



Upper Tribunal

(Immigration and Asylum Chamber)

Appeal Number: HU/11297/2018

**THE IMMIGRATION ACT**

Heard at Field House

On 8<sup>th</sup> January 2019

Decision & Reasons Promulgated

On 23<sup>rd</sup> January 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE MCCLURE

Between

Mrs Shristi Rai

(NO ANONYMITY DIRECTION MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mr Malik counsel instructed by The Sethi Partnership

For the Respondent: Mr Whitwell Senior Home Officer Presenting Officer

**DECISION AND REASONS**

1. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Woolley promulgated on the 29<sup>th</sup> October 2018 whereby the judge dismissed the appellant's appeal against the decision of the respondent to

refuse the appellant indefinite or further leave to remain in the UK as a partner under Appendix FM and thereafter under family life rights based on Article 8 of the ECHR.

2. I have considered whether or not it is appropriate to make an anonymity direction. Having considered all the circumstances I do not consider it necessary to do so.
3. Leave to appeal to the Upper Tribunal was granted by First-tier Tribunal Judge E M Simpson on 20<sup>th</sup> November 2018. Thus the case appeared before me to determine whether or not there was a material error of law in the decision.

### **Factual background**

4. The appellant is a citizen of Nepal born on 12 September 1993. The appellant had entered the United Kingdom on 26 June 2015 with leave as a spouse valid from 13 May 2015 until 13 February 2018.
5. On 24 January 2018 the appellant had made an application ostensibly for indefinite leave to remain under appendix FM and on the basis of family life under article 8.
6. The appellant continues to reside with her husband, the sponsor of her original application. It is not suggested that their relationship is anything other than genuine and subsisting. The appellant can be accommodated without recourse to public funds. The appellant speaks English. It was conceded in the refusal letter that the appellant met all the requirements under the suitability criteria of Appendix FM.
7. With regard to the requirements for indefinite leave to remain it was pointed out that the appellant had not completed at least 5 years continuous residence in the United Kingdom as a partner or the longer period of continuous period of residence at least 10 years required otherwise.
8. In respect of the requirements of Appendix FM-SE the appellant had failed to produce the required documentation for the six-month period prior to the application.
9. The grounds for refusing the appellant indefinite leave are clearly set out within the refusal letter and include the fact that the appellant did not meet time periods prescribed within the rules and that otherwise the appellant did not meet the requirements with regard to Appendix FM-SE.
10. The appellant had appealed and the appeal had as indicated above been heard by Judge Woolley who found that the appellant did not meet the requirements of the rules, specifically with regard to Appendix FM-SE, that the documentation to be submitted to substantiate that the appellant did not meet the requirements of the rules.

11. The judge went on to consider whether or not the appeal should be allowed otherwise under family life on article 8 grounds. In seeking to deal with family life the judge has referred to a significant number of cases including MM & Ors v SSHD [2014] EWCA Civ.
12. In the submissions the appellant's representative seek to rely amongst other things upon the case of MM in the Supreme Court [MM (Lebanon) v SSHD [2017] UKSC 10], specifically paragraph 99 thereof provides:-

*99. Operation of the same restrictive approach outside the rules is a different matter, and in our view is much more difficult to justify under the HRA. This is not because 'less intrusive' methods might be devised (as Blake J attempted to do: paragraph 147), but because it is inconsistent with the character of evaluation which article 8 requires. As has been seen avoiding a financial burden on the state can be relevant to the fair balance required by the article. But that judgement cannot properly be constrained by rigid restriction in the rules. Certainly, nothing that is said in the instructions to case officers can prevent the tribunal on appeal from looking at the matter more broadly. These are not matters of policy on which special weight has to be accorded to the judgement of the Secretary of State. There is nothing to prevent the tribunal, in the context of HRA appeal, from judging for itself the reliability of alternative sources of finance in the light of the evidence before it...*
13. It was accepted before me that whilst the appellant may not be entitled to indefinite leave to remain on the basis of Article 8 family life, the appellant's and her husband's right to family life under article 8 should be recognised and the appellant should be entitled to some form of leave.
14. It was accepted before me that the broader approach advocated in the case of MM with regard to the financial requirements of the rules had not been considered by Judge Woolley in assessing the Article 8 rights to family life of the appellant and her spouse. Whilst the judge had considered the guidance in the Court of Appeal clearly the guidance in the Supreme Court as identified was relevant.
15. In assessing the financial requirements of the rules it had been found by the judge that not only did the appellant herself earn some £17,269 but that her partner had an income of over £34,000. Whilst it was correct to say that the appellant and her sponsor partner had not submitted the required documents under appendix FM-SE for the period prior to the application, the evidence from the decision to the date of the hearing otherwise was sufficient to show that the earnings were genuine. In part the problem may be rather than showing income for the period for 6 months prior to the date of the application most of the evidence produced related to post the application. However the evidence did confirm the considerable income not only on the part of the appellant herself but on the part of her sponsor. Thus whilst they did not meet

the evidential requirements set out in appendix FM-SE, there was more than sufficient evidence to prove otherwise the income level.

16. With regard to other factors it was noted that the appellant had given evidence in English without any difficulty.
17. On behalf of the respondent it was accepted that the broader approach advocated in MM Supreme Court had not been applied in assessing the article 8 rights of the appellant and her partner.
18. I find that the judge has failed to apply the broader approach advocated in MM in assessing the article 8 rights of the appellant and her spouse. In looking at that broader approach I find the failure by the judge to apply that broader approach is such as to constitute an error of law on the part the judge.
19. I indicated to the parties that I saw no reason why in the light of that that I need to make any comment with regard to the 2<sup>nd</sup> ground of appeal.
20. I asked the respondent's representative how best this appeal could be determined. It was accepted that if I saw fit to determine the appeal on the basis of the evidence before me and the findings of fact made by the judge applying the broader approach, I would be able to deal with the appeal without hearing further evidence. In effect I would be determining the matter on the basis of the article 8 family life rights of the appellant and her spouse.
21. The appellant's representative accepted that the appellant was not entitled to indefinite leave to remain on the basis of the immigration rules but accepted that applying a broader approach within MM would recognise the appellant's rights under article 8 and that that would entitle the appellant to have some form of leave to remain in the United Kingdom.
22. In the event and I therefore determine that there was an error of law in the assessment of the appellant's article 8 rights and the article 8 rights of her spouse and that I was able to deal with the case on the basis of the evidence before me.
23. On the basis of the evidence before me I am satisfied that the appellant has a significant and substantial family life in the United Kingdom with her husband. I am satisfied that the decision sufficiently and significantly interferes with that family life. Whilst the decision is in accordance with the law and for the purposes of maintaining immigration control as an aspect of economic well-being of the country, I have to consider whether or not the decision is proportionately justified in all the circumstances.
24. Taking account of the fact that the appellant entered on the basis of her relationship with her spouse; that she is able to speak English; that she and her spouse earn sufficient to support themselves without recourse to public funds; that the couple are accommodated without any problem; that they have both

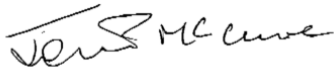
settled lifestyles with regard to employment being in settled occupations and otherwise; and that the appellant is clearly become integrated into the United Kingdom settling into lifestyle with a husband, I find for the reasons set out that the decision is not proportionately justified.

25. I find that the appellant's rights to family life in the United Kingdom are breached and that the appropriate step is to allow the appeal on article 8 grounds.

**Notice of Decision**

26. I allow the appeal on Article 8 grounds.

Signed



Deputy Upper Tribunal Judge McClure

Date 11<sup>th</sup> January 2019