Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/21578/2012

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 6 October 2014	**On 15 October 2014**

Before

UPPER TRIBUNAL JUDGE MOULDEN

Between

ENTRY CLEARANCE OFFICER - LAGOS

Appellant

and

MRS CHINONSO OKEOMA
(No Anonymity Direction Made)

Respondent

Representation:

For the Appellant: Mr T Melvin a Senior Home Office Presenting Officer
For the Respondent: Mr D Bazini of counsel instructed by Lawrence & Co

DETERMINATION AND REASONS

1. The appellant is the Entry Clearance Officer in Lagos ("the Entry Clearance Officer") the respondent is a citizen of Nigeria who was born on the 11 September 1985 ("the claimant"). The Entry Clearance Officer has been given permission to appeal the determination of First-Tier Tribunal Judge Blum ("the FTTJ") who allowed her appeal on Article 8 human rights grounds against the Entry Clearance Officer's decision of 28 September 2012 to refuse to grant her entry clearance for settlement in the United Kingdom as the

spouse of her husband and sponsor Mr Favour Okeoma ("the sponsor"). The sponsor is a naturalised British citizen.

2. The Entry Clearance Officer was not satisfied that the claimant and the sponsor were in a genuine and subsisting relationship. The claimant had not produced the relevant documentary evidence to demonstrate the sponsor's income as required by Appendix FM and Appendix FM-SE. The claimant failed the listening part of her English language test. The decision was reviewed by the Entry Clearance Manager who concluded that in any event the English language test was at a level below that required.

3. The claimant appealed and the FTTJ heard her appeal on 25 October 2013. The claimant was represented by Mr Bazini who appeared before me. The respondent was not represented. The sponsor attended and gave evidence.

4. Whilst expressing his conclusion in an indirect way it is sufficiently clear that the FTTJ found the sponsor to be a credible witness. He concluded that the claimant and the sponsor had established that at the date of the decision they were in a genuine and subsisting relationship. This is a conclusion not now challenged by the Entry Clearance Officer.

5. The FTTJ found that the claimant had not established that the sponsor met the income requirements of the Appendix FM SE. Although he had produced six months wage slips and his Santander bank statements covering the same period the letter from his employer this did not state his gross annual salary.

6. The FTTJ also found that the claimant had not shown that she met the English language requirements of Appendix FM. Her marks were sufficient to pass the speaking component but not the listening one.

7. The FTTJ went on to consider the Article 8 human rights grounds, firstly under the Immigration Rules and secondly outside the Immigration Rules under the Strasberg jurisprudence and the principles set out in Razgar [2004] UKHL 27. He concluded that the first four of the Razgar questions were answered in the affirmative and that the appeal turned on the last, whether the interference with the claimant's Article 8 human rights was proportionate to the legitimate public aim sought to be achieved. For reasons to which I will return he concluded that there would be a disproportionate interference. He dismissed the appeal under the Immigration Rules but allowed it on Article 8 human rights grounds.

8. The Entry Clearance Officer applied for permission to appeal, arguing that the FTTJ had erred in law by failing to consider whether there were exceptional circumstances which meant the refusal would result in an unjustifiably harsh outcome. There had been a failure to make adequate findings of fact as to the sponsor's income at the dates of the application and decision. The FTTJ erred in relying on the judgement of Blake J in R on the application of MM [2013] EWHC 1900 (Admin) which, it is argued, failed to recognise that the Secretary

of State was entitled to formulate policy and set criteria such as income requirements which applicants had to meet. The provisions in the Immigration Rules were not arbitrary. Permission to appeal was granted.

9. Mr Melvin relied on the grounds of appeal and emphasised that the appeal had been allowed on Article 8 human rights grounds only. The claimant had failed on the maintenance and English language test requirements under the Immigration Rules. The Judgement of Blake J in MM had been overturned by the Court of Appeal which had upheld the income level requirements in the Immigration Rules. He submitted that this was a material error of law and asked me to set aside the decision and remake it, dismissing the appellant's original appeal. In that context there were no exceptional circumstances as at the date of the decision. He relied on the reasons given by the Entry Clearance Officer.

10. Mr Bazini submitted that even if the judgement of Blake J was taken out of the equation the FTTJ gave cogent reasons for allowing the appeal on Article 8 human rights grounds. The FTTJ was entitled to find that this was a case which should be treated differently to other cases. He had accepted that the sponsor was a recognised refugee who still had a well-founded fear of persecution in Nigeria. There were insurmountable obstacles to his returning and living there with the appellant. The FTTJ had considered this and the other material factors. The Entry Clearance Officer had not challenged the finding in paragraph 24 that the sponsor's income would be sufficient to support him and the appellant. The figure at the time of the application was given in paragraph 2, namely £1250 per month which equated to £15,000 per annum. Read together the evidence presented at the hearing showed from the sponsor's employment letter, payslips and bank statements that his gross pay was approximately £16,700 per annum. Also the sponsor had produced evidence to show that he had a Bond with a surrender value of £9698 and owned two properties. One was rented out and produced an income and part of the other, where the sponsor lived, was also rented and would produce an income until the claimant was able to join him. The appellant had explained why she did not achieve the required level of marks in the listening section of the English language test. She took the test that she was told was the required one, had to listen to a recorded passage and had difficulty understanding the English accent. She passed the speaking component.

11. Mr Bazini accepted that their child had not been born at the date of the decision and the FTTJ was correct not to take this into account in relation to the Article 8 grounds. Nevertheless, he emphasised that, subject to the appropriate application being made the child would, like his father, be a British citizen.

12. Mr Bazini argued that this case met the requirements of both MF (Nigeria) [2013] EWCA Civ 1192 and Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 640 (IAC). I was also referred to R on the application of MM

[2014] EWCA Civ 985. This was an exceptional case, well out of the ordinary, where the claimant could not enjoy family life with the sponsor in Nigeria.

13. Mr Bazini referred to in paragraph 49 of AAO v Entry Clearance Officer [2011] EWCA Civ 840 mentioned by the First-Tier Tribunal Judge who granted permission to appeal. He submitted that the FTTJ had taken this into account. There was no error of law and he asked me to uphold the decision. If there was an error of law it was not material. However, if I was against him, he asked me to remake the decision adopting the findings of fact made by the FTTJ including the finding that the sponsor was credible.

14. Mr Melvin submitted that this was a "near miss" case which did not assist the claimant. There were no exceptional circumstances. I reserved my determination.

15. The law and the appropriate legal principles have moved on since the FTTJ heard this appeal on 25 October 2013. It predated Gulshan, MM in the Court of Appeal and MF (Nigeria) also in the Court of Appeal. I must apply the law as it now stands although I sympathise with the FTTJ who was applying principles as they were then thought to be. Furthermore, the Entry Clearance Officer's grounds of appeal were written before MM in the Court of Appeal.

16. With hindsight and in the light of the judgement of the Court of Appeal in MM the FTTJ erred in law by finding that the judgement of Blake J in MM meant that he had to apply a conclusion "that the requirement of £18,600 was disproportionate under Article 8 when applied to British citizens and recognised refugees as it was more intrusive than necessary in its restrictions on family life to ensure that couples are self-sufficient at the time of the spouses first admission."

17. The summary of the effect of Gulshan, prepared by the author of that determination, Cranston J, states; "(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)"; and "(c) The term "insurmountable obstacles" in provisions such as Section EX.1 are not obstacles which are impossible to surmount: MF (Article 8 – new rules) Nigeria [2012] UKUT 393 (IAC); Izuazu (Article 8 – new rules) [2013] UKUT 45 (IAC); they concern the practical possibilities of relocation. In the absence of such insurmountable obstacles, it is necessary to show other non-standard and particular features demonstrating that removal will be unjustifiably harsh: Nagre."

18. MF (Nigeria) in the Court of Appeal was an appeal relating to a foreign criminal and included consideration of whether addressing Article 8 human rights grounds under the Immigration Rules and under Strasberg

jurisprudence was a one stage or two stage test, accepting that the two stage process was appropriate.

19. I find that the FTTJ, without the benefit of either Gulshan or MF (Nigeria) in the Court of Appeal, although he had before him MF in the Upper Tribunal, correctly concluded that a two stage process was appropriate. In paragraph 19 he said; "I must engage in a two stage approach". I find that there was a slip in the following sentence which should have read and was clearly intended to say; "it is clear from the preceding findings that the appellant is unable to benefit under the applicable provisions of the Immigration Rules designed to address Article 8 claims."

20. In paragraph 49 of AAO Rix LJ emphasised that States were entitled to have regard to their system of immigration control and it's generally consistent application and a requirement that an entrant should be maintained without recourse to public funds. I find that the conclusion in paragraph 25 of the determination that the sponsor would be able to maintain the appellant in the UK "at an adequate level, and certainly at a level above that of the equivalent family on income support" paid proper regard to this.

21. The FTTJ did not consider whether, in line with Gulshan, there were arguably good grounds for granting leave to enter outside the Article 8 provisions of the Immigration Rules. I find that any error of law in this respect was not material because, on the facts set out by the FTTJ, there were such arguably good grounds. The FTTJ had found that the claimant and the sponsor were in a genuine and subsisting relationship and there was considerable evidence of "intervening devotion". Furthermore the FTTJ found, for the reasons set out in paragraph 24, that the sponsor still had a genuine and well-founded fear of persecution in Nigeria which would prevent him from living there with the appellant.

22. The FTTJ did not, at least in terms, consider whether there were compelling circumstances not sufficiently recognised under the Immigration Rules for granting leave to enter. I find that the reasons he gave did amount to such compelling circumstances. Perhaps the most telling of these is the sponsor's inability to go and live with the claimant in Nigeria because of his continuing well-founded fear of persecution. This is not a conclusion which the Entry Clearance Officer has challenged. In line with Gulshan the claimant did not need to show "insurmountable obstacles" amounting to obstacles which were impossible to surmount. In the context of this appeal the obstacles of sufficient severity were those which prevented the claimant and the sponsor living together in the UK if she was refused entry clearance or in Nigeria because of his fear of persecution. It has not been suggested that they could live together anywhere else. The FTTJ found the sponsor to be a credible witness. The Entry Clearance Officer has not challenged this finding or indeed the other findings of fact. The sponsor is a British citizen. He is gainfully employed here. Whilst he did not produce the required documents to show that he was earning £18,600 per annum the FTTJ found him credible and his evidence that he was

earning £1250 per month gross which equates to £15,000 per annum. The sponsor also owned two properties one of which was let and the other part let until such time as the claimant was able to join him. The Entry Clearance Officer did not accept that the claimant and the sponsor were in a genuine and subsisting relationship. The FTTJ found that they were and the Entry Clearance Officer has not challenged that conclusion. I do not apply any "near miss" argument but factors which, in the round, persuade me that there was no material error which should lead me to set aside the decision of the FTTJ. On that evidence it would have been open to him to conclude that the requirements of the two stage test set out in Gulshan were met and that the claimant was entitled to succeed on Article 8 human rights grounds outside the Immigration Rules.

23. The FTTJ did not make an anonymity direction. I have not been asked to do so and can see no good reason to make such a direction.

24. I uphold the decision of the FTTJ to allow the appeal on Article 8 human rights grounds.

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Signed Date 7 October 2014

Upper Tribunal Judge Moulden