IAC-PE-AW-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/13791/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 27th November 2014	**On 14th January 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE BAIRD

Between

MRS DIASONAMA JEANINE LANDU
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER - NAIROBI

Respondent

Representation:
For the Appellant: Mr M Murphy - Counsel
For the Respondent: Mr T Melvin – Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by Mrs Diasonama Jeanine Landu, a citizen of the Democratic Republic of Congo (DRC) born 20th December 1963. She appeals against the decision of the Respondent made on 10th April 2013 to refuse entry clearance under Appendix FM of the Immigration Rules. The Appellant appealed against that decision and following a hearing on 25th April 2014, First-tier Tribunal Judge Mailer allowed the appeal on human rights grounds having relied on the decision of the Upper Tribunal **MM v Secretary of State for the Home**

Department [2013] EWHC 1900 (Admin). The Respondent was granted permission to appeal against that decision and on 4th September 2014 having heard submissions I found that the determination of Judge Mailer contained a material error of law and I set that decision aside with no preserved findings of fact.

2. I now proceed to remake the decision.

3. The facts of this case are the Appellant's husband fled the DRC in 1992 and is now a British citizen. He married the Appellant in June 2012. The application, the decision on which is the subject of this appeal, was made on 26th March 2013 so the financial requirements of Appendix FM of the Immigration Rules had to be met at that date. In his statement the Sponsor sets out his earnings as at that date from both self-employment and a job with a cleaning firm. These earnings were £14,651 and £2,551 respectively, the total being below the level required by Appendix FM. His earnings from March 2013 to March 2014 were higher and do reach the level required by Appendix FM.

4. At the hearing before me Mr Murphy relied on a profit and loss account produced by an accountant in London. This showed a 'Gross Sales' figure of £14,651.29 and a Net Sales' figure of £10,614. The submission of Mr Murphy was that if the gross figure of £14,651.29 is added to the Sponsor's other income the minimum requirements of Appendix FM are met. I put it to Mr Murphy that the gross figure did not represent the Sponsor's income from the business because the true income from the business was the profit – i.e. the sales figure after deduction of the expenses of running the business. We had some discussion about this. There is a requirement in Appendix FM-SE which is in the main silent as to what constitutes "gross income" in relation to a self-employed person. Appendix FM-SE does however require that each applicant provide monthly personal bank statements for the same twelve month period as the tax returns showing that the income from self-employment has been paid into an account in the name of the person or in the name of the person and their partner jointly. Mr Murphy asked for time to check whether the statements produced showed this. I gave him a week to provide this and a week for Mr Melvin to provide any response required. I have received nothing from Mr Murphy. He made the analogy with someone paying their bus fares, travel expenses etc. to work out of their gross income and then having a net income. I do not think that running a business is the same. The expenses shown do include travel and fares but there is also printing and stationery, accountancy fees etc. and the £10,614 is referred to as "net profit". The requirement in Appendix FM-SE that I have referred to above is as stated for personal bank statements to be provided. If as is generally the case, a business account is used, the gross income figure will not be shown in the personal account because the business expenses will come out of the business account and only the net amount would be available to the Sponsor. It seems to me that a gross sales figure and gross income from self employment are not and cannot be the

same thing. In any event the Appellant has not provided the evidence required by Appendix FM-SE.

5. With reference to Article 8 Mr Murphy submitted that the marriage is genuine. The Sponsor is now earning well in excess of the minimum required. A fresh application would cost £1,000 and to expect the Appellant to pay this is utterly disproportionate.

6. Mr Melvin submitted that there is no evidence of family life. There are only a few emails. The marriage may be subsisting but there is nothing compelling in the circumstances of either the Appellant or the Sponsor that would warrant engagement of Article 8. The Appellant could make another application.

7. In response Mr Murphy said that the Sponsor has children in this country with whom he has regular contact and it would be disproportionate to expect him to move to the DRC to live with his wife. There are insurmountable obstacles to him moving.

My findings

8. I find that the Appellant has not established that in the relevant period he had sufficient income to meet the requirements of Appendix FM and Appendix FM-SE. He cannot therefore succeed under the Immigration Rules. Mr Murphy submitted that the appeal should succeed under Article 8 ECHR as the refusal of leave to enter gives rise to a disproportionate interference with the family life between the Appellant and Sponsor. The position of Mr Melvin was that there is no evidence of family life but I accept that the couple are married and that there is family life between them.

9. In **Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 640 (IAC)** the Tribunal said,

> "… (b) after applying the requirements of the Rules, only if there may be arguably good grounds for granting leave to remain outside them is it necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under them: R (on the application of) Nagre v Secretary of State for the Home Department [2013] EWHC 720 (Admin);"

10. I note that the Sponsor came to the UK in 1992 as a refugee from DRC and made a successful claim for asylum. In 1995 his wife was murdered in DRC and two of his sons joined him in the UK in 1996. These boys are now adults but the Sponsor still sees them and spends time with them. He remarried in 2001. That marriage ended in divorce but produced three daughters, twins who at the date of the hearing before the First-tier Tribunal were 12 years old and a 9 year-old. The Sponsor sees his daughters regularly at weekends and they sometimes stay over. There is not a lot of evidence before me of the Sponsor's family and private life in the UK but his account was not disputed and it does seem to me

that the focus throughout this appeal has been on assertions that the financial requirements are met. I accept that he has a close relationship in the UK with his five children. I must assume that the three girls in particular benefit greatly from the relationship they have with their father and that it is in their best interests that that relationship is not taken from them. In all the circumstances I find that there are insurmountable obstacles to the Sponsor moving to DRC to live with the Appellant.

11. In **MM & Ors, R (On the Application Of) v Secretary of State for the Home Department (Rev 1) [2014] EWCA Civ 985** the view was taken that it is necessary to apply a "proportionality test" with regard to the "exceptional circumstances" guidance in order to be compatible with the (human rights) Convention and in compliance with **Huang & Ors v Secretary of State for the Home Department [2005] EWCA Civ 105.**

12. Recent amendments to the Nationality Immigration and Asylum Act 2002 require a decision maker considering Article 8 ECHR to consider the public interest and set out relevant factors to be taken into account.

> **117B Article 8: public interest considerations applicable in all cases**
>
> (1) The maintenance of effective immigration controls is in the public interest.
>
> (2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—
>
> (a) are less of a burden on taxpayers, and
>
> (b) are better able to integrate into society.
>
> (3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—
>
> (a) are not a burden on taxpayers, and
>
> (b) are better able to integrate into society.
>
> (4) Little weight should be given to—
>
> (a) a private life, or
>
> (b) a relationship formed with a qualifying partner,
>
> that is established by a person at a time when the person is in the United Kingdom unlawfully.

> (5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.
>
> (6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—
>
> > (a) the person has a genuine and subsisting parental relationship with a qualifying child, and
> >
> > (b) it would not be reasonable to expect the child to leave the United Kingdom.

13. I have of course found that the Appellant does not meet the financial requirements of the Immigration Rules and must accept that the ethos of the Rules is that the public interest demands that people coming into the UK can be financially supported at the required level.

14. It was submitted by Mr Melvin that here are no compelling circumstances in this case that warrant consideration of Article 8. He said that a fresh application could be made. Mr Murphy submitted that in the circumstances that it is clear that the financial requirements of the Rules can now be met it would be disproportionate to expect the Appellant to pay the application fee of around £1000. I must agree with Mr Melvin. The Appellant simply did not meet the financial requirements of the Rules. Article 8 cannot be used to get round that especially in a situation where the circumstances of the Sponsor has changed and the Rules can now be met. I do not accept that having to pay the fee for another application is disproportionate or that in all the circumstances the decision gives rise to a disproportionate interference with family life. I would say that I have taken into account the fact that the Sponsor has visited DRC and could presumably do so again if necessary.

Notice of Decision

The decision of the First-tier Tribunal having been set aside is replaced with this decision.

The Appellant's appeal is against the decision of the Respondent is dismissed.

No anonymity direction is made

Signed Date: 12th January 2015

N A Baird
Deputy Judge of the Upper Tribunal