Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/06556/2016**

THE IMMIGRATION ACTS

Heard at Field House **Decision & Reasons Promulgated**
On 19 March 2018 **On 9 April 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

ENTRY CLEARANCE OFFICER

Appellant

and

MRS FAISO HASSAN SHEIKH ABUKAR
(ANONYMITY DIRECTION NOT/MADE)

Respondent/Claimant

Representation:

For the Appellant: Ms A Everett, Senior Home Office Presenting Officer
For the Respondent/Claimant: Mr Mohammed Akram, Counsel instructed by Aden & Co Solicitors

DECISION AND REASONS

1. The Specialist Appeals Team appeals on behalf of an Entry Clearance Officer from the decision of the First-tier Tribunal (Judge Rosalyn Choudhury sitting at Hatton Cross on 6 June 2017) allowing on human rights (Article 8 ECHR) grounds the claimant's appeal against the decision of an Entry Clearance Officer to refuse her entry clearance for the purposes of settlement with her British national spouse. The First-tier Tribunal did not make an anonymity direction, and I do not consider that such a direction is required for these proceedings in the Upper Tribunal.

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The Reasons for the Grant of Permission to Appeal

2. On 21 December 2017, Upper Tribunal Judge Martin granted the Entry Clearance Officer permission to appeal for the following reasons: "*It is arguable, as asserted in the grounds, that the Judge erred in concluding that the [claimant] met the requirement's Immigration Rules when she had not produced the required documents to the Entry Clearance Officer. It is also argued that the Judge has given no reason why the appeal should be allowed under Article 8, when if it was the case that she could now meet the Rules, she could make a fresh application.*"

Relevant Background

3. The claimant is a national of Somalia, whose date of birth is 6 June 1986. She says that she is a refugee from Somalia who fled to Egypt. It is from Egypt that she applied for entry clearance as a partner under Appendix FM of the Immigration Rules. The sponsor originates from Somalia, but he has become a British national.

4. On 2 February 2016, an ECO in Amman gave his reasons for refusing the claimant's application for entry clearance. He was not satisfied (a) that her marriage to the sponsor was valid; (b) that her relationship with the sponsor was genuine and subsisting or that they intended to live together permanently in the UK; (c) that she had provided specified documents as evidence of her sponsor's gross income from his employment; (d) that she had demonstrated that there would be adequate accommodation for her to occupy with her sponsor without recourse to public funds; and (e) that she had provided the required evidence to show that she met the English language requirement.

The Hearing Before, and the Decision of, the First-Tier Tribunal

5. At the hearing before Judge Choudhury, the claimant was represented by Counsel. There was no Presenting Officer. In her subsequent decision, the Judge set out her findings of fact and conclusions at paragraphs [19]-[31]. She addressed each of the concerns raised by the ECO. She found that the sponsor had divorced his previous wife in 2005, and so was free to marry the claimant, which he had done in Somalia in 2007, and again in Egypt in 2009. After reviewing the additional documentary evidence provided by way of appeal, the Judge found that the claimant "*has in fact satisfied the financial requirements of the Immigration Rules.*" The Judge found that the accommodation requirement was met; and that, as submitted by Counsel, the ECO had erred in law in requiring the language certificate relied upon by the claimant to satisfy Appendix O. The Judge continued as follows:

> 30. As I find the Rules are met (these being a reflection of the respondent's policy on how a fair balance is to be struck between the public interest and maintaining effective Immigration control, and an individual's right to enjoy his private/family life) the only conclusion is that there is no public interest in preventing the appellant from entering the United Kingdom to join her sponsor husband.
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> 31. I find in all the circumstances presented that the appellant ought to be granted entry clearance as the decision to refuse her was a disproportionate one.

The Hearing in the Upper Tribunal

6. At the hearing before me to determine whether an error of law was made out, Ms Everett developed the case advanced in the permission application. Mr Akram, on behalf of the claimant, acknowledged that the letter from the sponsor's employer did not contain all the specified information stipulated in Appendix FM-SE. However, he submitted that the Judge did not materially err in concluding that the interference with family life consequential upon the refusal decision was in all the circumstances disproportionate.

Reasons for Finding an Error of Law

7. In **MM (Lebanon) [2017] UKSC 10**, the Supreme Court concluded that the challenge to the acceptability in principle of the minimum income requirement (MIR) must fail, and went on to make some further observations which are pertinent to Mr Akram's defence of the Judge's approach:

> 98. It is apparent from the MAC report, and the evidence of Mr Peckover, the reasons for adopting a stricter approach in the new Rules were met as a practicality rather than wider policy, reflecting what the MAC acknowledged to be the relative uncertainty and difficult of verification of such sources. That did not make it unreasonable or irrational for the Secretary of State to take this into account in formulating the Rules. The MAC recognised the strength of the case for taking account of other sources, but did not in terms advise against the approach ultimately adopted by the Secretary of State. In considering the legality of that approach, for the reasons already discussed (para. 59 above) it is necessary to distinguish between two aspects: first, the rationality of this aspect of the Rules or instructions under common law principles, and secondly the compatibility with the HRA of similar restrictions as part of a consideration outside the Rules. As for the first, while the application of these restrictions may seem harsh and even capricious in some cases, the matter was given careful consideration by both the MAC and the Secretary of State. As Aikens LJ said (para 154), the decision was "not take on a whim". In argue, it was not irrational in the common law sense for the Secretary of State to give priority in the Rules to the simplicity of operation and the ease of verification.
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> 99. Operation of the same restrictive approach outside the Rules is a different matter, in our view is much more difficult to justify under the HRA. 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. …."

8. Although the topic under discussion in paragraphs [98] and [99] above is the treatment of alternative sources of funding, as distinct from non-compliance with the evidential requirements of Appendix FM-SE, it is supportive of Mr Akram's argument that, when addressing proportionality, the judicial decision-maker is not constrained "*by a rigid restriction in the Rules*", but can look at the matter more broadly.

9. However, the Judge did not clearly distinguish between the position under the Rules and a broader assessment outside the Rules.

10. In the refusal decision, the ECO identified three areas in which specified documents or evidence had not been submitted to demonstrate that the sponsor was earning at least £18,600 gross per annum. The first was that the claimant had only submitted 6 payslips for the required 6-month period; the second was that the bank statements were not in the correct format, and they did not cover the entire 6-month period; and the third was that the letter submitted from the sponsor's employer, Metroline, did not confirm how long the sponsor had been paid at the rate relied upon in the application (£30,000), nor did it confirm the nature of his employment.

11. This was not a points-based-system appeal, and so the Judge could take into account documentary evidence that had not been provided with the application. It is not suggested by way of appeal to the Upper Tribunal that the Judge did not give adequate reasons for finding that by the date of the hearing the claimant had now provided the required run of 6 months' payslips and 6 months' bank statements as evidence of the sponsor's gross income in the 6-month period prior to the refusal decision.

12. However, the Judge did not adequately address the concern raised over the employer's letter. At paragraph [36], she said that she also had had regard to the "*updated*" employer's letter of 12 May 2017, stating that the sponsor continued to be employed full-time as a bus driver at £33,632 per annum.

13. In order to comply with the Rules, the claimant needed to produce an employer's letter which addressed the deficiencies identified in the refusal decision. The employer needed to state in writing for how long the sponsor had been receiving the salary relied upon *in the application*. Moreover, insofar as it is material, the updated employer's letter replicated the defect of the earlier letter: it failed to specify for how long the sponsor had been employed at a rate of £33,632 per annum.

14. As the Judge found that the claimant had complied with the Rules in every relevant respect, the Judge did not purport to allow the appeal on Article 8 grounds outside the Rules. She allowed the appeal on the simple ground that, as the claimant had complied with the Rules, it was disproportionate to maintain the refusal. If the Judge had been right that the claimant met all the relevant requirements of the Rules, her decision would have been unimpeachable. However, she erred in finding that the claimant met the financial requirements of the Rules. So her decision is vitiated by a material error of law such that it must be set aside and re-made.

The Re-making of the Decision

15. The representatives were in agreement that, if an error of law was made out, I could remake the decision without a further hearing or further evidence.

16. I answer questions 1 and 2 of the **Razgar** test in favour of the claimant as the effect of the refusal decision as to prevent family reunion between husband and wife in the United Kingdom. Questions 3 and 4 of the **Razgar** test must be answered in favour of the Entry Clearance Officer. On the issue of proportionality, I take into account the relevant considerations arising under section 117B of the 2002 Act, insofar as they are applicable.

17. I consider that there are compelling circumstances which justify the claimant being granted Article 8 relief outside the Rules.

18. Firstly, the response of the Entry Clearance Manager (ECM) to the additional financial documents served with the notice of appeal is ambiguous. It is susceptible to the interpretation that the ECM no longer had any concern about the MIR, but remained concerned about the other requirements of the Rules in respect of which the claimant had not served any further documentary evidence (e.g. on the issues of the sponsor's freedom to marry, the subsistence of the relationship, the language requirement etc). The ECM does not indicate that he has a continuing concern over the absence of an employer's letter which contains all the required specified information.

19. The ECM could ascertain from the payslips - each of which contains a running total for the amount earned so far in the financial year - that the sponsor must have been paid a salary of over £30,000 since at least the beginning of the financial year. If the only issue in the appeal had been compliance with the evidential requirements specified in Appendix FM-SE, the ECM might therefore have expressly applied the evidential flexibility provisions in Appendix FM-SE to the claimant's advantage. But as there were many other issues – all of which the claimant went on to address successfully at the hearing of the appeal which took place more than a year after the refusal – the claimant was deprived of this possible safety-net.

20. Secondly and in any event, (a) having successfully addressed all the other requirements of the Rules put in issue by the ECO, and (b) having established on the balance of probabilities that the sponsor was earning well in excess of the MIR at the date of application and subsequently - so as to avoid by a considerable margin the threat of the claimant becoming a burden on the state – looking at the matter more broadly, as I empowered to do, I consider that the maintenance of the decision to refuse which was made over two years ago is disproportionate to the legitimate public end sought to be achieved, namely the maintenance of firm and effective immigration controls and the protection of the country's economic wellbeing.

Notice of Decision

The decision of the First-tier Tribunal contained an error of law, and accordingly the decision is set aside and the following decision is substituted:

This appeal is allowed on Article 8 grounds outside the Rules.

I make no anonymity direction.

Signed Date 21 March 2018

Judge Monson

Deputy Upper Tribunal Judge

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal, I have given consideration as to whether to make a fee award in respect of any fee which has been paid or is payable, and I have decided to make no fee award as the claimant needed to bring forward further evidence by way of appeal in order to succeed in her appeal.

Signed Date

Judge Monson

Deputy Upper Tribunal Judge