Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/04368/2013

THE IMMIGRATION ACTS

Heard at Newport	**Determination Promulgated**
On 12 May 2014	**On 20 May 2014**
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Before

UPPER TRIBUNAL JUDGE GRUBB

Between

ENTRY CLEARANCE OFFICER - PARIS

Appellant

and

ADLEN MEDJDOUB

Respondent

Representation:

For the Appellant: Mr I Richards, Home Office Presenting Officer
For the Respondent: Mr G Moore instructed by J D Spicer Zeb Solicitors

DETERMINATION AND REASONS

1. This is an appeal by the Entry Clearance Officer against a decision of the First-tier Tribunal (Judge Onoufriou) which allowed the appellant's appeal against a refusal to grant him entry clearance as the spouse of a British citizen under Appendix FM of the Immigration Rules. Although Judge Onoufriou was not satisfied that the appellant met the requirements of Appendix FM, in

particular the financial requirements in E-ECP3.1, the Judge allowed the appeal under Article 8 of the ECHR.

2. For convenience, I will refer to the parties hereafter as they appeared before the First-tier Tribunal Judge.

Background

3. The appellant is a citizen of Algeria who was born on 26 October 1973. He first came to the UK as a visitor on 24 July 2003. His leave expired on 24 January 2004 and he remained as an overstayer in the UK until 9 November 2012 when he voluntarily returned to Algeria.

4. On 26 April 2012, whilst in the UK, he married a British citizen, Sharon Elizabeth Medjdoub. On 13 November 2012, the appellant applied for entry clearance on the basis of his marriage. On 3 December 2012, the ECO refused the appellant's application and that decision was confirmed by the Entry Clearance Manager on 26 June 2013. The refusal was based upon three grounds. First, the appellant had failed to disclose material facts concerning his previous entry to the UK in his application (para S-EC2.2 of Appendix FM). Secondly, the appellant had failed to establish that the sponsor's income from her employment was at least £18,600 gross per annum as required by E-ECP3.1. Thirdly, the appellant had failed to show that his Entry Level Certificate in ESOL Skills for Life (Speaking and Listening) (Entry 1) satisfied the English language requirement in E-ECP4.1.

The Appeal to the First-tier Tribunal

5. The appellant appealed to the First-tier Tribunal. The appeal was heard by Judge Onoufriou and at that hearing, in addition to a number of documents being submitted, the sponsor gave oral evidence.

6. On the basis of that evidence, Judge Onoufriou concluded that the appellant had not dishonestly failed to disclose material facts in his application which had been mistakenly filled in (without any such intent) by his previous legal representative. It was accepted by the Presenting Officer that the appellant's English language qualification fulfilled the requirements of Appendix FM.

7. The remaining issue was, therefore, whether the appellant could establish that the sponsor earned at least a gross income of £18,600 per annum. At para 20, the Judge set out the sponsor's evidence concerning her employment by Somerset County Council and it was accepted, on the basis of the documentary evidence produced, that she had a gross annual income of £15,500. In addition, the sponsor relied upon further income which she claimed she earned from GI Protection Ltd where, in addition to her employment with Somerset County Council, she worked as a sales representative between August 2012 and March 2013. However, the Judge was not satisfied that there was the required documentary evidence to

establish that she earned the claimed income with GI Protection Ltd which, if added to her income from her employment with Somerset County Council, would have exceeded £18,600.

8. Judge Onoufriou concluded, therefore, that as a result the appellant could not succeed under the Immigration Rules.

9. Having made that finding, Judge Onoufriou went on to consider Article 8 of the ECHR. Applying the well known five-stage test in Razgar v SSHD [2004] UKHL 24 at [17], the Judge was satisfied that the decision interfered with the appellant's family life with the sponsor and that that interference was of sufficient gravity to engage Article 8.1. He accepted that the interference was in accordance with the law and was for a legitimate aim, namely the economic well being of the country and the protection of the rights and freedoms of others. The Judge identified that the crucial issue was whether that interference was a proportionate interference with the legitimate aims identified.

10. Judge Onoufriou found that the interference was disproportionate. First, at para 22 of his determination he found that the parties' relationship was a genuine one amounting to family life as did the appellant's relationship with the sponsor's daughter. In para 22 he concluded:

> "…I accept that to expect the sponsor and her daughter to go and live in Algeria in view of the fact that they are British citizens and the sponsor's daughter would lose contact with her natural father, that this would be an insurmountable obstacle."

11. The Judge then set out a lengthy extract from the decision of Blake J in R (MM) v SSHD [2013] EWHC 1900 (Admin) at [100], [126], [145]-[146] and [153(ix)]. At [146], Blake J concluded that the £18,600 minimum income set out in Appendix A was a disproportionate measure. At [153(ix)], Blake J concluded:

> "I recognise that there maybe some circumstances where the character, conduct or immigration history of the foreign spouse and the economic circumstances of the United Kingdom are so dire that this was the foreseeable consequence of the particular marriage, but in the vast bulk of ordinary cases where the relationship is genuine and subsisting and there is no adverse history of the spouse to weigh in the balance, the imposition of such a stark choice is precisely what Sedley LJ described as indirectly sending the citizen into exile. I agree that in the broad generality of ordinary cases, the abandonment of the citizen's right of residence in order to enjoy family life with his or her spouse [poses] an unacceptable choice, and a disproportionately high price to pay for choosing a foreign spouse in an increasingly international world."

12. At para 23, Judge Onoufriou reached his conclusion that the respondent's decision was disproportionate as follows:

> "In the circumstances, within the context of **MM**, I find that clearly the economic circumstances of the parties are not dire and whilst the appellant's immigration history is poor in that he was an overstayer for many years, he did voluntarily leave the United Kingdom to make a proper application. In effect, Mr Justice Blake has found that the application of the Immigration Rules in respect of financial requirements as they currently exist are disproportionate when applied to British citizens and recognised refugees in the majority of cases except where their financial circumstances are dire."

13. As a result, the Judge allowed the appeal under Article 8.

The Appeal to the Upper Tribunal

14. The ECO sought permission to appeal and on 14 January 2014 the First-tier Tribunal (Judge J M Holmes) granted the Secretary of State's permission to appeal on the following grounds:

> "Accordingly whilst the Judge purported to rely upon the decision in **MM & Others** [2013] EWHC 1900 to find that the decision was not proportionate he failed to engage with the full extent of the failure to meet the requirements of the Immigration Rules, or to undertake any adequate assessment of the proportionality of the decision itself. In the light of that failure, it is arguable that the Judge's analysis of proportionality was flawed.
>
> In any event it is arguable that the Judge's approach discloses a misunderstanding of the decision in **MM**, and the proper approach to such factual situations. Arguably he proceeded from the wrong starting point in appearing to assume that **MM** required the appeal to be allowed outright notwithstanding the failure to meet the requirements of the Immigration Rules. Since permission to appeal has been granted in relation to the decision in **MM** then the attack upon that decision advanced in the ground may also be argued."

15. In his submissions on behalf of the Entry Clearance Officer, Mr Richards relied upon the grounds and submitted that there were no compelling circumstances which entitled the Judge to reach the conclusion that the appellant could succeed outside the Rules. He submitted that in effect, the Judge had misread the judgment in MM and concluded that the mere fact that the appellant only failed to meet the financial requirements of the Rules resulted in the decision being disproportionate.

16. Mr Richards submitted that if the error of law was established then, as there were no compelling features outside the Rules, given the appellant's past history and that the parties had entered into marriage in full knowledge that the appellant had no right to live in the UK, the legitimate aim or public interest reflected in the Immigration Rules outweighed the appellant's circumstances and the appellant's exclusion was proportionate.

17. Mr Moore, who represented the appellant, relied upon his skeleton argument. He submitted that the Judge had not wrongly applied MM but had, instead, properly carried out the proportionality exercise under Razgar. He submitted that although the appellant overstayed his visit visa, he voluntarily left the

UK. The Judge had considered all the salient features of the evidence including that the appellant and sponsor had married before his immigration status was determined and had also taken into account the appellant's relationship with his step-daughter. Mr Moore submitted that the Judge was entitled to take into account, in the light of MM, that the sponsor's income was £15,500 even though it did not meet the requirements of the rules which, in principle, Blake J considered to be disproportionate in MM. Mr Moore submitted that the Judge had made his decision on the basis of the totality of the evidence before him.

18. Mr Moore further submitted that, if an error of law were established, taking all of these factors into account I should remake the decision allowing the appellant's appeal under Article 8.

Discussion

19. It is common ground that on the Judge's finding the appellant could not meet the requirements of the Immigration Rules because the sponsor could not demonstrate that she had an income of at £18,600 gross per annum. Her established income was £15,500.

20. The Judge also found, and it is not now challenged, that the sponsor and her daughter (whom I was told was ten years of age) could not be expected to live with the appellant in Algeria because they are both British citizens and the sponsor's daughter would lose contact with her natural father. The Judge found that there were insuperable obstacles to the parties' continuing their family life in Algeria. In fact, the effect of the respondent's decision is that, until the sponsor can demonstrate income of at least £18,600, the parties will not be able to continue their family life and the family life with the appellant's step-daughter as they will be required to live apart in the UK and Algeria respectively.

21. The fact that the appellant could not establish that he met the requirements of the Immigration Rules was a powerful expression of the public interest weighing heavily against his and his family's rights under Article 8. The case law clearly identified that where an individual cannot meet the requirements of the Rules it will only be where there are "exceptional" or "compelling" circumstances giving rise to unjustified hardship as a consequence that an individual can succeed outside the Rules (see R(Nagre) v SSHD [2013] EWHC 720 (Admin); MF (Nigeria) v SSHD [2013] EWCA Civ 1192 and Gulshan (Article 8 – New Rules – Correct Approach) [2013] UKUT 00640 (IAC)). Those cases were, however, decided in the context of the removal of an individual already in the UK. Even if unsuccessful, such an individual would have an opportunity to apply for entry clearance once they had left the UK. That latter situation is, of course, the very situation of this appellant.

22. It is clear that the Judge did fully consider all the appellant's circumstances or, as Mr Moore put it in his submissions, the "positive and negative" features of

the appellant's case. The Judge clearly took into account that the appellant had overstayed his visit visa from January 2004 until he left the UK in November 2012 and returned to Algeria. The Judge also expressly took into account (at para 22) that the parties had entered into the marriage fully aware that the appellant lacked any immigration status in the UK and, as the Judge put it, "the consequent risks of entering into the marriage". He also expressly recognised that the appellant could not meet the requirements of the Immigration Rules in that he could not meet the financial requirements. The Judge also, however, noted that Blake J in MM considered that the figure of £18,600 in the Rules might well, depending upon an individual's circumstances, impose a disproportionate measure when applied to British citizens such as the appellant's wife.

23. I reject Mr Richards' submissions that the Judge applied MM on the basis that the appellant could succeed simply because of that latter factor. On the contrary, it is clear from reading the determination as a whole that the Judge did, as Mr Moore submitted, take into account all the factors including that latter factor as relevant to the issue of proportionality. He did so in the context of a case where he accepted (and it is not in any way challenged) that the relationship between the appellant and the sponsor and between the appellant and the sponsor's daughter amounted to family life and that there were insuperable obstacles to that family life continuing in Algeria rather than in the UK which was the only other alternative.

24. In SSHD v Huang [2007] UKHL 11, Lord Bingham of Cornhill at [20] identified the crucial issue in assessing proportionality as follows:

> "…The ultimate question for the [Tribunal] is whether the refusal of leave to enter or remain, in circumstances where the life of the family cannot reasonably be expected to be enjoyed elsewhere, taking full account of all considerations weighing in favour of the refusal, prejudices the family life of the applicant in a manner sufficiently serious to amount to a breach of the fundamental rights protected by Art 8."

25. In my judgement, Judge Onoufriou did no more than apply, in effect, the approach of Lord Bingham in Huang. This was a case where the parties' family life could not "reasonably be expected to be enjoyed elsewhere". The view expressed by Blake J in MM was a relevant matter for the Judge to take into account in assessing whether the interference that would result from the appellant's exclusion from the UK because he could not comply with the Immigration Rules was proportionate. Further, the strength of, and the effect the decision had on, the relationships between the appellant and sponsor and appellant and sponsor's daughter (which the Judge was best placed to assess on the basis of the evidence including, of course, the oral evidence of the sponsor) were telling factors also in assessing whether there were unjustifiably harsh consequences of excluding the appellant which weighed against the appellant's immigration history (that he was an overstayer but

had voluntarily left the UK) and that he could not meet the requirements of the Immigration Rules.

26. In my judgement Judge Onoufriou was entitled to find, on the evidence, that the public interest was outweighed by the consequences to the appellant, the sponsor and the sponsor's daughter if the appellant could not (as he had sought lawfully to do) gain entry clearance. The Judge took into account all the relevant factors. He did not, in my judgement, over-read MM and conclude that the appellant should succeed under Article 8 simply because the sponsor had a level of income which Blake J considered appropriate and consistent with proportionality in the generality of cases in MM,. He considered all the factors and although not every Judge would necessarily have reached the same conclusion, it cannot in my judgement be said that the findings were perverse or irrational or otherwise unsustainable in law.

Decision

27. For these reasons, the First-tier Tribunal's decision to allow the appellant's appeal under Article 8 did not involve the making of an error of law. The First-tier Tribunal's decision to allow the appeal stands.

28. The ECO's appeal to the Upper Tribunal is, accordingly, dismissed.

Signed

A Grubb
Judge of the Upper Tribunal

Date:

For the Respondent
Fee Award

For the reasons given by Judge Onoufriou I make no fee award.

Signed

A Grubb
Judge of the Upper Tribunal

Date: