Upper Tier Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/06006/2013

THE IMMIGRATION ACTS

Heard at Field House
On 3 June 2014

Determination Promulgated
On 4 June 2014

Before

Deputy Upper Tribunal Judge Pickup
Between

Vivian Ntim
[No anonymity direction made]

Appellant

and

The Entry Clearance Officer Accra

Respondent

Representation:

For the appellant: Mr E Akohene
For the respondent: Ms A Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, Vivian Ntim, date of birth 5.12.76, is a citizen of Ghana.

2. This is her appeal against the determination of First-tier Tribunal Judge Harrington, who dismissed her appeal against the decision of the respondent, dated 24.1.13, to refuse entry clearance to the United Kingdom to settle as the spouse of Daniel Anno Opoku, a British citizen present and settled in the UK.

3. The Judge heard the appeal on 11.2.14.

4. First-tier Tribunal Judge Pirotta granted permission to appeal on 25.4.14.

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5. Thus the matter came before me on 3.6.14 as an appeal in the Upper Tribunal.

Error of Law

6. In the first instance I have to determine whether or not there was an error of law in the making of the decision of the First-tier Tribunal such that the determination of Judge Harrington should be set aside.

7. The grounds for permission to appeal to the Upper Tribunal assert that the First-tier Tribunal Judge committed errors of law in misdirecting herself or failing to consider case law MM [2013] EWCH 1900 Admin and Gulshan [2013] UKUT 640 (IAC), and misconstrued the tests of reasonableness, and erroneously applied a test of 'insurmountability' in the article 8 private and family life analysis. It is submitted that it was unreasonable and disproportionate to apply five tests to show sufficiency of income in the circumstances where the evidence showed genuine relationships and the sponsor could not be expected to relocate to Ghana.

8. In granting permission to appeal, Judge Pirotta observed that the determination of the First-tier Tribunal, "shows that the First-tier Tribunal Judge applied the Immigration Rules strictly on the provisions relating to income and savings, used a test of 'insurmountability' incorrectly and had accepted that the evidence showed that consideration outside the Rules was appropriate in the circumstances because of the Sponsor's ill health. The challenges to conclusions on the proportionality of interference with family life are arguable because of the compelling compassionate circumstances found as facts. The grounds disclose an arguable error of law on the tests applied and other grounds are arguable."

9. There is no EX1 provision available under Appendix FM for out of country settlement applications and thus 'insurmountable obstacles' test, which is part of EX1, does not arise. It is not clear to me why the judge applied that test at §27 of the determination, though the considerations set out there may be relevant to proportionality of the decision. However, this is not a material error of law as it played no part of the ultimate decision in the appeal.

10. Mr Akohene submitted that there was an error of law in §26 of the determination where the judge stated that the appellant could work longer hours if necessary to increase his income. He suggested that this was inconsistent with evidence at recorded at §18(d), where the appellant is recorded as stating that a stroke had reduced his ability to work overtime. However, I have examined the judge's record of proceedings and find that the judge has accurately noted the oral evidence and I note that at §18(l) the appellant said that if his ability to be joined by his wife was dependent on working overtime, he could do so. That too is accurate when compared with the record of proceedings. I am satisfied that there is no error in §26, apart from obvious typing errors.

11. I struggled to understand how most of the matters raised by Mr Akohene in relation to the first part of the determination prejudiced the appellant. Despite the findings set out between §24 and §27, which, apart from §26, are largely in the appellant's favour, the judge went on, in due course, to consider article 8 ECHR. There is no

challenge to the judge's findings at §29 of the determination, noting the appellant's concession, that she does not meet the requirements of the Immigration Rules for entry as a spouse, pursuant to Appendix FM and Appendix FM-SE. It had been accepted that the appellant did not meet the requirements of the Immigration Rules and thus the only avenue left to the appellant was reliance on article 8 outside the Immigration Rules, which was considered.

12. In Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 00640 (IAC) has set out, inter alia, that on the current state of the authorities:

(a) the maintenance requirements of E-LTRP.3.1-3.2 stand, although Blake J in R (on the application of MM) v Secretary of State for the Home Department [2013] EWHC 1900 (Admin) said that they could constitute an unjustified and disproportionate interference with the ability of spouses to live together; he suggested that an appropriate figure may be around £13,400, and highlighted the position of young people and low wage earners caught by the higher figure in the rules;

(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);

(c) the term "insurmountable obstacles" in provisions such as Section EX.1 are not obstacles which are impossible to surmount: MF (Article 8 – new rules) Nigeria [2012] UKUT 00393 (IAC); Izuazu (Article 8 – new rules) [2013] UKUT 00045 (IAC); they concern the practical possibilities of relocation. In the absence of such insurmountable obstacles, it is necessary to show other non-standard and particular features demonstrating that removal will be unjustifiably harsh: Nagre.

13. In Gulshan only if there were arguably good grounds for granting leave to remain outside the rules was it necessary for Article 8 purposes for the judge to go on to consider whether there were compelling circumstances not sufficiently recognised under the Rules. In fact, the Upper Tribunal considered that it was not unduly harsh for a husband who originated from Pakistan but was now a British national, to return to Pakistan with his wife who was seeking leave to remain as his spouse. The panel acknowledged that the couple would suffer some hardship, as he had been in the UK since 2002, he had worked here and was receiving a pension, and housing benefit and other state benefits, some of which could not be transferred to Pakistan.

14. Broadly speaking, MF (Nigeria) in the Court of Appeal, Nagre and Gulshan make clear that the Immigration Rules as now in force are to be read as incorporating Article 8 of the ECHR. More recently, in Shahzad (Art 8: legitimate aim) [2014] UKUT 00085 (IAC), promulgated the day before the promulgation of the First-tier Tribunal decision under appeal in this case, the Upper Tribunal held:

(i) Failure on the part of the Secretary of State to identify in her decision any legitimate aim under Article 8(2) of the ECHR does not prevent a court or tribunal from seeking to do so on the basis of the materials before it.

(ii) "Maintenance of effective immigration control" whilst not as such a legitimate aim under Article 8(2) of the ECHR can normally be assumed to be either an aspect of "prevention of disorder or crime" or an aspect of "economic well-being of the country" or both.

(iii) "[P]revention of disorder or crime" is normally a legitimate aim both in expulsion cases where there has been criminal conduct on the part of the claimant and in expulsion cases where there have only been breaches of immigration law.

(iv) MF (Nigeria) [2013] EWCA Civ 1192 held that the new immigration rules regarding deportation of a foreign criminal are a complete code. This was because of the express requirement in them at paragraph 398 to have regard to exceptional circumstances and other factors.

(v) It follows from this that any other rule which has a similar provision will also constitute a complete code;

(vi) Where an area of the rules does not have such an express mechanism, the approach in R (Nagre) v Secretary of State for the Home Department [2013] EWHC 720 (Admin) ([29]-[31] in particular) and Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 640 (IAC) should be followed: i.e. 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.

15. Referencing Gulshan (published on 20.12.13) at §30 of the determination, the First-tier Tribunal Judge properly considered whether there were arguably good grounds for granting leave to remain outside the Immigration Rules on the basis of compelling circumstances not sufficiently recognised in the Rules. Reaching the conclusion that it was arguable, the judge then considered whether the appellant's circumstances were so compelling as to justify granting the application outside the Immigration Rules.

16. The judge then followed what can be recognised as the five Razgar steps for the assessment of private and family life under article 8 ECHR. It was accepted at §32 that the appellant and the sponsor have family life and that the decision of the Entry Clearance Officer interfered with that family life, interference arguably sufficiently grave as to engage article 8 ECHR. At §33 the judge found the interference lawful and necessary to control immigration in pursuit of the legitimate aim of protecting the economic well-being of the UK.

17. At §34 the judge commenced the article 8 proportionality balancing exercise, very properly taking account of the importance the Secretary of State attaches to the Immigration Rules post July 2012 as representing the balance between the public interest and the private and family life rights of an individual. At §35 the judge set out what she considered to be the relevant factors to be weighed in the balance, including that the appellant did not meet the requirements of the Rules.

18. At §36 the judge reached the conclusion that the decision did not amount to a disproportionate interference with the article 8 rights of the appellant and the sponsor.

19. It may have been better if the judge had not referred in §35 to "insurmountable obstacles," as part of the proportionality balancing exercise, but the judge was right to consider whether it would be unreasonable or unjustifiably harsh to expect the sponsor to relocate to Ghana. Reference should be made to the relevant considerations at §27, which the judge clearly took into account, including that the sponsor is of Ghanian origin, has visited regularly, and has a house there. In the circumstances, even had the judge applied the correct test, I am satisfied the outcome of the appeal would still have been the same and thus there was no material error of law. The reference to insurmountable obstacles did not in fact prejudice the appellant as the judge went on to consider all the relevant circumstances in an article 8 proportionality assessment. Whether or not there were insurmountable obstacles was not the test applied under article 8.

20. The grounds rely on the decision of Blake J in MM & Ors and complain that, on the basis that the judge found that the sponsor's income was sufficient to maintain the appellant without recourse to public funds and that his health meant that he could not work more, the judge should have found the decision an unjustified and disproportionate interference with the family life of the appellant and the spouse. Gulshan makes clear that the financial threshold stands despite MM & Ors. Whilst the threshold could, in combination with other factors, be considered disproportionate, the appellant had failed to demonstrate that it was so, even though at §31 the judge took into account MM & Ors. The appellant was £4,000 short of the relevant threshold but he no long has to financially support his mother's medical treatment and said that he could work longer hours to increase his income. In the circumstances, I fail to see how the consequences of this decision could be regarded as "so excessive in impact as to be beyond a reasonable means of giving effect to the legitimate aim," as stated in MM & Ors. There is nothing preventing the appellant making a fresh application on his changed financial circumstances and ensuring that she and the sponsor meet the financial threshold and all the necessary evidential requirements.

21. Taking an overall view of the evidence as set out by the First-tier Tribunal Judge and in the light of the judge's findings, which are fully supported with cogent reasons, I fail to see in what way the circumstances of this particular appellant could be regarded as so compelling as to justify granting leave to remain outside the Rules on the basis of article 8 ECHR because the decision of the Entry Clearance Officer produced a result that could be described as unduly harsh or disproportionate. In my view, apart from the references to insurmountable obstacles the First-tier Tribunal Judge conducted a very fair and comprehensive assessment of the appellant's personal circumstances and reached a conclusion that was unassailable on the facts of this case.

Conclusions:

22. For the reasons set out herein, I find that the making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law such that the decision should be set aside.

I do not set aside the decision.

The decision of the First-tier Tribunal stands and the appeal remains dismissed.

Signed: Date: 3 June 2014

Deputy Upper Tribunal Judge Pickup

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Given the circumstances, I make no anonymity order.

Fee Award **Note: this is not part of the determination.**

In the light of my decision, I have considered whether to make a fee award (rule 23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007).

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: The decision of the First-tier Tribunal stands.

Signed: Date: 3 June 2014

Deputy Upper Tribunal Judge Pickup