IAC-AH-KRL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/11647/2013

THE IMMIGRATION ACTS

Heard at Bradford	**Determination Promulgated**
On 10 October 2014	**On 13 January 2015**

Before

UPPER TRIBUNAL JUDGE CLIVE LANE

Between

ENTRY CLEARANCE OFFICER – MANILA

Appellant

and

REGINA IL PEREZ VILLAR

Respondent

Representation:
For the Appellant: Mr M Diwnycz, a Senior Home Office Presenting Officer
For the Respondent: Not present and not represented

DETERMINATION AND REASONS

1. The respondent, Regina Il Perez Villar, was born on 9 December 1980 and is a female citizen of the Philippines. She sought entry clearance to the United Kingdom to join her husband, Jefferson King (hereafter referred to as the sponsor). Her application was refused by the ECO in Manila on 25 April 2013. She appealed to the First-tier Tribunal (Judge Cox) which, in a determination promulgated on 22 April 2014 allowed the appeal on human rights grounds (Article 8 ECHR) but dismissed it under the Immigration

Rules. The Entry Clearance Officer now appeals, with permission, to the Upper Tribunal.

2. The sponsor did not attend the Upper Tribunal hearing at Bradford on 10 October 2014 and nor was the respondent represented. I had a letter from the respondent's solicitors dated 24 September 2014 confirming that they would not attend. Mr Diwnycz, for the appellant, relied on the grounds of appeal.

3. I shall refer to the appellant as the respondent and the respondent as the appellant as they appeared respectively before the First-tier Tribunal. The appellant and sponsor were unable to satisfy the income provisions of the Immigration Rules. The judge noted this at [18] ("the appellant's Counsel acknowledged that the appellant could not demonstrate sufficient resources to meet the specified income.") The appeal therefore fell to be considered under Article 8 ECHR only. The judge quoted from and placed significant reliance upon the decision of the Administrative Court in *M* [2013] EWHC 1900 (Admin). Indeed, at [34], the judge indicated that he adopted "[the Administrative Court's] reasoning in its entirety."

4. The decision of Blake J in *MM* has now been reversed in the Court of Appeal (*MM* [2014] EWCA Civ 985). The Court of Appeal's judgment postdates the determination of the First-tier Tribunal having been handed down on 11 July 2014. Of particular relevance are the observations of the Court of Appeal at [136-153]:

> 136. Before us the emphasis was very much on ***Article 8*** and ***Article 14.*** The judge had rejected the argument that the present cases were not concerned with restrictions on the right to marry alone: see [101]. There is the associated right in ***Article 12*** to found a family. But that is so bound up with the ***Article 8*** rights that the judge was correct, in my view, to concentrate on those, as I shall do.
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> 137. Blake J's analysis of the lawfulness of the new MIR was along the lines of that of Lord Wilson in ***Quila*** and Maurice Kay LJ in ***Bibi.*** He asked whether they were an interference with ***Article 8*** and ***Article 12*** rights, concluded that they did infringe the former and then went on to conclude, ultimately, that, taken as a whole, the interference was disproportionate and not justifiable.[155] Ms Giovannetti accepts that the new MIR do interfere with the ***Article 8*** rights of the UK partners. She was right to do so. However, the judge said that the new MIR was an interference with "three rights and not just one":[156] the statutory right of the UK partner to reside in the UK "without let or hindrance"; the right of that person to marry and found a family and the right to respect of the private and family life created as a result of the exercise of the previous rights. Moreover, in his view the interference created by the new MIR was "considerably more intrusive" than the "colossal" interference identified in ***Quila.***

138. I would not accept the full breadth of the judge's reasoning on this point. The UK partner's statutory right to reside in the UK "without let or hindrance" is, in my view, a personal right. It cannot be extended to others. Nor can the rights of a person with refugee or HP status be extended to others. There is nothing in the 1971 Act or the common law that grants a "constitutional right" of British citizens to live in the UK with non-EEA partners who do not have the right of abode in the UK and who are currently living outside the UK. Of course, I accept that the UK partner (whether a UK citizen of a refugee or person with HP) is entitled to respect of his or her right to marry and to found a family. But those are not absolute rights; there is no absolute right to marry and found a family *in the UK* if it involves marriage to a non-EEA citizen who then wishes to reside in the UK. In ***Quila*** Lord Wilson accepted that the principle stated by the majority of the ECtHR in ***Abdulaziz,*** to the effect that ***Article 8*** did not impose a general obligation on a member state to facilitate the choice made by a married couple to reside in it, was "unexceptionable". With respect, I agree. In ***Quila*** the obstruction on the married couple exercising their choice of where to live was created by the total ban on marriage visas for those under 21. It was this total ban on all marriages with a non-EEA citizen under the age of 21 which constituted "a colossal interference" with ***Article 8*** rights.

139. In this case the obstruction on the choice of the married couple (or on two partners) to live in the UK is a financial one which effectively prevents all UK partners whose earnings and savings are below a certain amount (as calculated by the new MIR) from being able to sponsor the entry of their non-EEA partner. The new MIR must therefore constitute a very significant interference with the ***Article 8*** rights of a UK partner who cannot fulfil the new MIR conditions. Whether or not, in law, the non-EEA partners have "***Article 8*** rights", plainly their private and family lives are affected if their UK partners cannot fulfil the requirements.

140. Therefore, as in ***Quila*** and ***Bibi,*** the focus must shift to "justification" of the new MIR under ***Article 8(2).*** The new MIR were created in accordance with the law. Although it is not entirely clear whether the judge specifically addressed the first of the four ***Huang*** questions on the topic of whether the measure was "necessary in a democratic society",[157] Blake J characterised the general aim of the new MIR as being that "the families of migrants should be encouraged by the terms of admission to integrate, not live at or near subsistence levels and not be perceived to be a long term drain on the public purse in the form of increased access to state benefits".[158] I did not understand the respondents to challenge that aim as being both legitimate and sufficiently important to justify limiting the right to respect for private and family life. The aim which Blake J identified comes within the expression "the economic wellbeing of the country" in ***Article 8(2)***. The impact of migrants who join households with low incomes on working age benefits and other social services was properly researched. The conclusion of the SSHD that the aims that Blake J identified were sufficiently important to justify limiting ***Article 8*** rights was both rational and unobjectionable.

141. However the respondents attempt to challenge the judge's conclusion on this point because they argue that, individually, one or more of the five key elements of the new MIR which Blake J lists at [124] of his judgment did not do anything towards achieving the identified and legitimate aims and so were not "rationally connected" with the overall aim. They particularly focused on the fifth feature, viz. the disregard for non-EEA partner's own earning capacity during the thirty month period after initial entry.

142. I cannot accept these arguments in principle. The Secretary of State does not have to have "irrefutable empirical evidence" that the individual features of the policy proposed will achieve the social aim intended. It is enough that she should have a rational belief that the policy will, overall, achieve the identified aim.[159] The new MIR were the result of a great deal of work to identify (a) the long-term requirements of some immigrants on the welfare system and (b) what income was needed to lessen or avoid that dependence and how that income could be calculated. The conclusion that a family with more income would be more likely to be capable of integrating is not susceptible of empirical proof, but a belief in the link between higher income and the likelihood of better integration is rational.

143. As for the individual features, it is important at this stage to remember the question being considered: are those features "rationally connected" to the aims. The overall aim is sufficient income; but whether a family will have sufficient income depends on setting a certain level and then deciding what elements can and cannot be taken into account to see whether the relevant level will be reached in a particular case. Given the work of the MAC and the conclusions it reached, there is clearly a "rational connection" between both the figures chosen and the aim of the policy. Whether it is proportionate or the minimum needed to achieve the aim are different points.

144. As for the elements that must not be included in calculating whether the level of income has been achieved in a particular case viz. no savings below £16,000; 30 month forward projection of the UK partner's income; no account for third party support (generally speaking) and disregard of the non-EEA partner's potential income for 30 months, the question must be whether it is rational, bearing in mind the policy aim, to stipulate that those elements must be excluded in deciding whether the relevant level of income for the household of the UK partner and non-EEA spouse will be reached. The respondents particularly focused on the last element (non-EEA partner's potential income) as being irrational, not only in Convention terms but also under the common law. Reliance was placed on the Supreme Court's decision in ***Mahad***.[160]

145. There are two answers to the respondents' arguments, bearing in mind I am only considering at the moment the "rational connection" issue. First, the executive is entitled to examine the evidence it had on necessary levels of income and savings and the reliability of income or other support being received in order to take a view on what the new MIR should stipulate(as a policy statement) could be included or not in calculating

whether the required income level had been achieved. The executive did so. It did not just take the figures or the considerations out of the air in an unthinking way. Secondly, ***Mahad*** was a decision on the *construction* of the relevant IR. The Supreme Court held that, properly construed, the relevant IR did not prohibit recourse to third party support to reach the required minimum income requirements. The Supreme Court decision was not concerned with the policy issue of whether third party income should be disregarded in principle.

146. Although the judge concluded that the new MIR had a legitimate aim, he went on to say (at [142]) that the five economic/financial features of the new MIR that he had identified at [124][161] were "together… a disproportionate interference with the rights of the British citizen sponsors and refugees to enjoy respect for family life" and were not a "fair balance" between competing private and public interests. He went further, in [144], in concluding that that the five features were together "more than was necessary to promote the legitimate aim" and that, for both UK partners who were British citizens or refugees (and presumably those with HP), they were an "irrational and unjustified restriction" on their rights, particularly the "constitutional rights" of British citizens. These two conclusions are at the heart of the appeal. They are the judge's conclusions on the third and fourth questions posed in [19] of ***Huang***, viz: are the measures no more than is necessary to accomplish the identified aim, and do the measures strike a fair balance between the rights of the individual and the interests of the community?

147. The judge recognised that the SSHD was entitled to conclude that greater resources than £5,500 per couple (without children and with adequate accommodation) were needed for the identified aims. But he concluded that the figure of £18,600 chosen was more than the minimum necessary to accomplish the identified aim, particularly if (contrary to the stated policy) account could be taken of the non-EEA partner's potential income. Therefore the SSHD had failed to discharge the burden of demonstrating that the interference with ***Article 8*** rights was justified.

148. Essentially the debate is about figures and what should be the minimum necessary income figure and what other possible sources of income should or should not be taken into account to see if that minimum can be reached. This case is not the same as ***Quila***, where the policy imposed a total ban on entry of persons between 18 and 21 who wished to be married to UK citizens; or ***Baiai*** where the policy (subject to a discretionary compassionate exception) imposed a "blanket prohibition on the right to marry at all in the specified categories".[162] Here, the non-EEA partner can enter the UK, provided the UK partner's level of income, judged by the policy of the new MIR to be appropriate, is reached. Admittedly there is a total ban on the entry of non-EEA partners where the UK partner cannot reach the required minimum and I appreciate that this ban could be life-long. But there has always been a maintenance requirement at a certain level and if that level was not reached by the UK partner, then there was a total ban on the entry of the non-EEA partner unless, in an individual case, it would be

disproportionate under ***Article 8(2)*** to refuse entry in that instance. Moreover, maintenance requirements are not unique to the UK and it does not set the highest minimum annual income; Norway does.[163]

149. So the key question is: to what extent should the court substitute its own view of what, as a general policy, is the appropriate level of income for that rationally chosen as a matter of policy by the executive, which is headed by ministers who are democratically accountable? Blake J suggested, at [147], that there were "less intrusive responses" that were available and he gave examples. What he meant by this is that, in his view, these "less intrusive responses" constituted what was "no more than necessary" to accomplish the policy aim and, in his view, constituted a fair balance between the rights of the individual and the interests of the community. I appreciate that proportionality has to be judged "objectively by the court".[164] However, in making this objective judgment appropriate weight has to be given to the judgment of the Secretary of State, particularly where, as here, she has acted on the results of independent research and wide consultations.

150. As I have already noted, there was a keen debate before us as to the extent to which the court will accord the executive a degree of flexibility as to where it pitches its policy in the area of economic and social strategy when the policy affects the fundamental right of living together as a family. In ***Stec***, the ECtHR said that national authorities will be accorded a "wide margin" when it comes to "general measures of economic or social strategy"[165] but that was in relation to the payment of state benefits. In ***Quila***, Lord Wilson thought the correct approach was to give "appropriate weight" to the Secretary of State's view, at least when it was demonstrated that this was based on a proper consideration of relevant factors and evidence.[166] In this case the evidence of Mr Peckover (as noted above) is that the compatibility of the new MIR with ***Article 8*** was assessed by the Secretary of State as reflected in the Statement on Grounds of Compatibility (paragraphs 52-64) published in June 2012.[167]

151. I am very conscious of the evidence submitted by the claimants to demonstrate how the new MIR will have an impact on particular groups and, in particular, the evidence that only 301 occupations out of 422 listed in the 2011 UK Earnings data had average annual earnings over £18,600. But, given the work that was done on behalf of the Secretary of State to analyse the effect of the immigration of non-EEA partners and dependent children on the benefits system, the level of income needed to minimise dependence on the state for families where non-EEA partners enter the UK and what I regard as a rational conclusion on the link between better income and greater chances of integration, my conclusion is that the Secretary of State's judgment cannot be impugned. She has discharged the burden of demonstrating that the interference was both the minimum necessary and strikes a fair balance between the interests of the groups concerned and the community in general. Individuals will have different views on what constitutes the minimum income requirements needed to accomplish the stated policy aims. In my judgment it is not the court's job to impose its own view unless, objectively

> judged, the levels chosen are to be characterised as irrational, or inherently unjust or inherently unfair. In my view they cannot be.
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> 152. The respondents argued that the rule making process had not had regard to the particular need of refugees, such as MM, who are not in a position to return to their country and may have difficulty leaving the UK to meet their spouse/partner. I accept Ms Giovannetti's response that refugees could not be more favourably treated than British citizen sponsors; that would be discriminatory and difficult to justify. Moreover, as Mr Peckover points out in his second witness statement,[168] the reunion of refugees with "pre-flight" partners and family is dealt with in Part 11 of the IRs and Appendix FM does not apply to them. Appendix FM only applies to "post-flight" families and it is logical that they should be subject to the same rules as British citizen sponsors.
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> 153. Therefore, my answer to Issue Three is "no, the judge's analysis and conclusion that the new MIR were, in principle, incapable of being compatible with the ***Article 8*** rights of the UK partners (and others if relevant) was not correct".

5. In the light of the Court of Appeal's judgment, the First-tier Tribunal's determination and, in particular, its reliance upon the now reversed judgment of the Administrative Court renders the determination unsafe. It is clear from the determination that Judge Cox had sympathy for the appellant and sponsor as do I also. However, the failure of the appellant and sponsor to meet the immigration provisions of the Rules, taken together with the other facts in the case as detailed by Judge Cox, do not, in my opinion, make available the conclusion that this out of country appeal should be allowed on Article 8 ECHR grounds. Although the judge acknowledged the close relationship between the appellant and sponsor and the sponsor's close relationship with his daughter [45] there is nothing exceptional on the facts of this case to justify allowing the appeal under Article 8 ECHR. Obviously, the financial circumstances of the family may change and a new application may be made in due course. However, that is a matter for the appellant, sponsor and their advisers.

DECISION

6. The determination of the First-tier Tribunal which was promulgated on 22 April 2014 is set aside. I have remade the decision. The appeal of the appellant against the decision of the Entry Clearance Officer dated 25 April 2013 is dismissed under the Immigration Rules and on human rights (Article 8 ECHR) grounds.

Signed Date 19 November 2014

Upper Tribunal Judge Clive Lane