Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: VA/14962/2013**

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 26 January 2015	**On 27 January 2015**

Before

Deputy Upper Tribunal Judge MANUELL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

Mr MAHMOUD SALAH MOHAMED ELSAADANY
(ANONYMITY DIRECTION NOT MADE)

Respondents

Representation:
For the Appellant: Ms A Everett, Home Office Presenting Officer
For the Respondents: Mr A Chohan, Counsel (instructed by Greenfields Solicitors)

DETERMINATION AND REASONS

Introduction

1. The Appellant (the Secretary of State) appealed with permission granted by First-tier Tribunal Judge S. Chohan on 12 December 2014 against the

determination of First-tier Tribunal Judge Colvin who had allowed the Respondent's appeal on Article 8 ECHR grounds against refusal of his entry clearance application made under paragraph 41 of the Immigration Rules to visit his wife and young son in the United Kingdom. The determination was promulgated on 16 September 2014.

2. The Respondent is a national of Egypt, born on 13 January 1985. It is not necessary to repeat his adverse immigration history which is set out at [3] and [4] of Judge Colvin's determination. In essence the Respondent had been removed from the United Kingdom at public expense on 24 October 2010, after his leave to remain had been curtailed following the breakdown of his previous marriage to a British Citizen. The Appellant had formed a relationship with another British Citizen, who had joined him in Egypt. A son was born in 2012, who is a British Citizen. The Appellant had married his new wife in Egypt in 2013. She and the son had subsequently returned to the United Kingdom but remained in close contact with the Appellant. The couple were currently unable to satisfy the requirements of Appendix FM for financial reasons. The entry clearance application had been refused under paragraph 320(7B) of the Immigration Rules which applied to visitors but not to spouses seeking settlement. The judge found that the Appellant would abide by the visit visa conditions and that there were compassionate and compelling circumstances which made refusal of a visit visa a disproportionate lack of respect for the family life of the wife and son, settled British Citizens. The decision was also contrary to the best interests of the Appellant's son.

3. Permission to appeal was granted because it was considered arguable that the judge had erred in law in her proportionality analysis by failing to take into account the public interest and in giving inadequate reasons for her finding that the Appellant was a genuine visitor who would leave the United Kingdom at the end of his visit.

4. Standard directions were made by the tribunal, indicating that the appeal would be reheard immediately if a material error of law were found.

Submissions – error of law

5. Ms Everett for the Appellant relied on the grounds of onwards of appeal and the grant of permission to appeal. She submitted that the judge's approach had been wrong and had failed to follow MM (Lebanon) [2014] EWCA Civ 985. There was no "threshold" test. The judge had failed to provide adequate reasons for her findings. The fact that the Appellant was currently unable to settle as a spouse was ultimately a matter of choice in that his sponsor could seek qualifying employment enabling

the financial requirements for his settlement to be met. They had other choices. The judge had also failed to provide adequate reasons for her finding that the Appellant would abide by the terms of his visit visa. This was a mandatory refusal which the Appellant had brought on himself.

6. In response to the tribunal's enquiry Ms Everett confirmed that the Secretary of State did not contend that the judge's decision had been irrational.

7. The tribunal did not need to call on Mr Chohan.

8. The tribunal indicated that it found no material error of law and reserved its determination which now follows.

No material error of law finding

9. The judge's treatment of the evidence was thorough and she set out her essential findings with care. The judge weighed the evidence given by the Appellant's sponsor and by his parents in law as to why they believed that he would comply with the restrictions applicable to his visit visa and how they would ensure that he did. Her positive findings on that issue are at [20] of her determination and were open to her.

10. The judge was right to call attention to the circumstances where paragraph 320(7B) of the Immigration Rules do not apply and the parallel she drew between visits and settlement was relevant. It would not have been logical to reach that stage unless the judge had satisfied herself that compliance with the restricted visa by the Appellant was more likely than not to occur.

11. Although it is right to say that the judge followed the Gulshan (Article 8 – new rules – correct approach) [2013] UKUT 00640 (IAC) approach rather than the MM (Lebanon) [2014] EWCA Civ 985 approach on the "threshold" question, that debate probably remains live. It cannot be said to amount to a material error of law in the context of the present appeal because a Razgar [2004] UKHL 27 analysis had to be conducted by the judge in any event and was. The Appellant's son's best interests were plainly a relevant factor in the proportionality exercise. There can be no doubt that the judge was entitled to find what amounted to special circumstances which made refusal of a temporary visa disproportionate: see [21] and [22] of the determination. There is no sense in which the judge was following the impermissible approach identified in Patel v SSHD [2012] EWCA Civ 741 of seeking to use Article 8 ECHR as a general remedial power.

12. The public interest was adequately considered by the judge. The British child's best interests have an impact on society as a whole, affecting as they must the future wellbeing of that child. The judge considered the immigration control aspect in detail and found that the restrictions on the visa would be observed. It was not a settlement situation when other matters would have arisen. There was here no suggestion of any resulting expense to the public purse.

13. There was no irrationality in the judge's decision and quite properly none was suggested. This was ultimately merely a disagreement with the judge's decision. There would have been no point in parliament's provision for allowing Article 8 ECHR appeals in visit visas despite ending appeals under paragraph 41 of the Immigration Rules unless it was accepted that not every situation can be covered by the Immigration Rules. Successful appeals will be rare but the present appeal provides an example.

14. The tribunal accordingly finds that there was no material error of law in the determination and there is no basis for interfering with the judge's decision.

DECISION

The making of the previous decision did not involve the making of a material error on a point of law and stands unchanged

Signed **Dated 26 January 2015**

Deputy Upper Tribunal Judge Manuell