Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/10810/2013

THE IMMIGRATION ACTS

Heard at Bennett House, Stoke **Determination Promulgated**
On 18th June 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE GARRATT

Between

WESLEY WILLIAM CUNNINGHAM-BURNS
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Dr E Mynott, legal representative
For the Respondent: Mr G Harrison, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. Before the Upper Tribunal the Secretary of State becomes the appellant. However, for the sake of consistency and to avoid confusion I shall continue to refer to the parties as they were before the First-tier Tribunal.

Background

2. On 9th April 2014 Judge of the First-tier Tribunal N J Bennett gave permission to the respondent to appeal against the determination of Judge of the First-tier Tribunal

Landes in which she allowed the appeal on human rights grounds against the decision of the respondent to refuse entry clearance as a partner in accordance with the provisions of Appendix FM and FM-SE of the Immigration Rules.

3. In granting permission Judge Bennett noted that the grounds took issue with the judge's conclusions about Article 8. In particular the conclusion that, although the appellant did not meet the financial requirements of Appendix FM of the Rules and that section EX1 of that Appendix did not apply, the judge had found that it was unreasonable and therefore disproportionate to expect the sponsor, a British citizen, to live with the appellant in his country of citizenship, the United States of America. Judge Bennett thought it arguable that the judge had erred in finding in the appellant's favour in these circumstances.

4. At the hearing in the Upper Tribunal I heard submissions from both representatives after which I considered the matter for a few moments and then concluded that the determination did not show an error on a point of law and should stand. An outline of the submissions made and my reasons for that conclusion follow.

5. Initial submissions were made by Dr Mynott to suggest that the respondent's application was out of time as the determination had been sent out on 15th January 2014 but the application for leave had not been received by the Tribunal until 6th February 2014. However, on looking at the Tribunal file and electronic records, it was discovered that the determination sent out on 15th January 2014 was not a full copy and so the Tribunal promulgated the determination again on 30th January 2014. The respondent's application was therefore received in time.

6. Mr Mynott argued that the determination did not show an error on a point of law. It was fully reasoned and followed the guidance of the Upper Tribunal set out in *Gulshan* [2013] UKUT 00640 reaching the conclusion that there were compelling circumstances not sufficiently recognised under the Immigration Rules to enable consideration of Article 8 issues outside them. He further argued that the proposition set out in paragraph (c) of the respondent's grounds in relation to the need for exceptional circumstances was wrong in view of the "compelling circumstances" test set out in *Gulshan*. He also emphasised that the appellant's case was not a "precarious" one as there was no immigration offending at the time of the application. He suggested that the grounds amounted to no more than a disagreement with the reasoned conclusions of the judge. Further, although the judge had made reference to the decision of the High Court in *MM* [2013] EWHC 1900 (Admin) that was not the subject of the grounds nor, at the time of hearing, had *MM* been overturned.

7. Mr Harrison indicated that he relied upon the grounds and made no further submissions.

8. The grounds of application argue that no exceptional circumstances had been justified in the case to put it outside the ambit of continued maintenance of a firm and coherent system of immigration to require a fresh application as the appellant had failed to satisfy the Rules.

Conclusions

9. The determination is comprehensive and fair. The Rules under Appendix FM and the requirements of Appendix FM-SE are carefully considered before the judge reaches the conclusions, open to her, that the appellant was in a relationship which qualifies

as a partner under Appendix FM and the specific relationship between appellant and sponsor also meets the requirements of that Appendix. In the determination the judge concedes that, at the date of application, the parties could only show an income which was about £250 less than the annual requirement for £18,600 and that the appellant could not benefit from the provisions in section EX of Appendix FM, but she carefully considered whether there were arguably good grounds for granting leave to remain outside the Rules.

10. In conducting the *Gulshan* exercise the judge concluded that, at the time of the refusal and subsequently, the parties were earning well in excess of the £18,600 p.a. requirement under the Rules. Additionally, in identifying compelling circumstances not sufficiently recognised under the Rules, the judge found other material factors. She pointed out that, if the appellant had to return to the USA to apply for entry clearance, he would have to give up his employment with the consequent loss of income. Further, if the sponsor had to go to the USA with him, she would also be required to give up her employment and so there would be less prospect of the parties showing the income requirements of the Immigration Rules. Further, if the sponsor did not return with the appellant to America there would then be difficulties in showing that the couple had lived together for the requisite period of time before the date of application which, in any event, would have to be based on her income alone which would then be insufficient. Additionally, the judge identified the fact that the partnership had been formed at the time when the parties were in a position to support themselves when the appellant had appropriate leave. The judge was entitled to conclude that, in all these circumstances (which presented the appellant with a "stark choice") it was evident that the Rules did not recognise all the factors relevant to the continuation of Article 8 family life. The judge was not, therefore, in error in proceeding to consider Article 8 issues outside the rules

11. In considering the proportionality of the respondent's decision the judge acknowledged the public interest in immigration control and that Parliament had expressed its satisfaction with the Rules as *MF (Nigeria)* [2013] EWCA Civ 1192 had made clear.

12. Additionally she considered proportionality against the compelling circumstances which she had already identified. In doing so the judge made reference, as an example only, to the discussion about how income must be evidenced set out in paragraph 142 of *MM* although, since the date of the hearing before me in the Upper Tribunal, the findings in *MM* have been overturned by the Court of Appeal (*MM* [2014] EWCA Civ 985). However, reference to the earlier decision does not, in my view, affect the outcome in this appeal. The issue before the Court of Appeal (paragraph 1 of *MM*) was whether or not, amongst other things, the minimum income requirement of £18,600 was unlawful as being a disproportionate interference with a UK partner's Article 8 rights. That is not the case here because the judge made the clear finding that the appellant could not comply with the Rules and found compelling circumstances, consequent upon the refusal which were unique to the facts of the case relating not just to income, which enabled her to conclude that the respondent's decision was disproportionate. Further, and most importantly, the grounds of application took issue with the identification of "exceptional circumstances" or "compelling circumstances" as opposed to any issue arising under *MM*. With those distinguishing features in mind, my conclusion is that the grounds amount to no more than a disagreement with the conclusions of the judge rather than pointing to an error on a point of law.

DECISION

The decision of the First-tier Tribunal did not contain an error on a point of law and shall stand.

Anonymity

The First-tier Tribunal did not make an anonymity order nor do I consider one to be appropriate.

Signed Date

Deputy Upper Tribunal Judge Garratt