Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/04280/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 3rd March 2014	**On 7th March 2014**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MOHENJO ST ORBIN THOMPSON
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Miss Isherwood, Senior Home Office Presenting Officer
For the Respondent: Mr Collins, Counsel instructed on behalf of J McCarthy Solicitors

DETERMINATION AND REASONS

1. The Secretary of State appeals with permission against the decision of the First-tier Tribunal (Judge Blake) who in a determination promulgated on 24th December 2013 allowed the appeal of the Respondent, against the decision of the Entry Clearance Officer to refuse him entry clearance to the United Kingdom.

2. For the sake of convenience, I shall refer to the parties as they were before the First-tier Tribunal.

3. The Appellant is a citizen of Jamaica born on 21st August 1983. On 9th November 2012 he made an application for entry clearance as a partner with reference to Appendix FM and paragraph EC-P.1.1 of the Immigration Rules HC 395 (as amended).

4. In the notice of immigration decision dated 15th January 2013, the Entry Clearance Officer refused the application on the grounds that he had not provided evidence to demonstrate that the Sponsor could meet the financial requirements of the Immigration Rules and that the specified documents under the Rules had not been provided. Thus the application was refused under paragraph EC-P.1.1(d) of Appendix M of the Immigration Rules.

5. The Appellant appealed the decision and the appeal came before the First-tier Tribunal (Judge Blake). He had the advantage of hearing oral evidence from the Sponsor, her stepson Roshan and having considered two bundles of documentary evidence provided on the Appellant's behalf. It is common ground between the parties at that hearing the Appellant could not meet the Immigration Rules (at [26] and [43]). However the case was advanced on Article 8 grounds including submissions made concerning the decision of **MM and Others v SSHD [2013] EWHC 1900 (Admin)**.

6. It is plain from the determination that the judge had no difficulty in accepting all of the evidence of the Sponsor and reached the conclusion that she was an honest and credible witness. He referred himself to the relevant case law when making an assessment of Article 8 principles including **MF (Nigeria) [2013] EWCA Civ 1182** and what he described as the "European jurisprudence interpreted by the UK higher courts" including **Huang v SSHD [2007] UKHL 11**. The judge applied the well established five stage test in **Razgar** and reached the conclusion by going through the steps that the questions resolved in favour of the Appellant leading to the ultimate issue of proportionality.

7. In carrying out a balancing exercise, the judge reached the conclusion that the decision was not a proportionate one to the legitimate public aim identified. In this respect the judge took into account the decision of **MM** (as cited) and in particular the financial threshold, which it had been conceded that the appellant could meet, was a relevant consideration and further took into account from the evidence before him, which he accepted, as to the effect of the decision upon the Appellant's wife and family including the length of time that the parties were likely to be separated, the fact that the Sponsor was a British citizen and could not be reasonably expected to live in Jamaica given her circumstances and the medical evidence produced, which was not in dispute, concerning the effect upon the Sponsor's health and general wellbeing in the absence of the Appellant. Thus he allowed the appeal.

8. The Secretary of State sought permission to appeal on the grounds that the Appellant could not satisfy the Immigration Rules and that in allowing the appeal on Article 8 grounds the outcome could not be considered as "unjustifiably harsh". It was further submitted that the First-tier Tribunal had had particular regard to the decision of Mr Justice Blake in **MM** (as cited) and thus whilst noting it was a persuasive authority, the judgment did not dispute the entitlement to a minimum incomes' threshold and that such a financial requirement was a measure within the field of immigration control directly concerned with socio economic policy. Thus it was submitted that in **MM** the judge usurped the role of the democratically accountable decision-maker and that by relying on **MM** the Tribunal had erred. There were further criticisms made of the decision of **MM**.

9. Permission to appeal was granted by the First-tier Tribunal (Judge Brennan) on 17th January 2014.

10. Thus the hearing came before the Upper Tribunal; the Secretary of State being represented by Miss Isherwood and the Appellant by Mr Collins, who appeared as Counsel before the First-tier Tribunal. Miss Isherwood relied upon the grounds reiterating that the Appellant could not meet the Rules and the decision of **Gulshan** which had been promulgated after the decision of the First-tier Tribunal, made it clear that after applying the Rules an Appellant could only satisfy Article 8 if there were "compelling circumstances." In this case the judge did not consider whether there were such "compelling circumstances." Miss Isherwood also submitted that it would be wrong to follow the decision of **MM** (as cited) as it was not binding on this Tribunal.

11. A reply under Rule 24 had been submitted in advance of the hearing having been drafted by Mr Collins. In that response it was submitted that the Secretary of State appeared to be asserting that on the basis of a lack of "exceptionality" relying on **Gulshan**, the First-tier Tribunal erred in allowing the appeal under Article 8. It was submitted that that was solely misguided as this was not an argument advanced before the judge, it purported to introduce a test of exceptionality which was wrong (see **MF (Nigeria)**), **Gulshan** had not been promulgated at the date of the hearing and that **Gulshan**, was not binding on the First-tier Tribunal or the Upper Tribunal and even if correctly decided was not declaratory in nature. It submitted that the judge properly directed himself as to the correct approach in **MF (Nigeria)** and in any event permission was not granted on this ground.

12. As to the grounds asserting that the judge erred by having regard to **MM and Others**, it was submitted this was misguided and was an ineffectual critique of the judgment of Mr Justice Blake in **MM**. The reply also considered the grant of permission by the First-tier Tribunal where it was stated that "**MM** was not binding authority that the judge was bound to follow". The response goes on to state that that was a comment of concern as it did form part of the Grounds of Appeal and the judge did not approach **MM** as the only way binding on him and that the judge did not allow the appeal only on the basis of **MM** but addressed the other evidence and

conducted a proper and structured analysis of the proportionality of the Appellant continuing to be separated from his partner.

13. Mr Collins replied upon the response that he had drafted and supplemented with his oral submissions which followed those in the grounds. He submitted that the grounds as they stood did not disclose any error of law and that the judge had heard the evidence of the witnesses and had reached credible findings of fact. Mr Collins took the Tribunal through the particular evidence that had been placed before the First-tier Tribunal which was contained in the two bundles of documentation. He further submitted that in the grant of permission no submission was made on the grounds that the decision was flawed on **MF (Nigeria)** grounds. He further submitted that **Gulshan** had not been promulgated at the time of the First-tier Tribunal's decision and was not binding as it was not a starred decision nor did it rank as a country guidance case.

14. He took the Tribunal through the determination and reiterated the evidence that the judge had heard including the positive findings of fact made of the evidence of the Sponsor. He submitted that the judge in a balanced decision had accepted the evidence but had reached the conclusion that the balance lay in favour of the Appellant.

15. Miss Isherwood maintained a position that there was not a fair balance of proportionality.

16. I reserved my decision.

17. The grounds advanced on behalf of the Secretary of State by Miss Isherwood are that the judge failed to carry out the appropriate balancing exercise and after applying the requirement of the Rules the judge was required to consider whether there were any "compelling circumstances" not sufficiently recognised under them. In this context while she has relied upon the decision of **Gulshan**, which was not promulgated at the time that the First-tier Tribunal decided this appeal, that is not, I think, inconsistent with earlier jurisprudence including **R (on the application of) Nagre v SSHD [2013] EWHC 720 (Admin)**.

18. There were major changes in July 2012 in the Immigration Rules covering applications for entry clearance and leave to remain as family members. Appendix FM is the route for those seeking to enter or remain in the UK on the basis of the family life of the person who is a British citizen, is settled in the UK or is in the UK with limited leave as a refugee or person granted humanitarian protection. Section R-LTRP.1.1 of Appendix FM contains the requirements for limited leave to remain as a partner. The financial requirements, which were relevant in this appeal are set out at E-LTRP.3.1. They are set out within the decision letter.

19. Section FM at 1.0 of the October 2013 IDIs "partner and ECHR Article 8 guidance" concerns family members applying after 9th July 2012 under Chapter 8 Appendix F of the Immigration Rules. The guidance of the caseworkers therefore is appropriate to the current appeal. The guidance states:-

> "It reflects the two stage approach to considering applications under the family and private life Rules in Appendix FM and paragraph 276ADE-DH. First caseworkers must consider whether the applicant reached the requirements of the Rules, and if they do, leave under the Rules should be granted. If the applicant does not meet the requirement of the Rules, the caseworker must move on to the second stage: whether, based on an overall consideration of the facts of the case, there are exceptional circumstances which mean refusal of the application would result in unjustifiably harsh consequences for the individual or their family such that refusal would not be proportionate under Article 8. If there are such exceptional circumstances, leave outside the Rules should be granted. If not the application should be refused."

19. The guidance gives some indication of what exceptional means namely "circumstances if its refusal would result in unjustifiably harsh consequences for the individual or their family such that refusal of the application would not be proportionate. That is likely to be the case only very rarely." Nonetheless the guidance makes it plain that there are cases which although they may not meet the Rules may result in what are described as "unjustifiably harsh consequences" or what Miss Isherwood has described as compelling circumstances. As noted by Mr Collins, that does not mean that there is any test of exceptionality that was expressly stated in **MF (Nigeria)**.

20. It was common ground between the parties that the Appellant could not meet the financial requirements of the Rules (see paragraph [43]). There has been some discussion before the Tribunal concerning a concession purportedly made by the Presenting Officer at the hearing and referred to by the judge at paragraph 49. The judge said "I further note the concession made by the Home Office Presenting Officer that the Appellant would meet the threshold as advised by the Honourable Mr Justice Blake in MM on the basis of the evidence presented before me."

    I do not think that there can be any dispute as to what the judge meant by referring to this as a concession. It is plain that the Presenting Officer conceded that the earnings of the Sponsor, which Mr Collins has stated were £14,000 gross, met the threshold identified Mr Justice Blake in **MM** which was £13,400 but it is clear from his submissions at paragraph 23 that he was not conceding the appeal on behalf of the Secretary of State.

21. It is plain that the judge did take into account the decision of **MM** which had been placed before him on behalf of the Appellant. In that case the conclusion of Blake J was that the combination of the new Rules:-

> "... Amount together to a disproportionate interference for the rights of British citizen Sponsors and refugees to enjoy respect for family life. In terms of the Strasbourg approach they do not represent a fair balance between the competing interests and fall outside the margin of appreciation or discretionary area of judgment available in policy making in this sphere of administration."

    It is also plain from the determination that he accepted that the wider margin of appreciation was likely to be relevant to foreign Sponsors who are voluntary migrants but not British citizens or refugees. He went on to identify five measures which could be applied to cases which did not interfere with the right to respect for

family life including the reduction of the minimum income required of the Sponsor alone to £13,500 or thereabouts, permitting savings over £1,000 that may be spent on processing the application to be used to supplement the income figure, and permitting account to be taken of the earning capacity of the spouse after entry or the supported maintenance undertakings of third parties. Furthermore he took into account reducing to twelve months the period for which the pre-estimate of financial viability was to be assessed.

22. Whilst the requirements of E-LTRP3.1-3.2 stand, Mr Justice Blake said that they could constitute an unjustified and disproportionate interference with the ability of spouses to live together and suggested that rather than £18,600 (the amount specified in the Rules) an appropriate figure may be around £13,500 and highlighted the position of young people and low wage earners caught by the higher figure in the Rules.

23. The judge had the advantage of hearing and seeing the witnesses who appeared before him. There is no doubt that the judge reached the conclusion that the Sponsor was a credible and honest witness as set out at paragraph 41 of his findings. To that end, as Mr Collins submits, he accepted the evidence presented on her behalf concerning the genuineness of the relationship between the Appellant and Sponsor, the nature of that relationship, the medical conditions she suffered from which were exacerbated by the separation of the family members and the effect upon the family as a whole, including a minor child. This was not a case in which it was argued that the Sponsor could reasonably live in Jamaica given her British citizenship but also because she was responsible for undertaking the care of her 82 year old grandmother. The judge was specifically pointed to the likely effect of a lengthy separation between the parties. The evidence was contained in the bundle and in the various witness statements produced and in the form of medical evidence. There was also a letter from the Sponsor's Member of Parliament, Mr Barry Gardiner setting out the concerns for the family members as a whole who were likely to be separated by the decision of the Secretary of State. The importance of evidence heard by a judge should not be under estimated and it is plain from the findings of fact that the overall evaluation of the evidence by this particular judge was firmly in favour of the Appellant and the Sponsor.

24. Whilst the judge did not expressly state that those facts that he had found were either "compelling factors" or ones that would make the decision a "justifiably harsh" one and therefore disproportionate, it is implicit in his findings and his analysis of the issues that those were the factors that he considered to be the relevant considerations when carrying out the balance of proportionality, having found that the Appellant could not meet the Immigration Rules.

25. In his consideration of this issue he also gave weight to the decision of **MM** (as cited) and that the Sponsor's income did meet or indeed exceed the income threshold identified by Mr Justice Blake in **MM** (see paragraphs [47] and [49]). There has been some criticism made of the decision of **MM** in the grounds. However contrary to the submission made by Miss Isherwood, it is a binding authority it being a decision of the higher courts and remains good law unless and until it is overturned. The judge

was therefore entitled to take that into account and place that in the balance. Although as Mr Collins submits, that was not the only factor that led to the outcome in favour of the Appellant when carrying but the proportionality exercise. The fact that the First-tier Tribunal may have reached a generous decision does not demonstrate that there had been any error of law. The judge was entitled to make those findings concerning the circumstances of the Appellant and the Sponsor and other family members, the effect upon them of the continuing separation, the length of the separation and the effect both in medical terms and otherwise upon the parties. Those findings were sustainable in evidence based ones and the judge was entitled to take them into account. He was further entitled to place reliance upon the decision of **MM** when considering the balancing exercise as a whole which he found ultimately to be in favour of the Appellant.

26. Accordingly the Secretary of State has not demonstrated that the First-tier Tribunal made an error of law in its decision and therefore it shall stand.

Decision

The decision does not disclose the making of an error of law. The decision shall stand.

No anonymity direction was made.

Signed Date: 5/3/2014

Upper Tribunal Judge Reeds