Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/06321/2013

THE IMMIGRATION ACTS

Heard at Field House
On 2 July 2014

Determination Promulgated
On 5 August 2014

Before

THE HONOURABLE MR JUSTICE C A HADDON-CAVE
UPPER TRIBUNAL JUDGE GLEESON

Between

MR YAYA CAMARA

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mrs Jainaba Cham, Sponsor
For the Respondent: Ms Vidyadharan, a Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is an appeal by the Secretary of State against a decision of First-tier Tribunal Judge Britton promulgated on 10 February 2014 whereby the judge allowed an appeal under Article 8 against a decision of the Secretary of State dated 12 February 2013.

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2. The Claimant, Mr Yaya Camara, is a citizen of Gambia and applied for settlement in the United Kingdom to join his wife and sponsor, Mrs Jainaba Cham and his daughter, who is a British citizen having been born here in January 2013.

3. The appeal which is argued before us by Ms Vidyadharan on behalf of the Secretary of State is based on two main grounds. The first is that the judge entirely failed to refer to, or take account of, the decision of Gulshan [2013] UKUT 00640 (IAC) which enunciated the test that Article 8 assessments should only be carried out outside the Rules when there are compelling or compassionate circumstances to justify admission outside the Rules. Second, it is argued that the judge fell into the error of approaching the matter on a "near-miss" basis.

The financial requirements

4. The relevant Rules as to the financial requirements are set out at E-ECP.3.1. and provided as follows:

> "E-ECP.3.1. The applicant must provide specified evidence … of –
>
> (a) a specified gross annual income of at least -
> (i) £18,600;
> (ii) an additional £3,800 for the first child; and
> (iii) an additional £2,400 for each additional child; alone or in combination with
>
> (b) specified savings of-
> (i) £16,000; and
> (ii) additional savings of an amount equivalent to 2.5 times the amount which is the difference between the gross annual income from the sources listed in paragraph EECP.3.2.(a)-(d) and the total amount required under paragraph E-ECP.3.1.(a); or
>
> (c) the requirements in paragraph E-ECP.3.3.being met."

5. The sponsor's evidence of total income was that she had as a result of her employment in Morrisons and BUPA a total income of £18,014.76. She therefore fell short by the figure of £586.

6. In these circumstances, under the Rules the respondent argued before the First-tier Tribunal that, given the shortfall in income, the appellant had to demonstrate that his sponsor had savings of £17,463.10. By our calculations, however, that figure is not entirely accurate because 2.5 x £586 amounts to £1,457 which when added to the specified savings sum of £16,000 required by subparagraph (b) above gives a figure of £17,457. We return to this issue below.

Article 8

7. We begin by considering Ms Vidyadharan's case that the judge in this case fell into error because he failed to apply the requisite legal test before going on to make his Article 8 assessment.

8. Mrs Cham, who appears in person today, says that she has done her best to maximise her earnings, that she works extremely hard, that her total income is very nearly sufficient for the Rules and that she and her daughter would be denied their family life if her husband was not allowed to enter the United Kingdom. She also says that her young daughter would be at risk of female genital mutilation if she returned to the Gambia. She has also raised the question of her daughter having eczema which, she says, would also make it impossible to take her daughter back to the Gambia.

9. We have listened carefully to everything that has been said by Mrs Cham and are naturally sympathetic to her plight. However, this Tribunal can only act within the powers that it has been given by Parliament and we are required to apply the Rules and the law as it appears us to be.

10. We make the following points and observations. Firstly, we were initially puzzled by the Rules which we have quoted above. This particular phraseology of the Rules refers to "alone" or "in combination with". However, in the light of MM [2013] EWHC 1900 (Admin) it is clear where the specified income falls short of the requisite figure of £18,600, the additional savings requirement specified in subparagraph (b) of £16,000, plus a multiple of the shortfall in income, is required. In those circumstances, the analysis in paragraph 3 of the judgment, that the appellant has to demonstrate that the sponsor has savings of £17,463.10, is correct in law, save for the minor error in the mathematics to which we have referred.

11. Second, it is quite clear from Gulshan (above) that where an Article 8 assessment is to be carried out outside the Rules, there must be demonstrated the existence of exceptional circumstances (*i.e.* compelling or compassionate circumstances). It is clear from the judgment that, unfortunately, the judge failed to address this fundamental legal threshold test at all.

12. It is fair to say that the judge in paragraphs 5, 6 and 9 of his judgment did mention and analyse the question of the risk of FGM in Gambia if Mrs Cham's daughter was to be taken back there. He did not come to any concluded view on the risks attendant if she was to return to Gambia for a visit or otherwise. He observed, however, at paragraph 6, and we quote, "her husband would not push her for Fatima to be circumcised" even though he was a member of the Mandika tribe where FGM is apparently a tradition. He also pointed out in paragraph 9 that the sponsor and her daughter understandably do not want to return to the Gambia, not only because they are British citizens but also because of the danger of FGM.

13. Third, Ms Vidyadharan submits, correctly in our view, that the references in the judgment to FGM are simply a rehearsal by the judge of the general evidence that was before him and paragraphs 5, 6 and 9 do not amount to an application of the Gulshan test. Having read those paragraphs carefully we are compelled to agree. The failure to apply the Gulshan test amounts, in our view, to a fundamental error of law.

'Near miss'

14. The matter does not stop there, however, because it is clear that the ratio of the decision which appears in paragraph 10 of the Determination and Reasons is also based on an error of law. Having said that the appellant did not meet the financial requirements of the Immigration Rules, the judge observed that the shortfall in the sponsor's income was only "just short" of the required amount, and the judge then went on to find that it would be "disproportionate" not to allow the appellant to settle in this country.

15. Ms Vidyadharan submits that that finding by the judge was to all intents and purposes "a near-miss" finding by him and a flawed decision for that reason. We agree. It seems to us quite clear from paragraph 10 of the Determination and Reasons that the rationale for the judge's decision was that, because the sponsor's income fell only just short of the required amount (i.e. outside the Rules), the judge nevertheless felt that it would be unfair or disproportionate the appellant was not allowed to settle in this country. That approach (compassionate as it may be) is not an approach which that Tribunal is permitted to make under the law (see Gulshan).

Conclusion

16. For all those reasons, we are driven to the inevitable conclusion that the Determination and Reasons in this case cannot stand because they contain two significant errors of law which are material. We are, in these circumstances, bound to quash the decision.

Re-Make Decision

17. Having carefully considered the matter, we consider that it is appropriate to go on to remake the decision. In the light of the evidence, we conclude that the appeal against the decision of the Secretary of State should be refused because the appellant did not meet the financial requirements under the Immigration Rules and no sufficiently exceptional or compelling or compassionate circumstances are demonstrated such as to allow an Article 8 exception to be made. We are fortified in this approach by the decision of the Court of Appeal in *R on the application of MM (Lebanon) and others v Secretary of State for the Home Department* [2014] EWCA Civ 985, published on 11 July 2014, in which that court held, inter alia, that the new Rules (post July 2012 but pre July 2014) were not in principle incompatible with Articles 8, 12 and 14 of the ECHR.

The Immigration Act 2014

18. Since this determination is to be sent to the parties after 28 July 2014, we have had regard to the rule 117B(3) of the new Part 5A of those Rules inserted by s.19 of the Immigration Act 2014, which was brought into force on 28 July 2014 by section 3 of the Immigration Act 2014 (Commencement No 1, Transitory and Saving Provisions) Order 2014, S.I. 2014 no 1820. The relevant provisions for our purposes are set out at paragraph 117A and 117B as follows:

> "**117A Application of this Part**
>
> (1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts—
>
> (a) breaches a person's right to respect for private and family life under Article 8, and
>
> (b) as a result would be unlawful under section 6 of the Human Rights Act 1998.
>
> (2) In considering the public interest question, the court or tribunal must (in particular) have regard—
>
> (a) in all cases, to the considerations listed in section 117B, …
>
> (3) In subsection (2), "the public interest question" means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).
>
> **117B Article 8: public interest considerations applicable in all cases**
>
> (1) The maintenance of effective immigration controls is in the public interest. …
>
> (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."

19. It is clear to us that the introduction of the public interest question provisions set out above do not assist the appellant in any near-miss argument advanced on her behalf.

20. We would add that there is no reason why the appellant, Mr Yaya Camara, cannot in the usual way make a further application if and when his sponsor Mrs Cham's financial situation allows.

Signed Date 31st July 2014

Mr Justice Haddon-Cave