



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/24188/2012

THE IMMIGRATION ACTS

Heard at Bradford
On 29th November 2013

Determination Promulgated
On 9th January 2013
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Before

UPPER TRIBUNAL JUDGE D E TAYLOR

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MUHAMMAD AKHLAQ

Respondent

Representation:

For the Appellant: Mr Simghrajah, instructed by Clyde & Co LLP
For the Respondent: Mr Diwnycz, Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is the Secretary of State's appeal against the decision of Judge Seelhoff made following a hearing at Hatton Cross on 25th September 2013.

Background

2. The claimant is a national of Pakistan born on 12th November 1985. He is married to a British national. He applied for entry clearance but was refused on the grounds that he had not provided evidence to show that his Sponsor earned £18,600 and had

not provided the specified documents required under the Rules to establish that the income threshold had been met. Nor had he provided evidence that he had sat the mandatory English test.

3. It was conceded at the hearing that the claimant could not meet the requirements of the Rules. The Sponsor gave evidence and confirmed that as at the date of application she was earning about £12,000 a year and had savings of £3,340 in her own account. There was also a joint account with herself and her husband which held approximately £400. There was also evidence that the family would hand over a dowry of £30,000 from six relatives in the UK when the claimant arrived here. It was her evidence that she could not move to Pakistan because all her family are here.
4. The judge referred herself to the relevant case law, in particular MM and R (on the application of) v SSHD [2013] EWHC 720 (Admin) and the conclusion of Blake J that the combination of the new Rules:

“... amount together to a disproportionate interference with the rights of British citizen Sponsors and refugees to enjoy respect for family life. In terms of the Strasbourg approach they do not represent a fair balance between the competing interests and fall outside the margin of appreciation or discretionary area of judgment available in policymaking in this sphere of administration.”

5. Blake J accepted that the wider margin of appreciation was likely to be relevant to foreign Sponsors who are voluntary migrants but not British citizens or refugees.
6. He went on to identify five less intrusive measures which could be applied to such cases as follows:
 - “1. Reducing the minimum income required of the Sponsor alone to £13,500; or thereabouts;
 2. Permitting any savings over the £1,000 that may be spent on processing the application itself to be used to supplement the income figure;
 3. Permitting account to be taken of the earning capacity of the spouse after entry or the satisfactorily supported maintenance undertakings of third parties;
 4. Reducing to twelve months the period for which the pre-estimate of financial viability is assessed.”

7. The judge wrote as follows:

“In assessing the fifth stage of the Razgar test I consider the facts of this case. The Sponsor at the date of application earned approximately £12,000 which is now corroborated by bank statements, payslips and employer letters. She also had savings of roughly £3,800. If as envisaged in point 2 quoted above I disregard the first £1,000 and then assess the savings over a one year period (as

envisaged in 4) I have £12,000 income plus £2,800 towards the income threshold, which is envisaged in point 1 as £13,500. In this case I have a theoretical income of £14,800 against a required income of £13,500 and I consider that it is open to me to find that this is sufficient funds.

In addition to this there is potentially a significant sum available as a dowry, albeit I would attach more weight to it had it been paid over already. The Sponsor has free accommodation available from her family which would reduce her needs and those of the Appellant. I also attach weight to the misinformation on the Home Office website. It is significant that the Sponsor is a woman given that women on average earn less in the UK and is from Doncaster where earnings are lower than the UK average but also living costs are considerably lower than London.

I have considered the attempt at deception in seeking to have the old Rules applied to the case, but I note that the point was abandoned before me and while not excused I do not consider it appropriate to bear in mind the unfairness in discovering that Rules other than those which appeared on the Home Office website were to be applied to the application.

On the facts of this case I find that the refusal represents a disproportionate interference in the Article 8 rights of the Appellant and his British Sponsor and I therefore allow the appeal on the basis of those rights."

The Grounds of Application

8. The Secretary of State sought permission to appeal on the grounds that the Tribunal had used MM as a basis for creating a theoretical income for the Sponsor. In MM if Blake J had applied the proper principles to his assessment of proportionality he would have been compelled to the conclusion that the interference in the Article 8 rights of the applicants and their families caused by the material provisions of the new Rules was proportionate. As Mr Justice Blake correctly recognised the Rules pursue a legitimate aim and are rationally connected to that aim: they strike a balance between the interests of applicants and their families, and the wider interests of society as a whole. There was nothing arbitrary about the balance struck by the Secretary of State: it was the product of careful consideration, consultation and expert advice. It was therefore submitted that in relying upon MM in its proportionality assessment the Tribunal was relying upon an unsafe authority and its conclusions cannot stand. The Tribunal should not have applied the lower threshold limit established in that case. The Tribunal's conclusion does not reach a rational outcome since it is anticipating that the Appellant and Sponsor will, in the absence of any evidence shown to the contrary, be restricted to an annual income of £12,000 which is significantly below the level of the national immigration wage.
9. Permission to appeal was granted by Upper Tribunal Judge Martin on 30th October 2013.

Submissions

10. Mr Diwnycz relied on his grounds and said that the claimant could not meet the requirements of the Rules.
11. Mr Simghrajah submitted that MM was binding authority on the judge. He relied on the case of Mukarkar v SSHD [2006] EWCA Civ 1045 for the proposition that the mere fact that one Tribunal has reached a generous decision does not mean that there has been any error of law so as to justify an appeal. The judge had conducted a balancing exercise as she was required to do and had properly set out the relevant law and reached a decision on the basis of the facts which were open to her.

Findings and Conclusion

12. Insofar as the grounds are a complaint about the decision in MM they are not relevant to this appeal since MM was a binding authority for the First-tier Tribunal and remains good law unless and until it is overturned.
13. On the evidence before the judge the Sponsor earned approximately £12,000, a little below the figure of £13,500 suggested by Blake J. The judge then added £2,800 (the claimant's savings less £1,000) to give a theoretical income of £14,800 which was above the level set by Blake J.
14. When Blake J was considering the question of the use of savings to augment income he wrote as follows:

“130. When decision makers and judges assess pre-July 2012 applications for adequacy of maintenance, particularly where the maintenance limits rise because of dependent children, any shortfall in proven earnings can be met by evidence of capital resources. Thus supposing a person with a dependent spouse and children needed to show an income of £15,000 to meet the income support subsistence level test then applicable could only show part-time earnings of £12,500; such a person could make good the difference if at the time of the application there were cash assets of £6,250 available to support the couple for the full 30 month period before the next review. It was not necessary that savings of £16,000 first had to be shown before regard could be had to such savings. This approach will still apply to classes of people exempt from the new requirements.

131. If a similar approach had been permitted on the new £18,600 target, particularly if limited to the first 12 months before review, then if a claimant such as MM could demonstrate savings of £3,000 when added to his £15,600 income he could meet the threshold to permit his wife to come to the UK. ... I recognise that the Secretary of State's case is that she is looking for long-term economic viability of families after the spouse has acquired settlement five years after entry, but if so it seems to me that examination of the financial circumstances of the couple at the end of the five year period, when the earning capacities of both parties can be taken into account, is the time to make the assessment rather than to front-load

the substantial financial burdens on a self-sufficient but low-paid earner before the spouse is admitted.

132. Although the requirement of 30 month assessment preceded the July 2012 Rules, the inflexible continued use of such a period when the income and capital requirements have been so dramatically heightened, is not permissible when the potential consequences are so severe. ... A twelve month period as once was the case gives the family members a reasonable chance to settle themselves and absorb the expenses connected with the application itself.”
15. Accordingly since the Sponsor earned approximately £12,000 and, with her £2,800 savings which Blake J suggested ought to be permitted her financial resources were raised to the level suggested by Blake J in MM.
16. Moreover there were other factors to be taken into account. The judge made reference to a figure of £30,000 which had yet to be paid over but which she seems to have accepted was in the frame, although it was not the basis of her decision. She was also entitled to count it against the Secretary of State, in the proportionality exercise, that there was no indication on the UKBA website as at the date of the application that new and more stringent Rules would be applied to the case.
17. In conclusion, the Secretary of State’s challenge amounts to a challenge on the decision of MM which was binding authority on the judge and accordingly discloses no error of law.

Decision

The decision stands. The claimant’s appeal is allowed.

Signed

Date

Upper Tribunal Judge Taylor