



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

Appeal Number: OA/15204/2013

THE IMMIGRATION ACTS

**Heard at North Shields
on 14th July 2014**

**Determination
Promulgated
On 16th July 2014**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

ENTRY CLEARANCE OFFICER - NEW DELHI

Appellant

and

**BALDISH KAUR DOSANJH
(Anonymity order not made)**

Respondent

Representation:

For the Appellant: Mr J Kingham – Senior Home Office Presenting Officer.
For the Respondent: Mrs Chaggar instructed by London Immigration

DETERMINATION AND REASONS

1. This is an appeal by the Entry Clearance Officer against a determination of First- tier Tribunal Judge Trevaskis promulgated following a hearing at Newport on 18th March 2014, in which he allowed the appeal under the Immigration Rules on the basis the decision was 'not in accordance with the law'.
2. Mrs Dosanjh is an Indian national who applied for entry clearance to enable her to settle with her husband, who is also her sponsor. On 21st June 2013 her application was refused under Appendix FM and paragraph 276ADE of the Rules.
3. There were two issues of concern to the Entry Clearance Officer, the first relating to whether it had been shown that the party's intentions

were as they say or that the marriage is subsisting and, secondly, that documents provided did not show that the minimum required level of income was available.

4. In relation to the first issue the Judge considered the evidence and was satisfied on the balance of probabilities that the marriage is genuine and subsisting and that Mrs Dosanjh and her husband intend to live together permanently in the United Kingdom. This finding is not subject to challenge.
5. In relation to the financial aspects the Judge refers to the evidence that was submitted, the Rules, and a letter provided by the sponsor's aunt dated 1st March 2014 which was not before the decision maker and therefore could not be considered as it was not admissible. At paragraph 19 the Judge states that the applicant has not met the Rules, but only in respect of the income requirement.
6. The Judge then refers to the High Court decision of MM v SSHD [2013] EWHC 1900 (Admin) which is a decision of Mr Justice Blake in which he was highly critical of the minimum level of required income to be found in the Rules and who allowed an appeal on Article 8 grounds accordingly. The Judge notes that following the decision of the Secretary of State to appeal MM to the Court of Appeal decisions have been put on hold in respect of applications which would be refused solely because the Rules relating to the minimum income thresholds are not met and that, accordingly, he decided that the Entry Clearance Officers decision should await the outcome of that appeal.
7. The Judge did consider Article 8 by reference to Gulshan [2013] UKUT 00640 but did not find there were arguably good grounds for granting entry clearance outside the Immigration Rules based on the facts of the appeal.
8. In the intervening period the Court of Appeal have handed down their judgement in relation to the appeal to them against MM. The citation for their decision is MM (Lebanon) and others v Secretary of State for the Home Department and Master AF (Interested Party) [2014] EWCA Civ 985. In their judgement the Court comprehensively reject the findings of Mr Justice Blake, concluding that his analysis and conclusion that the new provisions were incapable of being compatible with Article 8 rights of UK partners was not correct. The outcome of the Court of Appeal's decision is that the provisions of the Rules are not unlawful and must be honoured by individuals seeking to enter the United Kingdom, including the provisions relating to minimum levels of financial resources.
9. The grounds on which permission to appeal was sought refer to the fact the First-tier found that Mrs Dosanjh could not meet the requirements of the Immigration Rules but then found that the

decision was not in accordance with the law, which is said to being an unsustainable conclusion.

10. Before the Upper Tribunal Mrs Chaggar rightly accepted that following the publication of the Court of Appeal judgement she was in difficulty in seeking to satisfy the Tribunal that there was no legal error in the First-tier Judge's determination.
11. I find the Judge was correct to find that on the admissible evidence Mrs Dosanjh had not discharged the burden of proof upon her to the required standard to show that she could satisfy the requirements of the Immigration Rules. The finding that, somehow, because there was doubt surrounding the sustainability of the High Court's decision in MM he should allow the appeal is, however, perverse. Decisions of the High Court are persuasive but not binding in the same way decisions of the Court of Appeal are. The Judge was required to either conclude that MM had no material effect upon the requirements of the Rules and therefore dismiss the appeal or to accept that even if the Rules could not be met, following MM, the appeal was allowed under Article 8, if this was justified on the facts.
12. The approach the Judge adopted effectively fell between these two stools and resulted in a decision that is not legally sustainable. I therefore set the determination aside. There is no challenge to the findings regarding the validity of the marriage which shall be preserved.
13. When proceeding to remake the decision, Mrs Chaggar acknowledged that although she had in her possession documentary evidence indicating the sponsor's income was above the minimum level required by the Immigration Rules, this had not been disclosed to the decision maker and was not admissible before this Tribunal. On the basis of the admissible evidence I have available and am able to consider, I do not find that Mrs Dosanjh has discharged the burden of proof upon her to the required standard to show that she is able to satisfy the requirements of the Rules relating to the required level of income that has to be shown to entitle an individual to a grant of entry clearance. Accordingly the appeal is dismissed.
14. This is a matter which has failed at this stage but which may succeed in the future. A fresh application is to be made in relation to which Mrs Dosanjh needs to think carefully about the requirements of the Rules and the provisions contained therein relating to the way in which available income has to be proved and ensure that the necessary admissible evidence is sent in with the application.

Decision

15. **The First-tier Tribunal Judge materially erred in law. I set aside the decision of the original Judge. I remake the decision as follows. This appeal is dismissed.**

Anonymity.

16. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Fee Award.

Note: this is **not** part of the determination.

17. In the light of my decision to re-make the decision in the appeal by dismissing it, I have considered whether to make a fee award (rule 23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007). I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: The applicant lost as her case has no legal merit.

Signed.....
Upper Tribunal Judge Hanson

Dated the 15th July 2014