**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: OA/04723/2014

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
|---|---|
| **On 16 March 2015** | **On 27 April 2015** |

**Before**

**UPPER TRIBUNAL JUDGE DAWSON**

**Between**

**ENTRY CLEARANCE OFFICER - CHENNAI**

Appellant

**and**

**PA**
**(ANONYMITY DIRECTION MADE)**

Respondent

**Representation:**

For the Appellant: Mr M Shilliday, Home Office Presenting Officer
For the Respondent: Ms A Benfield instructed by A P Solicitors

**DECISION AND REASONS**

1. The Entry Clearance Officer has been granted permission to challenge the decision of First-tier Tribunal Judge Ghani who allowed an appeal under Article 8 by the respondent, a national of Sri Lanka who was born in May 2013. I shall refer to the respondent as the claimant and as he is a minor I make an order pursuant to rule 14

of the Tribunal Procedure (Upper Tribunal) Rules 2008 prohibiting the disclosure or publication of any matter likely to lead members of the public to identify him.

2. His father a British citizen lives in the United Kingdom. The claimant's mother is a national of Sri Lanka and she lives with the claimant in Colombo. The couple married in August 2012 in Sri Lanka after which she was granted entry clearance twelve months later to enter the UK. At the time she applied for entry clearance she was pregnant with the claimant who as I have observed above was born in May 2013.

3. The Entry Clearance Officer refused the claimant's application on 27 February 2014 followed by a further decision dated 17 July 2014. The reason for the first decision was a failure to meet the income threshold under the relevant provision of Appendix FM. Although the claimant's mother had been issued with entry clearance, the Entry Clearance Officer contended she was still subject to UK immigration control and it was incumbent upon the sponsor to show a gross annual income of £22,400. The sponsor's income did not meet this threshold based on the documents that had been submitted.

4. In addition, the Entry Clearance Officer was not satisfied that the claimant would be adequately accommodated without recourse to public funds in the absence of evidence regarding the size and current occupancy of the proposed accommodation and the absence of consent from the landlord or owner. The Entry Clearance Officer nevertheless indicated that no final determination has been made whether the income threshold and/or related evidential requirements had been met as the courts had not decided the outcome of the Secretary of State's appeal in the legal challenge to the income threshold requirement. That final determination was made in the second decision. Although not referred to this is likely to have been in the light of the decision in *MM & Others, R (on the application of) v SSHD* [2014] EWCA Civ 985 which was handed down on 11 July.

5. The second decision by the Entry Clearance Officer restates the gross income requirement of £22,400. The sponsor's income from his employments amounted to £20,017.63 per annum. It was observed that the shortfall could only be met by savings of £21,955.63 of which no evidence had been provided. Concern was also expressed that the cash deposits to the sponsor's bank account were not consistent with the total net income claimed on the payslips submitted from Ozland Limited, a second employment by the sponsor in addition to KFC. Thus the application was refused with reference to the relevant provisions of Appendix FM. No issue regarding accommodation was raised.

6. The appeal by the claimant was against the first decision on grounds that the relevant minimum income threshold had been met. A report from Environmental Health Management Service Consultants was referred to in respect of the accommodation. It is also argued that the Entry Clearance Officer had failed to consider the child's best interests and furthermore it is argued that the decision was contrary to Article 8.

7. The judge noted that it was accepted on behalf of the claimant that he was unable to meet the requirements of the Immigration Rules and wished solely to rely on Article 8.

8. After directing himself as to the authorities the judge reached this conclusion at [10] of his decision:

> "The refusal of the application must not result in unjustifiably harsh consequences such as to be disproportionate under Article 8. The appellant has to establish some compelling circumstances which would justify departure from the immigration rules. The appellant's mother has been granted entry clearance to join the appellant's father thereby accepting and acknowledging that there is a genuine and subsisting spousal relationship. The family unit as a whole must be kept together and they must enjoy family life as a unit. The respondent's decision is preventing the appellant from sending his formative months with both his parents. This cannot be said to be in his best interest. As a young child his interest lies by living with both his mother and father I find that this constitutes an exceptional circumstances and merits substantial Article 8 analysis. Applying the principles of RAZGAR and the HUANG test, and taking into account the rights of both parents (BEOKU-BETTS) to refuse the appellant entry clearance to live with both his parents is an interference which I find is disproportionate as the legitimate aim appears to be the economic well-being of the country through immigration control. The appellant's father is earning sufficient amount to maintain the family without recourse to public funds. The decision is clearly preventing the development of family life by enforcing separation of the family. I must of course take into account the amendments made in section 117 of the Nationality, Immigration and Asylum Act 2002 as a result of implementation of section 19 of the Immigration Act 2014. I accept that one of the matters listed in paragraph 117B of the Immigration Act 2014 is immigration control which is in the public interest. However, the sponsor is economically independent and it cannot be in the best interest of appellant to remain separated from the sponsoring father. These factors I find outweigh the legitimate aim of immigration control in the appellant's case."

9. The challenge is lengthy from which I distil the following points:

   (i) The claimant and his mother could continue their family life together with the sponsor in Sri Lanka should they wish to do so.

   (ii) There was available the alternative remedy to re-apply with the correct evidence in support of the application.

   (iii) There was no reasoning why it would be unjustifiably harsh for the claimant to remain in Sri Lanka with his mother and the judge failed to consider that family life could be continued there.

   (iv) The judge had failed to consider or give adequate reasons why the sponsor could not return to Sri Lanka taking account of his previous visits.

   (v) Article 8 cannot be used to circumvent the requirements of the Immigration Rules.

(vi) The judge failed to refer to the correct test when conducting a balancing exercise. There were no compelling circumstances why family life could not continue in Sri Lanka. Article 8 does not oblige the United Kingdom to accept the choice of individuals as to which country they would prefer to reside in.

(vii) Should the sponsor not wish to reside in Sri Lanka the relationship could be maintained through visits and "modern means of communication in the interim.

(viii) The Tribunal's finding amounted to one that the Immigration Rules will never be proportionate in a case involving a British citizen.

10. Permission to appeal was granted by First-tier Tribunal Judge Kelly on the basis that it was arguable that the Tribunal had simply allowed the appeal on the basis of a near miss under the financial provisions and that it had misdirected itself by failing to consider whether it would be reasonable to expect family life to continue in the country of origin.

11. Ms Benfield clarified at the outset of the hearing that the sponsor is a British citizen by naturalisation on 29 July 2013. There was no Rule 24 response.

12. Mr Shilliday summarised the Secretary of State's challenge to be that the judge had allowed the appeal without their proper approach as set out in *Nagre v SSHD* [2013] EWHC 720 (Admin) and *Gulshan (Article 8 – new rules correct approach*) [2013] UKUT 00640 (IAC). He argued that the judge had failed to explore why the sponsor could not return to Sri Lanka. The specific purpose of the Rules was to avoid migrants coming here to rely on public funds. He did not however assert irrationality. All the factors raised by the judge in paragraph 10 were dealt with under the Rules.

13. Ms Benfield accepted that the income threshold of £22,400 could not be met. In her view the judge had not erred. He had focused on the child's best interests and had regard to the relevant factors. She contended the right test had been applied.

14. By way of response Mr Shilliday accepted that the spirit of s.55 applied to this case but argued in addition that the judge had not specified the public interest. The Entry Clearance Officer had not decided the relationship should continue in the United Kingdom; all that had happened was that the claimant's mother had met the requirements of the Rules.

**Analysis**

15. Short of any rationality challenge which Mr Shilliday did not seek to advance, the grounds involve argument as to the judge's direction as to the law, the adequacy of reasons and whether all relevant factors were taken into account. The first question is whether the judge applied the correct test. At paragraph [9] he referred to a number of relevant authorities as to the approach he was required to take. The second sentence of [10] (see [8] above) indicates the judge had in mind the need to see if there were some compelling circumstances that would justify departure from

the Immigration Rules. The judge was required to see whether there were compelling circumstances that were not sufficiently recognised by the Rules as was clearly stated by Sales J in *Nagre* at [29] of his judgment:

> "Nonetheless, the new rules do provide better explicit coverage of the factors identified in case law as relevant to analysis of claims under Article 8 than was formerly the position, so in many cases the main points for consideration in relation to Article 8 will be addressed by decision-makers applying the new rules. It is only if, after doing that, there remains an arguable case that there may be good grounds for granting leave to remain outside the Rules by reference to Article 8 that it will be necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under the new rules to require the grant of such leave."

16. The issue whether there is an intermediate test was addressed by the Court of Appeal in *Singh v SSHD* [2015] EWCA Civ 784 in which at [64] Underhill LJ explained why he did not read Sales J as intending to impose an intermediate requirement but with reference to the observation of Aikens LJ in *MM (Lebanon)*:

> "...what matters is that there is nothing in Aikens LJ's comment which cast doubt on Sales J's basic point that there was no need to conduct a full separate examination of Article 8 outside the Rules where, in the circumstances of a particular case all the issues have been addressed in the consideration under the Rules."

17. Whilst the judge correctly referred to compelling circumstances, he did add to his direction the need to assess whether these were sufficiently recognised or not under the Rules. The factors he considered to be compelling were these:

    (i) The claimant's mother had been granted entry clearance.

    (ii) The family unit as a whole must be kept together.

    (iii) The Entry Clearance Officer's decision prevented the claimant from spending his formative months with both parents which was not in his best interests. Those interests lay with living with both of his parents.

18. The judge found these constituted exceptional circumstances meriting substantial Article 8 analysis. However there is no reference in his analysis of the extent to which these factors were already catered for under the Rules. The fact of the claimant's mother having entry clearance which she had not exercised cannot be material as her not having done so was precisely because the claimant had been born and thus required entry clearance himself. Family unity was a matter in prospect; they had not previously lived together. Unity could be achieved under the Rules provided the maintenance requirements were met. These requirements have been found in *MM* to be article 8 compliant. The claimant's best interests were correctly identified however there was no real consideration given to whether this aspect could be served by his father returning to Sri Lanka.

19. In my view the judge erred by failing to give adequate reasons for his finding that there were compelling circumstances in this case and further more failed to factor

into the proportionality exercise a key factor being the possibility of the claimant's father joining him and his mother in Sri Lanka. This is not a case where it can be said that the judge applied the correct test and reached a generous but permissible conclusion. This error is one of substance and sufficiently material to require the decision to be set aside.

20. Ms Benfield and Mr Shilliday were content for me to re-make the decision based on the material that was before the judge in the event that error was found.

21. This is an unfortunate case. There is no doubt that family life has been established following the marriage and expressed through the birth of the claimant. The evidence before the Entry Clearance Officer and the First-tier Tribunal does not indicate that the claimant and his parents have lived together in Colombo. At the time of decision he had been employed with KFC through Ozland Limited on a permanent and full-time basis since November 2009. It would appear the time that he had spent in Colombo has been short. Accordingly, the decision of the Entry Clearance Officer is not one that is breaking up the family but one that is not facilitating its unification.

22. I am satisfied that the best interests of the claimant are to be with his parents. Section 55 of the Borders, Citizenship and Immigration Act 2009 does not apply to children who are outside the United Kingdom as explained in *T (s.55 BCIA 2009 – entry clearance) Jamaica* [2011] UKUT 00483 (IAC. As observed by the Tribunal:

> "When the interests of the child are under consideration in an entry clearance case, it may be necessary to make investigations and where appropriate having regard to age, the child herself may need to be interviewed."

23. The child's best interests have a bearing on the Article 8 consideration. There was no evidence at the time of decision that the claimant was at any risk or that his mother was unable to manage with the claimant's day-to-day care.

24. The claimant's father is a British citizen. As observed by Aikens LJ in *MM & Others v SSHD* [2014] EWCA Civ 985 when reviewing the lawfulness of the minimum income requirements under the Rules at [138]:

> "...There is nothing in the 1971 Act or the common law that grants a 'constitutional right' of British citizens to live in the UK with non-EEA partners who do not have the right of abode in the UK and who are currently living outside the UK. Of course, I accept that the UK partner (whether a UK citizen of a refugee or person with HP) is entitled to respect of his or her right to marry and to found a family. But those are not absolute rights; there is no absolute right to marry and found a family in the UK if it involves marriage to a non-EEA citizen who then wishes to reside in the UK....".

25. Accordingly the fact that the claimant's father is a British citizen is not a compelling factor.

26. Aikens LJ also considered the relationship between s.55 and the minimum income requirements. As he observed at [163]:

> "First, paragraph GEN.1.1 of Appendix FM states that the provision of the family route 'takes into account the need to safeguard and promote the welfare of children in the UK', which indicates that the Secretary of State has had regard to the statutory duty. Secondly, there is no legal requirement that the Immigration Rules should provide that the best interests of the child should be determinative. Section 55 is not a 'trump card' to be played whenever the interests of a child arise. Thus, thirdly, the new MIR are only a part of requirements set out in Appendix FM, but an important part. If a child in the UK is to be joined by a non-EEA partner under the 'partner rules' (as compared with those under E-LTRPT.2.3) then it is reasonable to require, for the child's best interests, that there be adequate financial provision for the unit of which the child will be a part if the non-EEA partner joins it. If the financial requirements are otherwise judged to be lawful, then, on the financial front, that must mean the section 55 duty has been discharged in framing the relevant IR...".

27. Whilst the best interests of the claimant clearly point to the desirability of family unification, the financial requirements under the Rules have been found to be justified. The fact as observed by the judge that the claimant's father is earning sufficient to maintain the family without recourse to public funds is not the correct approach. The Rules set out a financial criteria that is Article 8 compliant.

28. The only reason why the claimant was unsuccessful under the Rules was because of the financial requirements. I have sympathy for the claimant and his mother. Their desire to be with the sponsor in the United Kingdom is a natural and entirely understandable one. But in all the circumstances of this case their ambitions are adequately catered for within the Rules and I am unable to find any compelling circumstances that justifies allowing this appeal on Article 8 grounds.

NOTICE OF DECISION

29. By way of conclusion therefore the decision of the First-tier Tribunal is set aside for error of law. I re-make the decision and dismiss the appeal on human rights grounds and under the Immigration Rules.

Signed Date 24 April 2015

Upper Tribunal Judge Dawson