Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/08222/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 14th November 2017	**On 8th December 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE MCGINTY

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

MS BEAUTY DICKSON OMIDIRE

Respondent

Representation:

For the Appellant: Mr T Melvin, Home Office Presenting Officer
For the Respondent: Ms F Allen, Counsel instructed by Chancery CS Solicitors

DECISION AND REASONS

1. This is the Secretary of State's appeal against the decision of First-tier Tribunal Judge Gibbs promulgated on 2nd March 2017 in which she allowed the Appellant's appeal on human rights grounds against the decision of the Entry Clearance Officer to

refuse entry clearance to the Appellant to the UK as a spouse of a British citizen. Before the Upper Tribunal the Secretary of State has been represented by Mr Melvin, the Senior Home Office Presenting Officer and the claimant has been represented by Ms Allen of Counsel.

2. Within the Grounds of Appeal, there are effectively two Grounds of Appeal. The first Ground of Appeal seeks to argue that the judge has made findings that were inconsistent with the Court of Appeal case of **Rhuppiah v Secretary of State for the Home Department [2016] EWCA Civ 803** in which it was stated that her ability to speak English and financial independence were at best neutral factors for the purposes of section 117B of the Nationality Immigration and Asylum Act 2002, although obviously they could be negative factors if the person was not financially dependent or could not speak English.

3. However, when one looks at the judge's findings of facts in the first Ground of Appeal at paragraph 27, she states:

> "*In assessing the proportionality of the decision I have applied, as required, s.117 of the Nationality, Immigration and Asylum Act 2002 (as amended). Although the Appellant cannot gain a positive benefit from the attributes of speaking English and being financially independent, equally these factors do not weigh against her*."

4. Although it is sought to be argued within the Grounds of Appeal by Mr Melvin the fact that the judge has taken those as positive factors. However, looking at the clear wording of paragraph 27 of the judgment, the judge has properly indicated that these are neutral factors and the judge states specifically the Appellant cannot gain a positive benefit from speaking English and from being financially independent, but equally took account of the fact that those factors did not weigh against him in the circumstances of this case. That is a clear indication for judges did properly consider them to be neutral factors. There was therefore clearly no material error on the part of the judge in that regard.

5. In the second Ground of Appeal it is argued that the judge has failed to properly apply the ratio of the Supreme Court decision in the case of **MM (Lebanon) & Others, R (on the application of) v Secretary of State and Another [2017] UKSC 10**. It is argued that weight should be given to the Secretary of State's Policies and Rules when considering the case outside of them and a fair balance should be struck. The meaning of "exceptional circumstances" was, it is submitted, made clear in that the Appellant needed to demonstrate if there are unjustifiably harsh consequences as a result of refusal. It is asserted that that has been ignored by the Immigration Judge and a fair balance has not been struck and the judge has not identified any unjustifiably harsh consequences as a result of the decision made by the Respondent.

6. It is further argued by Mr Melvin on behalf of the Secretary of State that it is trite law that there needs to be exceptional or compelling circumstances for the case to be allowed outside of the Immigration Rules, the judge, it is argued has not set out what those compelling circumstances or exceptional circumstances are. Mr Melvin argued it has not shown that a fair balance has been struck.

7. Ms Allen on behalf of the Appellant argues that the judge has properly considered the proportionality issue and properly carried out the proportionality exercise. The judge identified the five stage test set out in the case of **Razgar** and at paragraph 24 the judge identified the public interest considerations. It is argued that the judge noted specifically that it is an important factor that the requirements of the Immigration Rules were not met at paragraph 22 of the decision. She says that the judge has properly then gone on to consider the Supreme Court decision in the case of **MM**. She argues in paragraph 25 that the judge had found there was no public interest in refusing the application on Article 8 grounds and she asked me to uphold the determination. She refers me specifically to the paragraphs within **MM** dealing with the factors that the judges would be looking at when considering proportionality.

8. In that regard, the judge found on the balance of probabilities the Appellant and Mr Abegha were in a genuine and subsisting relationship at paragraph 18 and went on at paragraph 20 to find that as at the date of decision the Appellant did meet the language requirements of paragraph E-ECP.4.1 of Appendix FM, despite the decision made to the contrary within the Grounds of Appeal.

9. The judge at paragraph 19, when considering the appeal through the prism of the Immigration Rules accepting that one payslip was missing and the contents of the employer's letter was not in accordance with Appendix FM-SE, paragraph 2(b) and while the letter had been re-written that document postdated the decision and the payslip remained missing. The judge went on to find at paragraph 19 that therefore, although she was satisfied as at the date of hearing Mr Abegha earned £24,047.14 in the tax year ending 2016, and £23,615.23 in the tax year ending 2015 she could not find that the Appellant met the requirements of Appendix FM E-ECP.3.1 solely because of a failure to provide the documents specified in Appendix FM-SE.

10. The judge at paragraph 22 noted the fact that the Appellant did not meet the requirements of the Rules was a relevant and important consideration in his Article 8 consideration, but she did properly consider the five stage test set out within the case in **Razgar** at paragraph 22 of her decision. She went on to find that family life existed for the purpose of Article 8 and would be interfered with by the decision under review at paragraph 23 and when considering the proportionality test at this stage of the **Razgar** properly took account of the public interest in respect of immigration control and the economic wellbeing of the country The judge has therefore clearly taken account of the public interest requirements in this case.

11. She went on at paragraph 25 to recognise the Appellant did not meet the requirements of the Immigration Rules, because of the failure to provide the specified evidence rather than an inability to meet the substantive requirements. The judge went on to find in the circumstances the weight to be attached to the Appellant's failure to meet the Immigration Rules is far less than usual, particularly in light of the Supreme Court's recent decision of **MM & Others v Secretary of State for the Home Department [2017] UKSC 10** in which she said the court identified at paragraph 99 that:

> "*Operation of the same restrictive approach outside the rules is a different matter, and in our view is much more difficult to justify under the HRA because it is inconsistent with the character of evaluation with article 8 requires... that judgment cannot be properly constrained by a rigid restriction of the rules...*".

Judge Gibbs found that she was satisfied Mr Abegha's income surpassed the income requirement albeit there were deficiencies in the documentary evidence submitted to the ECO. She went on to find there was no public interest in refusing the Appellant entry clearance to the UK because of that and practically satisfied that the required financial support would be there.

12. She went on to find that there were no significant factors that weighed in the public interest in refusal and taking all matters into account the decision was disproportionate to the legitimate public interest sought to be achieved in maintaining immigration control and therefore the decision breached the UK's obligations under Section 6 of the Human Rights Act 1998.

13. Both legal representatives referred me to what was said within the case of **MM & Others** at paragraph 61 of the Supreme Court judgment to be the ultimate issue as to whether or not a fair balance had been struck between individual and public interest taking account of the various factors identified. In that regard Ms Allen also then referred me to paragraph 76 of the judgment in which it was stated that:

> "*Similar considerations would apply to the Rules reflecting the Secretary of State's assessment of levels of income required to avoid a burden on public resources, informed as it is by the specialist expertise of the Migration Advisory Committee. By contrast, rules as to the quality of evidence necessary to satisfy that test in a particular case are, as the committee acknowledged, matters of practicality rather than principle; and as such matters on which the Tribunal may more readily draw on its own experience and expertise*."

14. The judge when quoting **MM (Lebanon)** also referred to paragraph 99 of the judgment in which it was stated that:

> "*The operation of the same restrictive approach outside the Rules is a different matter and in our view is much more difficult to justify under the Human Rights Act. This is not because less intrusive methods might be devised (as Blake J attempted to do: para 147), but because it is inconsistent with the character of evaluation which article 8 requires. As has been seen, avoiding a financial burden on the state can be relevant to the fair balance required by the article. But that judgment cannot properly be constrained by a rigid restriction in the rules. Certainly, nothing that is said in the instructions to case officers can prevent the tribunal on appeal from looking at the matter more broadly. These are not matters of policy on which special weight has to be accorded to the judgment of the Secretary of State. There is nothing to prevent the tribunal, in the context of the HRA appeal, from judging for itself the reliability of any alternative sources of finance in the light of the evidence before it. In doing so, it will no doubt take account of such considerations as those discussed by Lord Brown and Lord Kerr in Mahad, including the difficulties of proof highlighted in the quotation from Mr*

Justice Collins. That being the position before the tribunal, it would make little sense for decision-makers at the earlier stages to be forced to take a narrower approach which they might be unable to defend on appeal."

15. Although it is sought to be argued by Mr Melvin that there do have to be compelling circumstances or exceptional circumstances leading to undue harshness to the Appellant before the appeal can be argued under Article 8 grounds, the submission he sought to make in terms of that being an intermediate step before the Tribunal could go on to consider Article 8 outside the Rules is an approach which has been previously roundly rejected by the Court of Appeal. There is no intermediate step necessary before the court goes on to consider the Article 8. It is simply that there do have to be such circumstances before the appeal can be allowed on article 8 grounds in circumstances where the Rules are not met, but is not an intermediate test.

16. Given the changes to the immigration appeal rights brought about by the Immigration Act 2014, the appeal is argued on human rights grounds and therefore she does require consideration of the five stage test in **Razgar**. However, the Article 8 claim does have to be viewed through the lens or through the prism of the Immigration Rules.

17. It seems clear, having read the totality of the judgment that First-tier Tribunal Judge Gibbs has actually looked at it in terms of fact of his findings as at the date of the hearing, Mr Abegha earned £24,047.14 in the tax year ending 2016 and £23,615.23 in the tax year ending 2015. The reason why the Rules were not met were solely because of failure to provide the documents specified in Appendix FM-SE but the judge properly noted, following the case of **MM & Others**, paragraph 99, that the restrictive approach outside the Rules is more difficult two justify under the Human Rights Act because it is inconsistent with the character of evaluation of the Article 8 requirement and is not properly constrained by a rigid restriction of the Rules. The judge clearly was looking at the case, the purpose of the Article 8 consideration, as at the date of the hearing and as at that date the judge was entitled to find that the income requirement was met and it was simply the fact that the requisite documentation had not been provided under the Rules. However, the Judge clearly did consider that the evidence given in that regard was credible to her and found that Mr Abegha did earn the level of income stated. That is a factor which the judge has actually considered as being a relevant factor for the purposes of Article 8, and in my judgment is a sufficiently compelling factor to have permitted her to allow the appeal on article 8 grounds. In that regard I do find that in fact the judge has clearly taken account of the public interest and taken account of the fact that the requirements of the Rules were not met, but was entitled to take account of the evidence which she accepted regarding the income earned having heard oral evidence on the issue, and found the witness to be credible, as at the date of the appeal hearing.

18. I find that the judge has actually carried out the balanced approach as mandated by the Supreme Court and has taken account of all the relevant factors and has actually made a finding which was open to her on the evidence. I find that the Grounds of

Appeal in that regard simply amount to a disagreement with the findings made, but the findings were open to the judge on the evidence before her. I do not find there is any material error of law in that regard.

19. In respect of the two other submissions made by Mr Melvin, his argument that there was a factual erroneous finding within the decision at paragraph 28 of the judgment regarding whether or not the Appellant had previously been here for an illegal purpose between 2005 and 2013 before returning to Nigeria, was not an argument raised within the Grounds of Appeal. Nor did Mr Melvin seek specifically to make an application to amend the Grounds of Appeal. I do not consider that is something which I should now properly consider as no application was formally made to amend the Grounds of Appeal in that regard.

20. Further, in respect of Mr Melvin's submission that the judge erred in respect of consideration of the Article 8 claim as at the date of the hearing and whether or not an entry clearance case is actually considered as at the date of the application, again that did not form part of the Grounds of Appeal and again no formal application was made to amend the Grounds of Appeal in that regard and I have not considered that as a matter which was properly raised before the Tribunal.

21. However, on that issue, I did refer Mr Melvin to the re-wording of Section 85(4) of the Nationality, Immigration and Asylum Act 2002 in which it is stated, "on appeal under Section 82(1) against a decision, the Tribunal may consider any matter which it thinks relevant to the substance of the decision including a matter arising after the date of the decision". That wording under Section 85(4) substituted the previous wording which only permitted the tribunal to consider the circumstances appertaining as at the date of the decision and therefore makes it clear that the Tribunal may now consider matters of relevance including matters arising after the date of the decision and therefore the court under an Article 8 consideration is actually looking at it as at the date of the appeal hearing.

22. It has not been shown that the decision of First-tier Tribunal Judge Gibbs does contain a material error of law and I therefore maintain the decision. I dismiss the Secretary of State's appeal.

Notice of Decision

The decision of First-tier Tribunal Judge Gibbs does not contain a material error of law and is maintained.

No anonymity direction is made.

Signed Date 14th November 2017

RFMcGinty

Deputy Upper Tribunal Judge McGinty