Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/08174/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 13 November 2017	**On 27 November 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

ENTRY CLEARANCE OFFICER

Appellant

and

CHIKA GLORY OGWU
(ANONYMITY DIRECTION NOT MADE)

Respondent/Claimant

Representation:
For the Appellant: Ms K Pal, Senior Home Office Presenting Officer
For the Respondent/Claimant: No appearance.

DECISION AND REASONS

1. The Specialist Appeals Team appears on behalf of an Entry Clearance Officer (post reference: SHEFO\157468) against the decision of the First-tier Tribunal to allow on human rights grounds the claimant's appeal against the refusal of entry clearance as the spouse of a person present and settled here. The First-tier Tribunal did not make an anonymity direction, and I do not consider that the claimant or her spouse requires anonymity for these proceedings in the Upper Tribunal.

Relevant Background

2. The claimant is a national of Nigeria, whose date of birth is 17 April 1983. On 31 July 2014 she married her sponsor, who is of Nigerian heritage, in Nigeria.

3. On 16 April 2015, the Entry Clearance Officer gave his reasons for refusing her application for entry clearance as a spouse. In order to meet the financial requirements of Appendix FM, her sponsor needed a gross income of at least £18,600 per annum. She stated that the sponsor had been employed by ISS UK Ltd since 3 August 2009, and that he earned an annual salary of £20,300. However, she had not provided the specified evidence of salaried employment in the UK as specified in Appendix FM-SE. As she had failed to provide the required documents relating to her sponsor's employment, he was refusing her application under EC-P.1.1(d) of Appendix FM of the Rules.

4. The Entry Clearance Officer was also not satisfied that the appellant's relationship with the sponsor was genuine and subsisting, or that they intended to live together permanently in the UK.

The Decision of the First-tier Tribunal

5. The claimant's appeal came before Judge Wright sitting at Hatton Cross on 3 February 2017. There was no appearance on behalf of the Entry Clearance Officer. The claimant was represented by Counsel. The Judge received oral evidence from the sponsor.

6. In his subsequent decision, he found that the claimant did not meet the requirements of the Rules, as the specified evidence had not been provided to show that he had a claimed gross annual income of the £20,300 per annum. He also found that the claimed gross annual income was insufficient to cover the actual amount required, which was in fact £18,600 plus an additional £3,800 for the child who had been born in Nigeria before the Entry Clearance Officer made a decision on the application.

7. The Judge found at paragraph [33} that whilst the competing proportionality considerations were "*finely balanced"*, the claimant and her dependent child had shown:

> "that there are individual interests at stake covered by Article 8 of a particularly pressing nature so as to give rise to a strong claim that compelling circumstances may *[in fact here do]* exist to justify the grant of LTE [Leave to enter] outside the rules, (see headnote 3 below of **Kaur** (visit appeals; Article 8) **[2015]** UKUT 00478 (IAC**)** (SIJ Storey)) and, therefore, that refusal of entry clearance for the appellant (and her dependent child) would constitute a disproportionate interference with … her (and her dependent child's) Article 8 rights …"

The Application for Permission to Appeal

8. In the application for permission to appeal, Juliet McNamee of the Specialist Appeals Team pleaded that the proportionality balance had not been undertaken correctly and therefore the decision to allow the appeal contained a material error of law. She

cited **Dube (SS117A-117D) [2015] UKUT 0090 (IAC)** which states in Headnote 1(a) as follows: "*Judges are required statutorily to take into account a number of enumerated considerations. Sections 117A-117D are not, therefore, an a la carte menu of considerations that it is at the discretion of the judge to apply or not apply. Judges are duty bound to 'have regard' to the specified considerations.*"

The Grant of Permission to Appeal

9. On 11 September 2017, First-tier Tribunal Judge Boyes granted permission to appeal as the grounds asserted that the Judge had failed to have regard to a number of matters, specifically S117 N1AA 2002, and he was satisfied that the grounds were arguable.

The Hearing in the Upper Tribunal

10. In advance of the hearing in the Upper Tribunal, the claimant's legal representatives notified the Upper Tribunal that the claimant wished the appeal to be dealt with on the papers. Accordingly, they said they would not be making an appearance at the hearing.

11. Ms Pal submitted that the Judge had asked himself the wrong question when considering proportionality. He had failed to consider whether there were insurmountable obstacles to family life being carried on by the couple and their child in Nigeria. She submitted that the decision should be set aside and remade by me in favour of the Entry Clearance Officer, as the refusal decision was plainly proportionate.

The Reasons for Finding an Error of Law

12. The Judge painstakingly navigated his way through the relevant public interests considerations arising under section 117B of the 2002 Act. Accordingly, I do not consider that he can be faulted on the asserted ground of non-compliance with the guidance given by the Upper Tribunal in **Dube**. However, as is also pleaded in the Secretary of State's grounds of appeal, I consider that the proportionality balancing exercise was not correctly undertaken.

13. The Judge brought into the proportionality balancing exercise an irrelevant consideration, which was whether it was *reasonable* to expect the British national sponsor to leave the UK in order to be able to enjoy family life with the claimant and their child in Nigeria. This is not a question which arises under section 117B, and it was also not the right question when the judicial decision-maker is assessing whether there are sufficiently compelling circumstances to justify the grant of entry clearance of a spouse who has not shown that she meets the minimum income requirement ("MIR").

14. Under the Rules, if a spouse who is seeking leave to remain does not satisfy the MIR, then the only other basis on which the spouse can qualify for leave to remain is if EX.1 applies. EX.1 cannot be brought directly to bear in an entry clearance application. However, in a proportionality assessment outside the Rules, the question

of whether there are *insurmountable obstacles* to family life being carried on in the applicant's home country is an essential element in deciding whether the refusal leads to an unreasonable and disproportionate outcome.

15. Apart from addressing the wrong question at the wrong stage, the Judge also did not give adequate reasons for holding that it would be unreasonable for family life to be carried on in Nigeria. The Judge's reasoning was that it would be unreasonable for the sponsor - who had lived in the UK for 13 years since July 2003, who had become a British citizen by naturalisation, and who was in gainful employment - to leave the UK simply in order to be able to enjoy family life with the claimant and their child in Nigeria. But this line of reasoning overlooks the fact that the MIR applies to *all* British nationals and settled migrants, however long they have lived in the UK, and however remote their connection to the country of origin of the third country spouse. Given the common Nigerian heritage of the couple, and the fact that they would have entered into marriage in 2014 with no legitimate expectation of being able to carry on family life in the UK unless all the relevant requirements of the Rules were met, the Judge's finding of unreasonableness borders on the perverse.

16. The balancing exercise is further flawed in that the Judge failed to take into account: (a) that the effect of the refusal was to preserve the *status quo*; and (b) that the interference with family life need only be temporary, as it was open to the claimant to make a fresh application for entry clearance relying on further and better evidence of her sponsor earning £20,300 per annum.

17. For the above reasons, I find that the decision of the First-tier Tribunal was vitiated by a material error of law, such that it must be set aside and remade.

The Remaking of the Decision

18. In the normal course of events, where the Upper Tribunal finds an error of law in an Article 8 case, the Upper Tribunal will proceed at the same hearing to remake the decision. There is no good reason for departing from this practice in the present appeal, especially as there is no issue of fact which needs to be resolved.

19. The claimant has at all material times been legally represented, and so I infer that she is content for the decision to be remade on the papers, taking into account the findings of primary fact made by the First-tier Tribunal, none of which are controversial or the subject of challenge.

20. The claimant has not shown she meets the MIR as she has not provided the mandatory specified evidence to show that her sponsor's gross annual salary is £20,300. Appendix FM does not require her to show that the sponsor is earning an additional £3,800 for their first child, if the child is a British citizen. However, this is academic as she has not discharged the burden of proving that her sponsor has a specified gross annual income of at least £18,600.

21. Turning to an Article 8 claim outside the Rules, I accept that questions 1 and 2 of the **Razgar** test should be answered in the claimant's favour, as the effect of the refusal decision is to prevent family life being continued in the UK, albeit that the

interference will not necessarily be long-term or even medium-term. Questions 3 and 4 of the **Razgar** test must be answered in favour of the respondent. On the issue of proportionality, I take into account the relevant public interest considerations arising under section 117B of the 2002, while observing that they are mainly directed to cases of expulsion, not to cases of exclusion.

22. I accept that it is in the child's best interests to be cared for by both parents. However, there are not insurmountable obstacles to family life with both parents being carried on in Nigeria. Moreover, it is not suggested that the child's wellbeing or welfare is jeopardised by her mother continuing to be her primary carer in Nigeria.

23. Thus, the public interest considerations in favour of the maintenance of the *status quo* do not have to be strong in order to make the continued exclusion of the mother a proportionate outcome.

24. The couple did not have a legitimate expectation of being able to carry on family life in the UK, with or without a child of their union, unless they could show that the MIR was met. No excuse has ever been offered as to why the missing specified evidence was not provided by way of appeal. On the face of it, there should be no difficulty in the provision of the mandatory specified documents.

25. I note that the grounds of appeal to the First-tier Tribunal did not engage with the Entry Clearance Officer's reasons for finding that the MIR was not met. The legal representatives simply made a bald assertion that the sponsor was earning £20,300 per annum, and that this was more than enough for the couple and the child to live in the UK without recourse to public funds.

26. I also note that a similar line was taken by Counsel at the hearing. According to paragraph [14] of the Judge's decision, she submitted that the appeal should be allowed outside the Rules simply on the grounds that the sponsor was telling the truth in claiming that his gross annual income was £20,300.

27. I do not consider that the claimant made out an arguable case before the First-tier Tribunal that there were sufficiently compelling circumstances in her case such that the refusal was disproportionate.

28. I have considered the observations of the Supreme Court in **MM (Lebanon and Others) [2017] UKSE 10**, and I find that they do not assist the claimant on remaking. If the sponsor is earning £20,300 as claimed, there is no good reason why the mandatory evidence to demonstrate this cannot be provided in support of a fresh application.

29. I consider that the decision appealed against strikes a fair balance between, on the one hand, the rights and interests of the claimant and affected family members, and, on the other hand, the wider interests of society. It is proportionate to the legitimate public end sought to be achieved, which is the protection of the country's economic wellbeing and the maintenance of firm and effective immigration controls.

Notice of Decision

The decision of the First-tier Tribunal contained an error of law, and accordingly the decision is set aside and the following decision is substituted: this appeal is dismissed.

I make no anonymity direction.

Signed Date 24 November 2017

Judge Monson

Deputy Upper Tribunal Judge

TO THE RESPONDENT
FEE AWARD

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

Signed Date 24 November 2017

Judge Monson

Deputy Upper Tribunal Judge