



IAC-FH-CK-V1

**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/33383/2014

THE IMMIGRATION ACTS

Heard at Field House
On 9th June 2015

Decision & Reasons Promulgated
On 28th July 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE RIMINGTON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MR UMAIR UL HAQ
(NO ANONYMITY DIRECTION)**

Respondent

Representation:

For the Appellant: Mr Jarvis, Home Office Presenting Officer

For the Respondent: No Appearance

DECISION AND REASONS

The Appellant

1. The application for permission to appeal was made by the Secretary of State but for the purposes of this decision I shall refer to the parties as they were described before the First Tier Tribunal, in particular Mr Haq as the appellant.

2. The appellant is a citizen of Pakistan born on 19th October 1985 and he appealed against the refusal of his application dated 12th February 2014 for leave to remain as the spouse of Rabbiya Seher Rehman.
3. The Secretary of State considered refused the application on 7th August 2014 under Appendix FM, in particular R-LTRP.1.1.:

“Section R-LTRP: Requirements for limited leave to remain as a partner

R-LTRP.1.1. The requirements to be met for limited leave to remain as a partner are -

- (a) the applicant and their partner must be in the UK;
 - (b) the applicant must have made a valid application for limited or indefinite leave to remain as a partner; and either
 - (c)
 - (i) the applicant must not fall for refusal under Section S-LTR: Suitability leave to remain; and
 - (ii) the applicant meets all of the requirements of Section E-LTRP: Eligibility for leave to remain as a partner; or
 - (d)
 - (i) the applicant must not fall for refusal under Section S-LTR: Suitability leave to remain; and
 - (ii) the applicant meets the requirements of paragraphs E-LTRP.1.2-1.12. and E- LTRP.2.1.; and
 - (iii) paragraph EX.1. applies.”
4. The appellant was notified that his application was refused solely because he did not meet the income threshold requirements under Appendix FM. His application had been previously placed on hold pending the pronouncement of **R (MM & Others) v SSHD [2014]** EWCA Civ 985, that is the legal challenge to the income threshold requirement. It was considered that his application for leave to remain was refused because he did not meet the income threshold requirement under Appendix FM and the related evidential requirements under Appendix FM-SE. That income requirement was £18,600 per annum.
 5. The appellant had failed to provide the specified documentation to evidence that he and his spouse had an annual income of £18,600 prior to the date of the application and he had failed to provide evidence that his spouse had an annual income of £13,924 from self-employment.
 6. EX.1. was also considered:

“EX.1. This paragraph applies if

 - (a) (i) the applicant has a genuine and subsisting parental relationship with a child who -

- (aa) is under the age of 18 years, or was under the age of 18 years when the applicant was first granted leave on the basis that this paragraph applied;
 - (bb) is in the UK;
 - (cc) is a British Citizen or has lived in the UK continuously for at least the 7 years immediately preceding the date of application; and
- (ii) it would not be reasonable to expect the child to leave the UK; or
- (b) the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen, settled in the UK or in the UK with refugee leave or humanitarian protection, and there are insurmountable obstacles to family life with that partner continuing outside the UK.”

7. EX.2. - for the purposes of paragraph EX.1.(b) “insurmountable obstacles” meant very significant difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship. He had failed to provide documentary evidence to demonstrate that he was the parent of a child and therefore his application failed under EX.1.(a) and he had not demonstrated why his relationship could not continue in the country of origin and therefore he failed under EX.1.(b).
8. Again there were no exceptional circumstances to consider the matter outside the Immigration Rules.
9. The appeal came before Tribunal Judge Walker, who allowed the appeal under the Immigration Rules. He identified that the respondent did not specify how the appellant had failed to meet the evidential requirements.

Application for Permission to Appeal

10. The respondent made an application for permission to appeal on the basis that the Rules of specified evidence are comprehensively set out in Appendix FM-SE. These set out the types of evidence required, the periods covered and the format they should be in. At paragraph 31 of the decision the Tribunal ignored this. For Appendix FM the significant date is the date of the application and the significant evidence is from the specified period before that date. The Tribunal had not addressed the relevant evidence from prior to 12th February 2014. It was not clear what the sponsor’s actual gross income was at the date of the application. It also followed that the appeal could not therefore be made out. If the sponsor’s current income did exceed the income threshold there was no reason to prevent the appellant making a fresh application based on the sponsor’s income at this time along with the requisite specified evidence.

11. The application for permission to appeal was initially refused by First-tier Tribunal Judge Lever but on renewal of the application to the Upper Tribunal granted by Upper Tribunal Judge Coker, who stated it appeared the First-tier Tribunal Judge was confused as to whether it was an entry clearance appeal or an in country appeal.

The Hearing

12. The appellant did not attend the hearing despite having been forwarded a notice of the hearing on 8th May 2015 to his last home address. I am satisfied that the appellant received the date, time and venue of the hearing on the basis that he submitted a written skeleton argument received at Field House on 28th May 2015.
13. Mr Jarvis made submissions on the basis that the demands of the Rules under FM-SE were definite and in particular the requirements in relation to employment were based on a timeline, that is the appellant had to show evidence six or twelve months prior to the date of the application which in this case was 12th February 2014. The judge had found that the cumulative total in week 52 for employment in 2013 to 2014 was £3,522.59 but the judge had not set out the evidential requirements for Appendix FM-SE.
14. There were further numerous layers of evidential requirements in relation to self-employment and the judge had set out those requirements at paragraph 11 of his determination but the findings of the judge did not address all of the requisite elements of the self-employment evidential requirements.
15. The appellant could not comply with the evidential requirements.
16. Mr Jarvis also submitted that there were no compelling reasons for the matter to be considered outside the Immigration Rules and referred me to **SS (Congo)** which confirms that the requirements of FM-SE were justifiable. The fact that his wife was now pregnant was not relevant. The failure to meet the Rules was significant.

Conclusions

17. Under paragraph E-LTRP.3.1. the applicant must provide specified evidence, from the sources listed in paragraph E-LTRP.3.2., of -
 - (a) a specified gross annual income of at least -
 - (i) £18,600.
18. Appendix FM-SE sets out the specified evidence to meet the financial requirements for both employment and self-employment, under Appendix FM.
 - 'D. (a) In deciding an application in relation to which this Appendix states that specified documents must be provided, the Entry Clearance Officer or Secretary of State ("the decision-maker") will consider documents that have been submitted with the application, and will only consider documents submitted after the application where sub-paragraph (b) or (e) applies.
 - (b) If the applicant:

- (i) has submitted:
 - (aa) a sequence of documents and some of the documents in the sequence have been omitted (e.g. if one bank statement from a series is missing);
 - (bb) a document in the wrong format (for example, if a letter is not on letterhead paper as specified); or
 - (cc) a document that is a copy and not an original document; or
 - (dd) a document which does not contain all of the specified information; or

(ii) has not submitted a specified document, the decision-maker **may contact** the applicant or his representative in writing or otherwise, and request the document(s) or the correct version(s). The material requested must be received at the address specified in the request within a reasonable timescale specified in the request.

(c) The decision-maker will not request documents where he or she does not anticipate that addressing the error or omission referred to in sub-paragraph (b) will lead to a grant because the application will be refused for other reasons.

(d) If the applicant has submitted:

- (i) a document in the wrong format; or
- (ii) a document that is a copy and not an original document, or
- (iii) a document that does not contain all of the specified information, but the missing information is verifiable from:
 - (1) other documents submitted with the application,
 - (2) the website of the organisation which issued the document, or
 - (3) the website of the appropriate regulatory body,

the application may be granted exceptionally, providing the decision-maker is satisfied that the document(s) is genuine and that the applicant meets the requirement to which the document relates. The decision-maker reserves the right to request the specified original document(s) in the correct format in all cases where sub-paragraph (b) applies, and to refuse applications if this material is not provided as set out in sub-paragraph (b).

(e) Where the decision-maker is satisfied that there is a valid reason why a specified document(s) cannot be supplied, e.g. because it is not issued in a particular country or has been permanently lost, he or she may exercise discretion not to apply the requirement for the document(s) or to request alternative or additional information or document(s) be submitted by the applicant.

(f) Before making a decision under Appendix FM or this Appendix, the decision-maker may contact the applicant or their representative in writing or otherwise to request further information or documents. The material requested must be received at the address specified in the request within a reasonable timescale specified in the request.

In addition at

“2. In respect of salaried employment in the UK (except where paragraph 9 applies), all of the following evidence must be provided:

- (a) Payslips covering:
 - (i) a period of 6 months prior to the date of application if the person has been employed by their current employer for at least 6 months (and where paragraph 13(b) of this Appendix does not apply); or
 - (ii) any period of salaried employment in the period of 12 months prior to the date of application if the person has been employed by their current employer for less than 6 months (or at least 6 months but the person does not rely on paragraph 13(a) of this Appendix), or in the financial year(s) relied upon by a self-employed person.
- (b) A letter from the employer(s) who issued the payslips at paragraph 2(a) confirming:
 - (i) the person's employment and gross annual salary;
 - (ii) the length of their employment;
 - (iii) the period over which they have been or were paid the level of salary relied upon in the application; and
 - (iv) the type of employment (permanent, fixed-term contract or agency).
- (c) Personal bank statements corresponding to the same period(s) as the payslips at paragraph 2(a), showing that the salary has been paid into an account in the name of the person or in the name of the person and their partner jointly.
- (d) Where the person is a director of a limited company based in the UK, evidence that the company is not of a type specified in paragraph 9(a). This can include the latest Annual Return filed at Companies House.

....

7. In respect of self-employment in the UK as a partner, as a sole trader or in a franchise all of the following must be provided:

- (a) Evidence of the amount of tax payable, paid and unpaid **for the last full financial year.**
- (b) The following documents for the last full financial year, or for the last two such years (where those documents show the necessary level of gross income as an average of those two years):

- (i) annual self-assessment tax return to HMRC (a copy or print-out); and
- (ii) Statement of Account (SA300 or SA302).
- (c) Proof of registration with HMRC as self-employed if available.
- (d) Each partner's Unique Tax Reference Number (UTR) and/or the UTR of the partnership or business.
- (e) Where the person holds or held a separate business bank account(s), bank statements for the same 12-month period as the tax return(s).
- (f) personal bank statements for the same 12-month period as the tax return(s) showing that the income from self-employment has been paid into an account in the name of the person or in the name of the person and their partner jointly.
- (g) Evidence of ongoing self-employment through evidence of payment of Class 2 National Insurance contributions, or (where the person has reached state pension age) through alternative evidence (which may include, but is not confined to, evidence of ongoing payment of business rates, business-related insurance premiums, employer National Insurance contributions or franchise payments to the parent company).
- (h) One of the following documents must also be submitted:
 - (i) (aa) if the business is required to produce annual audited accounts, such accounts for the last full financial year; or
 - (bb) if the business is not required to produce annual audited accounts, unaudited accounts for the last full financial year and an accountant's certificate of confirmation, from an accountant who is a member of a UK Recognised Supervisory Body (as defined in the Companies Act 2006);
 - (ii) a certificate of VAT registration and the VAT return for the last full financial year (a copy or print-out) confirming the VAT registration number, if turnover is in excess of £79,000 or was in excess of the threshold which applied during the last full financial year;
 - (iii) evidence to show appropriate planning permission or local planning authority consent is held to operate the type/class of business at the trading address (where this is a local authority requirement); or
 - (iv) a franchise agreement signed by both parties.
- (i) The document referred to in paragraph 7(h)(iv) must be provided if the organisation is a franchise."

19. The requirements are extensive. Although the judge set out the requirements for self-employment there was no reference to the requirements in respect of salaried employment, although the judge took this figure into account. As can be seen from

above a specific requirement under 2(b) a letter is required from the employer who issued the payslips at paragraph 2(a) confirming:

- (i) the person's employment and gross annual salary;
- (ii) the length of their employment;
- (iii) the period over which they have been or were paid the level of salary relied upon in the application; and
- (iv) the type of employment (permanent, fixed-term contract or agency).

20. There was no indication that the judge had addressed this issue.
21. With respect to the payslips for the appellant's name referred to at paragraph 24 of the judge's decision he stated as follows:

"Copy payslips in the appellant's name for weeks 31, 32, 33, 34, 35, 38, 39, 40, 41, 42, 43, 44 have been filed. Who issued these or in what year are not ascertainable because of the poor quality of the photocopies. There part of a reference to JD Sports Fashion PLC in week 41 but it is still not sufficiently clear to know that they issued that payslip. The cumulative total appearing in week 44 was £2,516.13."

22. The judge then went on to record that the total shown by the appellant's P60 for the tax year ending **2014** was gross £3,522.59 [25].

23. The judge stated at [27] of the decision that

"... an extract of the appellant's tax return for 2013-2014 has been filed and shows payments from self-employment of £15,614 and from employment of £3,522" (totalling £19,136).

24. In his findings with respect to the self-employment, the judge referred to the requirements but did not apply them for the relevant period. For the purposes of the Rules the date on which an application or claim is made is the date on which the application form is sent by post, the date of posting, or, where the form is submitted in person the date on which it is accepted by the Home Office, or, where made by courier the date on which it is delivered to the Home Office, or, where the application is made via the online application process on the date on which the online application is submitted. (Rule 34 of the Immigration Rules).

25. At [28] the judge recorded that a letter dated 7th February 2014 from Azed & Co certified public accountants stated that the appellant had filed a tax return for the year ended 5th April 2013. Further the appellant had a taxable profit of £13,924 for period 1st April 2013 to 1st January 2014. A further letter from Azed & Co dated 24th April 2014 showed for the year period to 31st March 2014 the self employed profit was £15,614. A letter from the appellant dated 5th May 2014 included the letter dated 24th April from Azed & Co together with tax documentation and certificate which showed the income from both self employment and employment of £19,136, to demonstrate compliance with the rules.

26. The judge found at [31]:

“In order to meet the evidential requirements of Appendix FM-SE the appellant must meet the requirements of para 7 set out above. The amount of tax payable for the last financial year is included in the tax return and his National Insurance number is contained in the tax return as well as in his payslips. His Unique Tax Reference Number is also contained in the return. He has filed 12 months of bank statements and the total of the payments into the account for the year is £67,427.65 which of course includes the salary payments but it follows that since the letter from Azad & Co refers to gross income of £48,862 from self-employment the bank statement income is more than commensurate with the appellant’s income from self-employment. **The appellant has supplied an accountant’s certificate as to his income in the year ended 05.04.2014** and shows the appellant’s income to be £19,136.00. The letter from Azad & Co dated 24.04.2014 refers to the profit and loss account accounts. Their letter heading states that they are certified public accountants. The respondent did not assert in the refusal letter that Azad & Co is not a member of a recognised body and I consider that if that was the piece of information that the respondent considered was defective then it would have been mentioned specifically in the letter of refusal. I also consider the evidential flexibility which is embodied within Appendix FM-SE and note that this is unlikely to have been applied since the respondent has not mentioned in the refusal letter what evidence is complained of”,

27. The judge erred in taking figures from the income from self-employment from the financial year which ends **after the date** of the application which was in February 2014. It is clear that in respect of self-employment the evidence at 7(a) should be “evidence of the amount of tax payable, paid and unpaid for the *last full financial year*” prior to the application. The judge misconstrued this and took the self-employment of £19,136 for the year ending April 2014 [31]. The evidential flexibility rule is not applicable in this circumstance.
28. The bank statements filed were from 23rd February 2013 to 25th April 2014. These also post dated the application date. As such the personal bank statements for the *requisite same* twelve month period were not in existence either.
29. Even if the evidence should have been considered with the letter from the appellant dated 5th May 2014 (which I do not accept as it was after the application), as can be seen there was no employers’ letter and no mention of an employers’ letter within the decision. Thus the income from Cars Zone of £15,614 to 31st March 2014 could not be supplemented by the income from the employment of £3,522.
30. I considered EX.1 (with reference to EX,2) in respect of the application but am not persuaded on the evidence that there are any significant difficulties, let alone very significant difficulties, that would be faced by the appellant or there partner in continuing their family life together outside the UK and which could not be overcome or would entail serious hardship. In effect there was a bald assertion, rather than any specific evidence, that the parties could not relocate because they had an established life in the UK and the wife had lived all her life her. The wife has indeed visited Pakistan with her family and must have links there. However she will be relocating, if she wishes, with her husband.

31. I find that there is an error of law and therefore I remake the decision and dismiss Mr Ul Haq's appeal under the Immigration Rules for failure to comply with the specific evidential requirements as at the relevant date.
32. I note that there was no reference to Article 8 despite the fact that the grounds of appeal were lodged on the basis that the appellant had an Article 8 right to remain in the UK.
33. I acknowledge that the appeal was lodged on the basis that the appellant was married to a British national but there was a distinct paucity of evidence produced in relation to the appellant's claim and a distinct paucity of information regarding any Article 8 claim. At paragraph 2 of his further submissions the appellant stated:

"It is not reasonable or just for my wife who is a British citizen since birth to relocate to Pakistan. Firstly she has lived her whole life here in the UK and does not hold any ties in Pakistan, as all her close family including both her parents, siblings, grandparents, all extended relatives and friends are here residing in the UK. She has only been to Pakistan on family visits under the age of 16 as a child with her parents, and the last time she went to Pakistan was also with her family in 2008 which was seven years ago. Hence it would be unreasonable and unjust to consider her relocating to Pakistan as this would immensely affect her emotional and social set-up and would have a detrimental effect on her health.

Furthermore, my wife is fully financially dependent on me as shown in the documents provided, I am the only person who is earning and providing for my family. Also, as we are renting at the moment all rent and bills are also being paid by myself. As my wife is currently pregnant and we are expecting a baby in October 2015, she is unable to currently work as she has been extremely ill with regards to pregnancy symptoms and is also lacking energy which has had a huge effect on her health. Hence, my wife is fully financially dependent on me. Therefore our child will also be fully financially dependent on me."

34. I can accept that the appellant has established a private and family life in the UK with his wife but I have considered whether there are any compelling circumstances not sufficiently recognised under the Rules and Appendix FM which incorporate considerations under Article 8 further to **MF (Article 8 - new rules) Nigeria [2012] UKUT 00393 (IAC)** and **Nagre (on the application of) v Secretary of State [2013] EWHC 720**. Of particular relevance in this case is that **MM (Lebanon)** confirmed that the financial requirements under the Immigration Rules were lawful and **SS (Congo) [2015] EWCA Civ 387** confirms that the requirements under Appendix FM-SE are justifiable, in particular:

"55. In our judgment, the true position lies between these submissions. Contrary to the argument of the respondents, that fact that an applicant may be able to say that their case is a 'near miss' in relation to satisfying the requirements of the Rules will by no means show that compelling circumstances exist requiring the grant of LTE outside the Rules. A good deal more than this would need to be shown to make out such a case. The respondents' argument fails to recognise the value to be attached to having a clear statement of the standards applicable to everyone and fails to give proper weight to the judgment of the Secretary of

State, as expressed in the Rules, regarding what is needed to meet the public interest which is in issue. The 'near miss' argument of the respondents cannot be sustained in the light of these considerations and the authority of *Miah v Secretary of State for the Home Department* [2012] EWCA Civ 261, especially at [21]-[26].

56. However, it cannot be said that the fact that a case involves a 'near miss' in relation to the requirements set out in the Rules is wholly irrelevant to the balancing exercise required under Article 8. If an applicant can show that there are individual interests at stake covered by Article 8 which give rise to a strong claim that compelling circumstances may exist to justify the grant of LTE outside the Rules, the fact that their case is also a 'near miss' case may be a relevant consideration which tips the balance under Article 8 in their favour. In such a case, the applicant will be able to say that the detrimental impact on the public interest in issue if LTE is granted in their favour will be somewhat less than in a case where the gap between the applicant's position and the requirements of the Rules is great, and the risk that they may end up having recourse to public funds and resources is therefore greater."
35. Even if the application were considered outside the Immigration Rules and I find no reason to do so, there is a legitimate aim being pursued in denying leave to remain to a spouse in the claimant's circumstances, who does not comply with the rules on admission. It is open to the appellant to return to Pakistan and make an application for leave to remain from there. This is not a case where the application has fulfilled all the essential requirements and the requirement that he leave the UK is just a formal requirement. I take note of the fact that the appellant claims that his wife is a British citizen and I take this into account. Article 8 does not oblige states to respect the choice by married couples of their matrimonial residence or to accept the settlement of a non-national spouse in the country. The relevant principles were articulated in **Abdulaziz, Cabales and Balkandali v UK** [1985] 7 EHRR 471. It is clear that the wife still has connections to Pakistan but she married the appellant knowing that he had entered the UK as a student and had only been in the UK for four years and had spent the majority of his life in Pakistan. She knew that he had a precarious status. I make it clear she is not required to leave the European Union. It is a matter of choice.
36. The appellant's parents and siblings continue to reside in Pakistan and I also note that the appellant's wife has connections and has in the past visited family in Pakistan. There was no independent medical evidence before me that the wife had any significant medical conditions with her pregnancy or that there is no healthcare in the event that she wishes to give birth in Pakistan. I take the point that **SS (Congo)** refers to leave to enter rather than leave to remain but in the assessment of proportionality I find no reason why he cannot return and make an application from abroad. He cannot comply with Paragraph 276ADE as he has not been in the United Kingdom for 20 years and there are no very significant obstacles to his re-integration in Pakistan, and, with regards any private life, I must specifically consider Section 117B of the Nationality, Immigration and Asylum Act. The appellant was clear that his wife was fully dependent on him and as has been indicated he could not satisfy the financial evidential requirements. I am not satisfied either that the appellant

would not be a financial burden on the UK economy and further there was no specific evidence that the appellant could indeed speak English.

37. I find that the decision to refuse the appellant's application for leave to remain is proportionate, **Huang v SSHD** [2007] UKHL 11, taking full account of all considerations, I did not consider that any family or private life of the claimant was prejudiced in a manner sufficiently serious to amount to a breach of the fundamental right protected by Article 8.

Notice of Decision

The First-tier Tribunal made an error of law and the decision is set aside. I remake the decision and dismiss the appeal of Mr Haq both under the Immigration Rules and on Human Rights grounds.

Signed

Date 25th July 2015

Deputy Upper Tribunal Judge Rimington

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed

Date

Deputy Upper Tribunal Judge Rimington