



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

Appeal Number: UI-2021-000539
[HU/50239/2021][IA/01436/2021]

THE IMMIGRATION ACTS

**Heard at Bradford
On 7 September 2022**

**Decision & Reasons Promulgated
On 15 November 2022**

Before

UPPER TRIBUNAL JUDGE LANE

Between

**LEILA SHOJAEI
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Foot.

For the Respondent: Ms Young, Senior Presenting Officer

DECISION AND REASONS

1. The appellant is a female citizen of Iran who was born on 26 August 1978. The First-tier Tribunal judge summarises her immigration history as follows:

[The appellant] first entered the United Kingdom on 2 September 2014 with entry clearance as a spouse which was valid until 22 April 2017. On 20 April 2017, she successfully applied for leave to remain in the same capacity, leave being granted until 30 March 2020. On 27 March 2020, she applied for indefinite leave to remain as a partner, but her application was refused on 21 January 2021 as the Respondent was not

satisfied that she could meet the eligibility financial requirements of Appendix FM. The Appellant then exercised her right of appeal against the refusal of her human rights claim.

The First-tier Tribunal, following a hearing on 11 August 2021, dismissed the appeal. on The appellant now appeals, with permission, to the Upper Tribunal.

2. Granting permission, Upper Tribunal Judge Kebede wrote:

There is arguable merit in the assertion in the grounds that the judge failed to have regard to material documentary evidence which had been produced for the appeal, namely tenancy agreements ([19] of the grounds) and sale proceeds from one of the sponsor's properties ([20]) which were arguably material to the assessment outside the immigration rules despite not complying with the specified evidence requirements under Appendix FM-SE. Arguably, the judge erred by disregarding parts of the sponsor's income and took too narrow an approach to the evidence, contrary to the guidance in *MM (Lebanon) & Ors, R(on the applications of) v Secretary of State and another [2017] UKSC 10. 3.*

All grounds may be argued.

3. The respondent had concluded that the appellant did not meet the Minimum Income Requirement ('MIR') of £18,600, under Appendix FM of the Immigration Rules. The appellant relied on *MM (Lebanon) v SSHD [2017] UKSC 10, [2017] 1 WLR 771*, asserting that her failure to meet the MIR under Appendix FM-SE was not fatal to her human rights appeal, because she could show the MIR requirement was in fact met in practice. The First-tier Tribunal judge rejected that argument at [19-21]:

19. I was being asked to conclude that, although the specified evidence provisions were not met, the Appellant and her Sponsor had nevertheless shown that the minimum income requirement was met. Mr Holmes sought to rely on the decision in *MM (Lebanon) v SSHD [2017] UKSC 10*. Specifically, he directed me to paragraph 99 of the decision, and submitted that a distinction was to be drawn between the substantive requirements of the Immigration Rules, with the clear underlying public policy objectives, as opposed to the procedural requirements, that is, the specific evidence provisions.

20. I am afraid that I cannot accept that submission on the basis of paragraph 99. The Supreme Court there was concerned with third party support and the ability of the Tribunal, in the context of a human rights appeal, to judge for itself the reliability of alternative sources of finance in the light of the evidence before it. It is not authority for any proposition that the Tribunal can take in to account any evidence of funds, effectively ignoring the evidential requirements of Appendix FM-SE. Even if that were the case, I am not persuaded that it assists the Appellant. Taking as an example the point made by Mr Tuff in cross examination, that the bank statements for 2018 did not correspond to the payslips, Mr Mohammadi explained that he was renovating his commercial property at that time and using some of his and his wife's income towards it. In those circumstances, I am not satisfied that this

part of their “income” could realistically be said to have been available for their own maintenance. There was no satisfactory evidence to show that the bank accounts were compensated for any sums used on the property. It was not possible, on the evidence provided, to determine the extent to which the sums shown on individual payslips were allocated to the maintenance of the Appellant and her spouse, as opposed to capital expenditure on properties in his sole name. If, however, the corresponding sums could be seen in the individual accounts, then it would be a matter for the account holders as to their use of them. Mr Holmes also invited me to find that the heart of the policy objective in the Immigration Rules was to prevent reliance on public funds. Whilst that is undoubtedly a major factor, I would add that another facet of the objective is to prevent individuals from living below that which is considered to be subsistence level, regardless of whether there is, or can be, resort to public funds.

21. Furthermore, the Respondent is clearly entitled to make rules as to the manner in which she requires evidence of income to be provided. At risk of stating the obvious, proof of income is a matter which is capable of manipulation by the unscrupulous. The Rules are applicable to all, and if exceptions are made for certain individuals, it could quickly lead to the inconsistency in approach against which the Court in *MM* cautioned. Similarly, it would be unfair if the Appellant could succeed by circumventing the specified evidence provisions when other applicants may have failed for the same or similar reasons.

4. The Ground 1 cites *MM* at [66]:

A third misconception is the implication that article 8 considerations could be fitted into a rigid template provided by the Rules, so as in effect to exclude consideration by the tribunal of special cases outside the Rules. As is now common ground, this would be a negation of the evaluative exercise required in assessing the proportionality of a measure under article 8 of the Convention which excludes any “hard-edged or bright-line rule to be applied to the generality of cases”: *EB (Kosovo) v Secretary of State for the Home Department* [2009] AC 1159, para 12, per Lord Bingham.

5. I find that the judge has, as the grounds argue, wrongly treated *MM* as a constraint on his own duty to examine all relevant material before him and strike a fair balance between the public interest and the appellant’s own Article 8 ECHR interests. The Immigration Rules did not, as *MM* makes clear, contain within their provisions the assessment which the Tribunal was required to conduct. As a consequence of his error, the judge has failed properly to assess evidence which was capable of leading to a different outcome in the appeal.

6. Ground 2 asserts that, having constrained his assessment by a flawed understanding of *MM*, the judge failed to take account of material evidence. At [22] the judge wrote:

22. The Appellant’s Halifax Bank statements show no deposits from Sorrento Ashington Ltd, despite the fact that her payslips refer to payments being made by credit transfer. I was not persuaded that she received the sums set out on those payslips in the light of the Sponsor’s evidence that some of their income was being diverted at

source to meet the cost of the renovation of his commercial property. On the contrary, the Sponsor's oral evidence showed that the deposits which he has made in to his wife's account were to allow her to purchase things for herself. He would not need to do so if she was receiving her own income from the business which employed her. I simply cannot be satisfied that the Appellant or her husband have received the sums shown on their payslips. It was somewhat unclear which rents were paid into which of the Sponsor's bank accounts for each individual tenant. The Respondent was entitled to request copies of each tenancy agreement, as they would show the sums due, and the dates on which they were due. I found the Appellant's Sponsor to be vague in his evidence as to when particular tenants took or relinquished possession of his properties and, even though I accept that he may have lost some documents in the fire at his home, it should still have been possible to produce copies of the tenancy agreements from his letting agents or, indeed, from the tenants themselves. On the basis of the evidence before me, I cannot be satisfied that the minimum income requirement is met for the reasons which I have outlined. It is not simply the case that the Tribunal can accept that as the Sponsor owns property which may be valued in the region of £1m, the parties could not access means tested public funds and that the requirements of the Rules can be ignored. Regardless of specified evidence provisions, I conclude that the Appellant has failed to show that the financial eligibility requirements are met.

7. I agree with Ms Foot, who appeared for the appellant at the Upper Tribunal initial hearing, that the judge appears to have excluded from consideration evidence of the tenancy agreements which was before him but which had not been before the Secretary of State at the time of the decision to refuse (*The Respondent was entitled to request copies of each tenancy agreement, as they would show the sums due, and the dates on which they were due*). That evidence included documentary evidence of the sale of the sponsor's home and the deposit of £160,429.72 into the sponsor's bank account. The judge records that payment at [6] but fails properly to address it at [22] or elsewhere in his analysis. This error is a consequence of the judge's misunderstanding (in the light of *MM*) of the approach which he should have taken in determining the Article 8 ECHR appeal.

8. The grounds at [21] further assert that:

Finally, the Judge appeared to conclude some of the finances relied on could not be included in the MIR assessment because they were used to pay for renovations at one of A's sponsor's commercial properties (see [§20]). Such an approach is arguably wrong in law; there is no prohibition in the Rules to income relied upon to meet the MIR being spent on renovations. What needs to be shown is the MIR figure is met, not that it will only be spent in a certain way.

I agree with that submission also. The judge's concern throughout the wider Article 8 ECHR assessment to evaluate the evidence in the context of the Immigration Rules has led him to take an excessively restrictive view of the evidence adduced by the appellant.

9. Ground 3 states:

As a final matter, the Appellant respectfully submits that the Judge has failed to reason, adequately or at all, the assertion at paragraph §22 of his decision that the Sponsor's oral evidence as to the move-in dates of various tenants was "vague". The assertion is unparticularised, and the reader is left in the dark as to how or why the manner of the responses to questions put in evidence has not met with the Judge's approval.

10. I do not find that Ground 3 is made out. It was open to the judge to characterise the oral evidence of the sponsor as 'vague' given that he had clearly been unable to give precise evidence regarding the dates on which tenants had taken up or relinquished possession.

11. However, I find that the judge's errors of law in respect of Grounds 1 and 2 are such that his decision should be set aside. The judge has taken an unnecessarily narrow view of the evidence which the appellant asserts was capable of proving, to the necessary standard of proof, that her appeal on Article 8 ECHR grounds should succeed. I do not say that the evidence compels a different outcome from that reached by the First-tier Tribunal judge; there will need to be a new fact-finding exercise which is better conducted in the First-tier Tribunal. None of the findings of fact shall stand, save that the finding at [24] that, for the purposes of the appeal on Article 8 ECHR grounds, 'Family life clearly exists given it was not in issue that the Appellant and her Sponsor enjoy a genuine and subsisting relationship.' The appeal is returned to the First-tier Tribunal for that Tribunal to remake the decision following a hearing.

Notice of Decision

The appeal is allowed. The decision of the First-tier Tribunal is set aside. None of the findings of fact shall stand save as provided in paragraph [11] above. The appeal is returned to the First-tier Tribunal for that Tribunal to remake the decision.

Signed

Date 1 November 2022

Upper Tribunal Judge Lane