Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/01801/2015**

THE IMMIGRATION ACTS

Heard at Glasgow
On 22 May 2017

Decision & Reasons Promulgated
On 26 May 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

VARINDER KUMARI
(Anonymity direction not made)

Respondent

Representation:

For the Appellant: Mr M Matthews, Senior Home Office Presenting Officer
For the Respondent: Ms S Hussain of RH & Co, solicitors.

DECISION AND REASONS

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. The Secretary of State for the Home Department brings this appeal but in order to avoid confusion the parties are referred to as they were in the First-tier Tribunal. This is an appeal by the Secretary of State against a decision of First-tier Tribunal

Judge Blair, promulgated on 22 November 2016 which allowed the Appellant's appeal.

Background

3. The Appellant was born on 5 June 1969 and is a national of India. On 16 May 2015 the Secretary of State refused the Appellant's application for entry clearance as the partner of her sponsor under appendix FM of the Immigration Rules.

The Judge's Decision

4. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Blair ("the Judge") allowed the appeal against the Respondent's decision. Grounds of appeal were lodged and on 26 April 2017 Judge Hodgkinson gave permission to appeal stating inter alia

> The grounds do not challenge the Judge's finding that the relationship is genuine and subsisting. Rather, they argue that the Judge erred in concluding that the appellant satisfied the requirements of appendix FM-SE and in concluding that the appeal should be allowed under article 8, no compelling circumstances having been identified. The grounds disclose arguable errors of law and permission is granted in relation to both grounds pleaded.

The Hearing

5. (a) For the respondent, Mr Matthews moved the grounds of appeal. He reminded me of the terms of paragraph 2c of appendix FM-SE. He told me that, to succeed, the appellant must provide personal bank statements with the application and that that evidence is wholly lacking in this case. He argued that without that evidence the appellant cannot meet the requirements of the immigration rules, so that the Judge's finding at [32] of the decision (that the appellant meets the immigration rules) is a finding which has been made in error.

(b) Mr Matthews moved to the second ground of appeal. He told me that the Judge approached article 8 outside the rules but did not identify adequate reasons for considering article 8 outside the rules. He told me that the Judge's finding at [35] is inconsistent with the second sentence of [32] of the decision. In any event he told me that [35] is only a superficial consideration of article 8, so that an inadequate balancing exercise has been carried out and no reason for straying outside the immigration rules has been established.

(c) Mr Matthews urged me to allow the appeal and set the decision aside

6 (a) For the appellant, Ms Hussain told me that the decision does not contain errors, material or otherwise. She told me that between [28] and [34] of the decision the Judge analyses article 8 both by reference to the rules and outside the rules. Ms

Hussain referred me to MM (Lebanon) v SSHD [2017] UKSC 10 and told me that the appellant plainly demonstrated that he met the financial requirements of the rules.

(b) Ms Hussain told me that the facts of this case merited examination of the article 8 ECHR grounds of appeal out-with the rules because the appellant and sponsor have a 10-year-old child who is a British citizen. She again relied on MM(Lebanon) and told me that the interests of the British citizen child cannot be adequately considered by reference to the immigration rules alone.

(c) Ms Hussain urged me to dismiss the appeal and allow the decision to stand.

Analysis

7. Paragraph 2 of appendix FM-SE says

> 2. In respect of salaried employment in the UK (except where paragraph 9 applies), all of the following evidence must be provided:
>
> (a) Payslips covering:
>
> 1. (i) a period of 6 months prior to the date of application if the person has been employed by their current employer for at least 6 months (and where paragraph 13(b) of this Appendix does not apply); or
> 2. (ii) any period of salaried employment in the period of 12 months prior to the date of application if the person has been employed by their current employer for less than 6 months (or at least 6 months but the person does not rely on paragraph 13(a) of this Appendix), or in the financial year(s) relied upon by a self-employed person.
>
> (b) A letter from the employer(s) who issued the payslips at paragraph 2(a) confirming:
>
> 3. (i) the person's employment and gross annual salary;
> 4. (ii) the length of their employment;
> 5. (iii) the period over which they have been or were paid the level of salary relied upon in the application; and
> 6. (iv) the type of employment (permanent, fixed-term contract or agency).
>
> (c) Personal bank statements corresponding to the same period(s) as the payslips at paragraph 2(a), showing that the salary has been paid into an account in the name of the person or in the name of the person and their partner jointly.

8. In Mostafa (Article 8 in entry clearance) [2015] UKUT 112 (IAC) it was held that in appeals against refusal of entry clearance under Article 8, the claimant's ability to satisfy the Immigration Rules is not the question to be determined by the Tribunal, but is capable of being a weighty, though not determinative, factor when deciding whether such refusal is proportionate to the legitimate aim of enforcing immigration

control. At paragraph 9 it was said that where the ground of appeal is limited to human rights

> Clearly there can be no question of entertaining an appeal on grounds alleging that the decision was not in accordance with the law or the immigration rules. These are not permissible grounds. However if ...the claimant has shown that refusing him entry ... does interfere with his ...family life then it will be necessary to assess the evidence to see if the claimant meets the substance of the rules. This is because... the ability to satisfy the rules illuminates the proportionality of the decision to refuse him entry clearance

9. In Adjei (visit visas – Article 8) [2015] UKUT 0261 (IAC) it was held that (i) The first question to be addressed in an appeal against refusal to grant entry clearance as a visitor where only human rights grounds are available is whether article 8 of the ECHR is engaged at all. If it is not, which will not infrequently be the case, the Tribunal has no jurisdiction to embark upon an assessment of the decision of the ECO under the rules and should not do so. If article 8 is engaged, the Tribunal may need to look at the extent to which the claimant is said to have failed to meet the requirements of the rule because that may inform the proportionality balancing exercise that must follow. Mostafa (Article 8 in entry clearance) [2015] UKUT 112 (IAC) is not authority for any contrary proposition; (ii) As compliance with para 41 of HC 395 is not a ground of appeal to be decided by the Tribunal, any findings concerning that will carry little weight, especially if based upon arguments advanced only by the appellant. If the appellant were to make a fresh application for entry clearance the ECO will, if requested to do so, have regard to the assessment carried out by the judge but will not be bound by those findings to treat the appellant as a person who, at least at the date of the appeal hearing, met the requirements of paragraph 41.

10. At [31] the Judge finds that the evidence presented to him demonstrated that the appellant earned £9490 in a six-month period prior to application. It is clear from [27] of the decision that the Judge reaches that conclusion by placing reliance on a spreadsheet, wage slips, P 60s, accountant information and the sponsor's evidence. That is not evidence which the respondent would have accepted with an application because of the terms of appendix FM-SE.

11. The Judge was not considering appendix FM-SE because the ability to meet the immigration rules is not a free-standing, competent, ground of appeal. This is an appeal on article 8 ECHR grounds only. The Judge has (correctly) considered appendix FM and finds that on the evidence presented to him the requirements of appendix FM can be met. Because this is not an appeal under the immigration rules, the Judge's consideration of the evidence is not restricted by the provisions of appendix FM-SE.

12. The Judge's finding in the first sentence of [32] of the decision (that the appellant meets the requirements of the immigration rules) is not a finding that the appellant meets the evidential requirements of appendix FM-SE. It is an examination of the

requirements of appendix FM in order to inform the overall article 8 assessments. The exercise that the Judge carries out is a consideration of the component parts of article 8 family life informed by appendix FM. The Judge is required to consider each source of evidence, and that is what he did, before reaching his conclusion that the appellant meets the financial threshold of an income of £18,600.

13. The Judge's finding that the appellant meets the financial threshold is entirely consistent with a finding that the appellant meets the requirements of appendix FM of the immigration rules. It is a finding which is well within the range of findings reasonably available to the Judge to make. At [32] the Judge goes on to record that meeting the requirements of appendix FM does not automatically result in a successful article 8 ECHR appeal.

14. The second ground of appeal is that the Judge seamlessly and very briefly considers article 8 outside the rules. His consideration of article 8 is set out between [33] and [35] of the decision. It is argued that because the Judge does not make any assessment of what, if any, compelling circumstances exist in this case that his article 8 assessment is flawed. It is argued that without findings that compelling circumstances exist the Judge cannot consider article 8 outside the rules.

15. In R (on the application of Esther Ebun Oludoyi & Ors) v SSHD(Article 8 – MM (Lebanon) and Nagre) IJR [2014] UKUT 00539 (IAC) it was held that there is nothing in R (Nagre) v SSHD [2013] EWHC 720 (Admin), Gulshan (Article 8 – new Rules – correct approach) Pakistan [2013] UKUT 640 (IAC) or Shahzad (Art 8: legitimate aim) [2014] UKUT 00085 (IAC) that suggests that a threshold test was being suggested as opposed to making it clear that there was a need to look at the evidence to see if there was anything which has not already been adequately considered in the context of the Immigration Rules and which could lead to a successful Article 8 claim. These authorities must not be read as seeking to qualify or fetter the assessment of Article 8. This is consistent with para 128 of R (MM & Others) v SSHD [2014] EWCA Civ 985, that there is no utility in imposing a further intermediate test as a preliminary to a consideration of an Article 8 claim beyond the relevant criterion-based Rule.

16 In Khan (2015) CSIH 29 the Inner House found in favour of immigrant spouses who challenged refusals to grant leave to remain. The Court ruled that there was no human rights rule that an immigrant, who married a UK national at a time when their immigration status was uncertain, must establish "exceptional circumstance" before removal could amount to a breach of Article 8 of the ECHR.

17. In SS(Congo) and Others [2015] EWCA Civ 387 Richards LJ Lord Justice Richards said at paragraph 33

> In our judgment, even though a test of exceptionality does not apply in every case falling within the scope of Appendix FM, it is accurate to say that the general position outside the sorts of special contexts referred to above is that compelling circumstances would need to be identified to support a claim for grant of LTR

> outside the new Rules in Appendix FM. In our view, that is a formulation which is not as strict as a test of exceptionality or a requirement of "very compelling reasons" (as referred to in MF (Nigeria) in the context of the Rules applicable to foreign criminals), but which gives appropriate weight to the focused consideration of public interest factors as finds expression in the Secretary of State's formulation of the new Rules in Appendix FM. It also reflects the formulation in Nagre at para. [29], which has been tested and has survived scrutiny in this court: see, e.g., Haleemudeen at [44], per Beatson LJ

18, In SS(Congo) and Others [2015] EWCA Civ 387 Richards LJ drew a distinction in entry clearance cases, on the one hand, involving someone outside the United Kingdom who applies to come here to take up or resume family life when family life was originally established in ordinary and legitimate circumstances at some time in the past, rather than in the knowledge of its precariousness in terms of United Kingdom immigration controls and cases, on the other, where someone from the United Kingdom marries a foreign national or establishes a family life with them at a stage when they are contemplating trying to live together in the United Kingdom, but when they know that their partner does not have a right to come here. In the latter cases, the relationship will have been formed under conditions of known precariousness and it will be appropriate to apply a similar test of exceptional circumstances before a violation of Article 8 will be found to arise in relation to a refusal to grant LTE outside the Rules.

19. More recent cases indicate a departure from the requirement to find some additional factor before article 8 can be confidently considered outside the rules. In Hesham Ali (Iraq) v SSHD [2016] UKSC 60 Lord Reed at paragraphs 47 to 50 endorsed the structured approach to proportionality and said

> what has now become the established method of analysis can therefore continue to be followed in this context.....

That approach was also endorsed in MM (Lebanon) [2017] UKSC 10 (in particular paras 66 and 67) and in Agyarko [2017] UKSC 11 where Lord Reed in explaining how a court or tribunal should consider whether a refusal of leave to remain was compatible with Article 8 made clear that the critical issue was generally whether, giving due weight to the strength of the public interest in removal, the article 8 claim was sufficiently strong to outweigh it. There is no suggestion of any threshold to be overcome before proportionality can be fully considered.

20. Between [15] and [32] of the decision the Judge considers the article 8 ECHR grounds of appeal both within the rules and outwith the rules. At [33] the Judge clearly acknowledges that family life exists so that the burden of proving that the interference with family life is justified shifts to the respondent. Between [33] and [35] the Judge adequately answers the five questions posed in Razgar, before reaching his conclusion that the respondent's decision is a disproportionate breach of the appellant's article 8 rights.

21. In Shizad (sufficiency of reasons: set aside) [2013] UKUT 85 (IAC) the Tribunal held that (i) Although there is a legal duty to give a brief explanation of the conclusions on the central issue on which an appeal is determined, those reasons need not be extensive if the decision as a whole makes sense, having regard to the material accepted by the judge; (ii) Although a decision may contain an error of law where the requirements to give adequate reasons are not met, the Upper Tribunal would not normally set aside a decision of the First-tier Tribunal where there has been no misdirection of law, the fact-finding process cannot be criticised and the relevant Country Guidance has been taken into account, unless the conclusions the judge draws from the primary data were not reasonably open to him or her.

22. The decision does not contain an error of law. It is for the Judge to decide what weight to place on the evidence. There is no justifiable criticism of the fact-finding exercise. The Judge directed himself correctly in law. The Judge sets out adequate reasons for reaching the conclusion that he reaches. The decision reached by the Judge is well within the range of reasonable conclusions available to the Judge.

23. In this case, there is no misdirection in law & the fact-finding exercise is beyond criticism. The decision is not tainted by a material error of law. The Judge's decision, when read as a whole, sets out findings that are sustainable and sufficiently detailed.

CONCLUSION

24. No errors of law have been established. The Judge's decision stands.

DECISION

25. The appeal is dismissed. The decision of the First-tier Tribunal stands.

Signed Paul Doyle Date 25 May 2017

Deputy Upper Tribunal Judge Doyle