



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

Appeal Number: OA/15437/2014

**THE IMMIGRATION ACTS**

**Heard at IAC Manchester  
On 1 April 2016**

**Decisions and  
Promulgated  
On 13 April 2016**

**Reasons**

**Before**

**UPPER TRIBUNAL JUDGE KEBEDE**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**SYED AFZAN HUSSAIN SHAH**

Respondent

**Representation:**

For the Appellant: Mr A McVeety, Senior Home Office Presenting Officer  
For the Respondent: Mr M Khan of Burrell Jenkins Solicitors

**DECISION AND REASONS**

1. This is an appeal by the Secretary of State for the Home Department (SSHD). However, for the purposes of this decision, I shall refer to the SSHD as the respondent and Mr Shah as the appellant, reflecting their positions as they were in the appeal before the First-tier Tribunal.

2. The appellant is a citizen of Pakistan, born on 16 October 1985. He applied for entry clearance to the United Kingdom as a spouse under paragraph EC-P.1.1 of Appendix FM of the immigration rules. His application was refused on 29 October 2014 on the grounds that he could not meet the financial requirements in paragraph E-ECP.3.3.1 since he had not provided the specified evidence required under Appendix FM-SE of the immigration rules to demonstrate that his sponsor's gross annual income met the level required under the rules. The respondent noted that the sponsor worked for two employers but that with respect to the second employer, the specified evidence had not been produced and accordingly the income from that employment could not be included.

3. The appellant lodged an appeal against that decision. In response to the appeal the respondent maintained the decision. The respondent noted, with respect to the sponsor's second place of employment, that her cash salary from that employment was not reflected in her bank statements. The respondent did not consider that the decision was in breach of the appellant's Article 8 rights.

4. The appellant's appeal came before the First-tier Tribunal on 26 June 2015 and was allowed by Judge Hillis in a decision promulgated on 8 July 2015. The judge noted that this was a case where the respondent accepted that the sponsor met the substantive requirements of the immigration rules regarding her income but where she had not paid the cash into her bank account and had therefore failed to satisfy the evidential requirements in Appendix FM-SE. He therefore found that the requirements of the immigration rules had not been met and he accordingly dismissed the appeal under the immigration rules. However the judge went on to allow the appeal on Article 8 grounds, on the basis that it was not proportionate to require the appellant to make a fresh application when it was accepted that he otherwise met all the requirements of the immigration rules.

5. Permission to appeal to the Upper Tribunal was sought by the respondent on the basis that the judge had in effect applied a "near miss" principle in his proportionality assessment and that this did not constitute compelling circumstances as set out in the case of The Secretary of State for the Home Department v SS (Congo) & Ors [2015] EWCA Civ 387.

6. Permission to appeal was granted on 29 October 2015.

### **Appeal hearing and submissions**

7. At the hearing Mr McVeety relied upon the grounds of appeal and the principles in SS (Congo). He submitted that the judge had implied that the requirement in Appendix FM-SE was a mere technicality, whereas it clearly was not. The appellant, in order to succeed under Article 8, had to demonstrate compelling circumstances, which he had failed to do. He was best advised to make a fresh application.

8. Mr Khan submitted that there were compelling circumstances in that sponsor had had to wait a long time since her marriage to bring her husband to the UK and that the delay was having a toll on their relationship. She had made the application without legal advice and in ignorance of the requirements of the immigration rules. She was suffering from cysts on her ovaries but had delayed having an operation as she would not be able to work and had hoped that she would be successful in bringing her husband to the UK so that he could support her. The lack of legal advice, the sponsor's medical condition and the time and cost involved in the application so far were all compelling reasons justifying a grant of leave, when the appellant was able to meet all the substantive requirements of the rules.

### **Consideration and findings**

9. As I advised the parties, the judge had, in my view, clearly erred in law by failing to identify any compelling circumstances in the appellant's case for the purposes of Article 8. He had plainly treated the requirements of Appendix FM-SE as little more than a technicality and had in effect considered the fact that the appellant was able to meet the substantive financial requirements in Appendix FM as sufficient to justify the conclusion he reached. However such a view was clearly contrary to the principles set out in SS (Congo), as relied upon by the respondent, where it was stated as follows:

"51. In our judgment, the approach to Article 8 in the light of the Rules in Appendix FM-SE should be the same as in respect of the substantive LTE and LTR Rules in Appendix FM. In other words, the same general position applies, that compelling circumstances would have to apply to justify a grant of LTE or LTR where the evidence Rules are not complied with.

52. This is for two principal reasons. First, the evidence rules have the same general objective as the substantive rules, namely to limit the risk that someone is admitted into the United Kingdom and then becomes a burden on public resources, and the Secretary of State has the same primary function in relation to them, to assess the risk and put in place measures which are judged suitable to contain it within acceptable bounds. Similar weight should be given to her assessment of what the public interest requires in both contexts."

10. The judge's decision did not, in fact, identify any compelling circumstances in the appellant's case and there is no indication that he gave appropriate weight to the public interest. Accordingly his decision is not sustainable and I set it aside.

11. In re-making the decision, I find that the weight of the public interest is not in the appellant's favour. Whilst the appellant and sponsor may have been waiting for some time to be together, and whilst it may be that the sponsor has some medical issues, there was no evidence before the ECO, and neither is there any evidence before me, to show that the sponsor's and appellant's circumstances were, or are, such as to justify a departure from the requirement that she be able to support the appellant financially to the level required under the rules. Indeed, her income did meet the relevant threshold, but she had not

deposited her earnings into the bank so as to enable her to produce the specified evidence required under Appendix FM. No satisfactory reason was given as to why the appellant could not simply have made a fresh application or why he could not now do so, ensuring that the sponsor's income was deposited into her account and ensuring that the required evidence was produced with the application.

12. Accordingly I find that the appellant has failed to show that the respondent's decision was in any way disproportionate or that it amounted to a breach of his right to respect for his family life under Article 8 of the ECHR. In re-making the decision, I therefore dismiss the appeal on human rights grounds as well as under the immigration rules.

### **DECISION**

13. The making of the decision by the First-tier Tribunal involved the making of an error on a point of law. The decision has been set aside and the SSHD's appeal is allowed. I re-make the decision and substitute a decision dismissing Mr Shah's appeal on all grounds.

Signed

Upper Tribunal Judge Kebede