Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: OA/14637/2014**

THE IMMIGRATION ACTS

Heard at: Manchester **Determination Promulgated**
On: 23rd February 2016 **On 16th May 2016**

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

ENTRY CLEARANCE OFFICER, ISLAMABAD

Appellant

and

MRS SALIA ALI
(NO ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant Mr Harrison, Senior Home Office Presenting Officer
For the Respondent Ms Faryl, Counsel instructed by AMS Solicitors

DETERMINATION AND REASONS

1. The Respondent is a national of Pakistan born on the 17th January 1992. On the 14th May 2015 her appeal against a refusal of entry clearance as a spouse was allowed by First-tier Tribunal Judge Chambers. The Entry Clearance Officer in Islamabad now has permission to appeal against that decision[1].

[1] Permission granted on the 24th July 2015 by First-tier Tribunal Judge Ford

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Background and Matters in Issue

2. The wedding took place on the 5th March 2012 in Pakistan. The Respondent's husband is a Mr Sohail Ali, a British national. In the three and half years since she was married the Respondent has been trying to join him in the United Kingdom. She made her first application for entry on the 27th September 2012. That was refused on the 7th November 2012 for a failure to provide the documentary evidence specified in Appendix FM-SE of the Immigration Rules. This decision was upheld by an Entry Clearance Manager on the 31st May 2013. On the 28th March 2014 the Respondent made a second application. This was refused on the 2rd November 2014, again because the application was not supported by all of the relevant financial documents. The Sponsor Mr Ali had claimed to be earning £27,300; he had submitted wage slips reflecting this figure but had not supplied bank statements covering the same period which showed that money being deposited. An Entry Clearance Manager upheld that decision on the 7th January 2015 and the matter duly came before the First-tier Tribunal.

3. Before Judge Chambers the parties agreed that between September 2013 and March 2014 (the period covered by the payslips) the Sponsor Mr Ali had only deposited £7710. It was on this bases, applying the requirements in Appendix FM-SE, that the appeal was dismissed under the Immigration Rules. The fact that the Sponsor's payslips, P60 and letter from his employer showed him to be earning considerably more than that was neither here nor there. The ECO, and Judge Chambers, could only count any salary that was evidenced by deposits in the bank statements. The determination goes on to address Article 8 'outside of the Rules'. Having regard to the five stage test recommended in Razgar [2004] UKHL 27 the Tribunal was satisfied that there was a family life between this husband and wife such that Article 8 is engaged: "the Article was devised to promote family life not to frustrate it". Turning to the question of proportionality the determination notes that the Sponsor "was however earning a high gross figure well beyond the income bracket required although the application did not and cannot now technically succeed on the basis of the somewhat complicated rules". Accepting the Sponsor did earn well over the required amount of £18,600, the Tribunal finds there to be no public interest in the continued exclusion of his spouse. The conclusion is found at paragraph 13:

> "The Appellant and Sponsor married as long ago as 2012 and they are being kept apart not as a result of having insufficient money but as a result of not explaining in the application why they had (as is the fact) more than sufficient money. I have come to the conclusion that any further estrangement of the parties would be damaging to them and to their marriage and to the wider family life arrangements of those who have an interest in seeing the couple united. I take account of the all of this and of the interests of the Sponsor who is a hard-working United Kingdom citizen and the expense and difficulty of maintaining contact by visiting and the delay and the expense entailed in making a new application"

The appeal was thereby allowed.

4. The Entry Clearance Officer has appealed against that decision. The grounds, in summary, place reliance on the decision of the Court of Appeal in SS (Congo) and Ors [2015] EWCA Civ 387. It is submitted that the decision of the First-tier Tribunal is flawed for failure to consider whether Mr Ali could relocate to Pakistan (ie whether there was an interference at all) and for a failure to identify any exceptional features which would render this decision disproportionate.

5. Ms Faryl defended the decision on the basis that the Tribunal was correct to say that there was no public interest in refusing entry where it was accepted that the Sponsor is earning well over the required amount of money. It is accepted that this is a genuine marriage and that the parties want to live together in the UK. Their continued separation was difficult for them both and in those circumstances it was reasonable for the First-tier Tribunal to have allowed the appeal with reference to Article 8.

My Findings

6. This was a case which turned, insofar as it fell to be considered under the Rules, on whether the application had been supported by the mandatory list of documents set out in Appendix FM-SE. It does not ever appear to have been in issue that the ECO was correct to refuse entry with reference to those provisions. The bank statements produced before the Tribunal fell well short of showing at least £18,600 paid in over the preceding year.

7. This was then the case of a couple who could not presently be together because of a failure to supply specified evidence. It was also a case which concerned two people from two different countries who had married knowing that the requirements of the Immigration Rules would have to be met if they were to live together in the United Kingdom. These were precisely the facts considered by the Court of Appeal in SS (Congo). Considering applications which failed under Appendix FM-SE the Court said this: " in our judgement, the approach to Article 8 in the light of the Rules in Appendix FM-SE should be the same as in respect of the substantive LTE and LTR Rules in Appendix FM. In other words, the same general position applies, that compelling circumstances would have to apply to justify a grant of LTE or LTR where the evidence Rules are not complied with". The Court so found for two reasons. First, that that Rules as a whole pursued the legitimate objective of limiting the risk that a person admitted to the UK would become a burden on the public purse. The second reason was framed as follows [at 53]:

> "enforcement of the evidence rules ensures that everyone applying for LTE or LTR is treated equally and fairly in relation to the evidential requirements they must satisfy. As well as keeping the

> costs of administration within reasonable bounds, the application of standard rules is important as a means of minimising the risk of arbitrary differences in treatment of cases arising across a wide range of officials, tribunals, and courts which administer the system of immigration controls…..Good reason would need to be shown why a particular applicant was entitled to preferential treatment with respect to evidence than other applicants would expect to receive under the Rules".

8. The Court of Appeal here finds that contrary to the submissions of Ms Faryl, and the findings of the First-tier Tribunal in this case, that there was a clear public interest in refusing entry clearance to applicants who cannot meet the requirements of Appendix FM-SE. Appeals of this nature can only be allowed where the Judge identifies "good reasons" [paragraph 53 SS] to grant entry notwithstanding the failure under the Rules, or put another way, where "compelling circumstances" are found [paragraph 51].

9. Ms Faryl submits that this is what the First-tier Tribunal does at paragraph 13 of the determination. The fact that the couple have been apart since their marriage in 2012, the fact that the process of re-applying would cost them more money and cause further delay and the fact that their continued separation is no doubt upsetting for them and their families are all identified as good reasons why entry clearance should be granted.

10. Although all of these reasons are understandably matters causing the Respondent and Sponsor concern, I am bound to find that they are not matters which are capable of constituting "good reasons" why entry should be granted to the Respondent over and above any other applicant seeking settlement as a spouse from Pakistan. These factors apply to all cases where families are waiting for a visa to be together. There is in paragraph 13 no "good reason" why the evidential requirements imposed on other applicants should not apply to the Respondent. I would also agree with Mr Harrison that where the Tribunal has taken the length of separation into account, it appears to have overlooked the fact that this is the second application refused for want of specified documents. The Respondent and Sponsor can have been under no illusion as to how important these documents were. As the Court of Appeal has made clear in SS, it is only the exceptional case that will succeed in their absence. It follows that the decision is flawed for the reasons identified in the grounds, and the determination must be set aside.

11. I heard briefly from Mr Ali, and had regard to the record of proceedings before the First-tier Tribunal and his witness statement. He informed me that he is still working at the same place, where he has been a manager since 2010 (a reference to 2011 in the evidence is incorrect). He reiterated the evidence that he had given before the First-tier Tribunal, which was that he has not paid in his wages because he has kept some of the cash for his own expenses, including sending some money to his wife, and then paid the remainder into his account. He

acknowledged that there was no particular reason why he can't get to the bank or pay that money in; he simply hasn't done so. He has not seen his wife since 2013 when he last visited Pakistan. He is constrained from visiting her by expense and the fact that he cannot get time off work. He misses her and wants her to join him here as soon as possible.

12. I have a great deal of sympathy with the Respondent and her husband. This is a genuine couple who obviously want to be together. As Judge Chambers rightly noted, he is a hard-working British national who would like to be able to live with his wife in his own home. There are however no features of the evidence which disclose any compelling circumstances in this case. There is nothing to separate the case of the Respondent from that of any other applicant for settlement. I am not satisfied that there are "good reasons" why the evidence requirements can be dispensed with in this case. The appeal must be dismissed under Article 8 as well as the Rules.

Decisions

13. The decision of the First-tier Tribunal, insofar as it relates to human rights, has been set aside. The decision of the First-tier Tribunal to dismiss the appeal under the immigration rules is upheld.

14. The decision in the appeal is re-made as follows:

    "the appeal is dismissed on human rights grounds".

15. I was not asked to make a direction for anonymity and on the facts I see no reason to do so.

Upper Tribunal Judge Bruce
23rd February 2016