Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: OA/09405/2013**

THE IMMIGRATION ACTS

Heard at Field House **Determination promulgated**
On 4 June 2014 **On 29 August 2014**

Before

Deputy Judge of the Upper Tribunal I. A. Lewis

Between

Gurdeep Kaur
(Anonymity direction not made)

Appellant

and

Entry Clearance Officer,
New Delhi

Respondent

Representation
For the Appellant: Mr. V. Makol of Maalik & Co.
For the Respondent: Mr. S. Kandola, Home Office Presenting Officer.

DETERMINATION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Raymond promulgated on 18 December 2013, dismissing the Appellant's appeal against the Respondent's decision dated 15 March 2013 to refuse entry clearance as a spouse.

Background

2. The Appellant is a national of India born on 6 August 1965. On 18 December 2012 the Appellant made an application for entry clearance to settle in the UK as the spouse of a British citizen, Mr Jagminder Singh

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('the sponsor'). The application was refused for reasons set out in a Notice of Immigration Decision dated 15 March 2013 with reference to paragraphs EC-P.1.1(d) and E-ECP.2.6, 2.10 and 3.1 of Appendix FM of the Immigration Rules.

3. The Appellant appealed to the IAC. The First-tier Tribunal Judge dismissed the Appellant's appeal for reasons set out in his determination.

4. The Appellant sought permission to appeal which was granted by First-tier Tribunal Judge Raymond on 18 December 2013.

Consideration

5. The Respondent had not been satisfied that the Appellant's relationship with the sponsor was a genuine and subsisting marital relationship or that they intended to live together permanently in the UK. This issue had been the subject of a previous judicial finding favourable to the Appellant in an earlier appeal promulgated on 15 August 2011, which Judge Raymond adopted following the reasoning in **Devasseelan [2002] UKIAT 00702**: see determination at paragraphs 6–9.

6. The outstanding issue under the Rules was therefore that of the financial requirements.

7. It seems to me manifest that there was no error under the Rules – and indeed I do not understand the Appellant to pursue such an argument – although criticism is made of the drafting of the Rules as containing a 'lacuna' for those whose sponsors are paid in cash. In support of the application reliance had been placed on the sponsor's income from employment as a packer with Phoenix Natural that fell below the £18,600 threshold under the Rules. Additional reliance was placed on income from a second employment with Quality Foods, but the requisite supporting evidence was not supplied and so the Rules did not permit account to be taken of this claimed income.

8. The challenge is in respect of Article 8 of the ECHR, with particular reference to the decision in **MM [2013] EWHC 1900 (Admin)**. (The High Court decision in **MM** has now been overturned by the Court of Appeal: see further below.)

9. The First-tier Tribunal Judge dealt only very briefly with Article 8 in a single sentence at the conclusion of the determination – "*I further find that the Article 8 is not engaged as there is no obstacle to the couple residing in the UK if the maintenance threshold is met, and in the interim continuing their family contact in India*"- and did not consider the submissions that I accept were made on the Appellant's behalf with reference to **MM**.

10. The failure to engage with pertinent submissions and the case law that was applicable at the time amounts to an error of law.

11. In considering the interconnected issues of setting aside and remaking the decision I note the following matters.

(i) The High Court decision in **MM** might have potentially assisted the Appellant in two ways: the suggestion of a minimum income requirement of £13,500 would be met from the sponsor's principal employment; "*stringent new modes of proof*" (paragraph 107(viii)) potentially constituted an intrusive interference. I note, however, that this latter point was not carried forward into the five features at paragraph 124 of **MM**.

(ii) The Appellant's principal case was not that her sponsor did not earn sufficient to meet the requirements of the Rules. This was not, therefore, strictly an **MM** type case. The issue, rather, was whether the income was indeed as claimed, and had been shown to be so.

(iii) Although the First-tier Tribunal Judge did not precisely articulate the matter in this way, it seems to me clear that the thrust of what is said at paragraph 19 of the determination is in effect, that in circumstances where considerable doubts were engendered by the history of applications and the findings in earlier appeals, it was necessary to produce independent evidence of actual payment of salary from the employment with Quality Foods – "*such as would be provided by bank statements*"- beyond printed wage slips and notification to HMRC of the claimed income. This is the more so in circumstances where there is a further complication arising from an apparent confusion over use of the sponsor's National Insurance number: see, for example, wage slips for Phoenix Natural at page 23 *et seq* of the Appellant's bundle before the First-tier Tribunal, and the P60 for the year to 5 April 2012 for Quality Foods (page 54). There is no evidence or suggestion that it would present the sponsor with any difficulty if he were to pay into his bank account any wages received in cash, and similarly there is no evidence that it would present his employer – who was prepared to attend an earlier appeal to give evidence in support – with any difficulty to pay the sponsor's wages directly into his account.

(iv) In all of the circumstances in my judgement it is clear that the First-tier Tribunal Judge was not satisfied in respect of the claimed income from employment at Quality Foods, notwithstanding that the Judge took into account a wider range of evidence than was submitted with the application, and undertook an assessment of facts seemingly unconstrained by the particular requirements of the Rules. In short, the Judge did not confine his assessment to the "*stringent new modes of proof*", but was still not satisfied in respect of the claimed income. To this extent I find nothing in paragraph 107(viii) or elsewhere in **MM** avails the Appellant under Article 8 in respect of claimed income from his second job.

(v) As regards reliance upon paragraph 124 in **MM**, it is to be noted that in paragraph 123 the High Court considered that a "*combination of more than one*" of the five features in paragraph 124 was required for the Rules to be "*so onerous in effect as to be an unjustified and disproportionate interference with a genuine spousal relationship*". Whilst the first of the five features – the actual minimum income level – applies in the instant case with reference to the Appellant's accepted income from his primary job, no reliance has been placed in respect of any of the other four features. In such circumstances I find that this aspect of **MM** could not have availed the Appellant had it been considered by the First-tier Tribunal Judge.

(vi) No other arguments were raised in respect of Article 8, other than those engendered in the decision in **MM**.

12. I have considered the High Court decision in **MM** above because at the time of the hearing before me the judgement in the Court of Appeal had not been made. The effect of that judgement is now to overturn the decision of the High Court in **MM**. Necessarily this defeats the Appellant's continuing reliance upon the High Court decision. Further, there is no point in reconvening the hearing to hear submissions in light of the Court of Appeal decision because it is binding upon the Tribunal. In any event, for the reasons outlined above, I have concluded that I would not have reached a finding in the appeal favourable to the Appellant if I were remaking the decision, even applying the guidance and principles of the High Court decision in **MM**.

13. In all such circumstances it seems to me that, notwithstanding the First-tier Tribunal Judge's failure to engage with the Appellant's submissions in respect of **MM**, this did not then, and cannot now, make any material difference to the outcome, and accordingly I do not set aside the decision of the First-tier Tribunal. Both the decision under the Rules, and in respect of Article 8 – essentially that it was entirely proportionate to

expect the Appellant and sponsor to provide the prescribed evidence to demonstrate the maintenance threshold was met – stand.

Decision

14. The decision of the First-tier Tribunal Judge contained an error of law, but is not set aside.

15. The appeal is dismissed.

Deputy Judge of the Upper Tribunal I. A. Lewis 28 August 2014