Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: OA/09358/2013**
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THE IMMIGRATION ACTS

Heard at Field House	**Determination promulgated**
On 6 May 2014	**On 11 August 2014**

Before

Deputy Judge of the Upper Tribunal I. A. Lewis

Between

(1) Paramjeet Kaur
(2) Sukhjinder Kaur
(3) Gurpreet Singh
(Anonymity directions not made)

Appellants

and

Entry Clearance Officer,
New Delhi

Respondent

Representation
For the Appellants: Mr. V. Makol of Maalik & Co.
For the Respondent: Mr. L. Tarlow, Home Office Presenting Officer.

DETERMINATION AND REASONS

1. These are linked appeals against the decisions of First-tier Tribunal Judge M A Khan promulgated on 3 February 2014, dismissing the Appellants' appeals against the Respondent's decisions dated 1 March 2013 to refuse entry clearances as the wife and children of Mr Bhajan Singh ('the sponsor'), a naturalised British citizen.

Background

2. The Appellants are nationals of India. Mrs Paramjeet Kaur was born on 20 August 1970 and is the sponsor's wife. Ms Sukhjinder Kaur was born on 22 October 1995 and is the daughter of the sponsor and the First Appellant. Master Gurpreet Singh was born on 18 November 1997 and is the son of the sponsor and the First Appellant. On 12 November 2012 applications for entry clearance were made as the wife and children of the sponsor. The applications were refused for reasons set out in respective Notices of Immigration Decision dated 1 March 2013: Mrs Kaur's application was refused with particular reference to paragraphs E-ECP.2.6 and 2.10 (genuine and subsisting relationship, intention to live together permanently in UK), E–ECP.3.1 (financial requirements), and paragraph E–ECP.4.1 (English language requirement) of Appendix FM of the Immigration Rules; the children's applications were refused essentially 'in-line' with their mother's application with reference to paragraphs E-ECC.1.6 and 2.1.

3. The Appellants appealed to the IAC. Their appeals were dismissed for reasons set out in the determination the First-tier Tribunal Judge, both under the Immigration Rules and on human rights grounds (with reference to Article 8 of the ECHR).

4. The Appellants sought permission to appeal which was granted by First-tier Tribunal Judge Osborne on 3 April 2014.

Error of Law

5. Mr Tarlow accepted on behalf of the Respondent that the Judge had erred both in his consideration of the appeal under the Rules and under Article 8.

6. In respect of the Rules it was common ground between the representatives that the Judge's conclusion at paragraph 23 of the determination that the marital relationship between the sponsor and the First Appellant was subsisting and genuine, was not reconcilable with the conclusion stated at paragraph 26 that the First Appellant did not meet the requirements of paragraph E-ECP.2.6. However, equally, it was common ground between the representatives that this error was immaterial because the appeal under the Rules had been expressly conceded on behalf of the Appellants before the First-tier Tribunal : see paragraph 6. Indeed, Mr Makol confirmed to me that the Appellants

could not succeed under the Rules because the sponsor's income level was insufficient, the documents submitted in support of the application were deficient, and the First Appellant had not satisfied the requirements of the Rules relating to proficiency in the English language.

7. In respect of Article 8, whilst Mr Tarlow maintained that the Respondent supported the Judge's conclusion, he accepted that the Judge's approach and reasoning were inadequate to an extent that required the decision to be set aside and re-made. In light of this concession, which in my judgement was properly made, I do not propose to descend to any great detail. Suffice to say that it is only necessary to read the single paragraph, paragraph 27, in which the Judge addressed Article 8 to comprehend the perfunctory nature of the analysis which does not refer to, or follow, any of the relevant guidance from case law (for example **Razgar**), and did not address the particular submissions made to the Judge in reliance upon the then applicable judgement in **MM v Secretary of State for the Home Department [2013] EWHC 1900 (Admin)**.

8. In the circumstances I find that there were material errors of law on the part of the First-tier Tribunal in respect of both the consideration under the Rules and the ECHR. The determination must be set aside and is required to be re-made.

Remaking the decision

9. Directions were issued to the parties that they should prepare for the hearing before the Upper Tribunal on the basis that if the determination of the First-tier Tribunal was to be set aside any further evidence, including supplementary oral evidence, may need to be considered at the same hearing. Mr Makol, however, raised the issue of **MM** being outstanding before the Court of Appeal. I was not persuaded that this was a sound basis upon which to adjourn: there was some issue as to whether the Appellants could succeed pursuant to the High Court judgement in **MM** in any event and it was generally agreed that the outcome in the Court of Appeal was unlikely to be more favourable to applicants than held by the High Court. In all of the circumstances, I was satisfied that it was appropriate to proceed to remake the decision in the Upper Tribunal on the available evidence.

10. For the reasons already identified above, it is accepted on their behalf that the Appellants did not meet the financial requirements of the Rules at the date of the Respondent's decision, and moreover that the First Appellant did not satisfy the English language requirement.

11. For the avoidance of any doubt, Mr Tarlow did not seek to go behind the First-tier Tribunal Judge's finding in respect of the genuineness of the marital relationship. However, even where paragraphs E-ECP.2.6 and 2.10 were satisfied in respect of the First Appellant, in all of the circumstances I find that the decisions of the Respondent were otherwise in accordance with the Immigration Rules, and the appeals of each of the Appellants under the Rules are accordingly dismissed.

12. I turn to a consideration of the Appellants' cases by reference to Article 8.

13. I take as a starting point that the Immigration Rules are drafted with the intent of striking a proportionate balance between the family and private life of applicants and sponsors and the protection of the public interest by maintaining effective immigration control.

14. I have had regard to the extensive jurisprudence that has developed in this area, and approach this case by reference to the guidance in **Razgar**, and also with regard in particular to the more recent considerations of the applicable principles subsequent to the amendments to the Immigration Rules that introduced Appendix FM as a reflection of the Secretary of State for the Home Department's views as to the balance to be struck between the right to respect for private and family life and the legitimate aim to protecting national security, public safety and the economic well-being of the UK, the prevention of disorder or crime, the protection of health and morals, and the protection of the rights and freedoms of others (see Appendix FM at GEN.1.1). Recent case law has been helpfully considered and analysed in **Gulshan (Article 8 – new rules – correct approach) [2013] UKUT 00640 (IAC)**, and I note in particular the summary of that distillation at paragraph 24.

15. Mr Makol, on behalf of the Appellants placed particular reliance upon the various observations of the High Court in MM in respect of the requirements of Appendix FM in relation to finances.

16. However, the difficulty the Appellants encounter with this approach is that the sponsor's income and expenditure figures as presented in the statements and supporting evidence are not readily reconcilable.

17. I note the following matters:

(i) In the visa application form it is said that the sponsor's income is £1700 per month – which equates to an annual figure (x 12) of £20,400. However, an annual income figure, both for the last 12 months and for the last financial year, is given as £22,000.

(ii) In his witness statement signed on 8 January 2014 the sponsor declared that he earned approximately £22,000 in the last financial year, and that in the last two years he had earned a total of £42,000 (paragraph 12).

(iii) In his sponsorship declaration signed on 11 July 2012, the sponsor stated that he lived in a three bedroom property, adding "*I pay £950.00 per calendar month as rental*". He also stated that he earned approximately £300 per week, and sent £6500 per annum to the Appellants in India. £300 per week is equivalent to £1300 per month, not £1700 as declared in the visa application form. Even so, on the assumption that the figures provided in the sponsorship declaration are accurate, and on the assumption that the £300 per week figure is after-tax, the sponsor would be left with £3200 per annum after paying his rent – which is not reconcilable with the concept of sending £6500 per year to India to support his family.

(iv) The sponsor's claimed income is not reflected in the business accounts prepared by his accountant and submitted with the application.

(v) Although a 'sales' figure of £14,334 is given for the 6 month period from 1 October 2011 to 31 March 2012, the profit from these sales is given as £6895. It is this figure of £6895 that was declared to the H M Revenue and Customs in the sponsors 2011/2012 tax return. This equates to a weekly income of about £265 – i.e. less than that claimed in his sponsorship declaration.

(vi) Further, this profit projected forward would give an annual income of £13,790. The basic 'target' figure extrapolated from the High Court judgement in **MM** is £13,500: but that is for an applicant seeking to be joined only by a spouse or partner, and so would require to be adjusted in light of two children being included in the application. Under the

Rules this leads to an increase from £18,600 to £24,800 (i.e. 2 x 1/6); applying the same ratio to the **MM** figure of £13,500 would produce a target figure of £18,000. The sponsor's own figures fall short of such a 'target'.

(vii) A further set of accounts were prepared in support of the appeal, dated 20 July 2013, and for the tax year ended 5 April 2013. This set shows a gross income of £21,934, but a profit of only £9113 - which equates to approximately £175 per week, and is not even enough to cover the rent on the property it is proposed that the Appellants reside in with the sponsor.

(viii) It is manifest from the above that the sponsor has repeatedly based his claimed income figure on the turnover of his business, rather than his actual personal income derived from self-employment. Such an approach is in error, and has resulted in a fundamental misconception in the presentation of the Appellants' applications and appeals.

(ix) Moreover, the sponsor's actual declared derived income - (declared by way of his accounts and to the Revenue) – is not readily reconcilable with his claimed expenditures on rent and remittances to India.

18. In light of the above, Mr Makol informed me, having taken instructions, that the sponsor currently shared the accommodation with two others, and so he only actually paid £300 towards the monthly rent of £950. That may be so (although there is no supporting evidence on point): however, it makes no difference to the fact that the sponsor's declared income level is substantially below that mooted as a reasonable level by the High Court in **MM**. Nor does it appropriately anticipate the situation upon the arrival of the Appellants: in this context, the adequacy of the accommodation has been advanced on the basis that it would be exclusively occupied by the sponsor and the Appellants and nowhere is there any suggestion that other persons might be residing with them. As things stand, and for the reasons already given, the sponsor's income at the date of the Respondent's decision would not have been sufficient to cover the cost of rent, even before meeting any other expenses.

19. In the alternative, Mr Makol directed my attention to the sponsor's savings. However, it is to be noted, even allowing for an adjusted rent figure of £300 per month (£3600 per annum). This is not readily reconcilable with the notion of being able to send £6500 per annum to the Appellants in India, on an income of £9113. Necessarily it becomes

unclear how the sponsor has been able to accrue any savings at all through his self-employment in the UK.

20. In all the circumstances, I am not satisfied that the sponsor has made a full and frank disclosure of his income and expenditure. I find his figures to be unreliable. In any event, his declared income is substantially below that even mooted in **MM** as a reasonable amount for a British citizen to demonstrate in order to be joined by a spouse.

21. I accept that the fact of marriage evidences family life as between the First Appellant and sponsor, and in turn between the minor Appellants and their father. Necessarily the quality of that family life has been substantially diminished by the sponsor's election to remain in the UK without any proper status until such time as he was successful in securing leave through the 'legacy' process. Nonetheless, I accept that the Respondent's decisions prevent the resumption of a closer family life in the UK. Accordingly I accept that the first and second **Razgar** questions are to be answered in the Appellants' favour.

22. There is no issue between the parties in respect of the third and fourth **Razgar** questions.

23. In respect of the fifth **Razgar** question, proportionality, the Appellants place reliance upon the approach in **MM**. For the reasons given above, I find that the High Court decision in **MM** does not avail the Appellants. Moreover, nothing else is advanced on their behalves, and I can identify no basis for concluding that there were, or are, any compelling circumstances, such that an exception should be made for the Appellants notwithstanding that they did not meet the express requirements of the Rules at the date of the Respondent's decisions.

24. In all such circumstances, and on the premise that the Respondent's decisions constituted an interference in the mutual family life of the Appellants and the sponsor, I conclude that the Respondent's decisions were proportionate to the public interest in maintaining effective immigration control.

25. Accordingly, the appeals are dismissed on human rights grounds.

26. I am otherwise unable to identify any basis for concluding that the Respondent's decisions were not in accordance with the law.

27. For the avoidance of any doubt, I note that I have determined this appeal by reference to the High Court decision in **MM**, which was applicable at the date of hearing, and reflects the submissions made by the parties. Of course, since then the High Court decision in **MM** has been overturned by the Court of Appeal in such a manner as runs contrary to the Appellants' reliance upon it. Whilst not material for the purposes of this determination, necessarily the decision of the Court of Appeal undermines the Appellants' attempt to rely upon Article 8 by arguing that the income level requirements under the Rules are disproportionate.

Decisions

28. The decisions of the First-tier Tribunal Judge contained errors of law and are set aside. I remake the decisions in the appeals.

29. Appeal OA/09358/2013 is dismissed.

30. Appeal OA/09359/2013 is dismissed.

31. Appeal OA/09356/2013 is dismissed.

Deputy Judge of the Upper Tribunal I. A. Lewis 8 August 2014