



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/02048/2016

THE IMMIGRATION ACTS

Heard at Field House
On 7th November 2017

Decision & Reasons Promulgated
On 5th December 2017

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

MRS YAMUNA DEVI PRADHAN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J Dhanji, Counsel instructed by Malik & Malik, Solicitors
For the Respondent: Mr E Tufan, Home Office Presenting Officer

DECISION AND REASONS

The Appellant

1. The appellant appeals the decision of First-tier Tribunal promulgated on 10th April 2017 dismissing her appeal against the respondent's refusal dated 12th January 2016 of her human rights claim on the grounds of Article 8 (family and private life), having refused her further leave to remain in the United Kingdom as the spouse of a person present and settled here.
2. The appellant is a citizen of Nepal born on 8th April 1980 and she entered the United Kingdom on 27th April 2013 with entry clearance as a spouse valid from 26th March

2013 until 26th December 2015. Her application was considered under Appendix FM and paragraphs 276ADE of the Immigration Rules. The refusal of January 2017 reasoned that the appellant failed to meet Appendix FM-SE because she had not supplied an employer's letter or sufficient amount of wage slips or corresponding bank statements.

3. The Secretary of State was not satisfied that there were insurmountable obstacles in accordance with paragraph EX.2. of Appendix FM, such that there would be very significant difficulties which would be faced by the appellant or her spouse in continuing family life outside the UK in Nepal. There was no evidence that relocating to Nepal would cause serious hardship. The appellant had no dependent children and it was found there were no exceptional circumstances.
4. On the dismissal of the appeal by First-tier Tribunal Judge Bowler an application for permission to appeal to the Upper Tribunal was made on the following grounds
 - (i) it was submitted that there was a finding that the appellant and her husband were in a genuine, subsisting relationship and thus family life was engaged, and the question for the court was whether or not it was rationally justifiable as to whether the decision was proportionate in the light of all the circumstances. The appellant could not be expected to enjoy her Article 8 rights elsewhere and the judge failed to take into account all the relevant circumstances, including compelling and compassionate circumstances. To expect the appellant and his wife to return to Nepal would be unjustifiably harsh. **Beoku-Betts** was cited, such that the Article 8 rights of the family should be taken into account and the judge had failed to address the core values which Article 8 protected.
 - (ii) the reasoning of the First-tier Tribunal Judge was inadequate and insufficient in all the circumstances and the judge committed an error of law in finding that there were no compassionate or compelling circumstances.
 - (iii) the findings made by the judge were not open to him and the findings should be set aside.
5. Permission to appeal was initially refused by Designated Tribunal Judge McClure. He found that in making the application the appellant and sponsor had failed to submit relevant documentation under Appendix FM-SE and although further documentation had been submitted, the judge indicated there was still a lack of evidence in respect of the employer's letter and the lack of payslips. The appellant did not meet the requirements of the Rules. In that light the judge considered Article 8 and was satisfied there were no insurmountable obstacles and was fully justified in coming to his conclusions.
6. Upper Tribunal Judge Canavan found that the grounds of appeal were not particularised but that arguably the judge's finding at 27 required further consideration as to whether the decision struck a fair balance and finding that the

evidence that showed the appellant and her husband had a combined income of over £18,600 at the date of the hearing and it was at least arguable that the public policy consideration underpinning the Immigration Rules had been addressed and that the weight to be placed in the public interest was thereby diminished (see 99 MM (Lebanon) v The Secretary of State for the Home Department [2017] UKSC 10). It was argued that the Tribunal erred in failing to consider how the balancing exercise should be assessed in the light of recent case law.

The Hearing

7. At the hearing Mr Dhanji submitted that the First-tier Tribunal Judge had erred in the identification of the public interest and in the balancing exercise. It was clear, and Mr Dhanji accepted from paragraph 27 that the appellant could not meet the Immigration Rules with respect to Appendix FM-SE because not all the documents had been submitted, but the judge also identified that the Immigration Rules were only the starting point. It was held in MM (Lebanon) that where the Tribunal was satisfied that an appellant's level of income was above £18,600 that was a relevant factor and should be taken into account. I was referred to paragraphs 93 to 99 of MM (Lebanon).
8. The judge had addressed MM (Lebanon) but had considered it in relation to alternative financing, but that was not the only application of MM (Lebanon). Albeit that the appellants did not meet the requirements with respect to the specified evidence they did also satisfy a minimum income requirement.
9. Mr Tufan raised the case of SS (Congo) v SSHD [2015] EWCA Civ 317, which although had been overturned on its facts, the law, on this point, was not overturned. I was referred to paragraphs 82 and 89 in relation to the proportionality exercise. The Supreme Court promulgated MM (Lebanon) at the same time as Agyarko & Ors v SSHD [2017] UKSC 11 which concluded the relevant test when Article 8 was refused, was whether the refusal or removal would result in unjustifiably harsh consequences. It was open to the appellant to make a further application if she wished to do so within 28 days.
10. Mr Dhanji at this point submitted that in fact any new application had to be made within fourteen days and otherwise there needed to be exceptional circumstances. Mr Dhanji also accepted that MM (Lebanon) had not overturned SS (Congo) on the points discussed, but paragraph 99 of MM (Lebanon) was authority for the proposition that although the Rules may be restrictive it is open to the judge to take into account his finding in the balancing exercise and the judge had erred by distinguishing MM (Lebanon).

Conclusions

11. The grounds are interwoven but the judge clearly addressed the essence of Article 8. He was aware of the background and context of the appeal and that there was a genuine and subsisting relationship between the appellant and her husband. It was open to the judge to address the Immigration Rules as a basis for his subsequent findings on Article 8 and for which he addressed the relevant factors. As the judge

noted at paragraph 12 Appendix FM of the Immigration Rules sets out the eligibility requirements to remain as a spouse, and one of the bases to stay requires that the applicant provides specified evidence of a specified gross annual income of at least £18,600. Appendix FM-SE sets out the specified evidence that applicants need to provide to meet the requirements of the Rules, and paragraph A1 of Appendix FM-SE confirms that to meet the financial requirement the applicant must meet the level of financial requirement and the requirements specified as to the evidence required for each permitted source relied upon.

12. The judge considered whether the appellant had complied with the financial requirements of the Immigration Rules and identified that with regards the appellant she had three jobs and that the employer's letter for her first job was deficient and that no employers' letters had been provided for her two further part-time jobs. Further, for the second employment she had not provided the requisite six months of payslips. In relation to the third employment there were no payslips for the said employer, but payslips for another employer. Further, the appellant had provided bank statements for a year before the hearing but not for the six months before the application.
13. For the appellant's husband's income, the employer's letter did not state for how long his earnings had been paid or the type of employment. Once again, the appellant's husband's employment did not meet the required six month period for either the period before the application or the period prior to the hearing. The bank statements for the appellant's husband showed varying payments from his employer. It was the P60s alone for the tax year to 5th April 2016 that indicated the appellant's husband and the appellant earned in excess of £18,600, and at paragraph 27 the judge found ultimately:-

"27. Considering the evidence in the employer's letters and the P60's (sic) I find that the Appellant and her husband had a combined income in the year ending 5 April 2016 in excess of £18,600 and also have an ongoing income in excess of £18,600.

28. However, the Appellant has failed to satisfy the requirements of Appendix FM-SE. First, the requirements apply to the period prior to the date of application and the additional evidence provided for the hearing did not cover that period.

*29. **Even if I was to consider the period prior to the date of the hearing there is insufficient evidence regarding her and her husband's employment.** The £18,600 amount could be shown by providing the specified evidence regarding her husband's employment and one of her part time jobs. The evidence in relation to her Excel Cleaning job is substantially there, although the employer's letter is missing one confirmation. However, there are insufficient payslips for her husband's employment and his employer's letter omits one piece of information.*

30. The Appellant has had ample time to provide the correct documentation or to provide explanations why it is not available as the refusal letter made clear what information was missing. The Appellant did explain why she could not provide employer letters for two of her jobs, but there is no reason for the lack of payslips for her husband's work, or for the failure of the employment letters provided for

the Appellant and her husband to set out all the required information. These are matters (sic) about which her legal representatives should have been in a position to advise her."

14. Mr Dhanji was essentially reliant on the finding at [27] by the judge that the financial requirements had been met but that is not the whole of the judge's reasoning which needs to be read in context of the decision as a whole.
15. Whilst the judge finds initially that on the face of the evidence the income for the year ending 5th April 2016 showed a combined income in excess of £18,600, he also found this was not adequately evidenced even at the date of the hearing (as can be seen from the reference above at paragraph 29). At [30] the judge clearly has found that the appellant has had ample time to provide the correct documentation and there was no reason for the lack of payslips for her husband's work or for the failure of the employer's letter for the appellant and her husband to set out all the required information. It was open to the judge to accord what weight he did on the underpinning evidence.
16. In my view the judge had found that there had been, on the face of it, an income in excess of £18,600, but had not found that the appellant had indeed evidenced that income over the relevant period, either prior to the application or prior to the hearing. As such it was not reliable. **MM (Lebanon)** confirms that:-

"The issue is always whether the authorities have struck a fair balance between the individual and public interests and the factors identified by the Strasbourg court have to be taken into account, among them the 'significant weight' which has to be given to the interests of children."

17. The Supreme Court in **MM (Lebanon)** upheld the Immigration Rules finding that the Rules were not couched in a form which made non-compliance in individual cases practically inevitable, and in essence found that at paragraph 58:-

"58. Consistently with that approach, when dealing with the appeal in SS (Congo) (para 256), she accepts as 'uncontroversial' the appellant's submission that the requirements of rules 'do not absolve decision-makers from carrying out a full merits based fact-sensitive assessment outside the rules'.

...

65. *Secondly, it was wrong to interpret the House as indicating that individual decisions should be made entirely on a case-by-case basis, without regard to the Secretary of State's policy, or to the need for predictability and consistency. Paragraph 16 of the opinion is quite clear as to the importance of such factors:*

'There will, in almost any case, be certain general considerations to bear in mind: the general administrative desirability of applying known rules if a system of immigration control is to be workable, predictable, consistent and fair as between one applicant and another; the damage to good administration and effective control if a system is perceived by applicants internationally to be unduly porous, unpredictable or perfunctory ...'

As was said, the giving of weight to such factors is part of the ordinary judicial task of weighing up the competing considerations and 'according appropriate weight to the judgment of a person with responsibility for a given subject matter and access to special sources of knowledge and advice'."

18. As emphasised in **MM (Lebanon)**, and recognised in **Huang v SSHD [2007] UKHL 11**, "fairness and consistency are important considerations at both levels" but recognised that the courts may look at the wider circumstances:-

"The Secretary of State can give guidance to entry clearance officers and expect it to be followed, but has no such power to influence the decisions of tribunal judges in respect of the Convention. Frustrating though it may be for the Secretary of State, under the present legislation the task of promoting consistency at that level falls to the tribunals themselves." (Paragraph 71)

19. Nonetheless, the judgment continues at paragraph 75:-

"As Lord Reed has shown (Hesham Ali, paras 46f), although the tribunal must make its own judgment, it should attach 'considerable weight to judgments made by the Secretary of State in the exercise of her constitutional responsibility for immigration policy'."

20. It is clear that not everything in the Rules need be treated as high policy, or peculiarly within the province of the Secretary of State, and there is a difference between considerations which would apply to Rules reflecting the Secretary of State's assessment of levels of income required to avoid a burden on public resources and Rules and to the quality of evidence necessary to satisfy that test.
21. In this case the judge had found that the payslips had not been provided, even at the date of hearing. This was despite his finding in relation to the overall income presented in the P60s.
22. **MM (Lebanon)** found that the Rule may cause hardship but that did not mean that it was incompatible with Convention rights, and at paragraph 98 the Supreme Court confirmed that with regards to the minimum income requirements

"In our view, it was not irrational in the common law sense for the Secretary of State to give priority in the rules to simplicity of operation and ease of verification".

At paragraph 99, the Supreme Court considered that the restrictive approach outside the Rules was a different matter and much more difficult to justify under the Human Rights Act. Specifically at paragraph 99 it stated

"Certainly, nothing that is said in the instructions to case officers can prevent the tribunal on appeal from looking at the matter more broadly"

and further

“There is nothing to prevent the tribunal, in the context of the HRA appeal, from judging for itself the reliability of any alternative sources of finance in the light of the evidence before it”.

23. It is not, however, the case in this instance that the judge failed to consider the evidence as at the date of *hearing*, and indeed an important aspect of the factors to be taken into account in the Article 8 consideration, that is proof of the income, was not present before the judge and that is made clear by paragraph 30 of the judge’s decision which I have quoted above.

24. The judge at paragraph 51 makes clear that it was open to the respondent to indicate criteria by which reliability of such sources may be judged, and as he states, by allowing the appellant’s appeal outside the Rules it would, in effect, be simply applying a near miss approach. The judge’s reasoning at paragraphs 51 and 52 make clear that

‘there was nothing to prevent the tribunal, in the context of the human rights appeal, from judging for itself the reliability of any alternative sources of finance in the light of the evidence before it. However the case makes clear that it was open to the Respondent to indicate criteria by which reliability of such sources may be judged’.

It would appear that the judge is, in effect, adopting the criteria of the Secretary of State as to assessing reliability. That approach was open to the judge.

25. An overall reading of the decision demonstrates that the judge directed himself appropriately. He considered the obstacles both appellants would face on return (belying the suggestion that the husband’s rights were not considered) and found that it would be reasonable for the family to conduct their family life in Nepal if they chose not to make another application to stay in the United Kingdom. If anything the judge applied too lenient a test but that was to the appellant’s advantage and discloses no error of law. Reading Agyarko into MM (Lebanon) there are no unjustifiably harsh circumstances set out in the evidence and recorded by the judge, and as such he was entitled to take the decision he did.

26. As set out in SS Congo v SSHD [2015] EWCA Civ 317 at paragraph 89

“The FTT also erred in saying that it would not be proportionate to expect FA to make a further application. Since FA’s application failed to comply with the Immigration Rules and no compelling circumstances were identified why those Rules should not be applied in her case in the usual way, there was nothing disproportionate in applying the Rules in accordance with their terms, with the effect that FA’s application failed and she would have to make a new one. The Entry Clearance Officer (and the FTT) was not required to waive the operation of the Rules as some sort of goodwill gesture because of the way in which FA’s previous application had been dealt with.”

27. SS (Congo) was not overturned by MM (Lebanon) on this point and SS (Congo) confirmed that an alternative application could be made, which is precisely the reasoning the judge has adopted. As the judge states, finally, in paragraph 53 that it

was open to the appellant to apply again providing all the required evidence. As underlined in **MM (Lebanon)** it is open to the judge to take into account relevant factors, when undertaking the proportionality balancing exercising, not just those factors under the Immigration Rules.

28. The grounds of permission to appeal cited **Beoku-Betts v SSHD** [2008] UKHL 39 but the husband's interests were taken into account overall. It is relevant, and the judge was aware that there were no children. Nothing in the decision suggests that the judge failed to address the wider issues outside the Rules, having properly used them as a starting point, and as he is enjoined to do by the courts. That said it was open to the judge to place emphasis on the rules, the lawfulness of which has been upheld by the courts. Ultimately, the judge applied the correct test at paragraph 54, namely whether the decision taken by the respondent was necessary and proportionate. The judge addressed the relevant issues and gave cogent and full reasoning having directed himself appropriately on the law.

Notice of Decision

29. For the reasoning above, I find no error of law. The judge was entitled to take the approach that he did and the decision shall stand.
30. No anonymity direction is made.

Signed *Helen Rimmington*

Date 27th November 2017

Upper Tribunal Judge Rimmington