Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/17585/2013

THE IMMIGRATION ACTS

Heard at Bradford	**Determination Promulgated**
On 21 January 2014	**On 18 February 2014**

Before

UPPER TRIBUNAL JUDGE CLIVE LANE

Between

HUSNA DALGIN

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mrs K Oliver, Ison Harrison, Solicitors
For the Respondent: Mrs R Pettersen, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, Husnu Dalgin, born on 20 July 1987 is a male citizen of Turkey. On 13 February 2013, the appellant was refused leave to remain as a spouse of a British

citizen (Gillian Dalgin). The appellant appealed to the First-tier Tribunal (Judge Henderson) which, in a determination promulgated on 25 October 2013, dismissed the appeal. The appellant now appeals to the Upper Tribunal.

2. The appellant came to the United Kingdom as a visitor and subsequently attempted to obtain leave to remain under the Immigration Rules as the spouse of Gillian Dalgin. The parties accept that (a) that the appellant was badly advised by his professional representatives and that he did not know that he would be unable to "switch" immigration categories and; (b) the appellant cannot, as a consequence, succeed in his application under the Immigration Rules. The appeal fell to be decided under Article 8 ECHR only.

3. Judge Macleman granted permission in the Upper Tribunal on the basis that the appellant had argued that the "Home Office Presenting Officer [HOPO] conceded at the hearing that adequate maintenance was showing for the purposes of the Rules." The Upper Tribunal had subsequently received witness statements from Mr J Greer who appeared as advocate before the First-tier Tribunal for the appellant and Mr Neil Fuller who was the Home Office Presenting Officer. Mr Fuller was available at the hearing before the Upper Tribunal but it was not necessary for him to call evidence as Mrs Oliver, for the appellant, did not wish to cross-examine him. Mr Fuller, in his statement, claims that he made no concession about the appellant's ability to meet the maintenance requirements of the Rules, stating, "given the sponsor's income in 2012/2013 from salary it was approximately £302 per month there was no possibility the couple could meet the maintenance requirements." Mr Greer, in his statement, does not suggest that Mr Fuller openly and unequivocally conceded that the appellant could meet the maintenance requirements of the Rules. Rather, he records that Mr Fuller, when asked by the judge to comment on the adequacy of the sponsor's income, offered no submissions.

4. Refusing permission in the Upper Tribunal, Judge Zucker, accurately in my view, commented that "the respondent had refused the application on a particular basis that is not the same as [admitting] that all other requirements were met. It is trite law that the judge had to satisfy himself that all requirements of the particular Rule were met." I have to say that there is a qualitative difference between an unequivocal concession made by a party in appeal proceedings and the silence of that party as regards any particular issue. Given the fact that the sponsor's income fell so far below the figure provided for in the Immigration Rules for maintenance, I consider that it is virtually inconceivable that the Presenting Officer or any other officer acting on behalf of the Secretary of State would concede that the requirement could be satisfied. There is a further important point. Even assuming that Mr Fuller conceded that the appellant met the maintenance requirements of the Immigration Rules, this appeal still fell to be considered under Article 8 ECHR. In applying the law in respect of Article 8 (including the decision in *MM* [2013] EWHC 1900) it was imperative for the judge to have regard to all the relevant facts in the case including the actual income of the sponsor. I do not accept that the judge has erred in law by having regard to the income of the sponsor and the appellant when deciding the appeal under Article 8 ECHR.

5. Judge Henderson adopted a structured approach to analysis of Article 8. She acknowledged that the appellant had been "badly advised" but went on to record that "this does not mean the respondent is at fault in the consideration of the appellant's application under the Immigration Rules or that this should mean that the appellant can circumvent the Immigration Rules by relying on Article 8 of the ECHR." [29]. At [31], Judge Henderson states that "the sponsor is in receipt of benefits." As I understand it, the sponsor is in receipt of tax credits. It was not disputed that the sponsor's income falls below not only the sum of £18,600 provided for in the Immigration Rules but also the sum of £13,400 (the income level identified by the Migration Advisory Committee of the lowest maintenance threshold under the benefits and net physical approach, identified by Blake J in *MM*). At [31], Judge Henderson quoted Blake J's judgment at [123- 124]:

> Although there may be sound reasons in favour of some of the individual requirements taken in isolation, I conclude that when applied to either recognised refugees or British citizens the combination of more than one of the following five features of the rules to be so onerous in effect as to be an unjustified and disproportionate interference with a genuine spousal relationship. In particular that it likely to be the case where the minimum income requirement is combined with one or more than one of the other requirements discussed below. The consequences are so excessive in impact as to be beyond a reasonable means of giving effect to the legitimate aim.
>
> The five features are:
>
> i. The setting of the minimum income level to be provided by the sponsor at above the £13,400 level identified by the Migration Advisory Committee as the lowest maintenance threshold under the benefits and net fiscal approach (Conclusion 5.3). Such a level would be close to the adult minimum wage for a 40 hour week. Further the claimants have shown through by their experts that of the 422 occupations listed in the 2011 UK Earnings Index, only 301 were above the £18,600 threshold [16].
>
> ii. The requirement of £16,000 before savings can be said to contribute to rectify an income shortfall.
>
> iii. The use of a 30 month period for forward income projection, as opposed to a twelve month period that could be applied in a borderline case of ability to maintain.
>
> iv. The disregard of even credible and reliable evidence of undertakings of third party support effected by deed and supported by evidence of ability to fund.
>
> v. The disregard of the spouse's own earning capacity during the thirty month period of initial entry.

6. The judge went on at [32] to find that "the sponsor cannot meet the minimum income level outlined above at item (i) without the assistance of public funds." That statement may not be entirely accurate. Public funds are defined in the Immigration Rules at paragraph 6C:

> "public funds" means

(a) housing under Part VI or VII of the Housing Act 1996 and under Part II of the Housing Act 1985, Part I or II of the Housing (Scotland) Act 1987, Part II of the Housing (Northern Ireland) Order 1981 or Part II of the Housing (Northern Ireland) Order 1988;

(b) attendance allowance, severe disablement allowance, carer's allowance and disability living allowance under Part III of the Social Security Contribution and Benefits Act 1992;, income support, council tax benefit and housing benefit under Part VII of that Act; a social fund payment under Part VIII of that Act; child benefit under Part IX of that Act; income based jobseeker's allowance under the Jobseekers Act 1995, income related allowance under Part 1 of the Welfare Reform Act 2007 (employment and support allowance) state pension credit under the State Pension Credit Act 2002; or child tax credit and working tax credit under Part 1 of the Tax Credits Act 2002;

(c) attendance allowance, severe disablement allowance, carer's allowance and disability living allowance under Part III of the Social Security Contribution and Benefits (Northern Ireland) Act 1992;, income support, council tax benefit and, housing benefit under Part VII of that Act; a social fund payment under Part VIII of that Act; child benefit under Part IX of that Act; income based jobseeker's allowance under the Jobseekers (Northern Ireland) Order 1995 or income related allowance under Part 1 of the Welfare Reform Act (Northern Ireland) 2007;

7. It is not clear from the evidence before either the First-tier or Upper Tribunal to what extent the amount of tax credits paid to Mrs Dalgin may be influenced by the presence in her household of the appellant. If his presence increases the tax credits, then there is clearly an infringement of the Rules as contemplated in paragraph 6A. If his presence has no effect, then it is arguable that the appellant's continued presence would not lead to the couple living in the United Kingdom by recourse to public funds.

8. However, there is a further problem for the appellant in seeking to rely on *MM*. As I have quoted above, Blake J concluded that, "when applied to either recognised refugees or British citizens *the combination of more than one of the following five features of the Rules* [is] so onerous in effect as to be an unjustified and disproportionate interference with a genuine spousal relationship."[my emphasis] As Judge Henderson noted, there was no suggestion the appellant has a realistic job offer (v) whilst the issue of third party support (iv) had not been raised. There was also no evidence of the sponsor having "anything near the required level of savings" (ii). The requirement of (iii) did not arise in this case. Even assuming, therefore, that feature (i) applied in the present appeal there was no "combination of *more than one*" of the five features.

9. In the circumstances, the dismissal of the appeal on Article 8 ECHR grounds was clearly an outcome available to Judge Henderson. In reaching that outcome, she properly applied the jurisprudence (including *MM*) and appears to have had a proper and accurate understanding of the relevant factual matrix. In the

circumstances, I am unable to identify any error of law in her reasoning such that the determination falls to be set aside.

DECISION

10. This appeal is dismissed.

Signed Date 11 February 2014

Upper Tribunal Judge Clive Lane