Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/11082/2013

THE IMMIGRATION ACTS

Heard at North Shields	**Determination Promulgated**
On 4 September, 2013	**On 22nd October 2013**

Before

Upper Tribunal Judge Chalkley

Between

MR JOSEPH FEMI AFOLAYAN

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: *Mrs F McCrae of Counsel instructed by Fursdon Knapper Solicitors*
For the Respondent: *Mr J Kingham, a Home Office Presenting Officer*

DETERMINATION AND REASONS

1. The appellant is a citizen of Nigeria who was born on 23rd January, 1984. The appellant obtained entry clearance as a Tier 4 Student for the period 4th October, 2011 to 30th September, 2012 and entered the United Kingdom on 7th October, 2011. In an application which appears to have been submitted to the respondent on 26th

September, 2012, the appellant applied for a variation of his leave to enter or remain. On 23rd March, 2013 the respondent refused to vary leave and the appellant appealed that decision.

2. The appellant's appeal was heard by First-tier Tribunal Judge Moore at North Shields on 28th June, 2013. In a determination promulgated following that hearing on 15th July, 2013, the Immigration Judge dismissed the appellant's appeal under the Immigration Rules and dismissed the appeal on human rights grounds. The grounds of application relied on the judgment of the Administrative Court in *MM* [2013] EWHC 1900 (Admin) and assert that if the judge had taken the approach suggested in *MM* he would have allowed the appellant's appeal on Article 8 human rights grounds. The appellant could not show a gross annual income of at least £18,600 or that the exemption criteria on compassionate grounds warranted a grant of leave outside the Immigration Rules. The judge found that the appellant did not meet the requirement of paragraph 276ADE and dismissed the appeal.

3. The grounds suggested that the judge failed to take into account additional income that was being provided by the appellant's mother which amounted to a further £4,000 per annum and the judge also failed to take account of the fact that the appellant had been awarded a degree in applied business computing and, therefore had reasonable job prospects.

4. Counsel relied on the grounds and suggested that the judge had erred by not applying the decision of the Administrative Court in *MM*. It was accepted that the appellant did not meet the requirements of the Immigration Rules. Counsel suggested that the judge found that the appellant's income was £1,464.28, but the judge made no findings as to the amount of support the appellant received from his mother. Counsel suggested that where one considers what Blake J said at paragraphs 122 to 126 the decision of the Immigration Judge is clearly disproportionate.

5. The appellant was not in employment at the time of the application, but he had previously been employed until January, 2013 on an ad hoc basis. No evidence was adduced, however, at the hearing that the appellant had been seeking employment.

6. The judge dealt with the question of employment at paragraph 25 of the determination and noted that the appellant had not studied since September, 2012 although he claimed to have done some part-time factory work. There was, however, Mrs McCrae submitted, no primary finding as to the support given by the appellant's mother which the judge should have considered. The judge also should have considered the appellant's job prospects. He has a third class honours degree in applied business computing.

7. The Presenting Officer suggested that the grounds were misguided. The judge said at paragraph 22 of the determination that it would appear that an annual income of £14,664.23 had been demonstrated by reference to payslips from the appellant's

spouse from her employer 2 Touch Limited and the appellant's bank statement from GT Bank. However monies from GT Bank included her mother's support.

8. *MM* was an entry clearance application and at paragraphs 123 to 124 the court make it clear that it was actually a combination of one or more of five features of the Rules which made it onerous and therefore unjustified and disproportionate. The five features were first, the setting of the minimum income level above the sum of £13,400 identified by the Migration Advisory Committee as the lowest maintenance threshold, the requirement of £16,000 of savings, the use of a 30 month period for forward income projection, the disregard of even credible and reliable evidence of undertaking of third party support and finally the disregard of the spouse's own earning capacity during the 30 month period of the initial entry.

9 However, the Presenting Officer pointed out, in this appeal the spouse's income had been taken into account and third party support was allowed in certain circumstances.

10. In effect, in this appeal only one of the features which had been identified in *MM* applied, namely the minimum income level.

11. As for the question of job offers, the Home Office Presenting Officer pointed out that there was no evidence of any job offers. The appellant's previous work history was not at all helpful as the Immigration Judge pointed out. As to whether or not the decision was disproportionate, the Secretary of State had withdrawn the decision to remove the appellant.

12. Counsel suggested that the decision of the judge did not take into account the support offered to the appellant by his mother. The income referred to at paragraph 22 of the determination dealt only with the appellant's spouse's income and the appellant's savings in his GT Bank account. I reserved my decision.

13. Since 9th July, 2012 the Immigration Rules governing applications made by a spouse impose a mandatory financial requirement to be met by the sponsor of a minimum income of £18,600 per annum gross. E-LTRP3.1, 3.2 and 3.3 provide as follows:-

> "E-LTRP.3.1. The applicant must provide specified evidence, from the sources listed in paragraph E-LTRP.3.2., 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 E-LTRP.3.2.(a)-(f) and the total amount required under paragraph E-LTRP.3.1.(a); or

(c) the requirements in paragraph E-LTRP.3.3.being met, unless paragraph EX.1. applies.

In this paragraph "child" means a dependent child of the applicant who is-

(a) under the age of 18 years, or who was under the age of 18 years when they were first granted entry under this route;
(b) applying for entry clearance or is in the UK as a dependant of the applicant;
(c) not a British Citizen or settled in the UK; and
(d) not an EEA national with a right to remain in the UK under the Immigration (EEA) Regulations 2006.

E-LTRP.3.2. When determining whether the financial requirement in paragraph ELTRP.

3.1. is met only the following sources may be taken into account-

(a) income of the partner from specified employment or self-employment;
(b) income of the applicant from specified employment or self-employment unless they are working illegally;
(c) specified pension income of the applicant and partner;
(d) any specified maternity allowance or bereavement benefit received by the applicant and partner in the UK;
(e) other specified income of the applicant and partner;
(f) income from the sources at (b), (d) or (e) of a dependent child of the applicant under paragraph E-LTRP.3.1. who is aged 18 years or over; and
(g) specified savings of the applicant, partner and a dependent child of the applicant under paragraph E-LTRP.3.1. who is aged 18 years or over.

E-LTRP.3.3. The requirements to meet this paragraph are-

(a) the applicant's partner must be receiving one or more of the following -

(i) disability living allowance;
(ii) severe disablement allowance;
(iii) industrial injury disablement benefit;
(iv) attendance allowance;
(v) carer's allowance; or
(vi) personal independence payment; and

(b) the applicant must provide evidence that their partner is able to maintain and accommodate themselves, the applicant and any dependants adequately in the UK without recourse to public funds. ″

13. The requirements for limited leave to remain as a partner are set out in R-LTRP1.1 as follows:-

″R-LTRP.1.1. The requirements to be met for limited leave to remain as a partner are-

(a) the applicant and their partner must be in the UK;
(b) the applicant must have made a valid application for limited or indefinite leave to remain as a partner; and either
(c) (i) the applicant must not fall for refusal under Section S-LTR: Suitability leave to remain; and

(ii) the applicant meets all of the requirements of Section E-LTRP:

Eligibility for leave to remain as a partner; or

(d) (i) the applicant must not fall for refusal under Section S-LTR: Suitability leave to remain; and

(ii) the applicant meets the requirements of paragraphs E-LTRP.1.2-1.12. and E-LTRP.2.1.; and

(iii) paragraph EX.1. applies."

14. The requirements to be met by an applicant for leave to remain on the grounds of private life are set out in paragraph 276ADE as follows:-

"**Requirements to be met by an applicant for leave to remain on the grounds of private life**

276ADE. The requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that at the date of application, the applicant:

(i) does not fall for refusal under any of the grounds in Section S-LTR 1.2 to S-LTR 2.3. and S-LTR.3.1. in Appendix FM; and

(ii) has made a valid application for leave to remain on the grounds of private life in the UK; and

(iii) has lived continuously in the UK for at least 20 years (discounting any period of imprisonment); or

(iv) is under the age of 18 years and has lived continuously in the UK for at least 7 years (discounting any period of imprisonment) and it would not be reasonable to expect the applicant to leave the UK; or

(v) is aged 18 years or above and under 25 years and has spent at least half of his life living continuously in the UK (discounting any period of imprisonment); or

(vi) is aged 18 years or above, has lived continuously in the UK for less than 20 years (discounting any period of imprisonment) but has no ties (including social, cultural or family) with the country to which he would have to go if required to leave the United Kingdom."

15. The evidence before the judge is slightly confusing. Lloyds Bank statements were submitted by the appellant and he claimed that they showed that he was supported by his mother. The judge records that the evidence of the appellant was that his mother supported him "every now and then". Monies were paid to the appellant in the United Kingdom and his mother gave him approximately £150 per month and occasionally a further £150 towards the middle of each month. The appellant maintained that he would receive at least a total of £350 a month from his mother. Whilst he had been at university his mother sent him £550 per month, but that was reduced to £350 a month made up of roughly two payments of £150. The difficulty before the judge was that the Lloyds Bank statements which he submitted did not show transfers from the appellant's mother. A payment was made into the account on 4th November, 2011 of £350. Under the heading activity this was described as being, "DEP Sunderland". The only other two large payments made in around that

time were on 23rd December when the activity was described as being "BGC Temp Recruitment L" amounting to £133.76 and on 29th December, 2011 "DEP Rye Lane Peckham" £150. On 11th January, 2012 £165 was paid into his account which bore the activity "DEP Sunderland". There was a similar entry for 23rd January, 2012 when £150 was paid into his account. On 5th March, 2012 £1,950 was paid into the account but this was described as being "TFR J Afolayan" suggesting that it was a transfer from another account maintained by the appellant. Two further similar entries appeared in March, 2012, one for £30 and one for £140. According to a subsequent statement there were five more transfers during March of £360. Subsequent bank statements showed no deposits into the account; all subsequent entries appeared to be as a result of transfers from J Afolayan. The appellant did have a Halifax account which showed deposits in between 19th March, 2012 and payments out between 8th June, 2012 for £1,000. Subsequent movements on the account showed it being overdrawn from time to time to the extent that by August, 2012 it was overdrawn by more than £390. The last balance on 10th September showed the account overdrawn by £290.

16. There were payslips for the appellant produced with his application and in giving evidence to the First-tier Tribunal Judge claimed to have no memory of doing any work since the beginning of 2013. At the hearing before the judge the appellant relied on payslips from the appellant's spouse which the judge found showed an income of £14,664.28.

17. Before the Immigration Judge the Home Office Presenting Officer withdrew the removal decision under Section 47 of the Immigration, Asylum and Nationality Act 2006.

18. In *MM* Blake J considered whether the minimum income provisions of the maintenance Rules when applied to sponsors who are British citizens or refugees whose incomes and savings combined do not meet them are a disproportionate interference with the right to respect for family life. As Mr Kingham pointed out, *MM* dealt with an entry clearance application and at paragraphs 122 to 126 Blake J said this:-

> "*Justification of interference*
>
> 122. I can now finally turn to what I consider the central question in this challenge, namely whether the minimum income provisions of the maintenance rules when applied to sponsors who are British citizens or refugees whose incomes and savings combined do not meet them are a disproportionate interference with the right to respect for family life?
> 123. Although there may be sound reasons in favour of some of the individual requirements taken in isolation, I conclude that when applied to either recognised refugees or British citizens the combination of more than one of the following five features of the rules to be so onerous in effect as to be an unjustified and disproportionate interference with a genuine spousal relationship. In particular that it likely to be the case where the minimum income requirement is combined with one or more than one of the other requirements discussed below. The consequences are so excessive in impact as to be beyond a reasonable means of giving effect to the legitimate aim.
> 124. The five features are:

i. The setting of the minimum income level to be provided by the sponsor at above the £13,400 level identified by the Migration Advisory Committee as the lowest maintenance threshold under the benefits and net fiscal approach (Conclusion 5.3). Such a level would be close to the adult minimum wage for a 40 hour week. Further the claimants have shown through by their experts that of the 422 occupations listed in the 2011 UK Earnings Index, only 301 were above the £18,600 threshold[16].

ii. The requirement of £16,000 before savings can be said to contribute to rectify an income shortfall.

iii. The use of a 30 month period for forward income projection, as opposed to a twelve month period that could be applied in a borderline case of ability to maintain.

iv. The disregard of even credible and reliable evidence of undertakings of third party support effected by deed and supported by evidence of ability to fund.

v. The disregard of the spouse's own earning capacity during the thirty month period of initial entry.

125. In reaching my conclusions I understand and have given weight to the wide discretionary area of judgment open to the Secretary of State in making economic and social judgments in the context of immigration. In particular I recognise that the figure of £18,600 was the lower of the two options identified by the Migration Advisory Committee in their report and represented the level at which a two person household would be completely ineligible for housing benefit. I accept that the policy aim was to identify a figure above mere subsistence and from which future recourse to any form of benefit would be made impossible for all practical purposes (thus savings of £16,000 excludes a person from any claim to income support). I further recognise that Parliament must have been aware of the minimum income figure when expressing its satisfaction with the Secretary of State's policies.

126. Nevertheless, to set the figure significantly higher than even the £13,400 gross annual wage effectively denies young people and many thousands of low-wage earners in full time employment the ability to be joined by their non-EEA spouses from abroad unless they happen to have wealthy relatives or to have won the lottery. This frustrates the right of refugees and British citizens to live with their chosen partner and found a family unless such modest earnings could be supplemented by any reasonably substantial savings, third party support or the future earnings or the spouse seeking admission. The executive can hardly be heard to say that the minimum adult wage is a manifestly inadequate sum to provide a basic standard of living over the subsistence threshold for a household without dependent children."

19. At paragraph 123, the court was clear in finding that it was the combination of one or more of the features set out in paragraph 124 which made the Rules so onerous as to be unjustified and amount to disproportionate interference. In this appeal, of course, the judge was not dealing with an entry clearance application, but a variation of leave. He took into account the sponsor's income, because despite having a third class honours degree, the appellant had no income at all. He could not recall having worked during 2013 at all and when he did work his most recent employment had been with a company called Sir John Fitzgerald Limited and his gross pay appeared to vary between £145 per week and, on one occasion £400 per week. Whilst the appellant claimed that his mother supported him, there appeared to be very little evidence confirming this in the appellant's own bank statements, since most of the credits into the appellant's disclosed Lloyds TSB Bank account appeared to be transfers from an account maintained by J Afolayan. Reference was made by the judge to the appellant having a bank account with GT Bank but there appeared to be no evidence before me of any account with GT Bank.

20. I have concluded that the judge did not err in law by failing to apply *MM and Others*. The five features identified in *MM* any one of which taken with the minimum income provisions was found to be unjustified and disproportionate were not present in this appeal; indeed the judge did take into account the sponsor's own earnings. The claimed payments of cash into his account said to be from his mother and totalling £350 per month were not evidenced by the bank statements which showed very few cash deposits into the account. The judge did not fail to take into account third party support.

21. The making of the decision by the First-tier Tribunal Judge did not involve the making of an error of law. His determination is upheld. The appellant's appeal is dismissed under the Immigration Rules and is dismissed on human rights grounds.

Upper Tribunal Judge Chalkley