Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: IA/16153/2013

THE IMMIGRATION ACTS

Heard at Field House
On 18th June 2014

Determination Promulgated
On 23rd June 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE FRANCES

Between:

AKASHA IQBAL BUTT

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Rehman, Mayfair Solicitors
For the Respondent: Mr S Whitwell, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

The Appellant

1. The Appellant is a citizen of Pakistan born on 29th November 1986. He appeals against the determination of the First-tier Tribunal dated 10th February 2014 dismissing his appeal against the Respondent's decision of 30th April 2013 refusing to vary leave to remain outside the Immigration Rules.

2. Permission to appeal was granted by Upper Tribunal Judge Clive Lane on 9th May 2014 on the grounds that it was arguable that First-tier Tribunal Judge P J M Hollingsworth had erred in law in failing to take into account the Appellant's income in concluding that he could not meet the income threshold under the Immigration Rules.

3. At the hearing before me, Mr Rehman submitted that the Judge had erred in law in failing to take into account the Appellant's income of £6,000 having found that the Sponsor's income amounted to £14,000. The Appellant had shown that he met the income requirements of the Immigration Rules. Further, the case 'fell on all fours' with Majid (R (on application of MM and others) v Secretary of State for the Home Department [2013] EWHC 1900 (Admin). In the circumstances of this case, the maintenance criteria were disproportionate. The Judge had wrongly applied Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 00640 (IAC) because there were insurmountable obstacles and exceptional circumstances in the Appellant's case. The Sponsor was not able to live in Pakistan and could not leave her mother who was ill.

4. Mr Whitwell submitted a letter dated 19th May 2011 curtailing the Appellant's leave. It was addressed to the Appellant c/o Alperton College, which closed down in February 2011. Mr Whitwell accepted that he could not show that the letter had been served on the Appellant. He submitted that the application had been outside the Immigration Rules, the Appellant's representatives at that time accepting that the maintenance threshold could not be met.

5. In any event, the Appellant could not rely on the Sponsor's rental income because she had failed to submit monthly personal bank statements covering 12 months. The rental contract did not start until August 2013. The Sponsor's and Appellant's income did not meet the threshold of £18,600. Any error on the part of the Judge in relation to the application of the Immigration Rules was not material. Further, the Appellant was seeking to rely on income for six months to cover a period of 12 months. This was not permitted under the Immigration Rules.

6. Mr Whitwell submitted that the Judge properly applied the two-stage test set out in Gulshan. He took into account the Sponsor's nationality, the Appellant's oral evidence and the Sponsor's personal circumstances. The Judge properly analysed the facts and there was no error in his approach to Article 8. The Sponsor's mother's cancer was in remission since 2009. There were no exceptional compassionate circumstances in this case. The fact that the Appellant had continued working on his student visa after the college closed down was a countervailing factor.

7. Mr Rehman submitted that if an application was made outside the Immigration Rules, the Judge was entitled to take the Rules into account (SA (Pakistan) [2010] UKUT 481). The Judge still had jurisdiction to hear an application under the Rules

even if an application was not made on that basis.

8. If Majid was followed, the Appellant did not need to meet Appendix FM in terms of six months employment. Mr Rehman relied on paragraph 24 of Gulshan. The Appellant had permission to work under the terms of his visa and his leave continued by virtue of section 3C Immigration Act 1971.

Discussion and conclusion

9. The application for leave to remain as the spouse of a British citizen was made outside the Immigration Rules. The Appellant, through his representative at that time accepted that he could not meet the income threshold of £18,600. The Appellant's representative at the hearing before the First-tier Tribunal accepted that this was still the case. I am of the view that whether the Appellant could satisfy the Immigration Rules was relevant to his Article 8 assessment and therefore the Judge was correct to make a finding on that issue.

10. The Judge found that the Sponsor was working at the date of application (paragraph 7 of his determination). He found that her income was £10,994 and she received £3,900.94 rental income (paragraph 13). He came to this conclusion on the basis of a printout submitted by the Appellant's representative. The Judge disregarded the Appellant's claimed income. It was submitted that the Appellant had been working since December 2013 and had earned £727.20 to date, which amounted to an annual income of £6526.

11. It is clear from paragraph 13 of Appendix FM-SE that the Appellant was not entitled to rely on the income he claimed in the printout submitted before the First-tier Tribunal because at the date of application (December 2012) the Appellant was not working. The Appellant started working on 2nd December 2013. The Judge did not err in law in failing to take into account the Appellant's income.

12. In addition, the Appellant had failed to supply 12 months bank statements showing the Sponsor's monthly rental income under paragraph 10(a)(ii) of Appendix FM-SE. The Appellant could not rely on the Sponsor's rental income.

13. Accordingly, the application could not succeed under the Immigration Rules. There was no material error of law in the Judge's finding that the Appellant could not satisfy the maintenance requirements of the Immigration Rules (paragraph 13 of his determination).

14. In relation to Article 8, the Judge properly directed himself following Gulshan. He took into account the fact that the Sponsor was a British citizen and had lived in the UK all her life. He also took into account her mother's illness and the support that the Sponsor and Appellant provided for her (paragraph 8). The Judge found that there were no insurmountable obstacles to family life continuing outside the

UK nor were there exceptional circumstances which meant that the Appellant's removal would result in unjustifiably harsh consequences such that refusal was disproportionate under Article 8. These findings were open to the Judge on the evidence before him.

15. I am not persuaded by Mr Rehman's submission that this case "fell on all fours with Majid". Blake J did not strike down the financial requirements of the Rules and he did not make a formal declaration. He found that there was substantial merit in the contention that the interference represented by a combination of the five factors in the family life of the claimants on the assumed facts was disproportionate and unlawful. The Appellant's circumstances were different. The Judge took into account all the circumstances of the Appellant's case and his finding that the Appellant's refusal to vary leave to remain was proportionate was open to him on the evidence before him.

16. The Judge made no error on any point of law which might require the determination to be set aside. The appeal to the Upper Tribunal is dismissed. The determination of the First-tier Tribunal dated shall stand.

Deputy Upper Tribunal Judge Frances
23rd June 2014