Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/08952/2015**

THE IMMIGRATION ACTS

Heard at Birmingham	**Decision & Reasons Promulgated**
On 21 September 2017	**On 24 November 2017**

Before

UPPER TRIBUNAL JUDGE LANE

Between

SAMINA BIBI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Sharif, Fountain Solicitors
For the Respondent: Mr Mills, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, Samina Bibi, was born on 31 August 1990 and is a female citizen of Pakistan. By a decision dated 12 January 2016, the appellant was refused further leave to remain in the United Kingdom. She appealed to the First-tier Tribunal (Judge Jessica Pacey) which, in a decision promulgated on 16 December 2016, dismissed the appeal. She now appeals, with permission, to the Upper Tribunal.

2. The decision of Judge Pacey contains two errors. Mr Mills, who appeared for the Secretary of State before the Upper Tribunal, acknowledged that the judge was wrong to have excluded evidence submitted by the appellant prior to the application being determined by the Secretary of State but which had not been submitted "with it". Such evidence was not excluded in an in-country appeal in respect of the provisions of Appendix FM-SE of HC 395 (as amended). Secondly, by the provisions of the 2002 Act (as amended), the appeal before the judge did not lie in respect of possible breaches of the Immigration Rules but on human rights grounds, in this case Article 8 ECHR. The judge's statement at [21] that she was "not satisfied that compelling circumstances had been identified to enable me to consider Article 8 outside the Rules" is problematic for two reasons; first the judge's decision does, indeed, consider the appeal on Article 8 ECHR grounds and, secondly, the judge was wrong if (as appears to have been the case) she sought to identify some threshold criterion which had to be crossed before Article 8 should be considered.

3. Notwithstanding these errors, the question remains as to whether or not the Upper Tribunal should exercise its discretion to set aside the decision or to leave it in place. At the Upper Tribunal hearing, Mr Mills, who appeared for the respondent, submitted that the only issue which had prevented the appellant succeeding under the Immigration Rules (and which may, therefore, have made a difference to the judge's assessment of the appeal on human rights grounds) concerned the extent which the appellant had complied with Appendix FM-SE. The appeal turned on the assessment of the income of the sponsor who is self-employed. The sponsor's self-employment began in September 2014. The accounting year for his business, therefore, ran from September 2014 to 2015 and from September–September in the years thereafter. The application for leave to remain was made in August 2015 and the appellant accepts that the sponsor had been unable to provide evidence for a full financial tax year (that is, April 6–April 5) as the respondent contended Appendix FM required. Paragraph 13(e) of Appendix FM-SE provides as follows:

> (e) Where the person is self-employed, their gross annual income will be the total of their gross income from their self-employment (and that of their partner if that person is in the UK with permission to work), from any salaried or non-salaried employment they have had or their partner has had (if their partner is in the UK with permission to work), from specified non-employment income received by them or their partner, and from income from a UK or foreign State pension or a private pension received by them or their partner, in the last full financial year or as an average of the last two full financial years. The requirements of this Appendix for specified evidence relating to these forms of income shall apply as if references to the date of application were references to the end of the relevant financial year(s). The relevant financial year(s) cannot be combined with any financial year(s) to which paragraph 9 applies and vice versa.

4. The entire focus of this appeal, therefore, is upon the construction of the words "in the last full financial year". Although the appeal is brought on human rights grounds only, the fact that the respondent may have wrongly rejected the application because she considered that it did not

meet the requirements of HC 395 (as amended) when, in fact, it did would be a factor of weight in the Article 8 ECHR proportionality analysis. The appellant contends that the words "full financial year" should refer to the accounting year of the applicant/sponsor which need not necessarily be the commensurate with the tax year (April–April) but may be the yearly accounting period adopted by the applicant/sponsor. Mr Mills submitted to me that the words "last full financial year" must refer to the tax year. If Mr Mills is correct, then the parties are agreed that, because the sponsor's business had only commenced in September 2014 and the application was made in August 2015, accounts for a full *tax year* were not supplied as required.

5. Paragraph 19(d) of Appendix FM-SE provides as follows:

> (d) The financial year(s) to which paragraph 7 refers is the period of the last full financial year(s) to which the required Statement(s) of Account (SA300 or SA302) relates.

6. In my opinion, the last sentence of sub-paragraph (d) clearly intends that the words "last full financial year" be synonymous with the tax year. The statements of account and tax calculation forms SA300 and SA302 are standard HMRC forms which are submitted for tax year periods from April–April. Sub-paragraph (d) makes a direct connection between the words "last full financial year" and these HMRC forms ("to which the required statements of account relates …") Use of the adjectival "full" in relation to "financial years" should be read as referring to the tax year to which the statements of account, in turn, relate. Indeed, the use of the word "full" is a clear indication, in my opinion, that "financial year" is synonymous with tax year. The use of the word 'full' is not nugatory; it is intended by the Rule that an applicant should supply accounts relating to a full tax year, that is a tax year which has been subject to an assessment by HMRC. Indeed, it is the linking of reference to a financial year to HMRC procedures (which, of course, are concerned with tax years) that ultimately persuades me that Mr Mills' interpretation of the Rule is correct.

7. It follows from what I have said that the appellant did not comply with Appendix FM-SE. Her failure to meet the requirements of the Immigration Rules to represent a thorough application of law relating to Article 8 ECHR leads me to conclude that, in the absence of other compelling circumstances (and it was not submitted to me that any existed), the First-tier Tribunal was correct to dismiss the appeal. Both of the errors of law which I have identified in the First-tier Tribunal's decision do not, in my opinion, materially affect the outcome of the appeal. In the circumstances, I exercise my discretion to refrain from setting aside the First-tier Tribunal's decision notwithstanding the errors of law.

Notice of Decision

8. This appeal is dismissed.

9. No anonymity direction is made.

Signed Date 30 October 2017

Upper Tribunal Judge Lane

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed Date 30 October 2017

Upper Tribunal Judge Lane