Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: OA/04955/2013

THE IMMIGRATION ACTS

Heard at Newport	**Determination Promulgated**
On 1 May 2014	**On 11 September 2014**

Before

MR C M G OCKELTON, VICE PRESIDENT
UPPER TRIBUNAL JUDGE GRUBB

Between

MC
(Anonymity Order Made)

Appellant

and

ENTRY CLEARANCE OFFICER, KINGSTON

Respondent

Representation:

For the Appellant: Ms C Grubb, instructed by Hoole & Co. Solicitors
For the Respondent: Mr I Richards, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a national of Jamaica. He applied to the respondent for entry clearance with a view to settlement as the husband of the sponsor who is a British citizen. On 5 February 2013 the respondent refused his application. The appellant put in a notice of appeal, and in response an Entry Clearance Manager reviewed the decision and added further reasons for refusal. The appeal was heard by Judge A E Walker in the First-tier Tribunal. She heard oral evidence from the sponsor and considered a quantity of written evidence, particularly in relation to the sponsor's

income. She dismissed the appeal. The appellant now has permission to appeal to this Tribunal.

2. Three discrete issues arose and arise for consideration: two of them relate to the Immigration Rules and the third relates to the application of the art 8 of the European Convention on Human Rights outside the Rules.

Finance

3. The Entry Clearance Officer's reason for refusing the application was that the appellant could not meet the financial requirements of the Immigration Rules. The decision cites the relevant rules, and notes the evidence provided by the appellant, derived largely from the sponsor. The decision notes also that the appellant proposed to work as a barber but that there was no evidence of the income he might receive. The Officer's conclusion was that the appellant had not demonstrated that the sponsor's income from salaried employment was at least £18,600 per annum, the threshold fixed by paragraph E-ECP.3.3 of Appendix FM to the Statement of Changes in Immigration Rules, HC 395. It was for that reason that the officer refused the appellant's application.

4. The judge had, as we have said, considerable documentary evidence before her. She correctly reminded herself that she was concerned with the position at the date of the decision. There was a certain amount of evidence that the sponsor was doing some part-time work as well as work arranged for her through Red Recruitment. Her conclusion in relation to the financial aspects of the application and appeal is at para 49 of her determination, which reads as follows:

> "49. I am satisfied by the payslips from Red Recruitment supported by the letter from them and the entry of the payments into the sponsor's bank account that the appellant earns £15,600 per annum from that employment. I accept that the appellant is also employed by Minter cleaning and by Atlas Cleaning because payments from that employment are seen to enter her bank account. However, the appellant seeks to rely upon the case of MM and others v SSHD [2013] EWHC 1900 (Admin). This case is authority for the proposition that the financial requirement of £18,600 is disproportionate and in terms of the amount required should be £13,500 and it therefore follows that the appellant meets the financial requirements of the rules relying on her employment with Red Recruitment alone."

5. Her decision on this issue was therefore in favour of the appellant. It was not the subject of any submissions before us. Since the hearing, however, the decision to which the judge referred has been reversed by the Court of Appeal: SSHD v MM & Others [2014] EWCA Civ 985. It follows that, contrary to Judge Walker's view, the appellant needed to show that the sponsor's earning was £18,600 per year. It is clear that Judge Walker did not think that it was, and it is equally clear that the evidence was not such as to show that it was. There may have been some evidence of earnings of over £15,600, but there was no clear evidence that those additional earnings amounted to another £3,000.

6. It follows that Judge Walker ought to have concluded that the appellant did not meet the financial requirement of the rules. As we have said, this is a matter on which we heard no argument. We shall return later to its impact on the outcome of this appeal.

The appellant's criminal conviction

7. As we have said, the Entry Clearance Manager added, on review, an additional reason for refusing the appellant's application.

> "I would also like to take this opportunity to make the learned judge aware of an oversight on behalf of the ECO. The ECO failed to take the appellant's past criminal history into account. By his own admission the appellant confirmed that he had been convicted of a serious criminal offence (wounding with intent) and sentenced to four years' imprisonment. Under the current immigration rules that came into effect on 13/12/2012 (the same day that the appellant lodged his current application), the appellant should have been refused under paragraph S-EC.1.4(a) of Appendix FM of the Immigration Rules,
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> > "S-EC.1.4 the exclusion of the applicant from the UK is conducive to the public good because they have:
> >
> > (a) been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 4 years;
> >
> > […]
> >
> > Where this paragraph applies, unless refusal would be contrary to the Human Rights Convention or the Convention and Protocol Relating to the Status of Refugees, it will only be in exceptional circumstances that the public interest in maintaining refusal will be outweighed by compelling factors."
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> Furthermore, I am not satisfied that the public interest in maintaining this refusal is outweighed by compelling factors. The appellant married in 2011 and was convicted in 2008. He therefore had an opportunity to research whether his conviction may affect any applications for entry clearance to the UK. I am also aware of the fact that there is nothing in English law that prohibits the appellant from enjoying family life in Jamaica. I am therefore not persuaded to alter the original decision for the reasons as outlined above."

8. Before the judge the sponsor asserted that she was unaware of the appellant's criminal record in Jamaica until his (earlier) application for entry clearance. The judge was also told that the appellant was indeed sentenced to four years imprisonment, but that two years was subsequently suspended. The judge regarded the evidence on this point as "highly unsatisfactory". She concluded that the appellant had indeed been sentenced to imprisonment for four years and that his application therefore fell to be refused under the rules cited by the Entry Clearance Manager.

9. In the grounds of appeal to this Tribunal the draftsman submitted that a suspended sentence is not a custodial sentence and that the judge might have erred in law if the truth of the matter was that the sentence was suspended. The judge who granted permission indicated that it would be for the appellant to produce a copy of the certificate of conviction in order to establish the point. Before us there was a copy of a letter apparently signed by an Assistant Commissioner of Police in Jamaica indicating that it was not possible to provide a certificate but that the position was that the appellant had been convicted on 21 May 2008 (his first conviction); the charge was Wounding with Intent. The sentence was four years hard labour, suspended for two years. The details of the events were "during a dispute the accused used a machete to chop complainant on his hand and head".

10. Paragraph 6 of the Immigration Rules defines "a period of imprisonment" as having the same meaning as set out in s 38(2) of the UK Borders Act 2007. That section provides at para (a) that a period of imprisonment does not include a suspended sentence, unless a court subsequently orders that the sentence or any part of it is to take effect. It follows that para S-EC.1.4(a) did not apply to the appellant, and the Entry Clearance Manager was wrong to take that point against him.

11. The judge did the best she could with the material before her. There is no room for criticism of the view she took of the evidence. However, Mr Richards readily acknowledged that in the circumstances (which include a mystery as to the fate of the original certificate of conviction, which was submitted to the Entry Clearance Officer) it would be wrong to oppose the admission of the Police letter or to argue against a submission that an error of fact amounting to an error of law within the meaning of E & R v SSHD [2004] EWCA Civ 49 had occurred.

12. That seems to us to be right. We accordingly conclude that the judge erred in her application of the exclusionary provisions of the Immigration Rules to the appellant on the grounds of his conviction.

Article 8

13. As will be apparent from the above, the judge concluded that the appellant did not meet the requirements of the Immigration Rules. Although she thought (wrongly) that the appellant met the financial requirements of the rules, she also thought (wrongly) that he was excluded because of his criminal conviction. She therefore went on to consider whether, in the light of all the evidence, it would be disproportionate to apply the rules to the appellant or whether, on the contrary, the rights of the appellant, the sponsor, and the children to private and family life overrode the general rules. After setting out the general law she wrote as follows:

> "57. I am satisfied that here is a married relationship between the appellant and the sponsor. The sponsor is indeed working all the hours available to her in order to meet the financial requirements of the rules. However, she and the appellant have maintained their relationship since 2008 when they met. The sponsor has visited

> the appellant regularly. I accept that the appellant and the sponsor cannot live together except in the UK because I accept that the interests of the sponsor's children are that they remain in the UK and the sponsor is the carer of her children. They are both British citizens and the sponsor's daughter has a relationship with her father who lives in the UK. As for the sponsor's son I accept the appellant's evidence with regard to the murder of his father and that he is fearful of travelling to Jamaica. Both children are settled in their schools. I note that the sponsor has her mother to whom she has been able to turn to look after her daughter in the past and I am satisfied that when the sponsor visits the appellant she will be able to leave her children with her mother and other family members and friends as she has done on the past. I note that the sponsor's children aside from via modern methods of communication have had very little contact with the appellant.
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> 58. Although I accept that whilst the sponsor visits the appellant her children will be deprived of her care that interference is at the very minimum level. I consider that in light of my finding as to the contact that the sponsor's children have had with the appellant they do not have a family life with the appellant.
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> 59. It follows that I accept that the refusal is an interference that the appellant has with the sponsor because it in effect deprives him of the opportunity of living with the sponsor but I consider that the interference is proportionate to the legitimate aim of effective immigration control. In reaching that conclusion I take into account the appellant's previous conviction and my findings with regard to it. A conviction for wounding with intent, on the assumption that this offence in Jamaica is against the same framework as the English equivalent of s 18 of the Offences Against the Person Act 1861 is an extremely serious offence and one degree below that of attempted murder. I also take into account the ability of the appellant and the sponsor to maintain their family life by visits of the sponsor to Jamaica where she also has family members and friends remaining."

The appeal to the Upper Tribunal

14. Much of the grounds of appeal is directed to identifying the error of law in relation to the appellant's criminal conviction. As we have indicated, we accept those grounds. The judge was wrong to think that the appellant was excluded by reason of his criminal conviction. Submissions then moved to those based on art 8: as we have said, there were no submissions in relation to finance at the hearing. The grounds of appeal on art 8 are, in full, as follows:

> "Article 8
>
> 19. The tribunal erred in law when assessing whether refusal was proportionate, the tribunal's decision is in breach of s. 6 of the Human Rights Act 1998 and section 55 of the Borders, Citizenship and Immigration Act 2009. The Immigrations Judge:
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> (a) Failed to take into account that over 5 ½ years had elapsed since the conviction and so was nearly spent.
> (b) Failed to take into account the offence was the Appellant's only over offence.
> (c) Failed to make an adequate or sufficient assessment of whether the Appellant and sponsor's Article 8 rights could not reasonably have been expected to be

enjoyed elsewhere. The learned judge held that the Sponsor and children could not reasonably be expected to move to Jamaica however failed to take into account the impact on the Appellant and Sponsor's private lives.

(d) Did not give sufficient reasons why the Appellant and Sponsor's Article 8 rights could reasonably have been expected to be enjoyed elsewhere [see paragraph 59 of the judgement]. The Immigration Judge's reasoning instead focused on the Article 8 rights of the Sponsor's children. "

15. On the basis of those grounds Ms Grubb asked us to say that the judge ought not to have concluded that the appellant's exclusion was conducive to the public good. There was a family life derived from the marriage of the appellant and the sponsor. The impact requiring them to live apart had to be considered. Ms Grubb submitted that the appellant's offence was symptomatic of the society in which he lived in Jamaica: he had not committed any further offences even there, and it must be the case that the risk of him committing further offences in the United Kingdom was low. Mr Richards asked us to note that the appellant's crime appeared to be a serious one, even if the sentence was lenient. He asked us to say that the Article 8 findings were unimpeachable.

16. Working on the judge's conclusion in relation to financial matters, and on our conclusion that she was wrong about the automatic exclusion of the appellant by reason of his offence, a further question then arises, which is whether para S-EC.1.5 of Appendix FM applies to the appellant. That paragraph is as follows:

> "The exclusion of the applicant from the UK is conducive to the public good, because, for example, the applicant's conduct (including convictions which do not fall within paragraph S-EC.1.4.), character, associations, or other reasons, make it undesirable to grant them entry clearance."

17. We have no doubt at all on the evidence before us that the appellant's offence is one justifying a conclusion that his admission to the United Kingdom is not conducive to the public good. Ms Grubb may be right that it is an offence symptomatic of Jamaican society, but Mr Richards was right to characterise it as a very serious offence, and the few official details that we have of it confirm that description. It is all very well to say that at the date of the decision it was over five years ago, and that it was the appellant's first offence; it may be that in due course the appellant will be able to show that there is no risk of a further offence of that nature but we do not think that that time has yet to come.

18. It follows that in our judgment the appellant cannot meet the requirements of the Immigration Rules, not because of para S-EC.1.4 of Appendix FM, but because of S-EC.1.5.

19. We thus look at the matter outside the rules from a starting point very similar to that adopted by the judge. In that context we agree that her assessment shows no error of law. Contrary to what is suggested in the grounds, the position of the appellant, the sponsor, and the sponsor's children was considered by the judge. So far as the

offence is concerned, whichever paragraph of Appendix FM applies to the appellant, it has to be recognised that there is generally speaking going to be difficulty in establishing that a person whose exclusion from the United Kingdom is conducive to the public good is to be admitted because he has married a British citizen. The balancing of the public interest against the wishes of the appellant and the sponsor is a matter that the grounds of appeal to the Upper Tribunal appear to ignore completely. Looking at the matter as a whole in the light of the grounds, as we do, we conclude not merely that the decision of Judge Walker on Article 8 is one that was open to her on the basis from which she proceeded: it is also the view we reach on the slightly different basis upon which we proceed.

20. We must finally refer to the decision of the Court of Appeal in MM. For the reasons we have already given, our view is that the appellant does not meet the requirements of the rules because he is excluded by para S-EC.1.5 of Appendix FM, and that in those circumstances it is not disproportionate to apply the rules to him and so refuse him entry clearance. The decision of the Court of Appeal in MM makes it clear that, in addition, the Entry Clearance Officer's original decision refusing the appellant entry clearance for his failure to meet the financial requirements of the rules was correct. Thus, in order to succeed under Article 8 he would have to show that it was disproportionate to exclude him despite the fact that, as well as being a person convicted of a serious criminal offence, he had not demonstrated that his family was going to have a level of income required by the rules. It follows that if this factor were to be taken into account as well, the conclusion would have to be even more firmly against the appellant.

21. The judge erred in law in her application of the exclusionary requirements of Appendix FM. For that reason we set her decision aside. We substitute a decision dismissing the appellant's appeal for the reasons we have given.

C M G OCKELTON
VICE PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
Date: 22 August 2014