



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: OA/12042/2013

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 28<sup>th</sup> October 2014**

**Determination Promulgated  
On 12<sup>th</sup> December 2014**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE MCCLURE**

**Between**

**THE ENTRY CLEARANCE OFFICER, MUMBAI, INDIA**

Appellant

**AND**

**MR JUNED IKBALBHAI BHURA  
(NO ANONYMITY DIRECTION MADE)**

Respondent

**Representation:**

For the Appellant: Mr R Singer Counsel instructed by Nasim & Co Solicitors

For the Respondent: Mr P Nath, Senior Home Office Presenting Officer

**DETERMINATION AND REASONS**

1. The Respondent, Mr Juned Ikalbhai Bhura, [the applicant and Appellant in the First-tier Tribunal] date of birth 7<sup>th</sup> October 1987, is a citizen of India. Having considered the circumstances I do not make an anonymity direction.
2. The ECO is appealing against the determination of First-tier Tribunal Judge Blake promulgated on 24<sup>th</sup> July 2014. The judge allowed the appeal of the respondent against the decision of the ECO dated 6<sup>th</sup> May 2013 to refuse the respondent entry

clearance to the United Kingdom as the spouse or partner of a person present and settled in the United Kingdom. The application was considered under Appendix FM and appendix FM-SE and under Article 8 outside the rules. The appeal was allowed on Article 8 grounds.

3. The judge found that the respondent did not meet the requirements of the Immigration Rules, specifically Appendix FM and Appendix FM- SE. The issue in respect of the rules appears to have been the requirements under the rules that the sponsor had a set level of income and that that had to be proved by specified documents.
4. In order to meet the requirements of the rules the respondent and his sponsor had to prove that the sponsor received by way of income £18,600 and produce specified documents to substantiate such as set out in Appendix FM-SE, in part in accordance with paragraph 7 as a part-time self-employed person.
5. The documentation disclosed that the sponsor was mainly employed by Chestnut Nursery School, Newham Ltd earning £13,000 per annum [pay slips for October, November and December indicated a gross pay of £1,125, which equates to 13,500 per annum]. In order for the respondent to succeed the sponsor had to show that she received a further £5,100 income from other sources or that she had savings of £28,750 to make up the shortfall in income.
6. It was the respondent's case that the sponsor received a further £7800 gross income from self-employment as a tailor. The letter of refusal clearly sets out the evidence that was required to prove that the sponsor earned the required additional money as a self-employed person. The sponsor had only been earning monies for 8 months from self-employment and therefore had to comply with Category F of Appendix FM-SE. Of the documents required the respondent and the sponsor had only produced two to the ECO. The documents not produced according to the reasons for refusal letter included as specified in Appendix FM-SE paragraph 7:-
  - a) Evidence of the amount of tax payable, paid or unpaid for the last financial year.
  - b) The latest
    - i) annual self-assessment tax return to HMRC
    - ii) Statement of Account; and
    - iii) The same for the previous financial year
  - c) [produced]
  - d) [produced]
  - e) Where the person holds a separate business bank account bank statement for the same 12 month period as the tax return

- f) Personal bank statements for the same 12 month as the tax return showing the income from self-employment has been paid into an account in the name of the person or in the name of the person and their partner jointly.
- g) Evidence of ongoing self-employment through evidence of payment of Class 2 National Insurance contributions
- h) One of the following documents must also be submitted:-
  - i)(aa) If the business is required to produce annual audited accounts, the latest such account; or
  - (bb) If the business is not required to produce annual audited accounts, the latest unaudited accounts and accountants certificate of confirmation, from an accountant who is a member of a UK Recognised Supervisory Body( as defined in the Companies Act 2006);
  - ii) A certificate of VAT registration and the latest VAT return (a copy or printout) confirming the VAT registration number, if turnover is in excess of 73,000
  - iii) Evidence to show appropriate planning permission or local planning authority consent is held to operate the type/class of business at the trading address (where this is a local authority requirement); or
  - iv) A franchise agreement signed by both parties

- 7. The documents, as identified above and as required under the rules to substantiate income from self-employment, had not been submitted either to the ECO or to the Tribunal.
- 8. The judge in paragraph 66 notes with regard to the submissions made on behalf of the ECO:-

*66 She submitted that the accountant's letter produced by the Appellant was not sufficient and there had been no evidence produced to explain why no accounts had been produced.*

[The references to Appellant in the decision relate to the respondent in the present proceedings.]

- 9. The judge in considering the requirements of the rules at paragraph 87 states:-

*87. I found that the requirement in the Rules in respect of documents was mandatory and that the Appellant had failed to produce the relevant documents in order to meet the requirements of the rules.*
- 10. Having found that the respondent and sponsor had failed to meet the requirements of the rules the judge went on to consider Article 8. In so doing the judge makes

reference to the case of MM (Lebanon and others) v SSHD [2014] EWCA Civ 985 and to taking a purposive approach to the requirements of the rules [see paragraph 105]. In so doing the judge appears to be drawing a distinction between the rules which set the income threshold and the rules which prescribe the evidence to substantiate such an income. Such a difference in approach cannot be justified on the basis of the case law. The judge recognises the Court of Appeal had within MM accepted that the new Immigration Rules were capable of being compatible with Article 8.

11. The evidence with regard to the financial means of the sponsor and respondent are set out within paragraph 76 and 77 of the Determination. There it is indicated that a self-assessment tax return had been lodged as evidence of income from self-employment. There was otherwise a P60 for her employment, which corresponded with the payslips submitted in respect of the sponsor. Finally within paragraph 77 there is reference to a letter from the appellant's accountants. There does not appear to be any accounts, whether audited or on audited or any of the other documentation identified by the ECO. The judge appears to have relied upon a letter from an accountant. Given the circumstances proper accounts and the other documents identified were required to meet the Rules.
12. The judge in paragraph paragraphs 103 -106 states:-

*103 In the circumstances I accepted, that although it was not in the correct form, the evidence that have been placed before the ECO was such as to demonstrate that the appellant could meet the financial requirements of the Immigration Rules.*

*104 I accepted the submission that the evidence of the Sponsor's finances was contained in the P60, the accountant's letter, the bank statements and tax return. I therefore considered on the facts of the case before me that the evidence that the appellant met the financial threshold set by the Rules were such as to amount to an exceptional circumstances not covered by the immigration rules themselves.*

*105 In considering the appeal, I took a purposive approach to the Immigration Rules. I note from the authority of MM that the financial threshold had been deemed to be lawful and in pursuit of the legitimate aim and that it had been well researched by the Secretary Of State.*

*106 I considered however that the question of what evidence might demonstrate the attainment of the threshold was a separate issue. I found that it would not be rational to exclude evidence of compliance with the lawful financial threshold by excluding certain forms of evidence that demonstrate that a couple came within it. I found that the main purpose of the Rule as identified in the authority of MM was to ensure couples would meet the financial threshold such as to be able to readily integrate into society.*

13. It is not for the judge to substitute his view of what should be in the Immigration Rules as to the means of proving that a person meets the financial threshold, just as much as it is not for the judge to substitute his view on what that financial threshold should be. The case of MM has clearly established that the New Immigration Rules are Article 8 compliant. The judge in approaching the issue with regard to Article 8 has merely sought to circumvent the requirements within the rules as to the means by which a matter has to be proved. Just as much as there are valid reasons as to why the financial threshold was set at £18,600 in the Immigration Rules, there are also

valid reasons as to why accounts, tax documents and the other specified documents required by the rules should be produced to prove that income.

14. It is not for a judge to substitute his own view as to how a matter should be proved and therefore to ignore the requirements of the Immigration Rules. The case law makes clear that in assessing Article 8 outside the rules it is appropriate to consider the criteria within the rules in assessing the proportionality exercise. Here it is simply a matter that the respondent and sponsor have not lodged the required documents. Once they have the required documents a fresh application can be made.
15. The judge in approaching the issue of article 8 has failed to follow the guidance within Razgar and MM. The judge has merely found that the fact that other documents prove that the sponsor has the claimed income is an exceptional circumstance. The judge then uses that to justify allowing the appeal under article 8 without following the approach advocated in Razgar.
16. At the very least that approach ignores the guidance within the case law that in considering the final issue in article 8 outside the rules consideration has to be given to the rules themselves in assessing the proportionality. As the rules make specific provision that a matter is to be proved and there are justifiable reasons why those provisions exist, in assessing the proportionality exercise such is a significant factor.
17. In the circumstances the judge's approach with regard to article 8 is fundamentally flawed and involves an error of law.
18. I have to determine what the appropriate courses with regard to this appeal. The only issue between the parties is whether or not the sponsor has the required income and has the evidence to prove such. Once the sponsor has obtained the required evidence in proper form a fresh application can be made for entry clearance. It is accepted that the respondent cannot meet the requirements of the Immigration Rules in this application.
19. The issue thereafter is whether this case requires further evidence to resolve the issues between the parties. I am satisfied on the basis of the evidence before me that this case can be properly determined without a further hearing.
20. It has been accepted that this is a genuine marriage and that therefore there is a family life. It is for the appellant to prove that the decision significantly interferes with that family life. In assessing that consideration has to be given as to whether the respondent could go to live in Pakistan and whether or not it is the The references to Appellant in the decision relate to the respondent in the present proceedings. ECO's decision that interferes with family life rather than the respondent and the sponsor's choice of where they wish to live. There would have to be valid reasons as to why the sponsor cannot go to live in Pakistan before it could be found that it was the decision of the ECO which significantly interfered with family life

21. Even if it is the decision of the ECO that interferes with family life, the decision is clearly in accordance with the law and for the purposes of maintaining immigration control.
22. In the light of that the final issue to be determined would be whether or not the decision is proportionately justified. In assessing that issue weight has to be given to the fact that the United Kingdom is entitled to control immigration and to set standards which people have to be able to meet in order to enter. Set against that is the family life that the respondent and the sponsor clearly have.
23. All that the respondent and sponsor need to do is to obtain the necessary documentation as required by the rules to substantiate that the sponsor has the required income. Once the required evidence has been obtained the respondent would be able to make a further application.
24. In the light of that it is clear that the respondent and the appellant have a means by which they can exercise their right to family life within the United Kingdom. Whilst that requires them to follow a set procedure and method of proof such is not unwarranted or unduly onerous in the circumstances. Set against that is the right of the United Kingdom to control immigration centre set standards which people have to comply with before they can enter. Taking all the factors into account I find that the decision by the ECO is proportionately justified.
25. Accordingly for the reasons set out I find that the decision by judge contains a material error of law and I substitute the following decision:-
  - a) the appeal is dismissed under the immigration rules
  - b) The appeal is dismissed on human rights grounds.
26. In light of all the circumstances I make no award of costs.

Signed

Date **11<sup>th</sup> December 2014**

Deputy Upper Tribunal Judge McClure