Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/16082/2015**

THE IMMIGRATION ACTS

Heard at Birmingham	**Decision & Reasons Promulgated:**
On 8 February 2019	**On 25 March 2019**

Before

UPPER TRIBUNAL JUDGE HEMINGWAY

Between

MRS RUPAL DILIP MODHAVADIYA
(ANONYMITY NOT DIRECTED)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: No appearance
For the Respondent: Mrs H Aboni (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. On 19 February 2015 the Secretary of State refused to vary the claimant's leave to remain as a spouse and decided to remove her from the United Kingdom (UK) by way of directions under section 47 of the Immigration, Asylum and Nationality Act 2006. The claimant appealed to the First-tier Tribunal (the tribunal) but on 4 January 2017 the tribunal dismissed her appeal. The decision was sent to the parties on 16 January 2017. However, permission to appeal to the Upper Tribunal was sought and granted and, on 17 May 2018, I decided to set aside the tribunal's decision. I directed that the decision be remade in the Upper Tribunal after a further hearing. After a succession of adjournments which had been granted to enable the claimant to supply further evidence, that hearing finally took place on 8 February 2019. However, the claimant was not present nor was her UK based sponsor. Although she had previously had

representation she was not represented at that hearing. I shall say more about that and about why I decided to proceed in the absence of a claimant or a representative below. What follows amounts to an explanation as to how I have remade the decision and why I have done so in the terms that I have.

2. By way of background, the claimant is a national of India and she was born on 30 April 1999. She entered the UK on 20 September 2012 as a student. On 18 November 2014, having not overstayed or otherwise breached the terms of her leave, she married her UK based sponsor Mr [DM]. She then submitted an application to the Secretary of State for her leave to be varied on the basis of that marriage and the application was received by the Secretary of State on 20 November 2014. With respect to finance, she provided information to the effect that Mr [M] was employed by two different organisations, both based in Leicester, and that his annual income before deductions for tax and national insurance amounted to £19687.20. She provided various documents in support. However, on the Secretary of State's calculation based upon wage slips provided, it was concluded that his income was only £16769.36 which was less than the £18600 threshold required according to the terms of the relevant provisions contained within Appendix FM to the Immigration Rules. The Secretary of State, in light of that, asked himself whether the claimant could establish any entitlement to further leave based upon satisfaction of any other potentially applicable immigration rules but decided she could not. Accordingly, the application was refused and the appeal to the tribunal was dismissed as noted above.

3. I set aside the tribunal's decision because I concluded it had erred through failing to adequately explain its conclusion that the income threshold requirements had not been met and through failing to consider the case under Article 8 of the European Convention on Human Rights (ECHR) outside the Immigration Rules. I noted that the appeal to the tribunal had been bound to fail under the Immigration Rules in any event because the evidential requirements as set out in Appendix FM-SE had not been met and such was not, in fact, in dispute. But I also pointed out that satisfaction of the substantive requirements might have been a relevant consideration under Article 8 of the ECHR outside the rules so that it ought to have been considered by the tribunal at least as a prelude to its' considering Article 8 outside the rules.

4. The claimant was represented at the hearing before me of 11May 2018 which led to my set aside decision. When I issued that decision, I gave directions permitting the claimant to file further evidence regarding the satisfaction of the income threshold and I also directed that any assertions to the effect that the income threshold was satisfied "should be supported by clearly expressed mathematical calculations with reference to any documentary evidence relied upon". The appeal next came before me on 25 July 2018 when, despite the claimant still being represented, that had not been done. I adjourned again. The case next came before me on 9 October 2018 when evidential matters concerning the minimum income threshold had still not been dealt with or, at least, not in the ways I had directed. The claimant was still represented at that stage and, indeed, her counsel on that occasion applied for a further adjournment to enable the filing of further evidence and I acceded to that request. The matter was then listed for the hearing of 8 February 2019. However, on 5 February 2019 the claimant wrote to the Upper Tribunal at Field House saying that her husband (her UK sponsor) had had to travel to India as a matter of urgency and would not be returning until 29 March 2019. She asked that the hearing be postponed because she felt his presence at the hearing would be important as he had intended to give oral evidence. She asserted that she would not receive a fair hearing if he was not present. Her application was considered by Upper Tribunal Judge McWilliam who, on 7 February 2019, refused it. Accordingly, the matter came before me, as intended, on 8 February 2019.

5. As I have already indicated, the claimant was not in attendance at that hearing. Nor was she represented. Indeed, I noted that in her written application for a postponement which she had sent to the Upper Tribunal at Field House, she had said that she no longer had legal representation. The Secretary of State was represented by Mrs Aboni. There was no explanation before me as to why the claimant had not attended. She must have known that her application had been refused or, at least, even if the decision to refuse had not reached her for some reason or had been overlooked by her, she had no reason to assume it had been granted. So, she must have known or should have known that her attendance was still required. She had no basis to assume that her application had been granted merely because it had been made. Mrs Aboni pointed out that there had been previous adjournments and she invited me to decide the appeal in the absence of the claimant.

6. I decided not to adjourn. Strictly speaking I suppose there was not an application for an adjournment before me because the application which had been made had already been dealt with. But I thought it in the interests of justice that I consider the matter for myself. In so doing I reminded myself of the "overriding objective" to be found at rule 2 of the Tribunal Procedure (Upper Tribunal) Rules 2008 and I took into account principles of fairness and natural justice. I took into account that there had been previous adjournments for the benefit of the claimant and that matters seemed not to be any further forward. It had not been explained why it was that the sponsor had to travel abroad and no supporting documentary evidence regarding his travel had been provided. Had the claimant chosen to attend she could have given evidence herself which might have been sufficient to deal with the issues. Her husband could have prepared a letter or statement to put before the Upper Tribunal if he was not able to attend due to an urgent need to travel. In the circumstances I concluded that I should proceed.

7. I have decided to dismiss this appeal. There is a dispute between the claimant and the Secretary of State as to whether or not the claimant had demonstrated that the income threshold had been reached as at the time of her application. The claimant has not provided the mathematical calculations which I asked her to provide and has had sufficient time to do so. In any event she did not meet the evidential requirements as set out in Appendix FM-SE. There is no evidence before me to suggest that she is able to satisfy the financial requirements of the Immigration Rules now. As to Article 8 outside the Rules, I did not, because she chose not to attend, have any up to date oral evidence from her as to why it would be disproportionate to require her to return to her home country and make an application for entry clearance at the appropriate Embassy or High Commission. I did not have any up to date evidence from the sponsor as to matters touching upon that either. Given the absence of up to date evidence I am not able to conclude, for the purposes of a consideration of Article 8 outside the Rules, that the relationship between the claimant and the sponsor continues to subsist. So, I am not able to conclude that Article 8 is engaged. But assuming it is, as I say, no explanation has been given as to why the claimant is not able to return to India and to make an application for entry clearance to join her husband (if that is still what is wished) from there. So, I have concluded that she has not demonstrated that any interference with Article 8 rights there might be would, on the facts, be disproportionate.

8. It follows that in remaking the decision I must dismiss the claimant's appeal.

Decision

The decision of the First-tier Tribunal has been set aside. In remaking the decision, the Upper Tribunal dismisses the claimant's appeal from the Secretary of State's decision of 19 February 2015.

Anonymity has not been directed. There is no basis for any such direction and, in any event, none has been sought.

Signed: Dated: 21 March 2019

Upper Tribunal Judge Hemingway

To the Respondent

Fee award

Since the appeal has been dismissed there can be no fee award.

Signed: Dated: 21 March 2019

Upper Tribunal Judge Hemingway