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Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/17281/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 16 January 2015	**On 21 January 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE FROOM

Between

THE ENTRY CLEARANCE OFFICER, CAIRO

Appellant

and

MUKHTAR MOHAMED KULOW
(NO ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr C Avery, Home Office Presenting Officer
For the Respondent: Ms A Benfield, Counsel

DECISION AND REASONS

1. The appellant in this case is the Entry Clearance Officer, who appeals with the permission of the First-tier Tribunal against the decision of Judge of the First-tier Tribunal Fletcher-Hill to allow the appeal of Mr Kulow, a Somali national born on 26 October 1983, against a decision dated 16 April 2013 refusing Mr Kulow entry clearance in order to join his wife in the UK. The sponsor is Ms Foos Hidigow Hassan, a British citizen born on 1 January 1969. The couple married in Somalia on

10 March 2010 and have a child together: Mohamed Mukhtaar Mohamed, born on 15 August 2011 in London.

2. It is more convenient to refer to the parties as they were before the First-tier Tribunal. From now on I shall refer to Mr Kulow as "the appellant" and to the Entry Clearance Officer as "the respondent".

3. I was not asked and saw no reason to make an anonymity direction.

4. The respondent refused the appellant entry clearance as a partner under Appendix FM of the Immigration Rules on 16 April 2013 following an application made on 18 March 2013. The reasons for refusal can be summarised as follows:

   i) The sponsor had failed, as requested, to provide a sponsorship undertaking (S-EC.2.4);
   ii) The ECO was not satisfied the couple had met (E-ECP.2.5);
   iii) The ECO was not satisfied the couple were in a genuine and subsisting relationship and that they intended to live permanently in the UK (E-ECP.2.6 and 2.10);
   iv) The ECO was not satisfied the sponsor was divorced such that the marriage to the appellant was valid (E-ECP.2.7);
   v) The financial requirements were not met because the appellant's potential employment could not be taken into account and the sponsor's income was derived from welfare benefits (E-ECP.3.1).

5. Judge Fletcher-Hill heard oral evidence from the sponsor, whom she found to be a completely credible witness. She accepted the sponsor was present at the marriage on 10 March 2010, which took place in Somalia. Since then she had visited the appellant five times. She accepted the couple had a son. She accepted the marriage was genuine and subsisting. The presenting officer submitted the English language test and financial requirements of the rules were not met and counsel for the appellant conceded that was correct. The focus of the case became whether the decision breached article 8 outside the rules. The judge found it did. She noted the sponsor and her son were British. She noted the financial requirements of the rules were not met but noted the appellant was willing to work and that an offer of employment had been made and may still be available. She concluded as follows:

> "54. I find that after applying the requirements of the rules there may be arguably good grounds for granting leave outside the rules if there are compelling circumstances. I find that in this case the appellant's wife and their son are British citizens and that they live together with other children of the sponsor and half siblings of the appellant's son, all of whom are also British citizens. I find that it is unjustifiably harsh to expect the appellant's British citizen wife and child to continue to travel to Somalia or Egypt to visit him and that the sponsor has other minor children and responsibilities and work in the UK.
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> 55. I find that it is in the best interests of the appellant's son to be able to live with both his parents in a family unit and that his mother is not in a position to relocate to reside with the appellant in Somalia or elsewhere.

> 56. I find the appellant has now passed an ESOL level 1 certificate, as he did so in July 2013, and that as long ago as 2005 he had passed a two-year intensive English course in Somalia. Although the approved English language certificate was only obtained after the date of decision, it had been obtained prior to the date of the appeal and the ECM review and clearly indicates the appellant continues to have satisfactory knowledge of English to meet the requirements of the rules.
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> 57. Considering the financial requirements set out in the reasons for refusal, I find that the sponsor's position has changed since the date of decision and she has now commenced part-time work, although the amount that she earns would not enable the appellant to meet the financial requirements of the immigration rules.
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> 58. I therefore find that the Decision of the Respondent appealed against is in accordance with the law and the applicable immigration rules.
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> 59. In relation to article 8 ECHR I find that there are compelling circumstances not sufficiently recognised under the rules which make the exclusion of the appellant unjustifiably harsh in the particular circumstances of this case."

6. In recording the submissions made by counsel for the appellant, the judge stated as follows:

> "45. The recent cases of Gulshan and MM were relied on in relation to the correct approach to article 8 under the new rules and that the case of MM commented that the prevention of having any regard to the future earnings of the spouse in such cases is harsh and can prevent the exercise of family life by a couple and that the new income threshold is intrusive and higher than the minimum wage level and onerous and could constitute an unjustified and disproportionate interference with the ability of spouses to live together.
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> 46. It was submitted that although this case may fail under the immigration rules the cases of Gulshan and MM are relied on. It was submitted that the sponsor is a UK citizen as is the couple's son and that there is evidence of the possibility of work for the appellant on arrival in the UK which would enable him to generate his own income from the job offer. It was submitted that the offer is said to still be available and was certainly available at the date of the decision but cannot be taken account of under the immigration rules. The offer would generate £650 per month for the appellant (£150 per week). The sponsor and her children are already supported in terms of their maintenance and accommodation and the income support level required for an adult is £71 per week which would mean that if admitted to the UK to live with his family the appellant would not become an additional burden on State funds if the job offer is available and taken up."

7. The respondent sought permission to appeal, arguing the decision contained a material misdirection of law. The lengthy grounds can be summarised as follows. The case of *Gulshan* [2013] UKUT 00640 (IAC) made it clear that the article 8 assessment shall only be carried out where there are compelling circumstances not recognised by the rules and the Tribunal had not identified such compelling circumstances and had failed to refer to the case. The Tribunal's findings were

therefore unsustainable. The Secretary of State was entitled to set a minimum income threshold with the aim of ensuring that those who choose to establish their family life in the UK should have the financial ability to support themselves such that the migrant partner would not become a burden on the taxpayer and was better able to integrate into British society. The entry clearance officer had applied the law as it stood. The appellant and the sponsor could continue their family life together in Somalia and article 8 should not be used to circumvent the rules. There was no analysis by the judge as to why the appellant could not submit a further application. It was in the best interests of the sponsor's British child to remain with his parents. The judge had given significance to the fact the appellant claimed to have a job offer in the UK but, in the absence of any documentary evidence to demonstrate this, it was implausible that a job offer from 2012 was still open. The Tribunal placed reliance on *MM* and the grounds submitted – presciently – that the case was wrongly decided.

8. I heard submissions from the representatives on the question of whether the judge had made a material error of law. Mr Avery noted paragraphs 45 and 46 of the judge's decision and pointed out that the submissions were based on the Administrative Court decision of Blake J, which had in substance been overturned by the Court of Appeal in *MM (Lebanon) & Ors, R (on the application of) v SSHD* [2014] EWCA Civ 985. The fundamental problem with the judge's decision was that the article 8 consideration was particularly unstructured and it did not address all the relevant factors. The judge commented on several things favouring the appellant but made no reference to the public interest enshrined in the rules. The judge had not set out the Secretary of State's position at all. Secondly, in paragraphs 56 and 57, the judge had considered post-decision evidence relating to the English language test and the sponsor's income. Neither of these matters were foreseeable as at the date of decision. Thirdly, the judge failed to take into account, when looking at the best interests of the children, that the appellant had a child in Somalia as well, who would lose contact with his father if the appellant came to the UK. Finally, the judge had not really considered whether it was justifiable to split the family.

9. In reply, Ms Benfield argued there was no material error of law in the judge's decision and the respondent's arguments were simply disagreement with her findings. She pointed out that the Court of Appeal had not handed down its judgement when the First-tier Tribunal heard the appeal. The judge did not err by applying Blake J's decision. The judge had also applied the law as it stood at that time in relation to the *Gulshan* point. It was clear from paragraph 54 of the decision that the judge considered that British citizenship was a compelling factor in the case and it was open to the judge to make this finding. She took proper account of all the factors and concluded there were compelling circumstances. The judge had not placed inappropriate reliance on *MM*. While she had referred to it, it was not a material factor in her determination. It was appropriate to take into account the sponsor's recent earnings. It would have been wrong to consider the prospect of family life being continued in Somalia because of the principles set out in the cases

of *Ruiz Zambrano* (C-34/09) and *Sanade and others (British children – Zambrano – Dereci)* [2012] UKUT 00048 (IAC). It was also appropriate for the judge to take into account the fact the appellant had passed the English language test. It was unduly speculative to suggest the appellant could make a further application. She was the single mother of seven children and it was extremely unlikely she would ever meet the financial requirements of the rules.

10. Mr Avery repeated that it was not clear what the judge had weighed against the factors which he found favoured the appellant.

11. I reserved my decision as to whether the judge made a material error of law in her decision.

Error of law

12. The judge made material errors in her assessment. Perhaps the clearest error is shown at paragraphs 53, 56 and 57 where the judge, in conducting the proportionality balancing exercise, clearly took into account post-decision evidence relating to the sponsor's earnings and the fact the appellant had passed the English language test. In respect of the latter, I acknowledge that he appeared to have done so by the time the entry clearance manager conducted a review of the decision. However, in respect of the financial position the judge recorded that the sponsor had started working part-time cleaning shops and offices in the Westfield shopping centre (see paragraph 24). There was nothing in the evidence to suggest that the situation was foreseeable as at the date of decision, which was more than a year prior to the hearing in the First-tier Tribunal.

13. Section 85A(2) of the 2002 Act provides that the First-tier Tribunal can only consider the circumstances appertaining at the time of the decision to refuse, as interpreted in *DR (ECO: Post-decision evidence) Morocco* [2005] UKIAT 00038 Starred. This applies equally to the human rights ground of appeal (*AS (Somalia) (FC) and another v Secretary of State for the Home Department* [2009] UKHL 32). The judge plainly erred in this respect.

14. I also agree with Mr Avery's broader point regarding the conduct of the proportionality balancing exercise. He did not rely expressly on the point taken in the grounds of appeal in relation to *Gulshan*, no doubt because it has since been clarified that there is no threshold test (see, for example, *R (on the application of Esther Ebun Oludoyi & Ors) v SSHD (Article 8 – MM (Lebanon) and Nagre)* IJR [2014] UKUT 00539 (IAC)). The written grounds are also incorrect in suggesting the judge did not go through the process of identifying what she considered to be compelling circumstances. However, nowhere in paragraphs 48 to 59 does the judge make any reference to the public interest in ensuring that the rules are complied with. Accordingly, I find the judge did not in effect conduct a balancing exercise at all but simply gave reasons for finding in favour of the appellant.

15. To the extent the judge relied on the dicta of Blake J, as suggested by the references to the case of *MM* in paragraphs 45 and 46, whilst the judge cannot be

criticised for failing to apply the judgment of the Court of Appeal, which had not yet been handed down, it is nonetheless clear that the principles taken from the judgment of Blake J were not good law and therefore the First-tier Tribunal erred by relying on them.

16. I therefore set aside the decision of the First-tier Tribunal.

Decision substituted

17. The parties were in agreement that, in the event I found they judge's decision contained a material error of law, I should proceed to remake the decision myself. Such a course was anticipated in the directions to the parties and both representatives were prepared to proceed in that manner. Neither representative thought it was necessary to hear further evidence and there was no reason to disturb the factual findings made by the First-tier Tribunal.

18. I have had regard to the evidence filed by the parties in the First-tier Tribunal.

19. Ms Benfield said it was clear that the sponsor has been in the UK since 1990 and is British. She has six children from previous marriages and a seventh child with the appellant, now aged four. He is also British. All her children are in education of some sort. The appellant was happy to take on a relationship with all the children. The sponsor was a hard-working single mother. The family was attempting to be self-sufficient. There was little public interest in terms of the economic well-being of the country given that the arrival of the appellant would reduce the sponsor's reliance on benefits.

20. Mr Avery took me to the public interest, as defined in section 117B of the 2002 Act. It was clear that the ability of the family to support itself was an important consideration in the maintenance of immigration control. The Court of Appeal decided in *MM* that the minimum income requirement set by the rules was justified. The fact the sponsor was British was not relevant and the rules must apply in the majority of cases to sponsors who are British. He argued it was difficult to see why this made the case particularly compelling. The ultimate effect of the financial requirements of the rules was that families are split up. In terms of the best interests of the children, he reiterated that the appellant has a child in Somalia already. The decision was not disproportionate.

21. Ms Benfield again said the appellant wanted to work and support his family and this lessened the weight to be given to the public interest in accordance with section 117B.

22. The burden of proof is on the appellant and the standard of proof is the ordinary civil standard of a balance of probabilities. I may consider only the circumstances appertaining at the time of the decision to refuse.

23. It is common ground in this appeal that the Immigration Rules could not be met at

the date of decision, which was 16 April 2013. However, it was relevant to see to what extent the rules were not met. It is clear from the findings of the First-tier Tribunal that the appellant and sponsor are in a genuine and subsisting relationship and that they hold the requisite intentions to live together permanently in the UK. The sponsor has produced her divorce certificate and therefore the marriage between the appellant and the sponsor was no longer doubted. As seen, by the date of the entry clearance manager's review, the appellant had passed a suitable English language test. However, the financial requirements of the rules were not met because the sponsor derived her income from income support, housing benefit, child benefit and child tax credits.

24. The First-tier Tribunal appears to have been undecided about the value of the job offer submitted by the appellant. This consisted of a letter on the notepaper of the Horn of Africa Refugee Welfare Group, dated 14 December 2012, and addressed "to whom it may concern". The letter stated that the organisation would like to help the sponsor to bring her husband to the UK and they were therefore offering him a part-time job as an outreach worker with a salary of £650 per month, starting as soon as he arrived with a two-year contract to enable him to live with his partner if he came. The letter was signed by Ibrahim Elmi, projects manager.

25. No additional evidence has been provided regarding that job offer. In my judgment, no weight can be given to it for a number of reasons. The letter contains very few particulars of the job and it has patently been provided to assist the sponsor to bring her husband to the UK. There is no evidence of the appellant accepting the offer, although this may be assumed. There is no evidence supporting the apparent implication of the letter that the Horn of Africa, a charitable organisation, had funding in place to appoint an additional employee or that the correct procedures had been followed with respect to recruitment. Moreover, the letter must be regarded as having gone out of date long before the date of decision. It is not plausible that, if this were a genuine vacancy, a job could be held open for so long. That is because, if there were a genuine vacancy, the employers would need to fill it and it can be assumed there are suitably qualified people in the UK who would take it.

26. I therefore disregard the job offer, although there is no reason to discount the evidence that the appellant wishes to work and that he has knowledge of English. His statement is silent about his work experience.

27. The First-tier Tribunal did not quantify the sponsor's current reliance on welfare benefits. It seems some of her children are at university in which case they would no longer form part of her household. However, she relies on housing benefit to pay her rent and income-related benefits to support herself and the other school-age children. She does not receive DLA.

28. Other than referring to a willingness to work, the First-tier Tribunal made no clear findings about the appellant's skills which might assist the sponsor to show he

would be likely to find employment. There is no evidence of the availability of suitable employment, other than the Horn of Africa letter. It is difficult to accept the appellant would have the necessary experience of the UK to act effectively in the role of outreach worker. It is therefore difficult even to begin to consider the argument made by Ms Benfield that the arrival of the appellant would diminish the sponsor's reliance on benefits.

29. In *MM* the Court of Appeal held the policy aim of the minimum income requirement was to safeguard the economic wellbeing of the UK. The Secretary of State's analysis of the link between higher income and better integration was rational. As such, the interference engendered by the minimum income requirement of the rules was necessary and struck a fair balance between the interests of applicants and the community as a whole. It is not therefore legitimate, as the First-tier Tribunal appears to have done, to disregard the prohibition in Appendix FM on taking into account the earning potential of the appellant.

30. All of this places significant obstacles in the path of the appellant. Ms Benfield must be right when she argues there is no realistic prospect of the financial requirements of the rules being met by the sponsor in the foreseeable future, even taking into account her own willingness to work so as to reduce her reliance on welfare benefits.

31. The appellant relies on article 8 outside the rules. It is common ground the determinative issue is the proportionality of the decision. In *Oludoyi* the Upper Tribunal explained there is no 'threshold test' before considering article 8 outside the rules. However, it is necessary to look at the evidence to see if there is anything which has not already been adequately considered in the context of the rules and which could lead to a successful article 8 claim.

32. Parliament has resolved that the consideration of the public interest in the proportionality assessment must take into account the partial definition of the public interest contained in section 117B of the 2002 Act, which reads in relevant part as follows:

> "117BArticle 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.
>
> …"

33. The reference in subsection (2) to the English language requirement can be regarded as weighing in favour of the appellant. However, subsections (1) and (3) confront the appellant with the same problems already alluded to.

34. The strongest point which the appellant can raise as being a consideration not adequately covered by the application of the rules is the best interests of the children argument. Weight must be given to the position of the appellant's own child with the sponsor. He is British and little weight can be given to the notion of expecting the sponsor to relocate to Somalia so that family life can continue there for the reasons put forward by Ms Benfield. Apart from anything else, the notion would appear to be wholly impracticable given the needs of the sponsor's older children in the UK. All the children are British and therefore entitled to look forward to enjoying the benefits which attach to their nationality.

35. In *Mundeba (s.55 and para 297(i)(f))* [2013] UKUT 00088(IAC), guidance was given on the best interests principle in out of country appeals concerning paragraph 297 of the rules, which is helpful:

> "36. The exercise of the duty by the Entry Clearance Officer to assess the application under the Immigration Rules as to whether there are family or other considerations making the child's exclusion undesirable inevitably involves an assessment of what the child's welfare and best interests require. Where an immigration decision engages Article 8 rights, due regard must be had to the UN Convention on the Rights of the Child. An entry clearance decision for the admission of a child under 18 is "an action concerning children...undertaken by…administrative authorities" and so by Article 3 "the best interests of the child shall be a primary consideration". Although the statutory duty under s.55 UK Borders Act 2009 only applies to children within the UK, the broader duty doubtless explains why the Secretary of State's IDI invites Entry Clearance Officers to consider the statutory guidance issued under s.55."

36. In *Azimi-Moayed and others (decisions affecting children; onward appeals)*[2013] UKUT 00197(IAC), guidance was given on the applicable principles generally:

> "(1) The case law of the Upper Tribunal has identified the following principles to assist in the determination of appeals where children are affected by the appealed decisions:
>
> i) As a starting point it is in the best interests of children to be with both their parents and if both parents are being removed from the United Kingdom then the starting point suggests that so should dependent children who form part of their

household unless there are reasons to the contrary.
ii) It is generally in the interests of children to have both stability and continuity of social and educational provision and the benefit of growing up in the cultural norms of the society to which they belong.
iii) …"

37. In *ZH (Tanzania)* [2011] UKSC 4 and *Zoumbas v SSH*D [2013] UKSC, [2013] 1 WLR 3690 the Supreme Court emphasised the importance of British citizenship.

38. It can safely be assumed in this case that the British child is perfectly well settled with his mother and half-siblings and that he has little, if any, real attachment at present to his father, with whom he has never lived. He is only three years of age. However, that will obviously change over the course of time and it would be in his best interests to have a father-figure in his life. There may also be similar benefit for the sponsor's other children. Occasional visits abroad and contact over the telephone and other electronic media would be very little compensation for having an absent father.

39. Appendix FM of the rules requires the minimum financial requirement to be met in all cases other than those provided for in exceptions which do not apply here. I must give due weight to the public interest in the rules being applied with certainty and consistency to all applicants. This is now reinforced by section 117B(1) of the 2002 Act. I am not satisfied the public interest, as reinforced by section 117B(3), is in real terms diminished by the appellant's stated intention to work. It remained speculative as at the date of decision as to whether the appellant was likely to find employment so as to be able to reduce the sponsor's reliance on welfare benefits.

40. Against these matters, I have weighed the best interests of the children which are a primary consideration but which are not a 'trump card'. The stark reality is that the sponsor is unlikely to be able to meet the financial requirements of the rules in the foreseeable future and therefore the family separation is likely to be extended and, possibly, indefinite. However, the issue in this appeal is not an enforced family break-up but an attempt at family reunion in which the "moral pressures are different" (see paragraph 45 of *AB (Somalia) v SSHD* [2009] EWCA Civ 5). This couple chose to marry and start a family in the knowledge that the appellant would not be permitted to come to the UK unless and until the financial requirements of the rules could be met. Furthermore, the appellant has never lived with his British child. In all the circumstances of the case, I do not see that there are compelling circumstances sufficient to require a departure to be made from the rules. Important though the best interests of the children are, they are outweighed by the weight which must be attached to the public interest in the maintenance of immigration controls.

41. The rules provide sufficient answer to the circumstances posed by this appeal. The appellant has failed to demonstrate exceptional or compelling circumstances warranting a grant of leave outside the rules and I dismiss the appeal on human

rights grounds.

NOTICE OF DECISION

The Judge of the First-tier Tribunal made an error of law and I re-make the decision in the following terms:

The appeal is dismissed on human rights grounds.

No anonymity direction.

Signed **Date 21 January 2015**

Judge Froom, sitting as a Deputy Judge of the Upper Tribunal

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed **Date 21 January 2015**

Judge Froom, sitting as a Deputy Judge of the Upper Tribunal