2016**

Before

UPPER TRIBUNAL JUDGE HEMINGWAY

Between

MRS NOSHEEN IRAM
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER (ISLAMABAD)

Respondent

Representation:

For the Appellant: Mr L Sharif (Solicitor)
For the Respondent: Mr M Diwnycz (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. This is the Appellant's appeal to the Upper Tribunal, brought with the permission of a Judge of the Upper Tribunal, against a decision of the First-tier Tribunal (Judge Cox

hereinafter "the judge") promulgated on 10th August 2015 dismissing her appeal against a refusal by an Entry Clearance Officer of 21st November 2014 to issue to her entry clearance to come to the UK, with a view to settlement, as a spouse.

2. By way of brief background, the Appellant is a national of Pakistan and she was born on 2nd January 1984. She is married to her UK based Sponsor Mr Munir Ahmed, the relevant marriage having taken place in Pakistan. There are no children of the union. The Appellant made an initial application for entry clearance which was refused on financial grounds. Thereafter, she made a further application (the one which has led to this appeal) which was refused on 21st November 2014, again, on financial grounds. Essentially, the Entry Clearance Officer took the view that the Appellant had failed to provide certain items of prescribed evidence, the relevant evidential requirements being set at paragraph 7 of Appendix FM-SE of the Immigration Rules. The Entry Clearance Officer also thought that the accommodation requirements within the Rules were not met. However, the Appellant sought to dispute the decision and this led to an Entry Clearance Manager's review being undertaken on 5th January 2015. The Entry Clearance Manager accepted that documentation provided since the date of the initial decision demonstrated that the accommodation requirements were, in fact, met. However, no concession was made with respect to the financial requirements and, indeed, the Entry Clearance Manager noted that whilst bank statements provided by the Sponsor demonstrated his income for the 2013-2014 financial year to be £17,239.90, his accounts and tax return had indicated that his business income for that same period (that is the gross amount made by the business) was £27,798. So there was an apparent inconsistency in the figures. Having maintained the refusal under the Rules the Entry Clearance Manager addressed Article 8 but decided that there were "no exceptional circumstances" such that entry clearance could not be granted on the basis of that provision. The Appellant then appealed.

3. There was an oral hearing of the appeal on 23rd July 2015 at which both parties were represented. The Appellant, of course, being out of the country, was unable to attend but the Sponsor was in attendance and he gave oral evidence.

4. It is apparent from the judge's determination that he found the Sponsor to be entirely credible. He also accepted that documentation now provided by the Sponsor demonstrated that he had a net profit for the relevant year, as a self-employed taxi driver, amounting to £19,643 and that all of the shortcomings in the documentary evidence noted by the Entry Clearance Officer had now been addressed. One might have expected, therefore, that the appeal would have succeeded. However, the judge then turned to the additional point taken by the Entry Clearance Manager regarding the difference in figures contained in the bank statements and the accounts and tax return regarding his income for the 2013/2014 tax year. The judge noted, and indeed accepted, the Sponsor's explanation, given in oral evidence, that he would use cash paid to him to cover certain business expenses such as purchasing petrol or having the taxi vehicle washed such that some of his income would not be paid into any bank account at all. However, said the judge, the fact was that he had not produced a bank statement demonstrating that the £18,600 financial income threshold had been

met for the relevant tax year and had not, therefore, satisfied the requirements of the Immigration Rules in that respect. The judge put it this way;

> "22. At the hearing the Sponsor explained that he would use cash to cover expenses such as petrol or washing the car and I note that this is reflected in the accountant's report. Although I am satisfied that the Sponsor has adequately explained the shortfall in his gross income, I am also satisfied that the Sponsor's cash deposits for the relevant year do not show his gross income.
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> 23. On the totality of the evidence, I find that the Appellant has failed to discharge the burden of proof. I am satisfied that the Sponsor's gross income is not reflected in his bank statement. I note that the Appellant's representative has not disputed that the cash bank statements do not reflect his gross income.
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> 24. Accordingly, I am not satisfied that the Appellant met the financial eligibility requirements of the Rules and I am satisfied that the Respondent's decision is in accordance with the Immigration Rules."

5. The judge then turned to the arguments under Article 8 of the ECHR. He referred to case law and, in particular, to the **Secretary of State for the Home Department v SS (Congo) [2015] EWCA Civ 387** and **Razgar v Home Secretary [2004] UKHL 27**. He went through the fivefold test set out in **Razgar** and decided that Article 8 was engaged but that the interference with Article 8 rights was lawful, in pursuance of a legitimate aim and proportionate. As to proportionality he noted that in **SS (Congo)** it had been said that in out of country cases a greater margin of appreciation would be afforded to a Respondent and that "compelling circumstances" would be needed to justify a grant of leave to remain outside of the Immigration Rules. He thought that there were no such circumstances in this case, principally, because the Appellant would be able to make a fresh application for entry clearance. So, he dismissed the appeal.

6. That was not the end of the matter because an application was made, by the Appellant's current representatives who were not his representatives before the judge, for permission to appeal to the Upper Tribunal. The written grounds are quite lengthy but, in summary, it is contended that the judge erred in failing to apply "evidential flexibility" principles with respect to the position under the Immigration Rules and in failing to carry out a proper balancing exercise with respect to Article 8. The drafter of the grounds drew attention to a document entitled "Immigration Directorate Instructions: Annex FM Section FM1.7: Financial Requirement Nov 2014. He pointed out that paragraph 9.3.8 of that document says;

> "Self-employed income can be cash-in-hand if the correct tax is paid. In line with paragraph 3.1.5 of this guidance, it would generally be expected that the person's business or personal bank statements would fully reflect all gross (pre-tax) cash income. Flexibility may only be applied where the decision-maker is satisfied that the cash income relied upon is fully evidenced by the relevant tax return(s) and the accounts information."

7. It was his argument, in effect, that those words amounted to a policy with respect to flexibility in the context of cash businesses which the judge should have taken into account when dealing with the appeal under the Rules and which was also a relevant factor with respect to proportionality under Article 8.

8. Permission was granted by a Judge of the Upper Tribunal who said this;

> "2. Although it is not clear whether the judge was in fact referred to the policy guidance cited in the renewed Grounds of Appeal it is at least arguable, in light of the judge's finding that the Appellant had addressed the concerns raised by the ECO [20], that he should perhaps have gone on to consider evidential flexibility (at least in relation to Appendix FM-SE(D)(d).
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> 3. Permission to appeal is granted."

9. There was then a hearing before the Upper Tribunal (before me) to explore, initially, whether or not the judge had erred in law and then, if so, what should follow from that. Representation at that hearing was as indicated above.

10. Mr Sharif, for the Appellant, essentially, stood by his grounds. He pointed out that the actual business income received, which of course was more than that shown in the bank statement as having been received, was apparent from other documents such as the Sponsor's relevant tax return. The judge had accepted that all of the matters initially placed in dispute by the Entry Clearance Officer had been satisfactorily dealt with. Although the Grounds of Appeal to the First-tier Tribunal had not raised arguments concerning evidential flexibility, evidential flexibility is referred to in the Rules and, therefore, the judge should have considered the point for himself. As to Article 8, the policy regarding evidential flexibility was material and should have been considered by the judge in his balancing exercise. Mr Diwnycz, for the Respondent, observed that "Rules are Rules" and, in this case, submitted that the requirements of the Immigration Rules had not been met. It was not apparent that a point had been taken before the judge regarding evidential flexibility. Article 8 had been dealt with adequately.

11. I reserved my decision. Having reflected on matters I have decided that the judge did not make an error of law and that, therefore, his decision should stand. I set out my reasoning, as to this, below.

12. It is right to say that the judge did resolve a considerable number of matters in favour of the Appellant and the Sponsor. However, as noted, he concluded that the requirements of the Rules were not met because the bank statement did not demonstrate that the minimum income threshold had been met. It does not appear that the Appellant's representative at the hearing before the judge had contended otherwise. Indeed, at paragraph 23 of his determination the judge noted that it was not disputed "that the bank statements do not reflect his gross income". So, if the appeal were to succeed under the Rules that could only be on the basis that some form of evidential flexibility could be applied.

13. When granting permission to appeal the granting judge made reference to Appendix FM-SE(D)(d). The relevant part reads as follows;

> A. This Appendix sets out the specified evidence applicants need to provide to meet the requirements of the Rules contained in Appendix FM and where those requirements are also contained in other Rules, including Appendix Armed Forces, and unless otherwise stated, the specified evidence applicants need to provide to meet the requirements of those Rules ...
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> D. …
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> (d) If the applicant has submitted:
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> (i) a document in the wrong format;
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> (ii) a document that is a copy and not an original document, or
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> (iii) a document that does not contain all of the specified information, but the missing information is verifiable from:
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> (1) other documents submitted with the application,
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> (2) the website of the organisation which issued the document, or
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> (3) the website of the appropriate regulatory body,
>
> The application may be granted exceptionally, providing the decision maker is satisfied that the document(s) is genuine and that the applicant meets the requirement to which the document relates …

14. There is, also, the paragraph from the Immigration Directorate Instructions, referred to above, which also deals with evidential flexibility.

15. There is nothing to suggest, as Mr Sharif effectively and quite properly conceded before me, that any argument based upon evidential flexibility or specifically upon the paragraph of the Immigration Rules set out above or the Immigration Directorate Instructions was put at any point during the course of the appeal to the First-tier Tribunal. The Grounds of Appeal to that body do not mention evidential flexibility and it does not appear, from a careful reading of the determination, that any such argument was made to the judge. I have, in fairness to the Appellant and Sponsor, checked the judge's typed Record of Proceedings but that does not contain any indication of any such argument ever having been made during the course of the hearing. That, then, is consistent with the absence of a reference to such an argument in the judge's determination. I have to conclude, therefore, that no such argument was ever raised with the First-tier Tribunal at any stage.

16. I appreciate that paragraph 3.3.8 of the Immigration Directorate Instructions does refer to the possibility of flexibility being applied, in the context of a cash business, where the decision maker is satisfied that the cash income relied upon is fully evidenced by a tax return and accounts information. It is right to say that the judge

accepted that the cash income relied upon had been properly evidenced in that regard. One criticism of the judge advanced on behalf of the Appellant, then, is that he did not apply the policy contained within the relevant part of the Immigration Directorate Instructions. However, it must be the case that, in the context of an appeal where there is competent legal representation, for such representatives to raise any arguments based on policy matters before the First-tier Tribunal and evidence the existence of such a policy. Quite simply, here, that was not done. Against that background I cannot conclude that the judge erred in failing to deal with an argument based upon policy which had not been put to him. Had the point been raised before him and had he then disregarded it that would have been quite different. That, however, was not the situation.

17. There is then the matter of Appendix FM-SE(D)(d). Again, no argument based upon this provision was ever put to the judge. Mr Sharif, during discussions about this at the hearing, contended that, in effect, a judge should be aware of all potentially relevant Immigration Rules and should apply such Rules even if an argument about an aspect of such a Rule is not put by competent representatives. I have hesitated over this but it does seem to me that there is a distinction to be drawn between an Immigration Rule containing a substantive requirement and a provision such as this which is of a discretionary nature and which will not often be relevant. In my judgment, where a party is competently represented, as was the Appellant before the judge, it must be for the representative to raise the point. Quite simply, that was not done. Again, therefore, I cannot fault the judge for a failure to deal with an argument about a provision within the Rules of a discretionary nature which was not put to him at all.

18. It follows, from the above, that I conclude the judge did not err with respect to his consideration of the appeal under the Immigration Rules. I now turn to his Article 8 consideration.

19. Here, the judge did conscientiously go through the five stages set out in the judgment in **Razgar**. Although it would mean her having to make a third go, it was certainly open to the judge to attach significant weight, as he did, to the availability of a fresh entry clearance application. His consideration of the competing Article 8 factors was, very clearly, balanced. It was certainly an adequate consideration.

20. Mr Sharif makes the particular point that the judge did not factor in the existence of the "policy" regarding Article 8 and that he should have done so when considering proportionality. However, it seems to me that that argument, too, fails on the basis that the policy, if that is what it is, was never put to the judge at all. In any event, I can see no basis for thinking that that would have made a difference given the requirement, as identified by the judge, for compelling circumstances.

21. I must say I do have some sympathy for the Appellant and the Sponsor in this case. The consequence of the decision made by the judge and, indeed, my decision is that they must now contemplate making a third application in circumstances where it does appear the substantive requirements have been satisfied. I must, however,

apply the law and not be swayed by that sympathy. For the reasons set out above I cannot conclude that the judge erred in law and I must conclude, therefore, that his decision should stand.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error of law. That decision shall stand.

Anonymity

I make no anonymity direction.

Signed Date 19 May 2016

Upper Tribunal Judge Hemingway

TO THE RESPONDENT
FEE AWARD

I make no fee award.

Signed Date 19 May 2016

Upper Tribunal Judge Hemingway