



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/01048/2013

THE IMMIGRATION ACTS

Heard at : Field House
On : 18 July 2014

Determination Promulgated
On: 8 August 2014

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

ENTRY CLEARANCE OFFICER

Appellant

and

SEEMA HEYDARI

Respondent

Representation:

For the Appellant: Ms A Everett, Senior Home Office Presenting Officer
For the Respondent: No Appearance

DETERMINATION AND REASONS

1. This is an appeal by the Entry Clearance Officer (ECO). However, for the purposes of this decision, I shall refer to the ECO as the respondent and Ms Heydari as the appellant, reflecting their positions as they were in the appeal before the First-tier Tribunal.
2. The appellant is a citizen of Afghanistan, born on 6 September 1992. On 15 August 2012 she applied for entry clearance to the United Kingdom as a partner under paragraph EC-

P.1.1 of Appendix FM of the immigration rules. Her application was refused on 12 November 2012 on the grounds that she could not meet the financial requirements in paragraph E-ECP.3.3.1 since her sponsor's gross annual income was below that required under the rules.

3. The appellant lodged an appeal against that decision, stating in her grounds of appeal that her husband had since obtained a new job and was earning well above the gross annual income required under the rules.

4. The appellant's appeal came before the First-tier Tribunal on 23 January 2014 and was allowed in a determination promulgated on 6 February 2014. First-tier Tribunal Judge Murray heard oral evidence from the sponsor who provided details of his employment, which consisted of working for Domino's Pizza from 14 July 2011 until October 2012; for Swindon Kebab House from 1 November 2012 until the end of April 2013; and as a taxi driver from 1 May 2013. He also explained that his wife was from Afghanistan but was resident in Pakistan. He had met her in Pakistan and was with her for six months at the time he married her and for two weeks when she put in her application, but had otherwise never lived in Pakistan. He was from Afghanistan and had come to the United Kingdom in 2004 and become a British citizen in 2008. He could not live in Pakistan because there was genocide against his people, the Hazara, although his wife was Hazara but, being a woman, had not had problems.

5. The judge found that the sponsor's gross annual income at the relevant time was below the threshold required in the rules and that the appellant was therefore unable to meet the financial requirements of the immigration rules. She could not be satisfied, on the evidence before her, that the appellant was able to meet the lower gross annual income threshold suggested by Blake J in MM v Secretary of State for the Home Department [2013] EWHC 1900. However she allowed the appeal under Article 8 on the grounds that the sponsor could not reasonably move to Pakistan to enjoy his family life there because the situation for the Hazaras in Quetta was extremely dangerous and it would unduly harsh to expect him to relocate to Pakistan.

6. Permission to appeal to the Upper Tribunal was sought by the respondent on the basis that the judge had failed to identify compelling circumstances not recognised by the rules, pursuant to the guidance in Gulshan (Article 8 - new Rules - correct approach) Pakistan [2013] UKUT 640 and that the outcome of the respondent's decision was not unduly harsh.

7. Permission to appeal was granted on 15 April 2014.

Appeal hearing and submissions

8. The appeal came before me on 18 July 2014. There was no appearance by the sponsor or any other party on behalf of the appellant. However, in a letter dated 14 July 2014, the sponsor made written submissions in response to the grant of permission, submitting that the judge had identified compelling circumstances.

9. I considered there to be no reason why the appeal could not proceed in the sponsor's absence, as he was clearly aware of the hearing date and had put forward written submissions. I heard submissions from Ms Everett who referred to the judgment of the Court of Appeal in MM (Lebanon) & Ors, R (on the application of) v Secretary of State for the Home Department & Anor [2014] EWCA Civ 985 confirming the lawfulness of the provisions in the rules relating to the required level of gross annual income. She submitted that, in concluding that compelling circumstances existed not sufficiently recognised under the rules and in allowing the appeal on that basis, the judge ignored the fact that she had found that the appellant would have been able to meet the income threshold considered by Blake J in MM [2013] to be proportionate if he had produced the correct documents and that he could therefore have simply re-applied with the correct documents. She asked me to find that there was therefore an error of law in the decision and that it should be re-made by dismissing the appeal.

Consideration and findings

10. There is no challenge to the judge's finding that the appellant could not meet the requirements of the immigration rules and it is indeed the case that she could not, on the basis of the evidence before the judge in regard to her husband's gross annual income at the relevant time. The Court of Appeal in MM has confirmed the lawfulness of the rules in that respect and overturned the judgment of Blake J in the Administrative Court in regard to his findings on the ultra vires nature of the rules and with respect to Article 8.

11. The respondent challenges the judge's findings on Article 8, asserting that she failed to identify compelling circumstances justifying the grant of entry clearance outside the rules. It is the case that she did in fact refer to certain circumstances which she found to be compelling, namely the danger faced by the Hazara in Quetta. However I do not consider her findings in that respect to be sustainable for two reasons. Firstly, her findings failed to address the evidence that the sponsor had lived in Quetta for six months at the time of his marriage without any significant problems, but in any event referred only to Hazaras in Quetta and failed to consider the possibility of the appellant being able to maintain family life with her husband in another part of Pakistan. Secondly, in concluding that the outcome of the respondent's decision was that the sponsor would be required to live in Pakistan in order that family life be maintained, she failed to consider that it was in fact open to the appellant to make a fresh application supported by the documentary evidence demonstrating her ability to meet the financial requirements of the rules in the light of her husband's new gross annual income, which was claimed to be well in excess of the £18,600 threshold.

12. For those reasons I find that the judge erred in law and that her decision has to be set aside. In re-making the decision, it seems to me that the appeal falls to be dismissed on all grounds for the same reasons. The appellant was not able to meet the immigration rules at the date of the respondent's decision to refuse entry clearance. It cannot be said that there are arguably good grounds for granting entry clearance outside the rules or that there are compelling circumstances not sufficiently recognised under the rules, when it is claimed that the appellant can now meet the financial requirements of the rules, with respect to her

husband's income, and that she can simply make a fresh application to join him in the United Kingdom. Accordingly, I dismiss the appeal on human rights grounds as well as under the immigration rules.

DECISION

13. The making of the decision by the First-tier Tribunal involved the making of an error on a point of law. The decision has been set aside and to that extent the appeal made by the ECO is allowed. I re-make the decision and substitute a decision dismissing Ms Heydari's appeal on all grounds.

Signed

A handwritten signature in black ink, appearing to read 'Kebede', is written over a light blue rectangular stamp.

Upper Tribunal Judge Kebede