



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/02178/13

THE IMMIGRATION ACTS

Heard at: Field House
On: 24th June 2014

Determination Promulgated
On: 26th June 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE BRUCE

Between

Entry Clearance Officer, Nairobi

Appellant

and

**Fartun Abdullahi Awale
(no anonymity order made)**

Respondent

For the Appellant: Mr Tarlow, Senior Home Office Presenting Officer
For the Respondent: Mr Williams, CNA Solicitors

DETERMINATION AND REASONS

1. The Respondent is a national of Somalia date of birth 20th October 1990. She currently resides in Kampala, Uganda. On the 7th February 2014 the First-tier Tribunal (Judge Boyes) allowed her appeal against the decision of the Respondent to refuse her entry clearance to the UK as the spouse of a person present and settled here. The Respondent's sponsor is her husband Mr Gedi Ali.

Background and Matters in Issue

2. The application had been considered with reference to Appendix FM of the Immigration Rules and refused on the basis that the Respondent had not demonstrated

that she met the requirements set out in paragraph E-ECP 3.1. It was accepted that Mr Ali earned £16,380 in his employment at the 'Maple Leaf Bakery'. He had claimed to have additional income from 'Gees Good Grocery' which would take him over the threshold of £18,600 per annum, but the Entry Clearance Officer could not take evidence of this into account, in essence because Mr Ali had been working there for less than 6 months.

3. The First-tier Tribunal found as fact that Mr Ali was earning the claimed £16,380 from Maple Leaf Bakery. The Judge could not however be satisfied as to any earnings from Gees Good Grocery because of insufficient documentary evidence. The appeal was therefore dismissed under the Rules. The Judge went on to consider Article 8. She begins by setting out the key areas of enquiry identified by Lord Bingham in Razgar [2004] UKHL 27. She found that there was a family life and that the decision would interfere with it. It is noted that the sole reason for refusal is the failure to meet the financial requirements set out in Appendix FM, provisions that were the subject of the appeal in MM and Others [2013] EWHC 1900 (Admin). Judge Boyes cites from the reasoning of Blake J in that case and finds, on the "particular facts of this case", that the application of the minimum income requirements (in E-ECP 3.1) are an unjustified and proportionate interference with the parties' Article 8(1) rights. In addition to the 'MM point' the Judge identified a number of other factors which led to the decision being disproportionate: the Sponsor had come to the UK as a refugee and could not return to Somalia (thus precluding married life from continuing there); he had integrated into British society to the extent that he had a home and a job which he would lose if he had to go to Uganda; he had no connection with Uganda himself and "would struggle to survive" there. Finally the Judge had considered whether it would be proportionate to require the Respondent to make a fresh application. Particularly relevant to that matter was the fact that this couple had married as long ago as the 28th October 2010. An application for entry clearance soon after had failed because the Respondent was under 21 at the date of application, a provision under the Rules which was subsequently found to be unlawful by the Supreme Court in Quila [2011] UKSC 45. But for that unlawful provision the Respondent would have been granted entry clearance long ago. In those circumstances the First-tier Tribunal did not consider any further delay to be reasonable or proportionate.
4. The grounds of appeal are that the First-tier Tribunal erred in failing to have regard to Gulshan [2013] UKUT 00640 (IAC) and Nagre [2013] EWHC 720 (Admin). There was no regard had to whether there was a good arguable case for proceeding to consider Article 8. Further the grounds take issue with the conclusions reached by Blake J in MM and Ors. Before me Mr Tarlow did not pursue these 'MM' grounds.

Error of Law

5. It will rarely if ever be a material error of law to fail to specifically cite a case where it is clear that the Tribunal has applied the right principles.

6. Mr Tarlow submitted that the entire Article 8 reasoning in this case was flawed for failure to refer at the outset to the 'test' set out in Gulshan, Nagre and related cases. The grounds of appeal state that 'test' to be "that an Article 8 assessment shall only be carried out when there are compelling circumstances not recognised by the Rules". It is also said that "Gulshan makes it clear that at this stage an appeal should only be allowed where there are exceptional circumstances". In granting permission to appeal Judge Hemingway observed that this somewhat misstates the position post-Gulshan. She cites the guidance in full: "after applying the requirements of the Rules, only if there may be arguably good grounds for granting leave to remain outside them is it necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under them". Whichever way you put it, the point being made is that the way we approach Article 8 has changed since the statement of changes to the Immigration Rules made on the 9th July 2012. That is because on that day the Secretary of State expressly sought to integrate Article 8 into the Rules, formulating new paragraphs which would reflect where parliament considered the balance should be struck between the rights of the individual and the rights of the state.
7. I am quite satisfied that Judge Boyes had directed her mind to that fact. She had clearly had regard to the decision in MM, which addresses such changes head on, and in fact sets out (at paragraph 90) the Secretary of State's own guidance that post-July 2012 positive Article 8 decisions must identify "unjustifiably harsh consequences", later to be approved in Gulshan and Nagre, the latter decision being referenced at paragraph 84 of MM. The failure to refer in terms to any of these cases has not affected the decision, since it is apparent that the Judge had in mind that there needed to be particular factors which would render the decision unjustifiably harsh. As I have set out above (at paragraph 3) she has identified those.
8. There is no criticism of her proportionality balancing exercise *per se*; if it accepted that the findings on proportionality were open to Judge Boyes it can hardly be said that there was not a "good arguable case" for going on to consider Article 8. If there was an error in not expressly setting out the *dicta* in Gulshan it is not, in this case, such that the decision should be set aside.

Decision

9. The decision of the First-tier Tribunal contains no error of law and it is upheld.

Deputy Upper Tribunal Judge Bruce
24th June 2014