Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/14296/2013

THE IMMIGRATION ACTS

Heard at Columbus House, Newport	**Decision & Reasons Promulgated**
On 27th November 2014	**On 9th December 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE HARRIES

Between

ENTRY CLEARANCE OFFICER - ACCRA

Appellant

And

MR TERENCE NGWASHI FRUTUMAH
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr P Duffy, Home Office Presenting Officer
For the Respondent: Mr T Gaisford, Counsel

DECISION AND REASONS

1. The appellant in the Upper Tribunal is the entry clearance officer, referred to hereafter as the ECO. The respondent, Mr Frutumah, is referred to hereafter as the claimant. He is a national of Cameroon and was born on 18th June 1978. On 6th February 2014 First-tier Tribunal Judge Boyes (the Judge) heard his appeal against the decision made by the respondent on 3rd June 2013 to refuse his application for entry clearance to the United

Kingdom as a spouse under Appendix FM of the Immigration Rules. In a determination dated 4th April 2014 the Judge dismissed the appeal under the Immigration Rules but allowed it on Article 8 ECHR family human rights grounds.

2. After an initial refusal in the First-tier Tribunal the ECO was granted permission on 1st August 2014 in the Upper Tribunal to appeal to the Upper Tribunal against the Judge's decision allowing the appeal on Article 8 grounds. Upper Tribunal Judge Kebede granted permission to appeal for the following reasons;

> "Arguably Judge Boyes erred by failing to identify how the issues considered amounted to compelling circumstances in accordance with the principles in Gulshan (Article 8 – new rules – correct approach) [2013] UKUT 640, in particular when it was accepted that the appellant was in a position simply to make a fresh application supported by the required documentation."

3. The matter accordingly came before me for an initial hearing to determine whether the First-tier Tribunal decision involved the making of an error on a point of law.

4. The background to the appeal is that Judge heard oral evidence from the sponsor, Mrs Cynthia-Ella Maamu Sangwe and accepted her evidence that she originates from Cameroon but is now a British citizen living and working full-time for the NHS in the United Kingdom. The claimant first came to the United Kingdom with a student visa valid from 25th September 2002 to 25th September 2003 but he did not meet the sponsor until 7th September 2007; they formed a relationship but separated before rekindling their relationship in 2011. In May 2011 they decided to marry and did so on 10th October 2011. They started living together as a couple with the intention of doing so permanently.

5. The claimant made a further unsuccessful application for leave to remain on 16th July 2012 but whilst this was pending he obtained a travel document to travel at his own expense to Cameroon on 7th December 2012. A further marriage ceremony took place with the sponsor in Cameroon on 11th January 2013 and the pending application was refused on 21st February 2013. The out of country application for leave to enter as a souse was made on 4th April 2013 resulting in the ECO's refusal on 13th June 2013. At the time of the application, in April 2013, the sponsor was pregnant with the claimant's child which was born on 12th September 3013. The ECO's refusal was reviewed and upheld after consideration of the grounds of appeal by an entry clearance manager (ECM) on 18th November 2013.

6. The ECO refused the application under Immigration Rules on grounds of suitability because the claimant failed to declare two historic driving offences on his application form and on financial grounds. The application was further refused under paragraph 320(11) for overstaying and use of deception, as well as absconding. The ECO made no mention of, and gave no consideration to, Article 8 in refusing the application.

7. The ECM upheld the refusal for the reasons given by the ECO and considered Article 8 of the ECHR on the basis that the claimant could keep contact with his family and that there were no insurmountable obstacles to family life being continued by the claimant and sponsor in Cameroon together. The ECM found no interference caused to family life by the decision, or alternatively that such interference is justified and proportionate when weighed against the need to maintain immigration control.

8. The Judge found that paragraph 320(11) did not apply to the claimant but found that he could not meet the requirements of the Rules in relation to suitability or as a spouse under Appendix FM because of a lack of specified evidence in relation to the financial requirements which were otherwise met. The Judge therefore dismissed the appeal under the Immigration Rules but then went on to consider Article 8 of the ECHR on which ground he allowed the appeal.

9. Mr Duffy addressed me at the hearing in accordance with the submitted grounds of appeal for the ECO as follows. The ECO challenges the decision on the grounds that the Judge failed to identify the nature of the compelling circumstances he found not to be recognised by the Rules. The ECO asserts that Appendix FM is the route to be followed for those seeking leave to enter or remain in the United Kingdom on the basis of family life with a British or settled person and the circumstances of this case are sufficiently recognised and catered for by the Rules. It is asserted that in allowing the appeal under Article 8 the Judge was wrong because the case of Gulshan (Article 8 – new rules – correct approach) [2013] UKUT 640 makes clear that the Article 8 assessment shall only be carried out when there are compelling circumstances not recognised by the Rules.

10. The ECO's grounds assert that there must be exceptional circumstances at this stage of decision-making which, in accordance with the case of Nagre [2013] EWHC 720 (Admin), amount to an unjustifiably harsh outcome from refusal. It is asserted that in this case the ECO has applied the law and caused no prejudice to the claimant; family life can be continued in Cameroon and Article 8 should not be used to circumvent the Rules. There is no interference with family life as the claimant was conducting his married life in Cameroon whilst his wife was in the United Kingdom.

11. The Judge is asserted on behalf of the ECO to have failed to conduct an analysis of why the claimant could not simply make a fresh application, or why it would be unjustifiably harsh to expect him to do so. In the light of the finding by the Judge that, but for specified evidence, the financial requirements of the Rules are met any separation of the parties pending the making of a fresh application would be temporary.

12. Mr Duffy accepted in his submission to me that there is now a British child to be considered but he stated that this factor does not necessarily alter the balance; this is not a case where someone will never be able to come to the United Kingdom. Finally, Mr Duffy submitted that this is a case

where the Rules were not met because of the use of incorrect documents, but that does not make the outcome disproportionate. The Judge has erred in law and the decision should be set aside and remade by dismissal of the appeal.

13. Mr Gaisford in his oral submissions took issue with the use of the word "simply" in the permission to appeal and by Mr Duffy in his submissions that the claimant could simply make a fresh application. Mr Gaisford submitted that such a course of action is not at all simple and the Judge had said exactly why it would be disproportionate to expect another application to be made. I find merit in this submission for the claimant and I find that the Judge took full account of the possibility of a fresh application being made. In paragraph 36 of the determination the Judge found as follows:

> 36. It is not in dispute that the appellant and sponsor are married and that they have a young baby together. The appellant, sponsor and their child therefore enjoy family life. I consider that family life is interfered with by the respondent's decision because, at the very least, it means that the sponsor, who is a British citizen with a British child born in the UK, would have to choose to remain in the UK separated from the appellant, or, alternatively, return to Cameroon, either permanently, or for an indeterminate period of time whilst a further entry clearance application is made, and in doing so, leave (*her*) permanent, secure, employment in the UK. I consider that Article 8(1) is therefore engaged.

14. The Judge in my view continued to weigh in the balance the possibility of a fresh application being made, particularly the likely delay in doing so, when at paragraph 44 he made the following findings:

> 44. As the respondent states, the appellant was in the UK without leave for most of the time that he was in the UK, although between 2005 and 2010 he did have an application, and subsequent request for reconsideration, pending. No explanation has been provided by the respondent as to why the outcome of either of these took, in total, in the region of five years. In addition, the appellant did also seek to regularise his stay in the United Kingdom by making two applications for further leave to remain, and, whilst he had left by the time the second one was determined, the first one did not carry a right of appeal because no decision to remove had been made. The appellant subsequently left the United Kingdom voluntarily, at his own expense, and submitted a further application for entry clearance and, in doing so, subjected himself to immigration control."

15. In paragraph 45 of the determination the Judge's finding that the decision of the respondent is disproportionate took into account the claimant's efforts to regularise his position after his voluntary return to Cameroon at his own expense; he found the impact upon the child and sponsor to be disproportionate and noted that the claimant has in these circumstances not seen the sponsor since January 2013. He found that: "a further indeterminate period of delay whilst a further application for entry clearance is made would be disproportionate, particularly bearing in mind

the age of the child and the importance of the appellant being present during such an important developmental period of the child's life."

16. I am satisfied that the judge properly directed himself in accordance with relevant case law at paragraph 33 of his determination. He directed himself that having found the requirements of the Immigration Rules not to be met he may go on to consider the case under Article 8 of the ECHR if he found that the Rules have not addressed any family or private life issues in accordance with MF (Article8 – new rules) Nigeria [2012] UKUT 00393 (IAC) and Izuazu (Article8 – new rules) [2013] UKUT 00045 (IAC). He considered the case of Nagre [2013] EWHC 720 (Admin) and whether the Immigration Rules provided a complete code in this case.

17. At paragraph 34 of his determination the Judge states that he considers the case not to be one catered for within Appendix FM of the Rules or paragraph 276ADE. He found, in particular, that the Rules do not allow for consideration of the best interests of the child in the particular circumstances of this case, namely the failure to disclose a matter that, whilst material, was in reality unlikely to lead to a refusal of entry clearance bearing in mind the relatively minor nature of the claimant's conviction which related to a brake light and driving licence offence. In relation to the non-disclosure of these matters the Judge found the claimant not to have intended to deceive but to have been careless.

18. In his submissions to me Mr Gaisford relied on the case of R (Ganesabalan) v SSHD [2014] EWHC 2712 (Admin) heard by Michael Fordham QC, sitting as a Deputy High Court Judge. He found that the "threshold questions", as they have been described, inform the question of what is appropriate for the decision letter to go on to contain by way of assessment; they are not obviating the need for the Secretary of State at least to address her mind to the question of exceptional circumstances and to give some reasoning which indicates that she has done so and the conclusion at which she has arrived.

19. This finding has since been endorsed by Judge A Grubb sitting as a Deputy High Court Judge in the case of R (on the application of Halimatu SA Adiya Damilola Aliyu and Fatima Oluwakemi Aliyu) v SSHD [2014] EWHC 3919 (Admin). He found that there was nothing to suggest that the official dealing with the application of one of the claimant's before him had turned his or her mind to the question of whether there were "exceptional circumstances" and that, in his judgment, was unlawful.

20. Judge Grubb adopted the reasoning in Ganesabalan in which he considered that Michael Fordham QC had helpfully sought to draw together the threads of the many authorities, including MM. His summary of his view as to the correct legal approach was that:

> "… Where a person seeks leave to remain, relying on private life or family life or both, and relying on Article 8, and where the

> claim fails at the first stage by reference to the applicable Immigration Rules (Appendix FM and Rule 276ADE):
>
> (1) There is always a 'second stage' in which the Secretary of State must consider the exercise of discretion outside the Rules and must be in a position to demonstrate that she has done so.
>
> (2) The extent of that consideration and the extent of the reasoning called for will depend on the nature and circumstances of the individual case.
>
> (3) In a case in which the consideration or reasoning is legally inadequate, and leaving aside cases in which there is a right of appeal to a tribunal, it is open to the Secretary of State to resist the grant of judicial review if she is able to demonstrate that the decision would inevitably have been the same."

21. Amongst the six key points emerging from the case law summarised by the Deputy High Court Judges the following were set out as the fourth and fifth:

> ..the discretion outside the Rules variously described as "exceptional circumstances" or circumstances of "unjustifiable hardship" involves the Secretary of State applying a proportionality test by reference to Article 8 (see MF (Nigeria) at [44] and [45] and MM (Lebanon) [130] and [134]); and
>
> ..there is "no prior threshold" to the exercise of discretion based upon whether the individual could establish an "arguable" claim for the exercise of discretion based upon factors which have not already been assessed under the Rules. Those "threshold" factors were, rather, relevant to the nature of the assessment and the reasoning that was called for in considering the exercise of discretion outside the Rules.

22. In making these findings, Michael Fordham QC noted that the guidance recognised that the decision-maker was "required to consider relevant factors in order to determine whether there are exceptional circumstances" - the emphasis on "whether" being added by Judge Grubb. Mr Gaisford's submissions to me were that the Judge in this case had approached the issues in accordance with the case law and without error. He submitted that once the proportionality exercise had been conducted the Judge could consider whether to allow or dismiss the appeal and there was no test of "exceptionality" as such.

23. I accept this submission and I find that the judge did not err in law. Looking at the decision as a whole, it is evident that the Judge considered that the particular circumstances of this claimant and his family amounted to exceptional compelling circumstances in the context of Article 8 and those circumstances are fully aired in the proportionality assessment. Not least because of his findings in relation to the best interests of the child in

this case I find that the Judge was entitled to find reasons outside the Rules on which the appeal succeeds. The Judge in my view directed himself properly in arriving at an Article 8 consideration of the case and weighed all the relevant factors in the balance. Where the balance fell was a finding of fact to be made by the Judge, absent perversity.

24. In summary, I find that the making of the decision in the First-tier Tribunal did not involve the making of a material error on a point of law and it follows that the Judge's decision stands and this appeal to the Upper Tribunal is dismissed.

Notice of Decision

25. I find that the making of the decision in the First-tier Tribunal did not involve the making of an error on a point of law and it follows that the Judge's decision stands and this appeal to the Upper Tribunal is dismissed.

Anonymity

No anonymity direction is made.

Signed

J Harries

Deputy Upper Tribunal Judge
Date: 3rd December 2014

Fee Award

The position remains as in the First-tier Tribunal that there is no award for the reasons given by the Judge.

Signed

J Harries

Deputy Upper Tribunal Judge
Date: 3rd December 2014