Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/03269/2013

THE IMMIGRATION ACTS

Heard at Glasgow	**Determination issued**
on 3 December 2013	**on 16 December 2013**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

MOUAD SOUIHLI

Appellant

and

ENTRY CLEARANCE OFFICER, MOROCCO

Respondent

For the Appellant: No legal representative
For the Respondent: Mr A Mullen, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1) The appellant is a citizen of Morocco, born on 21 March 1976. The sponsor is his wife, Mrs Deborah Souihli, a UK citizen. They married in Morocco on 14 July 2008, and lived together there until October 2010 when the sponsor returned to the UK for medical treatment. The appellant visited her in the UK in September 2011, January 2012 and September - October 2012, returning each time well within the period permitted by his visas. On 25 November 2012, he applied to settle in the UK as her spouse.

2) The Entry Clearance Officer refused the application by notice dated 10 January 2013, under reference only to the financial requirements of the Immigration Rules. She was

required to have a gross income of £18,600 pa, but earned only £14,508 pa, and had insufficient savings.

3) The appellant appealed to the First-tier Tribunal. He did not seek an oral hearing. By determination promulgated on 21 June 2013 FtT Judge Ferguson dismissed the appeal under the Immigration Rules and under the ECHR.

4) On 1 August 2013 Designated Judge Woodcraft granted permission to appeal to the Upper Tribunal, on the view that the judge's conclusions in respect of the Rules and Article 8 were both arguably wrong in the light of MM & Others v SSHD [2013] EWHC 1900 (Admin).

5) Mr Mullen confirmed that the SSHD has been granted permission to appeal MM, and that a hearing is expected to take place in the Court of Appeal in March 2014. He did not press for an adjournment. He acknowledged that while MM is not binding, it might be viewed as highly persuasive, perhaps more so as at the time of giving the judgement the Hon Mr Justice Blake was also the President of the Upper Tribunal (Immigration and Asylum Chamber). Mr Mullen submitted that in this case the First-tier Tribunal reached a conclusion which was open to it and which was consistent with the approach explained in MM, although that case was not then available.

6) The following information emerged from questions I put, and from questions put by the Presenting Officer. Mrs Souihli advised that her husband had not been in the UK prior to the three visits since her return. He stayed for about 3 weeks each time, returning to his job as a salesman in Agadir. He had hoped to visit her again recently, but his application was refused this time by the Entry Clearance Officer. She had not seen a copy of the refusal notice. (Perhaps the refusal was based on suspicions about intention, given that the appellant since his last visit has made the application leading to these proceedings. Nothing turns on this refusal.) He speaks very good English. (I note from the application form that he lists languages he speaks well as Berber, French, Arabic and English.) Mrs Souihli speaks only English. She can exchange a few words of greeting in Arabic and French, but little more. She returned to the UK firstly for treatment for cervical cancer. Her treatment has been successful, and she is now subject only to 3 yearly check-ups. She has some fibroid problems for which she is on iron treatment. She works full time as an auxiliary nurse at Woodend Hospital, Aberdeen. Her adult daughter lives with her, works full time and contributes to the household expenses. She has the tenancy of a 2 bedroom flat. She does not anticipate being able to increase her earnings to £18,600 pa. She accepts that there is no longer any medical reason for her not to resume living with her husband in Agadir. However, they would both prefer to make their life in the UK. She lived with her husband in a densely populated part of Agadir, and felt almost housebound. She was frightened to go out on her own, and went out only with her husband. If she had been able to live in a more touristic or international area of the city she would have been happy to go out, but apartments there were too expensive. She had no real prospect of finding work due to the language barrier, and in any event work is in short supply. Her husband when visiting Aberdeen has no problem getting around on his own and

communicates well with her family and everyone else he meets. He is a hard worker who would take any employment available, starting as a cleaner if necessary. (I note that on his application form he says that he has good skills in electricity and air conditioning. He would look for a job in that domain but would hope to set up business eventually as a fruit and vegetable importer or as an upholstered furniture manufacturer.) Her husband's three sisters, two of them married, and both his parents live in Morocco. He has no nephews or nieces. Ms Souihli said that it had proved very easy for her husband to adapt to life in Aberdeen, but very difficult for her to adapt to life in Agadir. She and her husband had tried for a child, but with her medical history and the passage of time, she felt that this was now unlikely.

7) In relation to the fresh decision which might be substituted, if error of law were to be found, the Presenting Officer accepted that this was a case which would almost certainly have succeeded before the amendments to the Immigration Rules made in June 2012. He also accepted that there was nothing adverse in the appellant's immigration history. He was unable to say that there was any more on the state's side of the proportionality balance than the general public interest in enforcing the Rules as they stand, including the strict financial requirements.

8) I indicated that the appeal would be allowed.

9) I adopt the conclusion in MM at paragraph 142 that the amended Rules as to the financial requirements applying to entry clearance applications for a spouse amount to a disproportionate interference with the rights of UK citizen sponsors to enjoy respect for family life, and that the Rules do not represent by themselves a fair balance between the competing interests involved. I also adopt the conclusion at paragraphs 149 and 153 that the terms of the Rules and policy together are not sufficient to render the decision making process as a whole compatible with the ECHR. The observation at paragraph 153(ix) is apposite to this case:

> I recognise that there may be some circumstances where the character, conduct or immigration history of the foreign spouse and the economic circumstances of the couple in the UK are so dire that [exclusion] was the foreseeable consequence of the particular marriage, but in the vast bulk of ordinary cases where the relationship is genuine and subsisting, and there is no adverse history of the spouse to weigh in the balance, the imposition of such a stark choice is precisely what Sedley LJ described as indirectly sending the citizen into exile. I agree that in the broad generality of ordinary cases, the abandonment of the citizen's right of residence in order to enjoy family life with his or her spouse is an unacceptable choice and a disproportionately high price to pay for choosing a foreign spouse in an increasingly international world.

10) The figure of £13,400 pa was identified by the Migration Advisory Committee as the lowest maintenance threshold appropriate, close to the adult minimum wage for a 40 hour week (MM paragraph 124(i)). I find from the information provided by the appellant and the evidence of the sponsor (a transparently honest and reliable witness) that it is more likely than not that on arrival in Aberdeen he will find employment. Setting aside the strict financial requirements in the Rules, which exclude any possible earnings of the appellant, it is much more likely than not that he and the sponsor can

adequately maintain and accommodate themselves without recourse to public funds. (They have no dependants.)

11) The sponsor tried living in Morocco and found it, for understandable reasons, not much to her taste. Visiting for a period of weeks or even months is one thing, but adapting to a permanent life there is something else. The evidence is entirely persuasive as to why it is much easier for the appellant to adapt to life in Aberdeen. He is fluent in the language and unlike the appellant as a foreign woman moving around Agadir, there is no difficulty at all in the appellant adapting to Aberdeen. He has an immaculate history of compliance with UK immigration requirements.

12) Other than the (possible) desirability of 100% compliance with inflexible rules, there is nothing to weigh on the public interest side of the balance. The obstacles to the appellant and the sponsor carrying on married life in Morocco are not literally insurmountable, but the reasons for not putting the sponsor to such a stark choice and the reasons for preferring residence in the UK are so strong as to render insistence on refusal of entry clearance a clearly disproportionate measure.

13) The determination of the First-tier Tribunal is **set aside**. The appeal, as originally brought to the First-tier Tribunal, is **allowed under Article 8 of the ECHR**.

6 December 2013
Judge of the Upper Tribunal