Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/23041/2012

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 30 May 2014	**On 11 June 2014**
(By video link to Bradford)	

Before

DEPUTY UPPER TRIBUNAL JUDGE DAVID TAYLOR

Between

MRS SHAKEELA MAHMOOD
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms J Russell, Legal Representative
For the Respondent: Ms C Johnston, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Secretary of State is, technically, the appellant in this Upper Tribunal appeal but for the sake of consistency the Secretary of State is referred to in this determination as

"the respondent" and the original appellant, Mrs Mahmood, continues to be referred to as "the appellant".

2. The appellant is a 23 year old citizen of Pakistan whose application for entry clearance to enter the UK as the wife of her British born and settled husband Mr Qasim Mahmood was refused by the Entry Clearance Officer on 17 October 2012. Her application was refused because her sponsor was unable to meet the financial requirements of Appendix FM of the Immigration Rules in that his income fell far short of the minimum earnings requirement of £18,600 per annum. In addition, the Entry Clearance Officer was not satisfied as to the proposed accommodation.

3. The appellant appealed against that decision. In her determination promulgated on 20 December 2013 First-tier Tribunal Judge Mensah noted that the appellant accepted that she did not meet the financial threshold of the Rules and therefore could not succeed under the Immigration Rules as such. The judge, however, referred to the decision of Blake J in the case of **MM [2013] EWHC 1900 (Admin)** who criticised the financial requirements of the Rules and, relying on **MM**, the judge allowed the appeal under Article 8.

4. The Secretary of State sought permission to appeal, arguing that **MM** was no more than persuasive authority but, particularly, arguing that in light of the decision in **Gulshan [2013] UKUT 00640 (IAC)** the refusal of entry clearance could not be considered to be unjustifiably harsh nor were there any exceptional circumstances; the appeal should therefore not have been allowed under Article 8. Based on those submissions permission to appeal was granted on 26 March 2014.

5. On the issue of material error of law I heard submissions from both representatives. The Presenting Officer relied on the grounds. The relevant date is the Entry Clearance Officer's decision of 17 October 2012 and it was accepted that the appellant cannot meet the maintenance requirements. Nor was there any finding whatever by the judge on the question of accommodation. It was submitted that the correct approach by the appellant is to make a new application when she (and the sponsor) can meet the required minimum maintenance level.

6. Ms Russell, in reply, acknowledged that the judge's determination was exceptionally short and that the High Court decision in **Nagre [2013] EWHC 720 (Admin)** now requires the appellant to show exceptional circumstances namely ones where refusal would lead to an unjustifiably harsh outcome. In this case, she submitted, the refusal means the separation of the family. There are two young children now aged nearly 4 and nearly 3 who remain with their mother in Pakistan. They are both British citizens and are entitled to come to the UK but the sponsor does not wish to bring them here without their mother.

7. Following completion of the submissions I indicated that I was satisfied that there was a material error of law in the determination such that the decision in relation to Article 8 could not stand. The error of law is the fact that the judge gave no adequate

reasons for her findings. The determination is extraordinarily short and, apart from referring very briefly to the case of **MM,** the judge gave no reasons why this case was exceptional and why the Immigration Rules should not be followed.

8. It was then agreed by both representatives that no further evidence was required and that I should proceed to remake the Article 8 decision based on the evidence that was already before the Tribunal. I now do so.

9. It is common ground that the appellant and her sponsor do not meet the financial requirements of the Immigration Rules. Nor has any adequate evidence been provided as to the proposed accommodation. In that respect all that has been provided is a single page tenancy agreement in the names of the sponsor and, according to the appellant's bundle, that of his late grandmother. There is also a letter from the landlord agreeing that the appellant and her children may live there with him. Although the landlord's letter states that the house is a three bedroom house there is no evidence of the size of the accommodation or whether anyone else lives at the property with him.

10. Be that as it may the only issue before me now is that of Article 8. I note that the appellant and her sponsor was married in Pakistan on 22 December 2006 and that they now have two young children who were born in and remain in Pakistan. The marriage was arranged by the sponsor's family and he first went to Pakistan to meet her in April 2005; he stayed there until the marriage. Subsequently the sponsor went back to Pakistan to be with his wife on 29 September 2008 and remained there with her for nearly three years until 26 July 2011. It was during that time that their two children were born. I take all those factors into account in reaching my decision.

11. I must, however, take notice of and follow the Court of Appeal decision in **Haleemudeen [2014] EWCA Civ 558**. At paragraphs 42 and 43 of that decision Beatson LJ said this:

> "42. The authorities make it clear that the focus of any assessment of whether an interference with private life pursuant to the requirements of immigration control is proportionate should be whether the Secretary of State's decision is in accordance with those provisions. See in particular the decisions of the Immigration and Asylum Chamber of the Upper Tribunal, presided over by its then President, Blake J, in **Secretary of State for the Home Department v Izuazu [2013] UKUT 45** at [40] and [42]-[43], of Sales J in **Nagre [2013] EWHC 720 (Admin)** at [26] and [29]-[31], and of this court in **MF (Nigeria) [2013] EWCA Civ 1192**.
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> 43. In **Nagre's** case Sales J stated (at [26] and [29]) that it is necessary to find 'particular factors in individual cases … of especially compelling force in favour of a grant of leave to remain' even though those factors are not fully reflected in and dealt with in the new Rules and 'to consider whether there are compelling circumstances not sufficiently recognised under the new Rules to require the grant of such leave'. In **MF (Nigeria)**, albeit in the context of deportation and Article 8, this court stated (at [44]) that the Rules

> are 'a complete code', and that the provision in paragraph 398(c) that where the exceptions to mandatory deportation in paragraphs 399 and 399A do not apply, 'it will only be in exceptional circumstances that the public interest in deportation will be outweighed by other factors' involves the application of a proportionality test as required by the Strasbourg jurisprudence."

12. In this case I am satisfied that there are no exceptional circumstances which require me to consider the Strasbourg jurisprudence outside the Immigration Rules. As I have already said, it is common ground that the appellant and her sponsor do not meet the Immigration Rules; they did not do so at the date of the decision and I was told at the hearing before me that they still could not meet those requirements. I am mindful of the decision in **Mahmood** that a married couple, for Article 8 purposes, does not have the right to choose in which country they should live. There is no absolute right for the appellant to come to the UK simply because she is married to a British citizen. Indeed, it is apparent, that since the date of the marriage the sponsor has spent several years living with his wife and children in Pakistan and he is undoubtedly free, if he wishes to do so, to live there again with his wife and children. Against all that, I have to weigh in the balance the undoubted rights of the Secretary of State in relation to immigration control and, although I do not need to apply a proportionality test under the Strasbourg jurisprudence for all the reasons I have mentioned above, the Secretary of State's rights in this matter are likely to outweigh in the balance the personal wishes of the appellant and her sponsor.

13. For all these reasons the appellant cannot succeed under Article 8 and her claim must be dismissed.

Decision

The determination of the First-tier Tribunal contained a material error of law in relation to its findings under Article 8 and that part of the determination is accordingly set aside. I remake the decision by dismissing the appellant's claims under Article 8.

No anonymity direction has been requested and none is made.

Deputy Upper Tribunal Judge David Taylor
10 June 2014