Upper Tier Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/10232/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 28 August 2014	**On 28 August 2014**

Before

Deputy Upper Tribunal Judge Pickup

Between

Entry Clearance Officer- Kingston

Appellant

and

Treachea Adina Gentles
[No anonymity direction made]

Claimant

Representation:

For the claimant: Not represented
For the appellant: Mr C Avery, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The claimant, Treachea Adina Gentles, date of birth 12.11.78, is a citizen of Jamaica.

2. This is the appeal of the Secretary of State against the determination of First-tier Tribunal Judge Canavan, who allowed the claimant's appeal against the decision of the respondent, dated 17.4.13, to refuse her application made on 11.2.13 for entry clearance to the United Kingdom for settlement as the spouse of Barrington Dale Gentles, a British Citizen. The Judge heard the appeal on 13.5.14.

3. First-tier Tribunal Judge Hollingworth granted permission to appeal on 9.7.14.

4. Thus the matter came before me on 28.8.14 as an appeal in the Upper Tribunal.

5. There was no attendance by the sponsor or on behalf of the claimant. I note that on 16.5.14 notice of today's hearing was sent to the claimant and the sponsor at the address held on file for the sponsor. There has been no response. Neither has there been a Rule 24 response to the grounds of appeal or the grant of permission to appeal. A contact number was found from the First-tier Tribunal papers for the sponsor and a message left on voicemail but no response was forthcoming. I note that the sponsor has been visiting Jamaica and it may be that he has returned there again. In the circumstances, I decided that it was in the public interest to proceed to determine this appeal without further adjournment.

Error of Law

6. In the first instance I have to determine whether or not there was an error of law in the making of the decision of the First-tier Tribunal such that the determination of Judge Canavan should be set aside.

7. It is clear from the determination that the claimant could not meet the requirements of the Immigration Rules and in particular the specified evidence under Appendix FM-SE in relation to the sponsor's employment and income in the UK.

8. At §9 of the determination the judge found no breach of article 8 private life by the decision of the Entry Clearance Officer. However, Judge Canavan went on to make an article 8 family life assessment and find the decision disproportionate.

9. The grounds of application for permission to appeal complain that the judge failed to have regard to the case law guidance of Gulshan, to the effect that only if there are arguably good grounds for granting leave to remain outside the Immigration Rules is it necessary for article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under the Rules. I note here that the grounds assume an application for leave to remain, when this is an application for entry clearance, but the principle is the same. From §15 onwards of the determination the First-tier Tribunal Judge simply proceeded to make a free-standing article 8 assessment. It is submitted that without making findings as to arguably good grounds and compelling circumstances not sufficiently recognised under the Rules, the decision is flawed and should be set aside.

10. In granting permission to appeal, Judge Hollingworth noted that although it was conceded that the claimant could not meet the requirements of Appendix FM of the Immigration Rules for entry as a partner, insufficient weight appears to have been accorded to that fact in the overall decision. "The judge attaches insufficient weight to the fact that the appellant has been residing voluntarily in Jamaica for in the region of 6 years with her children without difficulty. So has the sponsor over a considerable period. There appears to be no reason why the sponsor cannot return to Jamaica if he wishes. After all, he has lived there for a number of years. He clearly has extended

family. Moreover his medical condition, previously unknown to the respondent, has arisen since the date of decision and was not supported by medical evidence. It is arguable the stand alone article 8 decision is flawed. All the grounds are arguable."

11. Although the First-tier Tribunal hearing took place in May 2014, Judge Canavan appears to have given no consideration to recent case law on considering article 8 outside the Immigration Rules.

12. The sponsor was not exempt from the financial requirements of Appendix FM, but he claimed to have an income in excess of that required under the Rules. However, the claimant and the sponsor failed to submit the specified evidence required under FM-SE to evidence that income. Neither was there evidence of adequate accommodation. In the circumstances the application was refused. At §8 Judge Canavan found that the decision was in accordance with the Immigration Rules.

13. Having found the appellant does not meet the requirements of the Immigration Rules for leave to remain, the question next arises whether the claimant's circumstances justify granting the application outside the Immigration Rules on the basis of article 8 as the decision of the Secretary of State produces a result that is unjustifiably harsh. The case law over the past 12 months has suggested a particular approach, developed over a number of months.

14. In MF (Nigeria) v SSHD [2013] EWCA Civ 1192, the Court of Appeal held that in relation to deportation cases the 'new' Immigration Rules are a complete code but involve the application of a proportionality test. Whether that is done within the new rules or outside the new rules as part of the article 8 general law was described as a sterile question, as either way the result should be the same; what matters is that proportionality balancing exercise is required to be carried out. In other words, a proportionality test is required whether under the new rules or article 8. MF (Nigeria) was followed in Kabia (MF: para 398 - "exceptional circumstances") 2013 UKUT 00569 (IAC).

15. In Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 00640 (IAC) has set out, inter alia, that on the current state of the authorities:

> (b) 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: R (on the application of) Nagre v Secretary of State for the Home Department [2013] EWHC 720 (Admin);

16. The case also explained that the Secretary of State addressed the Article 8 family aspects of the respondent's position through the Rules, in particular EX1, and the private life aspects through paragraph 276ADE. Only if there were arguably good grounds for granting leave to remain outside the rules was it necessary for him for

Article 8 purposes to go on to consider whether there were compelling circumstances not sufficiently recognised under the Rules.

17. More recently, in Shahzad (Art 8: legitimate aim) [2014] UKUT 00085 (IAC), the Upper Tribunal held:

> (i) Failure on the part of the Secretary of State to identify in her decision any legitimate aim under Article 8(2) of the ECHR does not prevent a court or tribunal from seeking to do so on the basis of the materials before it.
>
> (ii) "Maintenance of effective immigration control" whilst not as such a legitimate aim under Article 8(2) of the ECHR can normally be assumed to be either an aspect of "prevention of disorder or crime" or an aspect of "economic well-being of the country" or both.
>
> (iii) "[P]revention of disorder or crime" is normally a legitimate aim both in expulsion cases where there has been criminal conduct on the part of the claimant and in expulsion cases where there have only been breaches of immigration law.
>
> (iv) MF (Nigeria) [2013] EWCA Civ 1192 held that the new immigration rules regarding deportation of a foreign criminal are a complete code. This was because of the express requirement in them at paragraph 398 to have regard to exceptional circumstances and other factors.
>
> (v) It follows from this that any other rule which has a similar provision will also constitute a complete code;
>
> (vi) Where an area of the rules does not have such an express mechanism, the approach in R (Nagre) v Secretary of State for the Home Department [2013] EWHC 720 (Admin) ([29]-[31] in particular) and Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 640 (IAC) should be followed: i.e. 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.

18. Although case law continues to develop, the current position is perhaps best expressed in paragraph 135 of R(MM (Lebanon)) v SSHD [2014] EWCA Civ 985:

> "135. Where the relevant group of IRs [immigration rules], upon their proper construction provide a "complete code" for dealing with a person's Convention rights in the context of a particular IR or statutory provision, such as in the case of "foreign criminals", then the balancing exercise and the way the various factors are to be taken into account in an individual case must be done in accordance with that code, although reference to "exceptional circumstances" in the code will nonetheless entail a proportionality exercise. But if the relevant group of IRs is not such a "complete code"

then the proportionality test will be more at large, albeit guided by the Huang tests and UK and Strasbourg case law."

19. At §10 the judge appears to have applied the previous understanding of the law that there was always a two-stage process, consideration under the Rules and then a freestanding human rights assessment outside the Rules. As indicated above, the case law has move on considerably from that position. Before embarking on an article 8 assessment outside the Rules, Judge Canavan should have considered whether the relevant Immigration Rules provided a 'complete code' to address the claimant's article 8 rights to respect for family life. It is open to argument that the necessary exclusion of EX1 for out of country applications meant that there was no consideration of insurmountable obstacles and thus no effect proportionality assessment. However, no such argument was raised before me. Mr Avery suggested that the Immigration Rules under Appendix FM amounted to a complete code. However, the decision itself did not consider article 8. It was only in the Entry Clearance Manager review that article 8 was addressed. In the circumstances, it appears to me that there has been a consideration of the claimant's circumstances and a proportionality assessment outside the Immigration Rules.

20. I am not satisfied that the findings of Judge Canavan demonstrate anything which could be described as compelling circumstances insufficiently recognised in the Immigration Rules and requiring the application to be granted outside the Rules under article 8, on the basis that the decision of the Secretary of State was unjustifiably harsh. Without a correct approach to determine whether the Immigration Rules are a complete code for the facts of this case, it is not possible to be satisfied that the ensuing assessment was correctly made.

21. Further, I find that the article 8 assessment was itself flawed. The judge failed to take into account that the claimant failed to meet the requirements of the Rules, although the sponsor claimed an income that would meet the Rules. It is also relevant to any article 8 assessment outside the Rules that there remains a route for entry of a partner under section EC-P of Appendix FM of the Immigration Rules. Given the alleged ill-health of the sponsor it may be that the claimant and sponsor will not have to meet the normal financial threshold of Appendix FM, should they choose to make a further application. That she can make such an application is, of course, highly relevant to any article 8 assessment, but does not appear to have been taken into account in Judge Canavan's assessment. The claimant is not entitled to settle in the UK simply because that is her desire. Failure to comply with the Immigration Rules does not strengthen an article 8 claim.

22. I note that at §19 of the determination the judge relied on MM & Ors v SSHD [2013] EWHC 1900 (Admin), but that case has now been overturned by the Court of Appeal in MM (Lebanon) & Ors [2014] EWCA Civ 985.

23. I note that the judge took account of the best interests of the claimant's two British citizen children, who are entitled to reside in the UK. However, in reliance on T (s55 BCIA 2009 – entry clearance) Jamaica [2011] UKUT 00483, the judge failed to

appreciate that the Upper Tribunal held in that case that section 55 of the Borders Citizenship and Immigration Act 2009 does not apply to children who are outside the UK. Further, there are no concerns raised in this case that the children's welfare is being jeopardised by their residence with the claimant in Jamaica. They cannot be excluded from coming to the UK, but at present and for the past several years they have been settled and raised in Jamaica. In the circumstances, consideration of the best interests of the children in this case does not take the article 8 assessment any further.

24. I also find that the judge failed to take sufficient account of the fact that the claimant chose to return to Jamaica, and has been living there voluntarily for a number of years, often with the sponsor. Despite his recent claim of ill-health, unsupported by satisfactory medical evidence, he again travelled to Jamaica recently. It is the nature of the family life adopted voluntarily by the claimant and her family that he shuttled between Jamaica and the UK.

25. In the circumstances and for the reasons stated, I find such error of law in the making of the decision of the First-tier Tribunal that it should be set aside and remade.

26. In remaking the decision I take account of the all the matters set out above without having to repeat them. I find nothing particularly compelling about the circumstances of the claimant, the sponsor, or their children. The claimant chose to return to Jamaica in 2008 and the children have been raised there since that time, some 6 years. The sponsor was content to travel between Jamaica and the UK spending time between the UK and his family in Jamaica. I am not satisfied that there is any basis to consider article 8 outside the Rules. I do not find the decision of the Secretary of State to be unjustifiably harsh on the facts of this case.

27. Even if a stand-alone article 8 assessment outside the Rules is justified on the facts of this case, on the basis that the Rules for an out of country applicant do not permit of a proportionality assessment, the appeal still fails.

28. I find on the application of the Razgar five step assessment that the decision may sufficiently interfere with the claimant and her family's rights to respect for family life so as to engage article 8. However, in conducting the proportionality balancing exercise between on the one hand the rights of the claimant and her family and on the other the legitimate and necessary interests of the state in protecting the economic well-being of the UK through the fair and objective application of immigration control, the decision is clearly proportionate and not disproportionate to the family life rights, even when taking into account the best interests of the two British citizen children. In reaching that conclusion, I take into account all those matters set out above as well as those relied on by Judge Canavan. However, I have to bear in mind that the claimant purports to be able to meet the requirements of the Rules and that it is open to her to make a fresh application, marshalling the correct evidence. It remains for the claimant to demonstrate that she can meet the requirements of the Rules. I fail to see how in those circumstances the decision of the Secretary of State could be regarded as disproportionate.

29. In addition, I am now required to take into account section 117A and 117B of the Nationality Immigration and Asylum Act 2002, when considering the public interest. Sections 117B(1), (2) and (3) set out general principles of immigration policy. Those seeking to enter or stay in the UK should meet the requirements of immigration control as set out in the Immigration Laws and Immigration Rules. In addition, migrants should be able to speak English and be financially independent in order to be able to integrate into society and not to be a burden on taxpayers. When carrying out the balancing exercise the Tribunal might expect that a person who cannot meet one or more of these criteria will have to show clear evidence and reasons why their circumstances mean that the usual policy considerations do not apply to them. This might be because of exceptional circumstances or compassionate and compelling factors but there is no test of exceptionality as such. Applying the relevant public interest, it is in the public interest that the claimant in seeking to enter the UK be able to demonstrate that she will be financially independent. That is best done through an application under appendix FM and the financial requirements. In the absence of satisfactory evidence that the claimant will be financially independent, the public interest is not outweighed in this case.

30. In the circumstances and for the reasons stated, I find that the decision of the Secretary of State was correct and should stand. I further find that the decision was entirely proportionate to the family life rights of the claimant and her family.

Conclusions:

31. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside.

I set aside the decision.

I re-make the decision in the appeal by dismissing it.

Signed:  Date: 28 August 2014

Deputy Upper Tribunal Judge Pickup

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Given the circumstances, I make no anonymity order.

Fee Award **Note: this is not part of the determination.**

In the light of my decision, I have considered whether to make a fee award (rule 23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007).

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: The appeal has been dismissed.

Signed: Date: 28 August 2014

Deputy Upper Tribunal Judge Pickup