**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: OA/15081/2013

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Determination Promulgated** |
|---|---|
| **On 22nd July 2014** | **On 11th Aug 2014** |

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE JUSS**

**Between**

**MRS ZAMIRA VATNIKAJ**
**(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**ENTRY CLEARANCE OFFICER, (TIRANA)**

Respondent

**Representation:**

For the Appellant: Ms Carina Ward, Counsel
For the Respondent: Mr Chris Avery (Home Office Presenting Officer)

**DETERMINATION AND REASONS**

1. This is an appeal against the determination of First-tier Tribunal Judge Simpson promulgated on 1st April 2014, following a hearing at Taylor House on 25th March 2014. In the determination, the judge allowed the appeal of Zamira Vatnikaj. The Respondent subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

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**The Appellant**

2. The Appellant is a female, a citizen of Albania, who was born on 26th May 1986. She appealed against the decision of the Entry Clearance Officer, dated 21st June 2013, refusing her leave to enter the UK as the spouse of a person present and settled in the UK, who was also a British citizen, namely, Mr Lazer Vatnikaj.

**The Appellant's Claim**

3. The Appellant's claim raised that her husband was an Albanian citizen, who had lived in the UK for the past sixteen years, was settled in this country, had taken British citizenship, and had always worked gainfully, never claiming state benefits (paragraph 4). When her husband visited Albania subsequently they met, became engaged, and were married with the blessings of both their parents and on 10th January 2014 a son was born to them, who is now a British citizen (paragraph 5). The Appellant herself underwent extreme complications which almost deprived her of her life, following the birth of her son. The Sponsor produced wage slips and letters from his two employers. He produced a payslip from Stockvale Catering dated 20th June 2013 which showed gainful employment and he also showed his employment with the Lemon Tree Restaurant. His combined income was the equivalent of £21,777.

**The Judge's Findings**

4. The judge was satisfied that the Appellant earned almost £22,000 from his two employments and there was no issue relating to accommodation (paragraph 11). The judge was also satisfied that family life existed between the Appellant, her husband and their young son and that the decision of the Respondent interfered with his family life in a way that was not reasonable and proportionate. The judge did take into account the balance of interests of the Respondent against those of the Appellant, and whilst it was accepted that the Appellant could not meet the technical requirements of the Immigration Rules, he could succeed under free-standing Article 8 jurisprudence (paragraph 13). The appeal was allowed.

**Grounds of Application**

5. The grounds of application state that with respect to the Article 8 ECHR, a separate assessment should have been carried out whether there were compelling circumstances, which were not recognised by the Rules, following the judgment in **Gulshan [2013] UKUT 00640**, and the failure to do so rendered the judgment unsafe.

6. On 29th May 2014, permission to appeal was granted.

**Submissions**

7. At the hearing before me on 22nd July 2014, Mr Avery, appearing on behalf of the Respondent Secretary of State, submitted that there were a number of errors in the determination of the judge. First, there was no evidence of a second employment so the Sponsor's annual gross income was in doubt at the date of the application. Second, as far as Article 8 was concerned, the judge had disregarded the

requirements of Appendix FM because it was not clear from the information supplied that the Sponsor was receiving income from his employment which could be matched with the bank statement. Finally, the case of **Gulshan** had made it clear that it was necessary to show compelling circumstances before an appeal could be allowed under Article 8 ECHR grounds.

8. For her part, Ms Ward relied upon her helpful skeleton argument. In essence, Ms Ward submitted that, although the judge had not in terms referred to **Gulshan [2013] UKUT 00640**, it was plain that the approach in that case was one that informed the judge in coming to his decision.

9. This is clear from the fact that, the judge recognises at the outset that the Appellant cannot succeed under the Immigration Rules. He then has regard to factors that are clearly "exceptional" in the sense that there is the birth now of a child who is a British citizen child and of a father who is settled in the UK and has always worked and been able to provide for himself and his family, in circumstances where family life exists and has been unquestioned.

10. All this was set out at paragraphs 11 to 13 of the determination. In particular, the judge was clear that

> "The husband is an industrious man who at the time of application was holding down two employments together earning him annually almost £22,000, well exceeding the £18,600 threshold. There is no issue about their intention to live together permanently or about accommodation" (paragraph 11).

11. In these circumstances, it was clear that the judge was able to leave the code of the Immigration Rules and consider the position under free-standing Article 8 jurisprudence. Secondly, it was simply not the case that the income that the Sponsor claimed to earn was not reflected in the bank account. The failure to meet the Immigration Rules was not on this account at all. The reason why the Appellant could not succeed under the Immigration Rules was because the Sponsor had, at the time of the application been unable to provide a letter from his employer confirming his employment, although such a letter was provided at the hearing before Judge Simpson.

12. Finally, and in any event, Ms Ward submitted that under the latest jurisprudence of **MM (Lebanon)**, the court had made it clear in the words of Lord Justice Aikens that normally "References to 'exceptional circumstances' in the code will nonetheless entail a proportionality exercise". The quote went on to say that if the Rules were not a "complete code" then "The proportionality test will be more at large, albeit guided by **Huang** tests and the UK and Strasbourg case law" (paragraph 134).

13. Clearly, therefore, submitted Ms Ward, Strasbourg jurisprudence was entirely relevant to the situation before the judge in this case.

14. In reply, Mr Avery submitted that he had nothing further to add.

**No Error of Law**

15. I am satisfied that the making of the decision by the judge did not involve the making of an error on a point of law such that I should set aside the decision of the original judge and remake the decision under Section 12(1) of TCEA 2007. My reasons for so concluding are that this is nothing more than a disagreement with the decision of the judge below by the Respondent. It is well established that for the Upper Tribunal to intervene in a case such as this, the decision below must be shown as "perverse" or "irrational" and that this is "a very high hurdle" see **R (Iran) [2005] EWCA Civ 982** at paragraph 11. That threshold has not been crossed in submissions before this Tribunal to me.

16. It is clear that the judge had held that the Appellant could not meet the strict requirements of the Immigration Rules. The judge did not then allow the appeal under the Immigration Rules. Instead, he looked at the position under the Human Rights Act. He was aware that, "There is no mention of the application being considered of human rights grounds" by the Entry Clearance Officer (see paragraph 10). In doing so, he set out the relevant circumstances which were clearly of a "compelling" nature in the appeal before him, setting these out carefully at paragraphs 11 to 13, and making sure that these were weighed "In the balance [with] the interest of the Respondent against those of the Appellant" (paragraph 13).

17. A genuine family life existed between the Appellant, her Sponsor and the infant child and they enjoyed family life, which was being prevented now by the Respondent's decision. But most importantly, the judge took into account "The interests of the child which are best served by living in a loving family atmosphere with both his parents which leads me to the conclusions that the Respondent's decision is disproportionate and cannot stand" (paragraph 13).

18. All of this was done without a reference to Section 55 BCI 2009 under which the "best interests of the child" would plainly have led the judge under domestic law to the same conclusion. In short, there is no error of law here and certainly no "material" error of law in the determination. The determination stands.

**Decision**

19. There is no material error of law in the original judge's decision. The determination shall stand.

20. No anonymity order is made.

Signed Date

Deputy Upper Tribunal Judge Juss 11th August 2014