



IAC-BH-PMP-V1

**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: OA/15324/2013

**THE IMMIGRATION ACTS**

**Heard at Bennett House, Stoke  
On 24<sup>th</sup> September 2014**

**Decision & Reasons Promulgated  
On 24<sup>th</sup> October 2014**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE GARRATT**

**Between**

**HASSAN ISSA MWARAUSI  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mrs S Mwarausi, the sponsor  
For the Respondent: Ms C Johnstone, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. Before the Upper Tribunal the Secretary of State becomes the appellant. However, for the avoidance of confusion and to be consistent, I shall continue to refer to the parties as they were before the First-tier Tribunal.

## **Background**

2. On 28<sup>th</sup> May 2014 Designated Judge of the First-tier Tribunal Digney gave permission to the respondent to appeal against the determination of Judge of the First-tier Tribunal Dickinson in which he allowed the appeal under the Immigration Rules and on human rights grounds against the decision of the respondent to refuse entry clearance as a partner in accordance with the provisions of Appendix FM and FM-SE of the Immigration Rules.
3. In granting permission Designated Judge Digney thought it arguable that the judge was wrong to apply section EX.1 of Appendix FM to his consideration of the application of the Immigration Rules and that the judge was also arguably wrong, in the light of jurisprudence in existence at the time of the decision, to allow the appeal under Article 8.
4. In the grounds of application the respondent also made reference to the Tribunal determination in *Gulshan* [2013] UKUT 00640 (IAC) on the basis that the judge was wrong to proceed to an Article 8 assessment outside the Rules where he had not found compelling circumstances not recognised by the Rules to enable him to do so. The respondent also contended that the judge was wrong to conclude that the sponsor could not be expected to move to Kenya taking into account her career and stable financial situation without considering how such a move would result in an unjustifiably harsh outcome, particularly since the appellant could submit a further application once the sponsor could demonstrate that financial requirements of the Rules were met.

## **Error on a Point of Law**

5. I heard brief submissions from Ms Johnstone who asserted that the decision of the Court of Appeal in *MM and Others* [2014] EWCA Civ 985 had overturned the approach recommended in *Gulshan* and had endorsed the maintenance requirements of the Rules which could not be regarded as disproportionate. She also pointed out that, at paragraph 27 of the determination, the judge was wrong to consider that maintenance requirements could now be met when, as the application was for entry clearance, the future financial position of the parties could not be considered.
6. As the sponsor was unrepresented I assisted her to make submissions after I had explained the nature of the proceedings to her. She emphasised that, at the time of the hearing, she had been working for six months and, coupled with the sums she received from her son she had the required amount to maintain her husband under the Rules. However, Ms Johnstone pointed out that the rental income from the son was not admissible as the provisions of Appendix FM-SE required evidence of the contract for such income which had not been provided.
7. After I had considered the matter for a few moments I announced that I was satisfied that the determination showed an error on a point of law such that it should be re-made. My reasons for that conclusion follow.
8. Whilst, on the face of it, the judge's approach to Article 8 issues might appear to be without error in view of the conclusions of the Court of Appeal in *MM* where it was

concluded (paragraphs 128 and 134) that the conduct of an intermediary test before considering Article 8 issues outside the Rules was unnecessary, the judge's approach still shows an error. That is because in paragraphs 21 to 24 inclusive of the determination the judge considers the application of section EX.1 and reaches the conclusion that it would be unreasonable to expect the sponsor to conduct family life in Kenya. However, as was made clear by the Upper Tribunal in *Sabir* (Appendix FM-EX.1. not free-standing) Pakistan [2014] UKUT 63 (IAC), that section is parasitic on the relevant Rule and was not intended to be a free-standing element of Appendix FM. Section EX.1 does not apply to a partner's application for entry clearance, it is only relevant to an application for leave to remain by such a person.

9. It is also evident that the judge gives inadequate reasoning for reaching his conclusion that it would not be reasonable to expect the sponsor to move to Kenya. That is because he did not explain how such a move could result in an unjustifiably harsh outcome without consideration of the possibility of the appellant making a further application once the sponsor could demonstrate, at the time of that application, that the financial requirements of the Rules were met. It also appears, from the brief conclusions set out in paragraph 27 of the determination that the judge took into consideration evidence of income which would not have met the requirements of Appendix FM-SE.
10. These errors are material and mean that the determination should be re-made.

### **Re-making the Determination**

11. I heard further submissions from Ms Johnstone and the sponsor.
12. Ms Johnstone contended that there had been no challenge to the maintenance findings of the judge that a requirement for an income of £18,600 could not be met. She also drew attention to the sponsor's document dated 24<sup>th</sup> September 2014 containing financial calculations which, she argued, showed that maintenance requirements could not be met. In the skeleton argument submitted there was also no contention that the financial requirements of the Rules could be met. Further, she argued that the statement of the sponsor of 24<sup>th</sup> September 2014 took no issue with those requirements.
13. As to Article 8 issues Ms Johnstone finally submitted that, as the Rules were now recognised as a complete code and because the appellant could make a fresh application, there was no breach of Article 8 rights.
14. The sponsor confirmed that she relied upon the content of her latest statement along with the skeleton argument, financial calculation and bundle submitted. In relation to the statement and skeleton the main thrust of the argument is that it would not be reasonable to expect her to move to Kenya bearing in mind her established employment in UK and the need to care for her mother and father who are both ill. Her mother has cancer and her father has "crumbling bones and a heart condition associated with high blood pressure". She also refers to the presence of her three adult children in the United Kingdom. She gives examples of difficulties which she might experience if the parties were required to live together in Kenya which has now become an unstable place in which to live.

15. At the hearing the sponsor confirmed that she had met her husband on holiday in Kenya in 2009 and they married in 2011. She had given up employment in 2010 to maintain the relationship. She emphasised the details of her income and savings set out in paragraphs 22 and 23 of the skeleton argument. She considered that jobs would be difficult to obtain in Kenya. She conceded that her husband could re-apply for entry clearance but pointed out that there was the expense of doing so. It would also be costly for her to maintain her relationship by visits and phone calls.

### **Decision and Reasons**

16. At the time of making the application and when the respondent's decision was made on 3<sup>rd</sup> June 2013 the appellant had not shown that the financial requirement for entry clearance as a partner of a gross annual income of at least £18,600 set out in E-ECP.3.1 could be met. Although the sponsor claims that her income now comes to a total of £19,345.75 with savings of over £26,000 evidence of that income which met the requirements of Appendix FM-SE was not provided. For example, receipt of rental payments of £3,600 per year from the sponsor's son, Kieran, would need to meet the provisions of paragraph 10 of Appendix FM-SE which include the requirement for a rental agreement or contract in addition to monthly personal bank statements for a twelve month period showing receipt of such income. Additionally evidence of future income was neither admissible or in accordance with the requirements of the Rules.
17. As the Court of Appeal made clear in *MM* the financial requirements of the Rules in relation to partners are not disproportionate in terms of the respondent's legitimate exercise of immigration control. In relation to entry clearance the Rules do not incorporate the provisos set out in section EX.1 which are relevant to leave to remain applications. Thus, the Rules themselves cannot avail the appellant.
18. Whilst it is unnecessary for me to apply an intermediary test to find a good arguable case for considering Article 8 outside the Immigration Rules, my consideration of the factors put forward to support an Article 8 claim in this case do not enable me to reach a favourable conclusion for the appellant and sponsor.
19. Following the five stage approach recommended in *Razgar* [2004] UKHL 27 I can accept that the respondent's refusal decision interferes with the appellant's family life with his wife because of the desire of the parties to live together in the United Kingdom but it is difficult for me to conclude that such interference will have consequences of such gravity as potentially to engage the operation of Article 8. That is because the parties did not have the right to expect, when they married, that they could enjoy their marriage in the country of choice. In any event it now appears that the sponsor may be able to prove that the parties can meet the financial requirements of the Rules and so a renewed application can be made which might be successful. But even if I am wrong in that view, the same reasons lead me to conclude that the decision of the respondent was not a disproportionate exercise of legitimate immigration control. In reaching that conclusion I now must also take into consideration Section 117B of the Nationality, Immigration and Asylum Act 2002 which sets out the public interest considerations in cases such as this. Parliament has declared that it is in the public interest, and in particular in the interests of the economic wellbeing of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent. The appellant has not shown

such financial independence in this case although it may be that proof of the income requirements of the Rules can be provided in a future application.

20. Balanced against the above matters are the sponsor's reluctance to go to Kenya because of family and work commitments here and the worry that society in Kenya is becoming more unstable. But I must again emphasise that the parties had no right to expect that their relationship could continue in this country. The relationship can be continued by visits and modern methods of communication. There is also the prospect of a further application which will meet the requirements of the Rules.
21. For all the above reasons I find that the respondent's decision is not disproportionate.

### **Notice of Decision**

The decision of the First-tier Tribunal contained an error on a point of law such that it should be re-made. I re-make the determination by dismissing it on immigration and human rights grounds.

### **Anonymity**

Anonymity was not requested in this case nor do I consider it appropriate.

Signed

Date 24<sup>th</sup> October 2014

Deputy Upper Tribunal Judge Garratt

### **TO THE RESPONDENT** **FEE AWARD**

As I have dismissed this appeal there can be no fees award.

Signed

Date 24<sup>th</sup> October 2014

Judge Garratt

Deputy Upper Tribunal Judge