Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/28563/2013

THE IMMIGRATION ACTS

Heard at Birmingham	**Determination Promulgated**
On 20 February 2014	**On 24 March 2014**

Before

UPPER TRIBUNAL JUDGE CLIVE LANE

Between

KASHIF ALI

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Sawar, instructed by MA Consultants
For the Respondent: Mr Smart, a Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, Kashif Ali, was born on 3 June 1988 and is a male citizen of Pakistan. The appellant first entered the United Kingdom as a student but, on 25 April 2013, he married Mahria Begum and applied on 3 June 2013 for application for leave to remain in the United Kingdom for settlement and on the basis that he was married to a British citizen. The respondent refused the application on 25 June 2013 and the

appellant appealed to the First-tier Tribunal (Judge Stott) which, in a determination promulgated on 9 December 2013, dismissed the appeal. The appellant now appeals, with permission, to the Upper Tribunal.

2. Granting permission, Designated Judge Zucker wrote at [4]:

> Whilst being very slow to grant permission to challenge what are largely findings of fact, it is arguable that the judge has erred in law in this case by arguably going behind a concession (see *NR (Jamaica)* [2009] EWCA Civ 856); failing to make a finding as to the sponsor's earnings based upon the available evidence; failing to read the Rules purposefully; and misunderstanding the term 'exceptional' in the context of Article 8.

3. I shall consider the grounds of appeal in the order in which they are set out in the application for permission. First, the appellant challenges the judge's finding at [13]:

> As regards the wage slips, she [the appellant's wife] has produced wage slips dating between 31 December 2012 and 31 May 2013. That is a five month period, but I am prepared to accept she only commenced work on 3 December 2012.

4. It was not clear what might be the consequence for the appeal of the judge having accepted that the sponsor only commenced employment on 3 December 2012 but it does appear to be clear that the number of wage slips produced by the sponsor for the period 31 December 2012 – 31 May 2013 is six, and not five as stated by the judge. However, whilst it might be the case that the sponsor satisfied the requirements of the Rules as regards the production of the wage slips, the appellant does not challenge the judge's finding at [12]:

> In relation to the appellant's wife there is a letter from accountants but not from her direct employer. It is argued that the accountants' letter suffices but the Rules are precise as to the documentation which is needed. The appellant accepts that the Rules provide that there should be a letter from an individual's employer.

As a consequence, the assertion made in the grounds at [6] ("Had the IJ properly considered that this element of Appendix FMSE 2 [production of wage slips for a six month period] had been satisfied it would have impacted upon the outcome of his decision.") is immaterial because the sponsor could not satisfy the Rules in relation to the production of the employer's letter.

5. Secondly, there were problems relating to the evidence of income produced by the appellant himself. In relation to this ground of appeal, the appellant asserts that there had been a concession as regards his own ability to comply with the rules made in the refusal letter of the respondent dated 25 June 2013 and that no application had been made subsequently by the respondent or at the hearing by the Presenting Officer to withdraw that concession. The refusal letter, having set out the requirements of E-LTRP3.1/3.2 continued as follows:

> You stated on the application form that you and your spouse jointly earn £20,500, I have sufficient evidence to confirm how much you earn however I cannot corroborate your spouse's yearly income as she has not provided the required evidence, please see

> Appendix FMSE in the Immigration Rules. You and your spouse have not provided the required evidence for me to be able to confirm that you earn the required £18,600 per annum you therefore the Secretary of State is not satisfied you earn a specified gross annual income of at least £18,600 (*sic*).

6. Does that paragraph constitute a concession on the part of the Secretary of State? One thing is certain; the paragraph is very poorly expressed. The appellant relies on *Carcabuk (18 May 2000) (unreported)* a decision of the Tribunal presided over by Collins J. The judgment is quoted in *NR (Jamaica)* (see above):

> In *Carcabuk* guidance was offered as to the approach to be taken by tribunals to concessions. As was said [11-12]:
>
> "It is in our judgment important to identify the precise nature of any so-called concession. If it is of fact…the adjudicator should not go behind it. Accordingly, if facts are agreed, the adjudicator should accept whatever is agreed. Equally, if a concession is clearly made by a HOPO that an appellant is telling the truth either generally or on specific matters, the adjudicator may raise with the HOPO his doubts whether the concession as appropriate but, if it is maintained, he should accept it. But there is all the difference in the world between a concession and a failure to challenge. The former will bind the adjudicator, the latter will not. Furthermore, any concession can be withdrawn so that, for example, the case before the Tribunal can be presented in a different way to that before the adjudicator. It is open to a HOPO to withdraw a concession made before an adjudicator before the hearing is concluded, but the appellant must be given a proper opportunity to deal with the new case against him and unless there is good reason for the withdrawal such as the discovery of fresh material we doubt that the adjudicator should permit any adjournment which such withdrawal would be likely to necessitate…
> We can summarise the position as follows:-
> …(3) If the HOPO wishes to withdraw any concession made: in a refusal letter or explanatory statement, he must inform the appellant or his advisor as soon as possible and it will be for the adjudicator to decide if an application for an adjournment to enable the new case to be met is made, whether to grant it. If he does not, the concession will stand…
> (6) A concession can be withdrawn but, if a HOPO seeks to do this, the adjudicator must be satisfied that the appellant will not be prejudiced if the hearing continues and should only allow an adjournment if persuaded that there was good reason to have made and to withdraw the concession"

7. Collins J has used his words carefully in relation to "so-called concessions" made by the respondent. The passage quoted above refers to the importance of identifying "the precise nature" of any "so-called concession" and goes on to observe that "if a concession is *clearly* made by a HOPO…". In order to bind the Secretary of State, any concession needs to be unequivocal and clearly expressed. I do not consider the passage from the refusal letter which I have quoted above to comply with those requirements. The matter was raised before the First-tier Tribunal Judge who at [17] observed:

> Although accepting the respondent in the refusal letter makes reference to having sufficient evidence to confirm how much [the appellant] is earning, the particular paragraph goes on to state that, 'You and your spouse have not provided the required evidence for me to be able to confirm that you earn the required £18,600 per annum.' I consider this section to have been misinterpreted by the appellant as being an acceptance by the respondent of his gross annual salary.

The passage in the refusal letter is entirely equivocal; within two sentences, the author of the letter appears to accept "how much you earn" but then goes on to say that "you and your spouse have not provided the required evidence…" For the First-tier Tribunal to have found that those sentences unequivocally bound the Secretary of State to accept that the appellant met all the required provisions of the Immigration Rules even when, on the face of the evidence, he did not, would, in my opinion, have constituted an error of law. In addition, in order to have allowed the appeal under the Rules the judge himself would have had to have been satisfied that the requirements of the Rules had been met in full by the appellant and it was clear from the determination that he did not find this to be the case:

> There is however no documentation to establish that fact [the appellant's gross annual salary] nor is there any letter from his employer confirming the nature of his employment nor the annual sum that he is to be paid.

8. The appellant does not submit that he met those requirements of the Immigration Rules. Looking again at the passage in the refusal letter, the so-called concession solely concerns "how much you earn"; it says nothing about the nature of the supporting evidence produced by the Appellant whether or not that evidence complied with the Immigration Rules. I find that there has been no clear and unequivocal concession on the part of the Secretary of State in this instance and that the passages of the determination which I have set out above are free from legal error either as asserted in the grounds or at all.

9. The grounds go on to complain that the judge had not given sufficient weight to the oral evidence of the sponsor at the hearing. The judge was concerned at [17] that it was "not possible to trace the sponsor's salary into her bank account and, in any event part of her salary being paid to the appellant as opposed to into her own or into a joint bank account held with the appellant…" The appellant asserts that the sponsor "gave oral evidence as to the provenance of the sums and the reason as to why exactly it goes from her cash salary but not deposited into her account." Whilst that may be the case, the judge was not compelled to accept such explanations nor was he, faced with the very specific requirements of the Immigration Rules as to the nature of supporting documentation, obliged to ignore those specific requirements in the light of oral evidence.

10. Thirdly, the grounds raise with Article 8 ECHR. The grounds at [16a] contain an acknowledgement that the appellant was unable to meet the requirements of the Immigration Rules ("this is a classic case where the appellant could demonstrate that he met the substance of the Rules albeit without meeting the letter of Appendix FM-SE.") The grounds complain that the judge failed to follow the decision of Blake J in

MM [2013] EWHC 1900 (Admin). Having dismissed the appeal in respect of the Immigration Rules, the judge said this about Article 8 ECHR at [18]:

> As regards Article 8 of the ECHR, the sponsor was unable to put forward any reasons as to why she could not, if necessary, relocate to Pakistan to continue her married life in that country. I have taken account of the five principles set out in the case of *Razgar* and although family life undoubtedly would be disrupted by requiring the appellant to return to Pakistan, I do not find the consequences of the interference to be so extreme or exceptional for it to amount to a disproportionate interference with the appellant and his wife's right to a family life for a requirement to be made for the appellant to return to Pakistan where the couple's family life can be continued should they so choose.

11. The appellant criticises that passage of the determination on a number of grounds: the judge had failed to account of the sponsor's pregnancy; it was unlikely that the appellant will be able to obtain employment at the same level of income as he enjoys in the United Kingdom; the sponsor would have to travel to Pakistan to give birth; there was likely to be a delay in dealing with any entry clearance application because *MM* was awaiting hearing in the Court of Appeal; the appellant had not breached immigration law in the United Kingdom; the sponsor had not visited Pakistan since she was 3 years old; it would not be proportionate to expect the appellant to return to Pakistan to make an application for entry clearance.

12. Although he does not refer to it, the judge's determination postdates the decision of the Court of Appeal in *MF (Nigeria)* [2013] EWCA Civ 1192. The Court of Appeal held that the new Immigration Rules constitute a complete code as regards Article 8 and it would be only in limited circumstances that an individual who fails to comply with that code will succeed outside the Rules. In the present case, the judge was aware that the sponsor is a British citizen and he was aware also that there were, as at the date of the First-tier Tribunal hearing, no children of the marriage. Significantly, what appears to be the judge's main reason for dismissing the Article 8 appeal (the fact that the sponsor and appellant could continue their married life together in Pakistan) was not objected to by the appellant on the basis that his wife (and the child she is carrying) are British citizens. I do not consider that the judge is obliged to set out each and every fact which he had taken into consideration (for example, the wife's pregnancy or the fact that she had not been in Pakistan since she was 3 years old). I find that it was open to the judge to find that the appellant and sponsor could live together in Pakistan. That finding was sufficient to dispose of the Article 8 ECHR appeal. The decision in *MM* was not binding on the judge and it is not clear that it was even cited in argument before him.

13. In conclusion, I find that the judge did not go behind any unequivocal concession made by the Secretary of State and that he has correctly dismissed the appeal under the Immigration Rules. I find that the judge was well-aware of all the relevant circumstances in the Article 8 ECHR appeal and he has reached an outcome which was available to him in the light of those circumstances. It is arguable that his observation at [18] that "I do not find the consequences of the interference to [private and family life] to be so extreme or exceptional for it to amount to a disproportionate

interference…" might appear to suggest that he has applied a test of exceptionality, but I find, having read the determination as a whole, that the judge is doing no more than observing (as the court did in *MF*) that only rarely or exceptionally will an appellant succeed under Article 8 ECHR, when he or she has failed to meet the requirements of the complete code relating to Article 8 which is now contained in the Immigration Rules.

DECISION

14. This appeal is dismissed.

Signed Date 18 March 2014

Upper Tribunal Judge Clive Lane