Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: OA/22447/2012
OA/22445/2012
OA/22444/2012
OA/22443/2012

THE IMMIGRATION ACTS

Heard at Manchester	**Determination Promulgated**
On 13th December, 2013	**On 30th January, 2014**

Before

Upper Tribunal Judge Chalkley

Between

ENTRY CLEARANCE OFFICER

Appellant

and

MRS ATTIA PARVEEN
MR MUHAMMAD EHTISHAM BUTT
MR MUHAMMAD WAHSHAM ALI BUTT
MISS SAKINA SAQIB
(ANONYMITY DIRECTIONS NOT MADE)

Respondents

Representation:

For the Appellant: *Mr Harrison, Home Office Presenting Officer*
For the Respondents: *Mr Holt, Counsel instructed by Reiss Solicitors*

DETERMINATION AND REASONS

1. The appellant is the Entry Clearance Officer, to whom I shall refer in this determination as the "claimant".

2. The respondents are Pakistani nationals born 1st January, 1968, 6th October, 1996, 10th July, 1998 and 6th December, 2001, respectively. On 16th July, 2012 the respondents applied for a visa to enable them to join Saqib Mahmood Butt ("the sponsor") in the United Kingdom. The sponsor is the husband of the first respondent and together they are the parents of the second, third and fourth respondents.

3. The respondents' applications were refused by the claimant in Islamabad on 11th October, 2012. The first respondent's application was refused because the claimant was not satisfied that the relationship between the first named respondent and her partner was genuine and subsisting and because the respondent had failed to meet the financial requirements. The remaining respondents' applications were refused because the claimant had refused the first named respondent's application.

4. The respondent's appealed and their appeal was heard by First Tier Tribunal Judge Buster Cox who allowed their appeals in a determination promulgated on 23rd August, 2013. The judge found the sponsor to be credible and he accepted the sponsor's evidence. He found that the first named respondent and the sponsor were and are in a genuine and subsisting relationship.

5. In relation to financial requirements, the respondent needed to show that the sponsor had an annual income of at least £27,200. The judge set out the requirements of Appendix FM and the first named respondent's Counsel acknowledged that not all the specified evidence in respect of the sponsor's self-employment had been provided. He acknowledged that the judge could not take into account any income from the sponsor's self-employment and the sponsor had not adequately demonstrated for the purposes of the Rules that he had an income of £27,200. He found, therefore, that the first named respondent did not meet the financial requirements of the eligibility rules and did not therefore meet all of the eligibility requirements. He found that the decision of the claimant was in accordance with the Immigration Rules.

6. The judge went on to consider the respondents' human rights appeals. He concluded that the sponsor earned and continues to earn a "good living" as sole proprietor of a business and noted that it was not easy for the sponsor to travel to Pakistan due to his work commitments. He believed that the appeal was finely balanced, but that requiring a self-employed person to provide personal bank statements for a twelve month period covered by a statement of account is not particularly onerous. On the other hand, he was entirely satisfied that the businesses of which the sponsor was sole proprietor and a partner were "ongoing concerns" and provided him with a "regular source of income" that would have been more than

sufficient to meet the needs for himself and the respondents. He noted that the respondent had paid fees of over £2,500 and that if the sponsor stayed in Pakistan for anything more than a short break, there would be a detrimental impact on his earnings and profits. Either the sponsor continues to be separated from his family for at least a further three months or he goes to Pakistan which could then undermine his ability to demonstrate that he could meet the financial requirements of the Rules. He found on the particular facts of this appeal that the decision amounted to a disproportionate interference with the rights of the sponsor to enjoy respect for his family life and allow the appeal.

7. The claimant challenged the determination in lengthy grounds, suggesting that since the appeal failed under the Immigration Rules, it should only succeed under the European Convention for the Protection of Human Rights and Fundamental Freedoms if it was found to be an exceptional case. In this context "exceptional" meant that circumstances in which, although the requirements had not been met, refusal would result in an unjustified, harsh outcome. The grounds argued that this case was not exceptional simply because the respondents had failed to provide the specified evidence, and as such the judge had misdirected himself in law. He had attached significant weight to the sponsor's income, which was said to be significantly more than the average wage, but it was quite clearly the wrong basis to make such an assessment, as the minimum wage was not based upon the size of any family. The minimum income threshold adopted was following expert advice from the Migration Advisory Committee and subject to extensive consultation it was suggested that it was inappropriate therefore that the Tribunal should disregard these points in its proportionality assessment.

8. Mr Harrison relied on the grounds. Mr Holt suggested that the sponsor had not been in a position to provide any more information than he did. The judge was clearly entitled to have regard to the fact that fees of £2,500 had been paid and that the claimant took three months in which to make its decision. As a result, if the appeal were not allowed this would mean that the sponsor would have to wait a further three months before he was joined by his family, or he would have to leave his business and thereby jeopardise the chances of the respondents qualifying under the Immigration Rules, while he went to Pakistan.

9. Mr Holt was anxious to point out that this was not a near-miss situation and that the judge's decision had been taken outside the Rules and on the question of proportionality. First Tier Tribunal Judge Cox considered the sponsor's status as a British citizen and found the relationship between the sponsor and the respondents to be genuine. He found the sponsor's income to be satisfactory and placed significant weight on his income and on his nationality. Mr Harrison urged me to find that this was a decision which was not unlawful because it was effectively a near-miss decision. He asked me to note that latitude had been given simply because the respondents did not meet the requirements of the Rules.

10. I reserved my decision.

11. The judge found himself satisfied as to the relationship between the first named respondent and the sponsor and found that they were in a genuine and subsisting relationship. He concluded that the first named respondent did not meet the financial requirements of the eligibility rules and did not therefore meet all of the eligibility requirements. He found the decision of the claimant to be in accordance with the Immigration Rules.

12. The judge found that the sponsor had provided most of the documents required under Appendix FM as a self-employed person, but had failed to provide copies of his bank statements for the year covering 1st July, 2011 and 30th June, 2012. At the hearing before the judge the sponsor indicated that he now had three bank accounts and the judge noted that the statement provided regular cash deposits. However the sponsor was not asked at the hearing why he had not provided statements for the whole of the period covered by his statement of account.

13. The judge referred to and quote paragraphs 142 to 146 of *MM* [2013] EWHC 1900, High Court Admin and the judge noted that Blake J had not considered whether those parts of the Rules requiring specific documents for self-employed persons were disproportionate. The judge recognised that the appeal was finely balanced and recognised that there are legitimate and necessary reasons for requiring an appellant to provide supporting documentary evidence of their financial circumstances. Requiring a self-employed person to provide the personal bank statements for the same twelve month period covered by a statement of account is not particularly onerous and as he pointed out, Article 8 does not give an individual the right to choose where they can live with their family. The judge concluded that the sponsor's rights outweigh the claimant's legitimate interest in ensuring the economic and social order when maintaining effective immigration control and the judge said that he attached significant weight to the rights that flow from the sponsor's status as a British citizen and he attaches significant weight to the sponsor's income which, he said, was significantly more than the minimum wage.

14. Whilst the judge's decision is not necessarily one that I would have made in similar circumstances, that is not the test. With very great respect to Mr Harrison I do not believe that the judge allowed the respondents' Article 8, appeal because they had nearly missed meeting the requirements of the Immigration Rules. I have concluded that the judge's decision was one which was open to him on the evidence before him. He was entitled to give significant weight to the fact that the sponsor is a British subject and that the option of re-applying would not be reasonable. I find that the judge did not err in law in his determination which I uphold.

Upper Tribunal Judge Chalkley