Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: OA/00291/2014**

THE IMMIGRATION ACTS

Heard at Field House
On 6 October 2015

Determination Promulgated
On 7 October 2015

Before

Deputy Upper Tribunal Judge MANUELL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

Ms VASHTIE DASS
(NO ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr S Walker, Home Office Presenting Officer
For the Respondent: Ms T Murshid, Counsel (instructed by SJS Solicitors)

DETERMINATION AND REASONS

Introduction

1. The Appellant (the Secretary of State) appealed to the Upper Tribunal with permission granted by First-tier Tribunal Judge Heynes on 2 June 2015 against the decision and reasons of First-tier Tribunal Judge Blum who had allowed on Article 8 ECHR grounds only the Respondent's appeal against the refusal on 27 November 2013 of her application for entry clearance as the partner of a person

© CROWN COPYRIGHT 2015

present and settled in the United Kingdom. The decision and reasons was promulgated on 31 March 2015.

2. The Respondent is a national of Guyana, born on 12 May 1985. The Respondent had applied to enter the United Kingdom as the spouse of Mr Abdool Rahiman, born in Guyana on 12 October 1944 and a British Citizen by naturalisation. The Entry Clearance Officer had not accepted that the relationship relied on was genuine and subsisting. It was accepted before the First-tier Tribunal (see [29] of the determination) that the Respondent could not meet the financial requirements of Appendix FM of the Immigration Rules. The judge nevertheless found that the interference with the respect due to her and to her spouse's family life pursuant to Article 8 ECHR was disproportionate.

3. Permission to appeal was granted by Judge Heynes because he considered that it was arguable that the judge had failed to (a) identify factors calling for a free-standing Article 8 ECHR assessment; (b) attach any weight to the financial requirements of Appendix FM and (c) take into account section 117B(1) of the Nationality, Immigration and Asylum Act 2002

4. Standard directions were made by the tribunal, indicating that the decision would be remade in the event that a material error of law were found. A rule 24 notice opposing the onwards appeal was filed on the Respondent's behalf.

Submissions

5. Mr Walker for the Appellant relied on the grounds of onwards appeal and the grant of permission to appeal. He submitted that although the judge had made reference to the public interest at [42] of his determination, that had been insufficient. The maintenance requirements of Appendix FM were *ipso facto* indicative of where the public interest lay. The judge's reasoning and analysis were defective. It was open to the Respondent to make a fresh entry clearance application which met Appendix FM. The decision and reasons should be set aside, remade and dismissed.

6. Ms Murshid for the Respondent relied on the rule 24 notice. She submitted that there was no error of law and the determination should stand. The judge had found a reasonable case for considering the entry clearance application outside the Immigration Rules. Paragraph EX.1 of Appendix FM did not apply to entry clearance applications. The judge had identified compelling circumstances and had considered section 117B(1) of the Nationality, Immigration and Asylum Act 2002. Those factors had been taken into account and there was no justification for interfering with the judge's decision. The onwards appeal should be dismissed and the original decision upheld.

7. There was no reply.

8. The tribunal indicated at the conclusion of submissions that it found that there were material errors of law.

Material error of law finding

9. The tribunal accepts the submissions made on behalf of the Secretary of State. In short, the tribunal finds that the judge fell into the error of law identified by the Court of Appeal in MM (Lebanon) [2014] EWCA Civ 985, where MM [2013] EWHC 1900 (Admin) was overturned. It was not open to the judge to substitute his own view of what amounted to financial sufficiency as he did at, e.g. [41], of his determination. As Lord Carnwath stated at [57] of Patel [2013] UKSC 72: "It is important to remember that article 8 is not a general dispensing power."

10. Nor did the judge identify, or adequately identify, circumstances arising from the admitted failure to satisfy Appendix FM which could sensibly be described as unjustifiably harsh or compelling circumstances not identified within the Immigration Rules. Thus the requirement for a second stage analysis or evaluation was never reached.

11. There had been no challenge by the Secretary of State to the judge's findings of fact. The determination is otherwise set aside.

Remaking the decision

12. Given that the judge's findings of fact stood, neither side wished to make any further submissions. For clarity and convenience the tribunal will now refer to the parties by their original designations in the First-tier Tribunal.

13. As noted above, the entry clearance application had been refused because the Entry Clearance Officer was not satisfied that the relationship was genuine and subsisting, and that the Appellant and her sponsor intended to live together permanently in the United Kingdom. Judge Blum found that the relationship was genuine: see [21] to [28] of the determination. Some might consider that finding generous given some of the facts the judge identified, such as the huge age difference and the surprising speed of the marriage following the collapse of the sponsor's previous relationship with a United Kingdom resident: see [23] of the determination. Perhaps the judge's comment at [43] that "I found this a difficult decision to make" may reflect that. Nevertheless, the judge saw the sponsor and there was no challenge to his finding about the substance of the spousal relationship.

14. As also noted above, it was conceded before the judge that the Appellant was unable to satisfy the financial requirements of Appendix FM, as at the date of the decision. Importantly, there was no evidence before the judge that the Appellant through her sponsor could never meet the financial requirements. On the contrary, it was said that the sponsor was employed post decision and was in a position to meet the financial requirements.

15. But on the facts found (see [33] to [35] of the determination) employment was just one of the possibilities open to the Appellant's sponsor for meeting the

financial requirements. The sponsor already had a pension income. He claimed that he received £6,000 per year from lodgers and had cash savings. In the event he failed to produce adequate evidence of those matters at the hearing. Any such documents were, of course, required by Appendix FM-SE to have been produced with the entry clearance application, so that they could be verified, a most important requirement which must not be overlooked. There is, however, no reason to believe that the sponsor would be unable to produce proper evidence in the future. Perhaps most importantly of all, the sponsor was found to own his own home, with very substantial equity according to the sponsor's valuation. The tribunal finds that it is plain and obvious that the Appellant through her sponsor had and is more likely than not still has the realistic opportunity and potential ability to meet Appendix FM.

16. Are there any compelling circumstances which might require the Secretary of State to consider the exercise of her discretion outside the Immigration Rules? Would the Appellant's temporary exclusion pending making a compliant application have unjustifiably harsh consequence? (See SS (Congo) [2015] EWCA Civ 387).

17. In approaching this appeal, it seems to the tribunal important that both the Appellant and her sponsor are Guyanese. The sponsor lived in Guyana until the age of 29 and is likely to be familiar with its culture and any indigenous language: see [39] of the determination. He then worked most of his adult life in the United Kingdom. The obvious inference is that the sponsor came to the United Kingdom in search of a more prosperous life, which he has indeed found. His move was not shown to be as the result of any problem in Guyana.

18. The tribunal finds that both the Appellant and the sponsor were aware or should have made themselves aware at the time they formed their relationship that the Appellant as a Guyanese national would require leave to settle in the United Kingdom. At the stage that they decided to marry with the intention that the Appellant would come to the United Kingdom to live they fell under the obligations of the Immigration Rules, applicable to all persons in their situation.

19. It is also inevitably the case that one spouse or the other would have to leave family behind in their home country. In Mr Rahiman's case, he still has family in Guyana. The Appellant also has family in Guyana: see [38] of the determination. Mr Rahiman's children did not attend his wedding (see [40] of the determination) and the judge found he did not have a particularly strong relationship with them, or his sister.

20. The tribunal accordingly finds that Mr Rahiman's ties to the United Kingdom are not particularly strong. As at the date of the decision he was not working. There were no other family members living in his home, which was partly let to strangers. There was no evidence of wider community involvement on his part, or other potentially important private life.

21. Taking all of those facts and matters into account, the tribunal finds that there are no compelling circumstances or unjustifiably harsh consequences, nothing exceptional. The Appellant and the sponsor would be able to enjoy family life together in Guyana, as they have done during Mr Rahiman's visits there since their marriage. The couple's wish to settle together in the United Kingdom is their choice.

22. If for any reason the tribunal were mistaken to find that there are no compelling circumstances which would warrant consideration of the Appellant's case outside the Immigration Rules, the tribunal will conduct a Razgar [2004] UKHL 27 analysis and evaluation. The tribunal has accepted that there is family life between the Appellant and her sponsor. The tribunal does not accept that the Entry Clearance Officer's refusal amounts to an interference. The Appellant had no right to enter the United Kingdom absent satisfying Appendix FM. The tribunal has found that the Appellant and her sponsor can enjoy family life in Guyana and have done so.

23. If for any reason the tribunal were mistaken to find that the Entry Clearance Officer's decision did not amount to an interference, the live issue becomes proportionality. As the tribunal has already found, there was no evidence that the Appellant would never be able to meet the financial requirements of Appendix FM. There was no evidence of any pressing situation (e.g., serious illness of either partner) which might tip the proportionality balance. The tribunal finds that it is in the interests of immigration control which is in summary a legitimate objective of Article 8.2 ECHR for the Appellant to meet the financial requirements of Appendix FM. There was no finding that the Appellant had breached United Kingdom immigration control in the past (see the discussion at [22] of Judge Blum's determination) and of course she had quite properly applied for entry clearance from Guyana.

24. The tribunal now considers section 117B of the Nationality, Immigration and Asylum Act 2002. "Financial independence" for the purposes of section 117B(3) when applied to a prospective partner/spouse entrant must logically mean as defined in Appendix FM, i.e., meeting the financial requirements there prescribed: see MM (Lebanon) [2014] EWCA Civ 985. In any event, sections 117A-D identify factors to be taken into account, and create no free standing rights: see Dube [2015] UKUT 00090 (IAC).

25. It follows that the tribunal finds that the Appellant's exclusion pending a compliant further entry clearance application is a proportionate breach of Article 8 ECHR and is lawful. Any future entry clearance application will of course have to be assessed on the evidence presented at that date. The Appellant's appeal is dismissed.

26. As a footnote the tribunal adds that it is unfortunate that this appeal has been a long drawn out process. That is not the fault of either the First-tier Tribunal or the Upper Tribunal. It is a question of the resources made available to HMCTS

at a time of an over-burdened public purse. The tribunal reminds overseas appellants that it is possible to make a fresh entry clearance application notwithstanding an earlier refusal and a pending appeal. That is in contrast to "in country" applications. While there may be further expense incurred by a fresh application, a faster result may be seen as compensatory.

DECISION

The making of the previous decision involved the making of an error on a point of law and is set aside.

The tribunal makes a fresh decision as follows:

The appeal is DISMISSED

Signed **Dated**

Deputy Upper Tribunal Judge Manuell

TO THE RESPONDENT
FEE AWARD

The appeal was dismissed so there can be no fee award

Signed **Dated**

Deputy Upper Tribunal Judge Manuell