IAC-AH-DP-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/04408/2013

THE IMMIGRATION ACTS

Heard at Birmingham	**Decision & Reasons Promulgated**
On 21st October 2014	**On 28th October 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE FRENCH

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MATLOOB SARFRAZ
(NO ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Mr N Smart, Senior Home Office Presenting Officer
For the Respondent: Ms R Hussain instructed by Legal Justice Solicitors

DECISION AND REASONS

1. This determination concerns a resumed hearing of this appeal. Following the earlier hearing, on 10th June 2014, I set aside the decision of First-tier Tribunal Judge Sangha

by which he had allowed under Article 8 ECHR the appeal of Matloob Sarfraz against refusal of entry clearance as a spouse. My decision in that regard is annexed to this determination and is incorporated into it. As indicated in my earlier decision in the interests of continuity I continue to revert to the parties as they were described before the First-tier Tribunal.

2. Judge Sangha had dismissed the appeal under the Immigration Rules and there had been no appeal against that decision. At the commencement of the hearing before me it was confirmed that the only issue arose under Article 8. Judge Sangha had found that as at the date of decision under appeal (7th December 2012) the gross income of the Sponsor, Mrs Sabir Sadia, the wife of the Appellant, was £15,600 per annum. That figure was not in dispute. The representatives were in agreement that the hearing should proceed by way of submissions only.

3. Ms Hussain for the Appellant accepted that Judge Sangha had relied on the judgment in **MM v SSHD [2013] EWHC 1900 (Admin)** the relevant elements of which have now been overturned by the Court of Appeal in **MM (Lebanon) and Others v SSHD [2014] EWCA Civ 985**. It was accepted that the Appellant did not meet the threshold of having an income available from his Sponsor of £18,600 as at the date of decision. However she submitted that there were now compelling reasons to allow the appeal under Article 8 ECHR. The Appellant was separated from his wife and from his young child, both of whom were British. The circumstances had strengthened since the date of decision as the Sponsor's financial situation had improved and she could now meet the financial threshold. It was unreasonable to expect the Sponsor and their child to go to live in Pakistan, which would involve the British child in leaving the United Kingdom and leaving the European Union. The Appellant had met the income threshold indicated by Mr Justice Blake in **MM** in the Administrative Court and had legitimately relied upon that.

4. Mr Smart in response relied upon the judgment of the Court of Appeal in **MM** which he said answered every aspect of the Appellant's case. That judgment found that it was lawful for the Immigration Rules to set a threshold on income at £18,600 for a single adult. The Appellant had tried to rely on third party support (albeit the offer had only been made after the date of decision) but that was also dealt with in **MM**. He referred in particular to paragraphs 152 and 153 of that judgment. With regard to the best interests of the child he referred to paragraphs 161 to 163. It was the child's welfare which was a primary consideration and there was no evidence that the child in this country was at any risk in the care of the mother. There were no compelling circumstances such as to engage Article 8 as at the date of decision. If the Appellant could now meet the Immigration Rules he should make a fresh application. The prospect of relying upon public funds weighed heavily in the balance. He referred to the Court of Appeal judgment in **AAO v ECO [2011] EWCA Civ 840**.

5. Finally in response Ms Hussain submitted **AAO** had been decided under the old Rules, which rely on income support levels as the yardstick and it was not necessarily the case that this Appellant would become dependent on public funds on

the basis of the Sponsor's income as at the date of decision. Having heard those submissions I reserved my determination of the appeal which I now give.

6. It is quite clear that the relevant date, both under the Immigration Rules and under Article 8 ECHR, is the date of decision. This is put beyond doubt by the judgment of the House of Lords in **AS (Somalia) v SSHD [2009] UKHL 32**. The fact that the Sponsor may now be able to meet the requirements of the Rules as to income has no bearing on the issues either under the Rules or under Article 8. Similarly the offer of third party support upon which the Appellant sought to rely was not made until after the date of decision. Third party support is not permitted under the Rules but even under Article 8 that particular offer is not potentially admissible as it was made after the date of decision.

7. The guidance in **Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 00640** and **Nagre v SSHD [2013] EWHC 720 (Admin)** indicates that if an Appellant does not meet the requirements of the Rules there need to be good grounds shown for going beyond the Rules to consider issues under Article 8 and only if there are compelling circumstances or the result would be unjustifiably harsh consequences should the appeal be allowed on that basis. That approach has been approved by the Court of Appeal in **Haleemudeen v SSHD [2014] EWCA Civ 558**.

8. In order to ascertain whether the Appellant has potentially a good arguable case under Article 8 which might entail unjustifiably harsh consequences as a result of the decision or compelling circumstances for allowing the appeal I have had regard to the approach to Article 8 approved by the House of Lords in **Razgar v SSHD [2004] UKHL 27** and in particular the series of steps suggested by Lord Bingham at paragraph 17.

9. The Appellant is married to the Sponsor and the couple have a young child now aged 3 years. There is undoubtedly family life and the decision under appeal potentially interferes with that in that the couple wish to change the terms of the family life so that they are living together in this country. Turning to the second question, whilst the parties to the marriage clearly entered into the relationship in full knowledge that the Sponsor resides in the United Kingdom and the Appellant in Pakistan having regard to the judgment of the Court of Appeal in **AG (Eritrea) v SSHD [2007] EWCA Civ 801** the interference is more than merely technical or academic and Article 8 is potentially engaged. The decision is in accordance with the law being made under the terms of Statute and Immigration Rules approved by Parliament and is in pursuit of a legitimate aim, fair and consistent immigration control which would come within the ambit of prevention of disorder or crime, maintenance of the economic well-being of the country and protection of the rights and freedoms of others.

10. Turning to the final question of proportionality the Sponsor and child are living in this country. There is no evidence that the welfare of the child is being adversely affected by those circumstances and it was the parties to the marriage who agreed to run their relationship on this basis until the Appellant could obtain entry clearance.

Whilst ideally the best interests of the child may be to live with both parents there is no pressing need apparent from the evidence that this is a matter of any urgency or that the child is suffering in the meantime. As at the date of decision the child was aged only 1. It is clear from the judgment in **AAO** that the ability of the parties to maintain themselves is a significant factor in proportionality and this Appellant does not meet the requirements of the Immigration Rules. This requirement has now been endorsed by Statute in Section 117B(3) of the Nationality, Immigration and Asylum Act 2002- that economic self-sufficiency is in the public interest. The couple have maintained their relationship at a distance. There is a route available for them under the Immigration Rules (and it is asserted that if a new application were made the Appellant would now succeed). I perceive no compelling circumstances or unjustifiably harsh consequences flowing from the decision. In short the decision is proportionate to the legitimate aims pursued.

11. The Appellant's appeal against the initial decision therefore fails.

12. There was no request for an anonymity order and I saw no requirement for one to be made.

13. The judge at first instance made a fee award. As the appeal now stands dismissed no fee award is appropriate.

Notice of Decisions

I have already set aside the decision of the First-tier Tribunal to allow the appeal. I have now remade the decision and for the reasons set out above the appeal is dismissed on all grounds.

The fee award made by the judge at the first instance is also set aside.

Signed Date: 27 October 2014

Deputy Upper Tribunal Judge French