Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/22814/2012

THE IMMIGRATION ACTS

Heard at Bradford	**Determination Promulgated**
On 29th October 2013	**On 3rd November 2013**

Before

UPPER TRIBUNAL JUDGE ROBERTS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRS JASPREET KAUR
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr Hunt-Jackson, Home Office Presenting Officer
For the Respondent: Mr B Clark, Barry Clark Solicitors

DETERMINATION AND REASONS

1. In this appeal the Appellant is the Secretary of State for the Home Department and the Respondent is Mrs Jaspreet Kaur a citizen of India born 18th July 1989. For ease of reference however I shall refer to the Secretary of State as "the Respondent" and Mrs Kaur as "the Appellant".

2. This is the review of an appeal brought against the Entry Clearance Officer New Delhi, 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.

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History of the Matter

3. The Appellant made application on 7th August 2012 to join her husband as his spouse. It is accepted that she and her husband are validly married and at the date of decision which is 1st November 2012, there were no dependant children born of the union.

4. The ECO refused the application because he was not satisfied that the Appellant met the requirements of Appendix FM-SE (Financial Requirements) of the new Immigration Rules. In order to meet the financial requirements the Appellant needed to show that her Sponsor had a gross income of £18,600 per annum and that he had been in receipt of this amount for at least six months.

5. The ECO was satisfied that the Sponsor was holding down two jobs which brought in a gross income of at least £18,600; but he had not demonstrated that this had been the situation for six months. He therefore refused the Appellant's application.

6. The Appellant appealed the refusal and the appeal came before First-tier Tribunal Judge Reed. At the hearing before the Judge it was accepted on behalf of the Appellant, that she could not meet the Immigration Rules. It was claimed however that the Entry Clearance Officer's refusal was disproportionate under Article 8 ECHR.

7. In his determination the First-tier Tribunal Judge concluded,

> *"The evidence before me demonstrates that at the time of the application and the decision, the Sponsor was earning a sum which was in excess of £19,000 per annum. I therefore find that the Appellant has demonstrated that although she did not meet all of the documentary requirements of Appendix FM, her husband's income was such that she in effect met the substance of the financial requirements. I say this because I am satisfied on the balance of probabilities that the Sponsor was earning at least £18,600 per annum".*

The Judge then summed up at paragraph 33,

> *"The Respondent's decision prevents family life from continuing in the country of the Sponsor's nationality and in all the circumstances cannot be considered to be proportionate. I therefore allow the appeal under Article 8 of the ECHR".*

8. The Respondent sought and was granted permission to appeal. Thus the matter comes before me to determine firstly whether there is an error contained in the First-tier Tribunal Judge's judgment; and if so whether it is of sufficient gravity such as to require the decision to be remade.

The Hearing Before Me

9. I heard representations from both parties. Mr Hunt-Jackson on behalf of the Respondent sought to rely on the grounds seeking permission. The Appellant had failed to meet the Immigration Rules and the Judge had erred in his assessment

under Article 8, as he had not given the appropriate weight to the Respondent's clear expression of the public interest element. The Judge had failed to balance the public interest appropriately. In any event the Article 8 assessment itself was given without adequate reasoning.

10. Finally Mr Hunt-Jackson submitted, the Judge had failed to recognise that there is no near-miss principle applicable to the Immigration Rules. **Miah [2012] EWCA Civ 261.**

11. Mr Clark on behalf of the Appellant submitted that the determination should stand. The Judge found clearly at paragraph 30 that the substance of the Rules were met and was therefore satisfied that the decision of the Respondent was disproportionate. The Judge had found that the decision interfered with the Appellant and Sponsor's family life. The decision was therefore sustainable.

12. At the end of submissions, both representatives agreed there was no challenge to facts found by the First-tier Tribunal Judge and if I were to find the decision disclosed an error of law then I could go on and remake the decision.

Has the Judge Erred

13. I am satisfied that the First-tier Tribunal Judge erred in the decision he made and that the decision needs to be remade for the following reasons.

14. Firstly in paragraph 30 of the determination the Judge records that he finds that although the Appellant did not meet the documentary requirements of Appendix FM, she in effect met the substance of the financial requirements. That in my judgment is the wrong approach and it is this which has led the Judge into error. As Mr Hunt-Jackson points out there is no near-miss principle when dealing with the Immigration Rules. The Rules have been framed and endorsed by Parliament to take into account public policy consideration when weighed against individual family and private rights.

15. At the date of decision which is the relevant one in an out of country case (even for Article 8), the Appellant could not meet the requirements of the Immigration Rules. What the Judge needs to ask himself is where then is the disproportionate interference with the Appellant and Sponsor's family life.

16. The Judge found that the Appellant and his wife have a subsisting marriage and intend to live together permanently. I agree with that finding, and am satisfied that there was evidence of family life at the date of the decision.

17. The next consideration which the Judge properly identified is whether at the date of decision on the balance of probabilities, the Respondent's decision would have consequences of such gravity as to potentially engage the operation of Article 8. The Judge found and I accept that it is more likely than not that the Sponsor would not be able to live permanently with the Appellant in India. Accordingly if the decision is maintained, the probability is that they would not be able to enjoy their family life with each other by living physically together. This therefore engages the operation of Article 8.

18. I turn however to the main issue in this appeal which is one of proportionality. In this I take guidance from **<u>Huang</u>** and **<u>Razgar</u>**. The guidance in those cases is to the effect that "decisions taken pursuant to the lawful operation of immigration control will be proportionate in all save a small minority of exceptional cases, identifiable only on a case by case basis". Judges when assessing proportionality must be careful to state clearly that their task is to weigh all the competing considerations and give due and considerable weight to the considerations in favour of the decision appealed against. They should then answer the proportionality question by stating whether they find that the case they are dealing with, although it is not covered by the Rules, is entitled to succeed under Article 8. The expectation remains that such cases will form a very small minority. Turning to the present case, there is nothing in the evidence before the First-tier Tribunal Judge, nor me, to show that the situation of this Appellant can be described as one of those "very small minority of cases". In fact there is little evidence at all to weigh in the Appellant's favour in the Article 8 assessment, other than to say she and the Appellant enjoy a subsisting relationship, which by choice, they would like to continue in the UK. That is hardly exceptional.

19. For the foregoing reasons, the First-tier Tribunal Judge erred in law. I remake the decision. The Appellant's appeal against the Respondent's decision to refuse her entry clearance is dismissed.

20. I will add one post-script to this decision. I was informed at the hearing, by Mr Clark, that the Sponsor has now worked for six months in the same employment. Mr Hunt-Jackson accepted this. Mr Hunt-Jackson said that the appropriate course of action would be for the Appellant to make a fresh application. I canvassed this with Mr Clark. He gave a pessimistic response. I do not share his pessimism. If the Appellant can now meet the requirements of the Immigration Rules, which by all accounts she can, then this is not a case without hope of a successful conclusion. However so far as disposal of this appeal is concerned, the appeal is dismissed.

No anonymity direction is made

Signature **Dated**
Judge of the Upper Tribunal

<u>Fee Award</u>

I have dismissed the appeal and therefore there can be no fee award.

Signature **Dated**