Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: OA/03630/2013
OA/03712/2013
OA/03729/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 6 March 2014	**On 14 March 2014**

Before

UPPER TRIBUNAL JUDGE PETER LANE

Between

KAMAL BAHADUR PUN
DICHHYA PUN
DIYA PUN

Appellants

and

ENTRY CLEARANCE OFFICER - MANILA

Respondent

Representation:

For the Appellants: Ms R. Stickler, Counsel, instructed by N C Brothers & Co, Solicitors
For the Respondent: Mr T. Melvin, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellants, citizens of the Philippines, are the husband and children of a British citizen, who sought entry clearance to the United Kingdom in order to join the sponsor. Their applications were refused on 9 January 2013 and they appealed unsuccessfully to the First-tier Tribunal whose determination was promulgated on 14 December 2013. Permission to appeal to the Upper Tribunal was granted by the First-tier Tribunal on 17 January 2014 on all grounds.

2. Both the Entry Clearance Officer and the First-tier Tribunal concluded that the appellants failed to meet the following financial requirements of the Immigration Rules:–

> "E-ECP.3.1 The applicant must provide specified evidence, from the sources listed in paragraph E-ECP.3.2, of –
>
> (a) a specified gross annual income of at least –
>
> (i) £18,600;
>
> (ii) an additional £3,800 for the first child; and
>
> (iii) an additional £2,400 for each additional child: alone or in combination with
>
> (b) specified savings of –
>
> (i) £16,000; and
>
> (ii) additional savings of an amount equivalent to 2.5 times the amount which is the difference between the gross annual income from the sources listed in paragraph E-ECP.3.2.(a)-(b) and the total amount required under paragraph E-ECP.3.1.(a);"

3. The Entry Clearance Officer's stance was recorded by the First-tier Tribunal as follows:

> "4. The Respondent's refusal letter dated 9.1.13 states in summary that the sponsor needs to show a gross income of at least £18,600 for at least 6 months prior to the application. There is submission of an annex 2 which confirms that he is reliant on sponsorship from a third party, his brother and sister-in-law which cannot be taken into account. The Appellant has provided wage slips that state that he earned £1,283 p.m. in Hong Kong in 2012. There is no evidence that he still in employment or in respect of his income. There is no submission of any savings that are held to meet the financial requirements for entry clearance. The application was refused under paragraph EC-P.1.1(d) of Appendix FM of the

Immigration Rules. The Second and Third Appellants were refused pursuant to Paragraph EC-C.1.1 of Appendix FM.

5. The Respondent's review dated 11.7.03 states that there is no evidence of the proposed employment of the sponsor and her current payslip shows an income of less than £1000 p.m.. There is a fidelity investment portfolio which contains £15000 but does not cover the 6 months period but the deposits are not significant. The sponsor has a Hang Seng bank account with a balance near to £30,000 over 6 months. There is also £15,000 in an HSBC account but the combined values of the accounts does not meet the threshold."

4. The judge's findings were as follows:-

"11. I have considered all the evidence in the round and I make the following findings.

12. The First Appellant has submitted further evidence in respect of income and savings. However, none of this satisfies the financial criteria set out in paragraph 9 above. The sponsor's income is evidenced by 4 payslips for September to December 2012 which show an average monthly income of 10,000. This I presume to be Hong Kong dollars. The First Appellant works and in January 2013 his income was confirmed by a letter to be $16000 p.m. There is no evidence of the proposed employment of the sponsor. I find that the First Appellant has failed to establish the necessary income requirements.

13. I take the savings into account. The amounts held in the Standard Chartered Bank accounts are small, the Fidelity investment portfolio does not cover a 6 month period. There is a substantial amount in the Hang Seng Bank over a 6 month period of a balance which does not dip below $£330,000. However, the difficulty remains with the failure to have sufficient income."

5. In R (On the application of MM) v Secretary of State for the Home Department & Others [2013] EWHC 1900 (Admin), Blake J made findings concerning E-ECP.3.1, which are directly relevant to the issues in the present appeals. I am satisfied that I should regard those findings as persuasive, absent compelling argument to the contrary. The fact that MM is under appeal to the Court of Appeal is not per se a reason to depart from MM. Blake J made findings regarding the lawfulness of the relevant Immigration Rules in the context of British citizens wishing to live with their family in this country. It is common ground that, in the present case, the sponsor is such a citizen. Particular aspects of his judgment are as follows:-

"130. When decision-makers and judges assess pre-July 2012 applications for adequacy of maintenance, particularly where the maintenance limits rise because of dependent children, any short fall in proven earnings can be met by evidence of capital resources. Thus, suppose a person with a dependent spouse and children needed to show an income of £15,000 to meet the income support subsistence level test then applicable could only show part-time earnings of £12,500; such a person could make good the difference, if at the time of the application, there were cash assets of £6,250 available to support the couple for the full thirty

month period before next review. It was not necessary that savings of £16,000 first had to be shown before regard could be had to such savings. This approach will still apply to classes of people exempt from the new requirements.

131. If a similar approach had been permitted on the new £18,600 target, particularly if limited to the first twelve months before review, then if a claimant such as MM could demonstrate savings of £3,000 when added to his £15,600 income, he could meet the threshold to permit his wife to come to the UK. To inform a low earner that there is fairness and flexibility in the scheme because they can count any savings over £16,000 to add to their low earnings seems a rather cruel piece of mockery: how is a person earning the minimum wage likely to accumulate savings of £16,000? For a sponsor with no income at all that would mean £16,000 plus £18,600 x 2.5 years = £62,500. Moreover this requirement is additional to the statutory prohibition on access to income support or similar benefits whilst a person has limited leave to remain. I recognise that the Secretary of State's case is that she is looking for long-term economic viability of families after the spouse has acquired settlement five years after entry, but if so it seems to me that examination of the financial circumstances of the couple at the end of the five year period when the earning capacities of both parties can be taken into account is the time to make the assessment rather than to front load these substantial financial burdens on a self-sufficient but low-paid earner before the spouse is admitted.

144. Nevertheless, the rights are of such fundamental importance and the effect of the five aspects on which I have focused attention are so intrusive, that I conclude that taken together they are more than is necessary to promote the legitimate aim. The substance of this claim is both the human rights of the sponsor claimants to enjoy respect for family life and the constitutional right of the British citizen to reside in the country of nationality without let or hindrance. From this perspective the application of the combination of the five factors to people in the position of these claimants is not merely disproportionate as a matter of human rights law but also an irrational and unjustified restriction on rights under the law relating to recognised refugees and the constitutional rights of British citizens.

145. I do not accept the claimants' case that the Secretary of State was required to adhere to the rule 281 (v) formula in all cases of entry clearance application by spouses of British citizens and recognised refugees. She was justified in concluding that greater resources than £5,500 per annum for a couple without children and adequate accommodation were needed in pursuit of the aims she has identified. It may be that the £18,600 minimum income without recourse to other sources of funding would be within the limits of the Secretary of State's margin of appreciation in setting the terms in which foreign sponsors can bring in their spouses and partners, even though this represents a radical departure from the norm in the European Union based on the Family Reunion Directive.

146. However, I conclude that this measure is disproportionate when applied to British citizens and recognised refugees. In particular, it is more intrusive in its restrictions on family life to ensure that couples are self sufficient at the time of the spouse's first admission, and are above the level of recourse to public funds at

the end of the five year period when the spouse's application for settlement is being considered.

147. There are a variety of less intrusive responses available. They include:

i. reducing the minimum income required of the sponsor alone to £13,500; or thereabouts;

ii. permitting any savings over the £1,000 that may be spent on processing the application itself to be used to supplement the income figure;

iii. permitting account to be taken of the earning capacity of the spouse after entry or the satisfactorily supported maintenance undertakings of third parties;

iv. reducing to twelve months the period for which the pre estimate of financial viability is assessed."

6. I am entirely satisfied that the First-tier Tribunal in the present case erred in law in that the judge misapplied the relevant financial requirements by confusing the issues of "income" and "savings". In particular, at [13] of the determination, the judge accepted that the appellants had a "substantial amount" of savings covering the relevant six month period prior to the application but failed to consider whether such savings were sufficient to meet the requirements. It is clear that E-ECP.3.1(b) permits the financial requirement to be met by a combination of income and savings.

7. As a result of that error of law, I have decided to set the judge's determination aside, so that the Upper Tribunal can re-make the decision in the appellants' appeals, which I now proceed to do.

8. Ms Stickler's oral submissions have been modified by written submissions, received after the hearing, in which she very properly drew my attention to an omission in her skeleton argument, to which she spoke at that hearing. Those written submissions were copied to Mr Melvin, who has responded in writing to me, copied to counsel.

9. If one applies the requirements of E-ECP.3.1 without regard to the judgment in MM, the sum needed by the appellants is £24,600 (£18,600 + £3,800 + £2,400).

10. Although Mr Melvin questioned the income of the sponsor, I agree with Ms Stickler that the evidence on this issue is such that I should have regard to it. The income is £9,240 per annum. Thus, the deficit is £15,360. Savings as specified by E-ECP.3.1(b) therefore need to be shown, if the appellants are to meet the requirements of the rules. The formula contained in that sub-paragraph requires the sum of £16,000 to be aggregated to 2.5 x £15,360 (£24,600 - £9,240) = £54,400.

11. There was a disagreement between the representatives at the hearing regarding the evidence of savings that was before the entry clearance officer and the First-tier Tribunal judge. Having examined the materials, however, I agree with Ms Stickler at

paragraphs 9 and 10 of her skeleton argument that both the savings in the Hang Seng Bank and the account (543-7-0267420 fall to be taken into consideration, as, in both cases, there was evidence in respect of the requisite six month period. The total savings were, thus, as stated in Ms Stickler's skeleton argument: viz. £25,421.90 + £14,140.62 = £39, 562.52.

12. As can be seen, this total amount of savings falls well short of the £54,400 required by the rules. The appellants can, therefore, succeed only by successfully invoking MM.

13. MM is a decision carrying considerable persuasive force. The fact that it is under appeal does not *per se* affect that force. The difficulty, rather, lies in determining how, if at all, it falls to be applied in a particular appeal, such as the present case.

14. Mr Melvin submitted that what Blake J had to say about ways in which the rules might be made "less intrusive" [147], even if correct, was in the context of Article 8, as it bears in the case of a sponsor who is a British citizen. Mr Melvin pointed to the fact that the sponsor in the present case, although British, had spent little time in the United Kingdom and that the family had lived together in Hong Kong.

15. There is some force in that submission, and I shall revert to it shortly. But, the real difficulty, as it seems to me, in the appellants' case is that it amounts to an invitation to the judiciary to re-write the detailed requirements of the immigration rules in ways that will almost inevitably lack consistency and which risk being seen as akin to the discredited "near miss" principle (see Patel [2103] UKSC 72).

16. In so saying, I am aware Blake J said at [148] that his conclusions were in part designed to assist

> "judges of the First-tier and Upper Tribunal who will have the difficult task of determining on the basis of particular facts as found or are undisputed whether Article 8 requires the admission of the particular person".

However, I do not consider that observation was intended to be an invitation to judges, as opposed to the respondent, to take a view as to precisely what financial level should be set by the rules in the case of a particular appellant. Rather, it seems to me that the judicial assistance envisaged by Blake J comes down to the following. In determining the proportionality of any interference with Article 8 rights stemming from the refusal of entry clearance, having assessed the weight to be placed on the appellant's side of the balance, the weight to be placed on the respondent's side may fall to be diminished (and so produce a result in the appellant's favour) if and to the extent that the respondent is relying on aspects of the rules, which Blake J identified as problematic (or "intrusive").

16. The present case provides a good instance of the problems with the approach described in paragraph 15 above. It is plain from [147] that Blake J was not finding

that certain specific requirements of the rules had to be rewritten by the respondent in order to make them generally compatible with Article 8. His list of "less intrusive" responses is non-exhaustive. It is also evident that Blake J was not saying that all four items on the list had to be adopted by the respondent.

17. In the present case, even if, as Ms Stickler submits, I were to read the reference to 18,600 as if it were a reference to Blake J's suggested figure of £13,500 in [147](i), the sum required in savings would be £45,100 (£16,000 + (£11,640 x 2.5). That sum is still well in excess of the savings of £39,562.52.

18. Accordingly, in her post-hearing written submissions, Ms Stickler is forced to make the submission that Blake J's judgment is authority for the proposition that, as well as reducing the sum of £18,600, the "savings" sum of £16,000 should be ignored, as well as the multiplier of 2.5. [131] of the judgment is said to be authority for the first proposition, whilst [147] iv is a distillation of the judge's observations on the second proposition. If one does all this, then, Ms Sticker says, the required savings were only £15,560.

19. With respect to Ms Stickler, this will not do. Adopting the approach I have described at paragraph 16 above, I accept that, the stronger the Article 8 case, the more one might need to "read down" the intrusive rule requirements. But the present appeals have not been put forward on the basis that there is a pressing human rights need for family reunion in the United Kingdom. Significantly, Ms Stickler's original submissions, as contained in her skeleton argument, sought only to rely on the suggested £13,500 figure. The inclusion of the sums relating to the child appellants has had the result that reliance only on the £13,500 figure is no longer enough to get the appellants the result they want. But the absence of a weighty Article 8 case in favour of the appellants means there is no basis for reading down the £16,000 or 2.5 multiplier requirements, in order to produce a result that is not a disproportionate interference.

9. The determination of the First-tier Tribunal contains an error of law. I set it aside and substitute a decision of my own, dismissing the appeal of the appellants.

Signed Date

Upper Tribunal Judge Peter Lane