



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

**Appeal Number:  
OA/13215/2013**

**THE IMMIGRATION ACTS**

**Heard at Field House  
Determination  
promulgated  
On 4 September 2014 On 8  
September 2014**

**Before**

**Deputy Judge of the Upper Tribunal I. A. Lewis**

**Between**

**Entry Clearance Officer,  
Rabat**

**Appellant**

**and**

**Naoual Mounim  
(Anonymity direction not made)**

**Respondent**

**Representation**

For the Appellant: Mr. I. Jarvis, Home Office Presenting Officer.  
For the Respondent: No appearance.

**DETERMINATION AND REASONS**

1. Although before me the Entry Clearance Officer ('ECO') is the appellant and Ms Mounim is the respondent, for the sake of consistency with the proceedings before the First-tier Tribunal I shall hereafter refer to Ms Mounim as the Appellant and the ECO as the Respondent.

2. The Appellant is a citizen of Morocco born on 28 October 1983. An application for entry clearance as the spouse of Mr Javid Mustaqim ('the sponsor') was refused for reasons set out in a Notice of Immigration Decision dated 14 June 2013 with reference to paragraphs E-ECP.3.1 and EC-P.1.1(d) of Appendix FM of the Immigration Rules. Essentially the Respondent was not satisfied that the Appellant met the financial requirements of the Rules.

3. The Appellant appealed to the IAC. Her appeal was allowed by First-tier Tribunal Judge McMahon for reasons set out in a determination promulgated on 18 June 2014 - notwithstanding that there was no attendance on behalf of the Appellant at the hearing.

4. The Respondent applied for permission to appeal to the Upper Tribunal which was granted by First-tier Tribunal Judge Hollingworth on 16 July 2014.

5. Although due notice of the hearing was given, there was no appearance by or on behalf of the Appellant today. The Tribunal is in receipt of a letter signed by the sponsor dated 14 August 2014, said to be written on behalf of both the Appellant and the sponsor seeking to withdraw the appeal listed today because "*having resubmitted a new application, the visa was granted in December 2013*". A reply was sent to this letter from the Tribunal's Correspondence Section dated 19 August 2014 to the effect that a sponsor, even if an authorised sponsor, is not a party to the appeal and as such could not give notice of withdrawal.

6. Mr Jarvis indicated that he had been unaware from the file in his possession that the Appellant had been granted entry clearance. I afforded him time to take instructions, and he was able to verify and confirm to me that the Appellant had been issued with a visa as a spouse on 17 December 2013 pursuant to a further application.

7. In the circumstances the failure of the Appellant to attend either in person or by way of the sponsor or a representative was understandable. I was in any event satisfied that the Appellant had been afforded an opportunity of attending or sending any written representations to the Tribunal, and I was satisfied that it was appropriate to proceed with the appeal in her absence.

8. It is to be observed that although the Appellant would now appear to have been granted leave to enter the UK, none of the circumstances specified at rule 17A(2) of the Tribunal Procedure (Upper Tribunal) Rules 2005 whereby an appeal is treated as

abandoned have arisen. Further, for the reasons already communicated to the sponsor, there has been no valid notice of withdrawal such as to meet the requirements of rule 17.

9. It follows that notwithstanding the grant of entry clearance pursuant to an application subsequent to the immigration decision upon which the jurisdiction of the Tribunal is founded, it is necessary for me to consider the challenge to the decision of the First-tier Tribunal.

10. I have little hesitation in accepting the substance of the Respondent's challenge. The First-tier Tribunal Judge determined the appeal under the Rules in complete disregard of the specified evidential requirements under Appendix FM-SE, and further failed to take into account the relevant date - which in the context of Appendix FM was the date of application. Accordingly, the Judge's approach to the case under the Rules was premised on a material misdirection of law. Further, in so far as the Judge allowed the appeal in the alternative on Article 8 grounds, he did so by reference to the decision in **MM [2013] EWHC 1900**, which has now been overturned in **MM [2014] EWCA Civ 985**.

11. Accordingly I find that the decision of the First-tier Tribunal Judge was flawed for material error of law and requires to be set aside.

12. Whilst in one sense little purpose is served in remaking the decision in the appeal in circumstances where the Appellant has now been granted entry clearance pursuant to a further application, procedurally it is necessary to bring the proceedings to a conclusion by some form of determination. Accordingly I proceed to remake the decision in the appeal.

13. I uphold the Respondent's decision essentially for the reasons given in the Notice of Immigration Decision dated 14 June 2013. The materials submitted with the Appellant's application did not meet the requirements of Appendix FM-SE in all respects, and the Appellant failed to demonstrate that the sponsor's income met the threshold requirement of Appendix FM. Whilst the decision frustrated the Appellant's attempts to establish family life with her husband in the UK, there was nothing indicated to suggest the application of the Rules to the Appellant's case resulted in a disproportionate interference with the mutual Article 8 rights of the Appellant and the sponsor. In my judgement there was nothing disproportionate in expecting the Appellant to provide evidential material in compliance with the Rules - and indeed it appears that this is what she in due course did.

14. In all the circumstances the Appellant's appeal against the decision of 14 June 2014 is dismissed.

15. For the avoidance of any doubt, the decision herein in no way affects the subsequent decision of the Respondent to grant the Appellant entry clearance to the UK: that decision has not been the subject of any challenge before me or the subject of any scrutiny by the Tribunal, and accordingly stands and takes effect unimpugned.

### **Decision**

16. The decision of the First-tier Tribunal Judge contained errors of law and is set aside. I remake the decision in the appeal.

17. The appeal is dismissed.

**Deputy Judge of the Upper Tribunal I. A. Lewis 4 September 2014**