Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA074542015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 6 April 2017 & 29 June 2017	**On 21 July 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE LATTER

Between

ENTRY CLEARANCE OFFICER – ISLAMABAD

Appellant

and

MARIAM IMRAN
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant:	Mr N Bramble, Home Office Presenting Officer (6 April 2017)
	Mr S Kotas, Home Office Presenting Officer (29 June 2017)
For the Respondent:	Mr D Lemer, Counsel (6 April 2017)
	Ms K Wass, Counsel (29 June 2017)

DECISION AND REASONS

1. This is an appeal by the Entry Clearance Officer, Islamabad, against a decision of the First-tier Tribunal (Judge Farmer) allowing an appeal by the applicant against a decision made on 7 April 2015 refusing her entry clearance as a spouse. In this

decision, I will refer to the parties as they were before the First-tier Tribunal, the applicant as the appellant and the Entry Clearance Officer as the respondent.

Background

2. The appellant is a citizen of Pakistan born on 28 April 1995. She applied for entry clearance on 12 January 2015 for settlement as a partner under para EC-P.1.1 of Appendix FM but her application was refused as she did not meet the relevant income threshold requirement. It was accepted that the appellant was exempt from meeting the requirements of para E-ECP.3.1 as the sponsor was in receipt of a carer's allowance. She had to meet the requirements of para E-ECP.3.3 of showing that she and her husband could be maintained and accommodated adequately without recourse to public funds. The respondent was not satisfied from the evidence before him that she could do so. She appealed to the First-tier Tribunal.

The Hearing before the First-tier Tribunal

3. At [6] of his decision the judge said that the gist of the appellant's case was that there was no set income level in the Rules stating what was needed for a couple to maintain themselves. The judge accepted that the sponsor was in receipt of disability living allowance of £21.55 per week and jobseeker allowance of £41.40 per week. She also found that the sponsor would be accommodated with the appellant in his family home where he lives with his mother, accepting that both his and his mother's evidence was truthful and credible. She accepted that his mother worked and paid the rent and would continue to do so and that the property was suitable for the appellant to join the sponsor. His brother who also lived there worked and contributed financially to the utilities and outgoings.

4. The judge accepted the submission made on behalf of the appellant that there was no financial threshold that must be met to determine whether the appellant would be adequately maintained and said that it was a question of looking at all the evidence in the round and at the needs and resources of the parties. She found that the respondent had erred in finding that, as the sponsor's income was less than £113.70 per week (the relevant income support level), the appellant did not satisfy the criteria. The judge accepted that the appellant and sponsor had savings as they had been given approximately £5,000 by friends and family and that this had been transferred to the appellant, the sponsor being candid enough to say that he thought this was the best thing to do as he kept dipping into the money when it was supposed to be used to support them as a couple when she came to the UK. She accepted that the appellant and sponsor would have the use of these funds, about £4,500, to support themselves in the UK and found that they would be able to maintain and accommodate themselves adequately without recourse to public funds. The appeal was allowed accordingly.

The Grounds of Appeal and Submissions

5. The respondent argues in the grounds that the judge erred in law by finding that there was no financial threshold that must be met contrary to the decision of the AIT in KA & Others (adequacy of maintenance) Pakistan [2006] UKAIT 00065.

6. At the hearing on 6 April 2017 Mr Lemer accepted that the First-tier Tribunal erred in law and that the existence of a financial threshold, set at the relevant income support level, had been made clear in KA (Pakistan) and in the provisions of para 6A of the Rules. However, he argued that whilst the Tribunal had erred in law, the error was not material as, whilst there was a shortfall of £50.75 between the relevant income support level of £113.70 and the sponsor's benefits of £62.95, the savings of £4,500 would cover that shortfall for about 88 weeks, the sponsor's mother and brother would be paying the utility bills and outgoings and this would amount to a significant further addition to the sponsor's available income and that, given the appellant's accepted level of education and ability to work, she would be able to obtain employment within 88 weeks, earning a weekly sum in excess of £50.75. In summary, he submitted that on the evidence before the First-tier Tribunal the appeal should have been allowed in any event.

7. Mr Bramble disagreed arguing that the savings would only provide a top up for about 21 months instead of 30 months, the initial period of leave. The issues relating to third party support and the appellant's employment capacity had not been adequately dealt with and, on the information before the judge, the appellant would fail to meet the requirements of the Rules.

The Error of Law

8. It is rightly conceded that the judge erred in law when he said that there was no relevant financial threshold. It is clear from both KA (Pakistan) and para 6A of the Rules that the relevant financial threshold is the level of income support that would be available to the family.

9. I do not accept Mr Lemer's submission that the judge's error of law had no material bearing on the outcome of the appeal. It is correct that the judge accepted that the sponsor, his mother and brother all contributed financially to the household and that there were savings of £4,500. He also accepted the evidence of both the sponsor and his mother as truthful and credible. However, their evidence was an expression of their intentions but with no further analysis of whether those intentions could be fulfilled. Applications based on third party support, if the appellant is able to rely on such support, must be considered with care so that the financial realities are properly considered: Mahad v Entry Clearance Officer [2009] UKSC 16 and Jahangara Begum (maintenance and savings) [2011] UKUT 246 Bangladesh [2011]. Similarly, any assessment of the appellant's own earning capacity, if relevant under the Rules, must

be based on evidence about her qualifications and abilities and the availability of work. I am not therefore satisfied that this is a case where the error of law had no material bearing on the outcome of the appeal.

10. The decision is, accordingly, set aside and is to be re-made in the Upper Tribunal. I record that it was accepted that there was no issue in relation to the adequacy of accommodation or with the figures relating to the benefits received by the sponsor and the relevant income support level. I also directed that if either party wished to re-open those issues, they may only do so if they gave adequate notice to the other party.

11. Following directions made at the end of the error of law hearing, the appellant has submitted a further bundle of documents indexed and paginated 1-142 supplementing the evidence before the First-tier Tribunal in the bundle indexed and paginated 1-164. The respondent has not sought to re-open the issues referred to in [10] above.

12. At the resumed hearing Mr Kotas indicated that it was his submission that as the decision was taken on 7 April 2015 and related to an application made before 6 April 2015, by virtue of the relevant transitional provisions in article 9(C)(2) the appeal should be determined under the Rules as at the date of decision and in accordance with s.85(5) of the Nationality, Immigration and Asylum Act 2002, requiring that only the circumstances appertaining at the time of the decision to refuse entry clearance should be considered. There is no dispute between the parties that this is the proper approach and I note that it was the approach taken by the First-tier Tribunal judge as set out in [4] of her decision. Secondly, Mr Kotas indicated that it was his submission that under the Rules at the date of decision third party support was excluded from consideration of whether the requirements of para E-ECP.3.3(b) were met. This point is in dispute between the parties, Ms Wass submitting that the provisions of para E-ECP.3.3 are freestanding and not covered by the restrictions set out in Appendix FM-SE.

Further Evidence

13. I heard further evidence from the sponsor who adopted his witness statement of 21 June 2017 and his mother and brother similarly adopted their statements of the same date. There was very limited cross-examination save on minor points of detail. I note that the First-tier Tribunal judge accepted the evidence of the sponsor and his mother as truthful and credible. I also accept their evidence as set out in their witness statements and the evidence of the sponsor's brother.

14. At the date of decision the sponsor was in receipt of disability living allowance of £21.55 per week and job seeker's allowance of £41.40 a week, benefits totalling £62.95. The income support level was £113.70 and there was therefore a weekly shortfall of £50.75.

15. The sponsor's financial circumstances have changed since the last hearing and he is now in part-time employment receiving wages of £470 a month/£108.48 a week and he continues to receive disability living allowance at the rate of £22 a week and so has a total weekly income of £130.46. In the circumstances, the sponsor is, prima facie at least, able to demonstrate that he now meets the relevant income threshold of para E-ECP.3.3 as his income is higher than the relevant income support level.

16. In his witness statement he says that he and the appellant have been advised to make a fresh entry clearance application following the change in their financial situation but he adds that this is not a viable option as he would not have sufficient funds to pay the increased application fee and the additional cost of the immigration health surcharge as well as the legal fees.

17. In her witness statement the sponsor's mother confirms that she is responsible for the rent of the family home and all the utility bills. She receives a financial contribution from her son, the sponsor's brother, who contributes £450 every month. She adds that she is willing to offer the appellant £150 a month as third party support. In his witness statement the sponsor's brother confirms that he also is willing to provide the appellant £150 per month through the period of her leave and confirms his contribution to the household expenses. He adds that the sponsor has limited earning capacity due to his disability and does not make any contribution to the household expenses and this will continue after the appellant arrives in the UK. I accept that the offers of support are genuine and that this support will be provided so long as necessary.

Assessment of the Issues

18. I must now turn to the issue of whether, when considering the appeal under the Rules as at the date of decision, it is open to the appellant and sponsor to rely on third party support or the appellant's earning capacity. The relevant provisions are set out in Appendix FM in the financial requirements at E-ECP.3.1 – E-ECP.3.4. It is provided in E-ECP.3.1 that "an applicant must provide specified evidence from the sources listed in para E-ECP.3.2 of …(c) the requirements in para E-ECP.3.3 being met."

19. The provisions of E-ECP.3.2 provide that, when determining whether the financial requirement in para E-ECP.3.1 is met, only particular sources of income will be taken into account including income of the partner from specified employment or self-employment. The wording of E-ECP.3.3(b) provides that "the applicant must provide evidence that their partner is able to maintain and accommodate themselves, the applicant and any dependants adequately in the UK without recourse to public funds."

20. Ms Wass' argument is that para E-ECP.3.3(b) refers simply to "evidence" and does not require specified evidence and therefore the restrictions on the evidence which can be relied on as set out in Appendices FM and FM-SE do not apply. In this

context, it is right to note that the word "specified", which preceded "evidence", was deleted from para E-ECP.3.3 on 20 July 2012. She further submits that the provisions relating to specified evidence set out in Appendix FM-SE at para A1 and 1 do not therefore apply.

21. However, it is clear from Appendix FM-SE that para A1 is limited to particular paragraphs, including E-ECP.3.1 but not covering E-ECP.3.3. whereas para 1 provides that in relation to evidencing the financial requirements in Appendix FM the following general provisions shall apply. These include at para 1(b) that "Promises of third party support will not be accepted. Third party support will only be accepted in the form of" [four identified categories, only one of which is relevant in the present appeal sub-para (iii)] "gift of cash savings, whose source must be declared, … provided that the cash savings had been held by the person or persons … for at least six months prior to the date of application and are under their control".

22. I do not accept as argued on behalf of the appellant that the provisions of para ECP.3.3 are free-standing such that the provisions of Appendix FM-SE do not apply. The fact that E-ECP.3.3 is referred to in E-ECP.3.1 means that it falls within E-ECP 3.2 with the restriction on the sources of income that can be relied on and, although para A1 of Appendix FM-SE does not apply to E-ECP.3.3, the provisions of E-ECP.3.3 set out a financial requirement within Appendix FM (regardless of the deletion of "specified" within that paragraph) and it must follow that the restrictions in para 1 of Appendix FM-SE do apply.

23. Unfortunately, therefore, so far as the appellant is concerned, when assessing the position under the Rules it is not open to me to take into account issues of third party support save in relation to the funds of £4,500 received as wedding gifts or of the appellant's earning capacity as the Rules require reliance on the sponsor's earnings. I am not satisfied that savings of £4,500 can properly be regarded as sufficient to meet the shortfall of £50.75 per week looking at the position as at the date of decision. As set out at [7] above, these savings will only provide a top up for about 21 months as opposed to 30 months, the period of leave which would be granted on a successful application.

24. So far as the position under article 8 is concerned I have been referred to the judgment of the Supreme Court in MM (Lebanon) v Secretary of State [2017] UKSC 10. This judgment confirmed that the restriction on taking into account alternative sources of funding set out in the Rules is not irrational and does not make the Rules unlawful but also indicated that a broader approach could be taken when assessing whether the circumstances gave rise to a positive article 8 duty as explained in Jeunesse v Netherlands [2015] 60 EHRR 17.

25. However, article 8 must be assessed as at the date of decision as this is an entry clearance case and not as at the date of this hearing. I am satisfied that at the date of decision a fair balance was struck between the public interest in controlling immigration by requiring compliance with the Rules and the positive obligation to

afford respect to family life. The simple fact was that the appellant could not meet the requirements of the Rules. It is correct that circumstances have changed since the decision as the appellant and the sponsor have a young child living with the appellant in Pakistan but, constrained as I am to assess the position as at the date of decision, I am not satisfied that the refusal of entry clearance was disproportionate to a legitimate aim within article 8(2). I am therefore not satisfied that the respondent's decision was at the date of decision in breach of article 8.

26. Accordingly, looking at the position as at the date of decision and considering the circumstances appertaining at that time, I must dismiss the appeal on both immigration and human rights grounds. It is of course open to the appellant to make a fresh application.

Decision

27. The First-tier Tribunal erred in law and the decision has been set aside. I must re-make the decision by dismissing the appellant's appeal. No anonymity direction was made by the First-tier Tribunal.

Signed H J E Latter Dated: 19 July 2017

Deputy Upper Tribunal Judge Latter