



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/11933/2013

THE IMMIGRATION ACTS

Heard at Bennett House, Stoke
On 24th September 2014

Determination Promulgated
On 20th October 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE GARRATT

Between

SUNISA WHELLIGAN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms S Lee, Solicitor of Salam & Co
For the Respondent: Ms C Johnstone, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. On 23rd June 2014 Designated Judge of the First-tier Tribunal Zucker gave permission to the appellant to appeal against the determination of Judge of the First-tier Tribunal Devlin who dismissed the appeal on immigration and human rights grounds against the decision of the respondent on 16th May 2013 to refuse entry

clearance as a partner under the provisions of Appendix FM and FM-SE of the Immigration Rules.

2. In granting permission Designated Judge Zucker noted that, in essence, the grounds argued that the judge clearly disagreed with the decision of Blake J in *R (MM) v SSHD* [2013] EWHC 1900 and allowed his views of that judgment to unfairly effect his determination of the issues he had to resolve. Although Designated Judge Zucker noted that Judge Devlin indicated (paragraph 102) that, despite his views, he would follow the reasoning of Blake J it was arguable that the judge had failed to give sufficient weight to the factors identified in the judgment which, unless and until reversed on appeal, would arguably to have been given.
3. At the time this matter came before me the judgment of Blake J had been overturned by the decision of the Court of Appeal in *MM and Others, R (On the application of) v SHHD* [2014] EWCA Civ 985. In summary the Court of Appeal held that the new maintenance requirements of the Immigration Rules which the judgment of Blake J had sought to ameliorate were created in accordance with the law and were not inherently disproportionate or unfair. It was not the Court's job to impose its own views of the new minimum income requirements created in accordance with the law and it was not correct to conclude that those income requirements were, in principle, incapable of being compatible with Article 8 rights of UK partners.
4. At paragraph 129 of their judgement the Court of Appeal also made reference to the conclusions of the High Court in *R (On the application of) Nagre* [2013] EWHC 720 (Admin) by concluding that there was not much utility in imposing a further, intermediary, test before considering a further Article 8 claim where the particular requirements of the Rules could not be fulfilled. This conclusion undermined the decision of the Upper Tribunal in *Gulshan (Article 8 – new Rules – correct approach)* [2013] UKUT 00640 (IAC).
5. Before me, Ms Lee argued (with reference to her skeleton argument) that, despite the decision in *MM* which she agreed was broadly in line with Judge Devlin's views of the decision of Blake J, the determination did not show that the judge had given sufficient weight to the factors relevant to the Article 8 balancing act. This was even though she conceded that the sponsor could not show that he had the requisite £18,600 annual income required for a couple under the Rules.
6. Ms Johnstone argued that the Court of Appeal had endorsed the application of the £18,600 maintenance minimum requirement and, in that respect, the Rules were a complete code. She also pointed out that, as the decision had to be made on the circumstances appertaining at the time of the respondent's decision on 16th May 2013, the prospective future earnings and savings claimed by the sponsor could not be taken into consideration.

Conclusions

7. The First-tier Judge's determination is comprehensive. He correctly (at the time) referred to the decision of Blake J in *MM* and also *Gulshan* setting out his own views for disagreeing with the conclusions of Blake J which he nevertheless treated with the highest of respect. However, the judge stated in paragraph 60 that he would, nevertheless, follow the guidance contained in both Blake J's judgment and *Gulshan*

as he was required to do. The issues for me to consider are, therefore, whether the judge's approach, now, gives rise to a material error on a point of law and whether his subsequent consideration of human rights issues outside the Immigration Rules also indicates such an error.

8. If the judgment of Blake J had been supported by the Court of Appeal in *MM* then there might have been strong merit in the grounds of application on the basis that Judge Devlin had expressed disagreement with guidance which he was bound to apply. But any such concerns are effectively neutralised by the Court of Appeal's decision in *MM* which requires that the minimum financial limit set out in paragraph E-LTRP.3.1 of Appendix FM to the Immigration Rules is to be met. It is also evident, from paragraph 61 of the determination, that representatives had conceded that the appellant could not meet the financial requirements set out in the Rules. Thus, the judge was not wrong to dismiss the appeal on immigration grounds.
9. The judge then found (paragraph 65) that, if it were not for the judgment of Blake J and the determination of the Upper Tribunal *Gulshan*, he would have found that the appellant had failed to establish a good arguable case for consideration of Article 8 issues outside the Rules. Although that approach is now wrong having regard to the decision of the Court of Appeal in *MM*, the judge's actual consideration of Article 8 outside the Immigration Rules is in line with the decision of the Court of Appeal. Thus, the judge's approach to Article 8 issues is not, I conclude, wrong in a material respect.
10. However, in considering Article 8 issues, the judge reverted to consideration to the judgment of Blake J (paragraph 76 onwards). Nevertheless, for the cogently reasoned arguments put forward from paragraph 76 to paragraph 102 of the determination, the judge reached the conclusion, then open to him, that the application of £18,600 requirement in Appendix FM to the appellant was not disproportionate despite the guidance of Blake J. In summary the judge identified a shortfall of £3,145.66 in the sponsor's gross income in the twelve months prior to the date of application which, for the reasons given, he was entitled to conclude was not made up by the prospect of future earnings (which could not in any event be taken into consideration) or savings. The total figure still came below the £18,600 minimum in the Rules. Although such a second analysis of the parties' ability to meet the minimum amount required under the Rules is now unnecessary that does not mean that the judge's decision was materially wrong. His analysis made it doubly clear that the parties could not meet the minimum income requirements.
11. However, the judge did not leave his analysis of Article 8 issues at that point. From paragraph 107 onwards he considered other factors relating to the circumstances of the parties, particularly those of the sponsor, before reaching the conclusion that the respondent's decision was not disproportionate. These are the factors which, according to the grounds of application, the judge failed to give sufficient weight to. However, the determination makes it clear that the judge did not gloss over the sponsor's age, nationality or state of health and gave consideration to whether or not it would be reasonable to expect the sponsor to move to Thailand to maintain his family life. The judge carefully balanced the relevant factors against the public interest in legitimate immigration control noting that the sponsor had decided to marry the appellant at a time when he knew he could not meet the financial requirements of

Appendix FM and could have no legitimate expectation that his wife would be admitted to UK.

12. In all the circumstances I have reached the conclusion that, despite the change in approach to an Article 8 claim required following the Court of Appeal decision in *MM*, the determination does not show that the judge made a material error on a point of law. It can be said that he reached a conclusion about proportionality under Article 8 which would have been the same even if he had been aware of the change of approach to consideration of such issues.

DECISION

The making of the decision of the First-tier Tribunal did not involve the making of a material error on a point of law and shall stand.

Anonymity

The First-tier Tribunal did not make an anonymity order nor do I consider that it is appropriate to make one in the Upper Tribunal bearing in mind the circumstances of this appeal and the fact that no such order was requested by representatives.

Signed

Date

Deputy Upper Tribunal Judge Garratt