Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: OA/00677/2013
OA/00688/2013

THE IMMIGRATION ACTS

Heard at Bennett House, Stoke-on-Trent
On 3rd September 2014

Determination Promulgated
On 9th October 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE COATES

Between

SG – FIRST APPELLANT
DT – SECOND APPELLANT
(ANONYMITY DIRECTION MADE)

Appellants

and

ENTRY CLEARANCE OFFICER - NAIROBI

Respondent

Representation:

For the Appellants: Mr T Royston instructed by Paragon Law
For the Respondent: Miss C Johnstone, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The first Appellant is an Ethiopian national born on 19th November 1987. She is the mother of the second Appellant who was born in Ethiopia in June 2012 and is also of Ethiopian nationality.

2. The Appellants applied for entry clearance to join the Sponsor, the first Appellant's husband and second Appellant's father. The family relationship is not disputed.

3. The applications were refused by the Respondent on 15th November 2012 because it was considered that the financial requirements of the relevant Immigration Rules were not satisfied. The Sponsor needed a gross income of at least £22,400 but his declared income fell well short of that figure. The application was therefore refused under paragraph EC-P.1.1(d) of Appendix FM.

4. Notices of Appeal were lodged on behalf of both Appellants and the matter came before Judge of the First-tier Tribunal Colyer at Nottingham on 6th December 2013. In a determination promulgated on 7th January 2014 the appeals were allowed under section EX of Appendix FM and under Article 8 of the European Convention on Human Rights.

5. The Respondent's representative applied for permission to appeal to the Upper Tribunal on the basis that the First-tier Judge had made a material misdirection in law. Grounds submitted in support of the application argue that section EX1 of Appendix FM is not a potential route to qualifying for entry clearance. This is to be contrasted with R-LTRP: requirements for limited leave to remain as a partner where it is accepted that paragraph EX1 does apply. The grounds also relied upon the decision in Gulshan [2013] UKUT 00640 (IAC) where it was held that the Article 8 assessment shall only be carried out where there are compelling circumstances not recognised by the Rules. In this case it is submitted that the First-tier Tribunal did not identify such compelling circumstances and its findings are therefore unsustainable.

6. Permission to appeal was granted in the First-tier Tribunal by Designated Judge Shaerf on 28th January 2014. Judge Shaerf noted that the First-tier Judge found that the Appellants could not satisfy the requirements of the Immigration Rules regardless of whether their application was made before or after the change in the Rules on 9th July 2012. It was therefore an arguable error to have allowed the appeal under section EX of the Immigration Rules which is not relevant to entry clearance applications. Judge Shaerf further noted the Respondent's argument that the Immigration Rules provide a complete code for the assessment of claims under Article 8 of the European Convention. The Court of Appeal in MF (Nigeria) v SSHD [2013] EWCA Civ 1192 found that the Rules were a complete code for the assessment of such claims when made in relation to a decision to deport. The court did not extend that finding to other parts of the Immigration Rules. The grounds further challenged the judge's reasoning and argue that he failed to identify any compelling circumstances which would justify the grant of entry clearance. However, Judge Shaerf pointed out that the grounds failed to take account that in the assessment of claims under Article 8 the principles enunciated by the House of Lords in Huang v SSHD [2007] UKHL 11 remain good law and the relevant yardstick remains one of "reasonableness" and not "compelling circumstances". Although permission to appeal was granted, Judge Shaerf suggested that at that stage the Respondent may wish to consider the overall position based on the First-tier Judge's findings of fact which had not been challenged. It would appear that the Respondent declined to take up this suggestion.

7. That is the procedural route by which the matter came before me for an error of law hearing in the Upper Tribunal on 3rd September 2014. Representation was as

mentioned above. I had before me all the documentation which was before the First-tier Tribunal. In addition, I have been helpfully supplied with a bundle of recent decisions which includes the judgment of the Court of Appeal in MM v SSHD [2014] EWCA Civ 985.

8. Having heard submissions by both advocates I reserved my decision which I now give.

9. As I have already mentioned, the original refusal was on financial grounds under the Immigration Rules. The application was also considered under Article 8 of the ECHR but the Respondent considered that whilst there may be a perceived interference with the Appellants' right to family life under Article 8, such interference was justified for the purpose of maintaining effective immigration control and was therefore proportionate to the legitimate aim.

10. Judge Colyer noted that the first Appellant and the Sponsor were married and had a child born in Ethiopia (the second Appellant) in June 2012. As a consequence of the child's birth, an application for entry clearance which would have been ready to have been submitted before 9th July 2012 could not be made due to the fact that the first Appellant could not travel to the UK at a late stage of pregnancy. Furthermore, she was unable to complete an English language test. The Appellants' representatives argued that the birth of the second Appellant outside the UK was a factor which justified a favourable decision under Article 8 and that by the date of the appeal in the First-tier Tribunal the financial requirements could be satisfied.

11. Judge Colyer found the Sponsor to be a credible witness and that the documents which he had produced were reliable. Cogent reasons have been given in support of these findings.

12. The Sponsor is an Eritrean national who has been recognised as a refugee in the UK. It is the Sponsor's case that he met the Appellant whilst he was in Sudan having escaped from Eritrea in 2008. The Appellant was on a family holiday and they met by chance in a church. They became friends and continued to meet at the church on a daily basis. By the time the Appellant was due to return home a relationship had developed between them. The Sponsor finally entered the UK in December 2009. Initially he was detained but following his release he re-established contact with the Appellant and their relationship continued. The Sponsor was granted refugee status in November 2010. Thereafter he obtained a travel document and went to Ethiopia where he and the Appellant married on 22nd September 2011. The Sponsor was in Ethiopia between 6th September 2011 and 1st November 2011. As already mentioned, the second Appellant was born in Ethiopia on 4th June 2012.

13. Judge Colyer noted that the Sponsor conceded that at the date of application he did not meet the financial requirements of the Immigration Rules. However, by the date of the appeal hearing his earnings had increased to a level which exceeded the minimum requirement of the Rules but the judge rightly pointed out that the relevant date for consideration of the evidence is the date of application. The judge also concluded that since the Appellants' applications were not made until after the amended Rules came into force on 9th July 2012 they were required to satisfy the current Rules and did not benefit from any interim concessions. I am satisfied that as a matter of law the First-tier Judge was correct in this conclusion.

14. Judge Colyer went on to consider the exception to Appendix FM contained in section EX. EX.1 applies if the applicant has a "genuine and subsisting relationship with a partner who is in the UK ... with refugee leave, and there are insurmountable obstacles to family life with that partner continuing outside the UK". Judge Colyer found that there were such insurmountable obstacles for the reasons which are mentioned at paragraph 41 of the determination. In summary, the reasons are that the Sponsor is an Eritrean with refugee status. As an Eritrean he cannot be expected to reside in neighbouring countries to Eritrea, such as Sudan and Ethiopia, because there is a real risk that he would be deported back to Eritrea. Eritreans in Ethiopia have been kept in detention camps. While the Sponsor has been able to remain in Ethiopia legally for short periods he would not be granted permanent status. Judge Colyer found that the Sponsor would not be able to reside permanently as part of the Appellants' family in Ethiopia. Therefore the Appellants have established an exception to the requirements to meet Appendix FM.

15. Judge Colyer has noted the Tribunal's obligation to take account of the welfare of children and he has also considered Article 8 in accordance with the well-known five step approach advocated by Lord Bingham in Razgar. This is a careful and comprehensive determination which discloses a thorough examination of the Appellants' claim.

16. Both representatives made helpful submissions. For the Respondent, Miss Johnstone submitted that the First-tier Judge erred in law in applying paragraph EX1 for the reasons which are set out in the grounds in support of the application for permission to appeal. She argued that this misapplication had infected the overall Article 8 assessment. She argued that the First-tier Judge had failed to apply the guidance given in the recent decisions in Nagre and Gulshan.

17. For the Appellants, Mr Royston relied upon a supplementary skeleton argument and emphasised the following points.

18. When granting permission to appeal, Designated Judge Shaerf had pointed out that in an assessment of claims under Article 8 the decision of the House of Lords in Huang remains good law and that the relevant yardstick is one of reasonableness rather than compelling circumstances. Mr Royston submitted that the First-tier Judge had identified factors well recognised as amounting to compelling circumstances. In the present case there are:

    - The second Appellant is a young child.

    - There are insurmountable obstacles to family life being maintained outside the UK.

    - The Sponsor has been recognised as a refugee.

19. Mr Royston argued that Nagre and Gulshan were cases where there were no children, it was practicable for the family unit to live together outside the UK and the family unit was living precariously in the UK.

20. He also emphasised that the Respondent does not challenge any of the First-tier Judge's findings of fact. He argued that the present case involves the separation of a

young child from her father and that makes the circumstances of the case even more "compelling", resulting in an outcome which would be unjustifiably harsh.

21. Finally, Mr Royston relied upon the very recent guidance given by the Court of Appeal in MM v SSHD [2014] EWCA Civ 985 where it was held –

> "Nagre does not add anything to the debate, save for the statement that if a particular person is outside the Rule then he has to demonstrate, as a preliminary to a consideration outside the Rule, that he has an arguable case and there may be good grounds for granting leave to remain outside the Rules. I cannot see much utility in imposing this further, intermediary, test. If the applicant cannot satisfy the Rule, then there either is or there is not a further Article 8 claim. That will have to be determined by the relevant decision-maker".

22. In the light of this very clear guidance Mr Royston submitted that a failure to apply a threshold case cannot amount to an error of law. I agree with this submission.

23. I have concluded that the making of the decision by the First-tier Tribunal did not involve the making of an error on a point of law. I therefore uphold the determination in its entirety. I direct that the order for anonymity made previously shall continue.

Signed Date 7th October 2014

Deputy Upper Tribunal Judge Coates