



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: OA/02417/2013
OA/02418/2013
OA/02420/2013
OA/02423/2013

THE IMMIGRATION ACTS

Heard at Birmingham
On 23rd June 2014

Determination Promulgated
On 15th July 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

N W (FIRST APPELLANT)
K W (SECOND APPELLANT)
S W (THIRD APPELLANT)
R W (FOURTH APPELLANT)
(ANONYMITY ORDER MADE)

Appellants

and

ENTRY CLEARANCE OFFICER - ISLAMABAD

Respondent

Representation:

For the Appellants: Mr S Vokes of Counsel instructed by Maya & Co, Solicitors
For the Respondent: Mr N Smart, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

Introduction and Background

1. The Appellants appeal against a determination of Judge of the First-tier Tribunal Balloch promulgated on 13th February 2014.

2. The Appellants are nationals of Pakistan born 1st January 1973, 23rd July 1995, 29th October 1998, and 28th June 1997. The first Appellant is the mother of the second, third and fourth Appellants.
3. The Appellants applied for entry clearance to enable them to settle in the United Kingdom with the Sponsor MW, the husband of the first Appellant, and the father of the second, third and fourth Appellants. The Sponsor had indefinite leave to remain in the United Kingdom when the applications were made, and became a British citizen in May 2013.
4. The applications were refused on 29th November 2012 as the financial requirements set out in Appendix FM of the Immigration Rules were not satisfied. The Respondent contended that it had not been proved that the Sponsor had a gross annual income of at least £27,200, as it was claimed that he had a gross salary of £27,000 per annum, and specified documents which were required to prove satisfaction of the financial requirements, had not been submitted with the applications.
5. The Appellants appealed and their appeals were heard together by Judge Balloch (the judge) on 30th January 2014. The judge found that the specified documentation required by Appendix FM-SE had not been submitted, and it had not been proved that the Sponsor had gross annual income of at least £27,200. The appeals were therefore dismissed under the Immigration Rules.
6. The judge also considered Article 8 of the 1950 European Convention on Human Rights, on the basis of the Sponsor's private life, and found that the Respondent's decisions did not breach Article 8. The appeals were therefore dismissed on human rights grounds.
7. The Appellants applied for permission to appeal to the Upper Tribunal. In brief summary it was contended that the judge had erred in law by failing to consider the de minimis principle on the basis that the minimum income requirement was £27,200, and the Sponsor's income without his bonus was £27,000 being a shortfall of £200. The Sponsor's income was therefore 99.26% of the requisite amount.
8. It was also contended that the judge had erred in failing to consider material matters in relation to Article 8, and had not considered the best interests of the minor Appellants. It was contended that the judge should have followed the approach set out by Blake J at paragraph 102 of R (on the application of MM) v SSHD [2013] EWHC 1900 (Admin).
9. Permission to appeal was granted by Judge of the First-tier Tribunal Maller in the following terms;
 - "1. The appellants are the mother and three children who are nationals of Pakistan. Their appeals against the decision of the respondent refusing their applications

for an entry clearance under Appendix FM of the Rules were dismissed by FTT Judge Balloch in a determination promulgated on 13th February 2014.

2. The judge dismissed their appeals under the financial requirements of the Rules and pursuant to Article 8 of the Human Rights Convention. The sponsor's gross income was £200 short of the required minimum level of earnings. The interference was found to be proportionate.
 3. The grounds assert that there was a near miss which should have been considered as being de minimis. Further, the judge did not follow the decision in **MM [2013] EWHC 1900 (Admin)** in the Article 8 assessment.
 4. Whilst it is not obvious whether the amount of £200 is de minimis, it is arguable that the failure to have regard to and apply the approach identified in **MM** amounts to an error of law.
 5. Permission is granted on both grounds."
10. Following the grant of permission the Respondent lodged a response pursuant to rule 24 of The Tribunal Procedure (Upper Tribunal) Rules 2008 contending in summary that the judge had not erred in law. It was contended that the judge was correct to find that post decision evidence relating to a bonus could not be taken into account, and not considering **MM** was not an error. The Respondent sought to rely upon **Gulshan [2013] UKUT 00640 (IAC)**. It was contended that the Immigration Rules could not be met, and there were no compelling circumstances that would give rise to an unjustifiably harsh outcome by refusing leave to the Appellants.
11. The Tribunal issued directions making provision for there to be a hearing before the Upper Tribunal to decide whether the First-tier Tribunal determination should be set aside.

The Appellants' Submissions

12. Mr Vokes relied upon his skeleton argument. In relation to the de minimis principle, the sponsor had given evidence that he would receive some bonus even if monthly targets were not met but the judge made no finding on this evidence and it was therefore open to question as to whether the sponsor's earnings were in fact below £27,200, but even if they were a sum of £200 was less than one percent of the sum required.
13. Mr Vokes pointed out that the judge had not considered **MM** which indicated that the figure of £13,400 was a more appropriate figure than the figure of £18,600. I was referred to paragraphs 43 - 45 of **Nasim and Others [2013] UKUT 610 (IAC)** which gave guidance on the de minimis principle, and confirmed that it was distinct from the near miss principle.
14. In relation to Article 8 the judge had failed to take into account the best interests of the three minor children. Mr Vokes also made the point that there were four separate appeals taken together, and that it would seem on the figures provided, that three out of the four Appellants should have succeeded. If the Appellants had had separate appeals, three out of four would have succeeded based upon the Sponsor's earnings. This should have been considered by the Judge. If **Gulshan** was to be

applied, Mr Vokes submitted that there were arguably good grounds for granting leave outside the rules and referred to Quila v SSHD [2011] UKSC 45, which gives guidance on family reunion. The question was whether the state could justify the exclusion of a spouse as necessary and proportionate in pursuit of a legitimate aim.

15. I was asked to conclude that the Appellants' representative before the First-tier Tribunal was wrong to present the Article 8 case to the judge on the basis that only the Sponsor's private life should be considered.

The Respondent's Submissions

16. Mr Smart relied upon the rule 24 response and pointed out that the refusal under the Immigration Rules was not based simply on a shortfall of £200, but was based upon the fact that specified documents had not been submitted. Those documents were mandatory, and a failure to submit them with the application meant that the appeal could not succeed under the rules. Therefore the judge had not erred in dismissing the appeals under the rules.
17. In relation to MM Mr Smart noted that the Sponsor was not a British citizen at the date of refusal, which was 29th November 2012, and in any event this case had not been argued before the judge.
18. In relation to Mr Vokes' point that three out of four Appellants should have succeeded based upon the Sponsor's earnings, Mr Smart questioned which three should have been successful, as the applications for entry clearance were made jointly, the Appellants are a family, and the appeals were heard jointly and together.
19. Mr Smart submitted that the judge had properly considered Article 8 and that the determination should stand.

The Appellants' Response

20. Mr Vokes contended that the judge should have considered that three out of four Appellants could have succeeded under the financial requirements, based upon the Sponsor's income. In relation to Article 8 MM was a leading authority, and should have been considered, and the fact that the Sponsor was found to fall short of the financial requirements by only £200 should have featured in the Article 8 consideration.
21. At the conclusion of oral submissions I reserved my decision.

My Conclusions and Reasons

22. I reject the submission that the judge erred by not considering the de minimis principle. This is not a case where that principle could have assisted the Appellants.
23. The appeals were not dismissed solely on the basis that the financial requirements were not met because the sponsor's annual income fell short by only £200. The

applications were refused because it had not been proved that the Sponsor's annual income was sufficient to meet the financial requirements, but also because the specified documents required by Appendix FM-SE had not been submitted with the application. The Respondent in refusing the applications stated;

"These documents are specified in Immigration Rules in Appendix FM-SE and must be provided. You have not submitted all of the required documentation to demonstrate your Sponsor's income is as claimed."

24. The judge set this out in paragraphs 8 and 15 of the determination. The judge considered the documents that should have been submitted, and those that were submitted in paragraphs 16 - 23, and concluded in paragraph 24;

"24. It is therefore the case that all the relevant information and documentation to demonstrate that the required level of earnings could be met was not provided at the relevant time and was not before the decision maker."

It has not been contended that either the Respondent or the judge was wrong to find that the specified documents had not been submitted.

25. I also reject the submission that the judge should have decided that three out of four Appellants could succeed based upon the financial requirements being satisfied. This is because the financial requirements were not satisfied as the specified documentation had not been submitted. Therefore it is not the case that three out of four of the Appellants could have succeeded if their cases had been heard separately on appeal. The judge did not err in law in dismissing the appeals under the Immigration Rules.
26. Article 8 was not raised as a Ground of Appeal before the First-tier Tribunal, nor was it raised in the skeleton argument placed before the First-tier Tribunal.
27. The Appellants were legally represented and the Grounds of Appeal and skeleton argument were prepared by their legal representative.
28. Nevertheless, the judge permitted Article 8 to be argued at the hearing, and considered Article 8 in paragraphs 28 - 33 of the determination. The Appellants' representative specifically conceded that Article 8 was not relied upon in relation to family life, but was only relied upon in relation to the Sponsor's private life in the United Kingdom.
29. Reference has been made to MM, which was considered in Gulshan, when it was found that the maintenance requirements of Appendix FM stand. The Upper Tribunal In Gulshan recorded at paragraph 24(b);

"24(b) after applying the requirements of the rules, only if there may arguably be good grounds for granting leave to remain outside them is it necessary for Article 8 purposes to go on to consider whether there are compelling

circumstances not sufficiently recognised under them: R (on the application of) Nagre v SSHD [2013] EWHC 720 (Admin);”

30. There was no material error in the judge not making a reference to MM. The judge was entitled to take into account that the appellants were legally represented, and entitled to accept a concession made by that legal representative, that family life was not relied upon. If family life was to be relied upon, the judge would have needed to consider the principles in Gulshan, and to have considered whether there were arguably good grounds for granting leave to remain outside the rules, and if it was decided that there were, the judge would have had to consider the best interests of the children as a primary consideration, even though the children are not in the United Kingdom. Those best interests could of course be outweighed by other considerations.
31. However in this case, as it was specifically conceded that family life was not relied upon, and the judge had found that the financial requirements of the Immigration Rules were not satisfied, the judge committed no material error of law in only considering the Sponsor’s private life, and in finding that the Appellants could not succeed under Article 8, and did not materially err in so finding.

Decision

The determination of the First-tier Tribunal does not disclose a material error of law.

I do not set aside the decision. The appeals are dismissed.

Anonymity

No order for anonymity was made by the First-tier Tribunal. However as three of the appellants are minors I consider it appropriate to make an anonymity order. The appellants are granted anonymity throughout these proceedings unless and until directed otherwise and no report of these proceedings shall directly or indirectly identify them or any members of their family. Failure to comply with this order could lead to contempt of court.

The anonymity order is made pursuant to rule 14 of The Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed

Date

Deputy Upper Tribunal Judge M A Hall

7th July 2014

**TO THE RESPONDENT
FEE AWARD**

The appeals are dismissed. There is no fee award.

Signed

Date

Deputy Upper Tribunal Judge M A Hall

7th July 2014