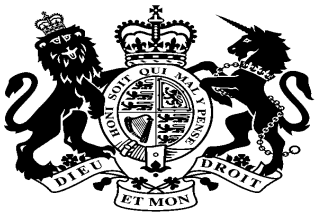

Upper Tribunal
(Immigration and Asylum Chamber) HU/15309/2016

THE IMMIGRATION ACTS

Heard at Glasgow
on 21 February 2019

Decision & Reasons Promulgated
On 04 March 2019

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

GEORGE MICHAEL FLANAGAN

Appellant

and

ENTRY CLEARANCE OFFICER, Pretoria

Respondent

For the Appellant: Mr S Winter, Advocate, instructed by Maguire, Solicitors
For the Respondent: Mr A Govan, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant has permission to appeal against the decision of Designated FtT Judge Murray, promulgated on 20 November 2017, dismissing his appeal against refusal of entry clearance as a spouse.

2. The ECO's decision dated 17 May 2016 refused the application for (i) inadequate evidence of relationship and (ii) shortfall in financial requirements. In a review by an Entry Clearance manager, the relationship was accepted, and that has not since been in issue.

3. The FtT took account of *MM (Lebanon)* [2017] 1 WLR 771. At [25] it found that third party support was not reliable, and the terms of appendix FM of the immigration rules could not be satisfied.

4. At [26], the FtT declined to allow the appeal outside the rules, because the financial requirements would soon be satisfied, and a further application could be made.

5. The appellant's grounds of appeal to the UT, set out in his application filed with the UT on 25 April 2018, say at [3(i) – (ii)] that the reasons given at [25] are flawed, and at [4 (i) – (iii)] that the outcome is disproportionate, even if a future application could be made.

6. The grounds and submissions for the appellant showed that the reasons given at [25] are not sustainable.

7. It was of negligible (if any) significance that the sponsor's son (the third-party source) had not previously supported his mother. His payment of her legal bills was positive rather than negative. It might be that £800 a month after outgoings was "not a lot", but it was enough to cover the shortfall (£350 a month at most; it appeared that the calculation at [11], on all information available, might be an overestimate). The fact that he was giving support precisely in order to bring earnings up to the required level was not adverse; it might have been taken as positive. The reasons did not support the conclusion that this was "not a reliable source of third-party support".

8. Although at the time of the FtT hearing the issue was governed by *MM*, the SSHD later modified the rules in response. Representatives agreed that the rules, as they stand now, apply to remaking of the decision.

9. The sponsor's income is likely to remain short of requirements, although by hundreds not thousands of pounds. The additional sources which may be considered in a suitable case are set out at paragraph 21A(2) of appendix FM-SE of the rules. Taking account of the sponsor's earnings together with the support offered by her son, there is no difficulty in finding that the financial requirement would be met. Mr Govan did not resist that conclusion.

10. The financial requirement could be met even without a finding on the prospect of the appellant finding employment, which is also permitted by paragraph 21A(2). That has not been much explored in evidence, but appears likely.

11. The rules at GEN.3.1.(1) set up a gateway to considering such further evidence. It must be "… evident from the information provided by the applicant that there are exceptional circumstances which could render refusal of entry clearance a breach of article 8 … because such refusal could result in unjustifiably harsh consequences for the applicant [or] their partner … "

12. Mr Govan submitted that the case disclosed no such consequences, but only separation, which was a matter of choice and of the ordinary operation of the rules; and that the exception is not intended to let in a "near miss".

13. I was not referred to and am not aware of any discussion in case law of the criterion in GEN.3.1.(1).

14. The ECO's decision has consequences. Are they harsh? The sponsor lived most of her adult life in South Africa, and returned here about three years ago. It would not be impossible for her to live again in South Africa, but the reasons for her preference are understandable. If the decision is maintained, the appellant and sponsor must choose whether to continue to live separately (apart from visits), or for her to return.

15. There is professional evidence of the sponsor suffering some psychological distress, which is readily comprehensible.

16. Harshness is a matter of ordinary language, not a specialised legal concept (as it might be in some other legal contexts). The Oxford dictionary offers "unpleasantly rough", "cruel or severe", "grim and unpalatable", and "having an undesirably strong effect". The choice before the appellant and sponsor lies within the spectrum of those definitions. The decision has harsh consequences.

17. The decisive question is whether those consequences are *unjustifiably* harsh.

18. The rules use similar terms elsewhere. For example, in a deportation case it is "unduly harsh" for someone to live in another country only if there are "compelling circumstances over and above" an already high threshold (paragraph 399). This case involves no such high thresholds.

19. The justification must come from the ECO's side. The maintenance of effective immigration controls is in the public interest: 2002 Act, section 117B(1). The rules are designed to be as prescriptive as possible. The public interest includes provision of certainty and consistency (even if through a bewildering labyrinth of detail). No other aspect of the public interest has been suggested as weighing against the appellant. The rules provide for sources of income to be widened, if the consequences of not doing so would be unjustifiably harsh.

20. Justification for refusing entry to the appellant, on the facts of this case, is lacking. Those facts meet the requirements of GEN.3.1.(1), from which success follows on article 8 grounds.

21. The decision of the FtT is set aside, and the following decision is substituted: the appeal, as originally brought to the FtT, is allowed.

22. No anonymity direction has been requested or made.

Hugh Macleman

26 February 2019
UT Judge Macleman