IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2021-001795
First-tier Tribunal No: HU/01873/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 4 April 2023

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between
The Entry Clearance Officer

Appellant

and

Mr Louis Kavuma
(NO ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Ms Z Young Home Office Presenting Officer
For the Respondent: Mr Greer, instructed by Titan Solicitors

Heard at Phoenix House (Bradford) on 8 February 2023

DECISION AND REASONS

1. The application for permission to appeal was made by the Secretary of State on behalf of the Entry Clearance Officer but hereinafter for the purposes of this decision I shall refer to the parties as they were described before the First-tier Tribunal ("the FtT") for example, Mr Kavuma as the appellant.

2. The Secretary of State appeals against the decision of First-tier Tribunal ("FtT") Judge O'Malley ("the judge") who on 2nd November 2021 allowed the appellant's appeal against the decision of the Entry Clearance Officer dated 25th February 2021 to refuse a human rights claim following the refusal of an application for a fiancé visa dated 20th January 2021.

3. The grounds for permission were that the judge, in allowing the appeal on article 8 grounds outside the immigration rules, had failed adequately to resolve whether the Appellant will be maintained without recourse to public funds. It was submitted in the grounds that at [22] and [23] the judge notes**:**

> **'***The sponsor does not meet the Rules on the basis of her employed income. Looking at the sponsor's income on a self-employed basis I*

> *find that the figures in the HMRC self-assessment are not supported by the documents relating to the appellant's self-employed earnings. I am not satisfied that it is appropriate to put weight on the calculation of self-employment earnings in the tax assessment. I find that the sponsor has gross self-employed earnings of £9,433.70 between April 2020 and April 2021. I do not accept the figure of £32,289.00 set out in the tax return'*

It was submitted that the Appellant would be a significant burden on the public purse due to their sponsor's inability to satisfy the financial requirement and that the judge appeared to have formed their own opinion on what constituted a financial threshold at [40] stating as follows:

> *'On the balance of probabilities, taking into account the provisions of MM (Lebanon) as "the tribunal on appeal … looking at the matter more broadly", I am satisfied that the sponsor's earnings are consistently above the level which would allow the appellant to be maintained without recourse to public funds'*

It was also observed that '*to support the Appellant in addition is not a sustainable practice especially as the cost of supporting the Appellant in the UK will be significantly higher. In allowing this appeal without any consideration of exceptional circumstances their decision is a misdirection of law'* (sic)

4. Permission to appeal was granted on the following basis:

> *'The Immigration Rules mandate minimum earnings of £18,600 and specified evidence to demonstrate that level of income. From the decision it appears that the specified evidence was not provided and the level of income did not meet £18,600. The findings in paragraphs 22, 25 and 26 were arguably the end of the matter. The Judge appears to have treated article 8 as a general dispensing power. The Judge did not assess what income was available, whether that exceeded the minimum level for benefits for a married couple, if a renewed application could be made and so on.'*

5. Ms Young submitted at the hearing before me that there was no challenge to the findings that the sponsor did not meet the financial requirements of the immigration rules. The judge accepted at [37] that the appellant would not be financially independent but, as found, the sponsor would be earning only £213 per week. The judge, however, did not set out the expenses or outgoings of the sponsor and did not take into account earlier findings in relation to the immigration rules Even if the judge looked at the matter more broadly, she needed to take all relevant factors such as outgoings into account to ensure the appellant would be maintained.

6. Mr Greer submitted the judge had directed herself appropriately in terms of the law and he submitted that the judge must have reasoned in accordance with the income level support which was £121.50 per couple and thus it was tolerably clear as to why the judge in these circumstances had allowed the appeal. It was a well-ordered decision and the steps in Razgar [2004] HL 27 had been properly followed.

Analysis

7. The judge failed to have proper regard to the position that the sponsor, on the judge's own findings, did not succeed under the immigration rules. Those findings were made from [17] to [25]. The Supreme Court in MM (Lebanon) [2017] UKSC 10 accepted that the minimum income requirement had a sound underpinning and was not inimical to Article 8. The reference to permitting consideration 'more broadly' related to third party support. Even if that were not the case the judge stated at [37]

> *'I find that he would not be financially independent and would rely on funds from his fiancé. I accept that the sponsor continues to earn and I accept that at present she received regular earning from Delight, a gross sum of £213 per week'.*

8. The judge merely proceeded to state that the sponsor was hard-working individual and there was a regular pattern of earning and working but the judge had accepted that the errors on the face of the tax assessment weighed against the finding that her earnings were sufficient to meet the burden of proving adequate earning to maintain the appellant and there was no analysis of the sponsor's outgoings. That was not sustainable or adequate reasoning to support the contention that the appellant would not be a burden on public resources in the light of the judge's own findings and as required by Section 117B of the Nationality Immigration and Asylum Act 2022 which sets out:

> *"(1) The maintenance of effective immigration controls is in the public interest.*
>
> *(2) 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 able to speak English, because persons who can speak English—*
>
> *(a) are less of a burden on taxpayers, and*
>
> *(b) are better able to integrate into society.*
>
> *(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."*

9. The judge then found without more at [40]

> *'On the balance of probabilities, taking into account the provisions of MM (Lebanon) as "the tribunal on appeal … looking at the matter more broadly", I am satisfied that the sponsor's earnings are consistently above the level which would allow the appellant to be maintained without recourse to public funds.'*

10. The reference to Jitendra Rai [2017] EWCA 320 was flawed because that engaged a consideration of historical injustice in Gurkha cases when weighing the public interest which Mr Greer accepted was not evident in this case. When

allowing the appeal on the basis of the financial security of the sponsor the judge effectively omitted proper consideration of Section 117B.

11. When allowing the appeal, the judge did consider the five stage test in Razgar [2004] UKHL 27 but failed to address any 'unjustifiably harsh consequences' of refusal as set out in Agyarko [2017] UKSC 11. It is correct that there is no test of exceptionality but nothing in the decision addressed any factors which could be construed as unjustifiably harsh. The judge appeared to have conducted a 'freewheeling' article 8 assessment. There may be relevant factors in this appeal, but they were not identified.

12. I find that there are material errors of law in the decision and set aside the conclusions on article 8. Mr Greer requested that up-to-date evidence be submitted, and the matter be remitted to the First-tier Tribunal. Ms Young did not object to that course.

Notice of Decision

The Judge erred materially for the reasons identified. I set aside the decision pursuant to Section 12(2)(a) of the Tribunals Courts and Enforcement Act 2007 (TCE 2007). Bearing in mind the nature and extent of the findings to be made the matter should be remitted to the First-tier Tribunal under section 12(2) (b) of the TCE 2007 and further to 7.2 (b) of the Presidential Practice Statement.

Helen Rimington

Judge of the Upper Tribunal Rimington
Immigration and Asylum Chamber

8th February 2023