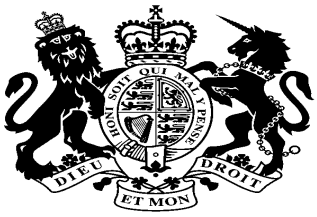

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/16228/2018

THE IMMIGRATION ACTS

Heard at Bradford	**Decision and Reasons Promulgated**
on 11 June 2019	**On 14 June 2019**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

ANITA OGECHI EZENWA
(anonymity direction not made)

Appellant

and

AN ENTRY CLEARANCE OFFICER - SHEFFIELD

Respondent

Representation:
For the Appellant: Mr Ihebuzar of Midland Solicitors.
For the Respondent: Mr Diwnycz Senior Home Office Presenting Officer.

ERROR OF LAW FINDING AND REASONS

1. The appellant appeals with permission a decision of First-Tier Tribunal Judge Lodge promulgated on 26 February 2019 in which the Judge dismissed the appellant's appeal on human rights grounds.

Background

2. The appellant is a citizen of Nigeria born on 18 April 1982 who applied for leave to enter the United Kingdom to join her husband Mr Christopher Njoku Ezenwa who is also the appellant's sponsor.
3. The application was refused in a decision dated 4 July 2018 as it was not found the appellant qualify for entry clearance under the 5 – year partner route. The decision-maker was not satisfied the appellant met the financial eligibility requirements of Appendix FM, the English language requirement, or that there were exceptional circumstances in her case which would render the refusal a breach of article 8 ECHR; for the reasons set out in the decision under challenge. The refusal was considered by an Entry Clearance Manager on 7 January 2019 who, whilst conceding that the appellant had produced sufficient evidence to show she satisfied the English language requirement, upheld the decision for the following reasons:

> "With regard to the appellant had not meeting the financial provisions of Appendix FM, it is clear from the additional documentation submitted in the appeal bundle that because the sponsor did not work in February 2018, his net pay for the six-month period under review from 06/10/17 – 06/04/does not meet the requisite £9300.
>
> I have considered under paragraphs GEN 3.1 and GEN 3.2 of Appendix FM as applicable, whether there are exceptional circumstances in the appellant's case which could or would render refusal a breach of article 8 of the ECHR because it could or would result in unjustifiably harsh consequences for the appellant or the appellant's family. Following a thorough assessment of the appeal I am satisfied that there is no basis for such a claim.

4. The Judge having considered the documentary and oral evidence provided by the sponsor sets out findings of fact from [13] of the decision under challenge in which the Judge noted the sole issue in the appeal was whether the appellant met the financial requirements of Appendix FM and whether the appellant had established the sponsor had an annual income prior to the decision date of £18,600.
5. Findings of fact between [19 – 25] are in the following terms:

> "19. Over the period October 2017 to March 2018 the sponsor received a total of £8319. That is clearly below the £9300 required. The sponsor in evidence said he had been on holiday that is why no payslip for February was submitted. I accept his explanation but that does not get around the fact that his income for the 6 months prior to the date of the application does not evidence an annual salary of £18,600.
>
> 20. Looking at his income for the 12 months prior to the date of the application, the 3 April 2017, the schedule shows the total income from June 2017 – March 2018 of £16,064. For reasons I cannot discern I do not have the payslips for April and May 2017. Neither are those months listed on the schedule. In the absence of those payslips I am not prepared to find that is income for the period April 2017 – March 2018 was above the minimum income requirement.

21. I have not been furnished with any evidence from HMRC such as a P60 (which might have been helpful). I also note that I have no explanation as to why the schedule of earnings is from June 2017 to May 2018 when a more appropriate schedule would have detailed the earnings from April 2017 to the end of March 2018.

22. I cannot find on the evidence before me that the appellant meets the minimum income requirement of Appendix FM.

23. Perhaps I should add that I am satisfied having regard to the appellant's bundle that the appellant has provided personal bank statements corresponding to the payslips for the 6 months prior to the application.

24. This being a human rights appeal the appellant failing to meet the Immigration Rules will not necessarily cause the appeal to fail. I have, however, not been provided with anything to suggest there are any exceptional circumstances which would require me to look outside the Rules. Whilst the result of this appeal will be disappointing and upsetting to the appellant, it means she is unable to join her sponsor in the UK at the present time, that disappointment may be assuaged by the appellant making a fresh application which meets the Immigration Rules. I am satisfied the decision to refuse the application is proportionate having regard to the maintenance of effective immigration control.

25. The appeal is dismissed."

6. The appellant sought permission to appeal which was granted by another judge of the First-tier Tribunal the relevant parts of which are in the following terms:

"3. It is submitted, firstly, that the judge failed to take account of the sponsor's Santander savings account, the balance of which would have overcome the shortfall in income in the period preceding the application. The Santander statements which were provided with the application for permission to appeal show wildly fluctuating balances, however, and it would not have been possible for the judge to conclude that there were sufficient savings to overcome the shortfall in the manner contemplated by E-ECP 3.1(b) of Appendix FM.

4. The second and third grounds merit consideration by the Upper Tribunal. The judge focused on the six and twelve month periods preceding the date of application (3 April 2018), as required by Appendix FM-SE of the Immigration Rules. In circumstances in which there was evidence to show that the sponsor had earned more than the MIR in other 12 month periods, however, it is arguable that the judge failed to adopt an approach which was consistent with the character and evaluation which Article 8 ECHR requires: MM (Lebanon) [2017] UKSC 10: [2017] 1 WLR 771, at [99].

5. As for the fourth ground, I have seen no evidence that the sponsor claimed before the First-Tier Tribunal to have two jobs, let alone any evidence of income from other jobs.

6. In the circumstances, permission to appeal is granted. Whilst I do not personally consider the first or last grounds to be arguable, I nevertheless grant unrestricted permission to appeal in light of Ferrer [2012] UKUT 304 (IAC)."

Error of law

Preliminary issue

7. At the commencement of the hearing before the Upper Tribunal Mr Ihebuzar handed up a copy of a decision of a Deputy Judge of the Upper Tribunal dated 25th May 2016 following a hearing at Field House in London in which the appeal of an Entry Clearance Officer against a decision of another judge of the First-Tier Tribunal who allowed the appellant's appeal was dismissed. It has not been made out this is a reported decision of the Upper Tribunal. A party wishing to rely upon an unreported decision is required to give consideration to the 'Practice Directions of the Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal, 18 December 2018', paragraph 11, which provides that a determination of the Tribunal which has not been reported may not be cited in proceedings before the Tribunal unless: (a) the person who is or was the appellant before the First-Tier Tribunal, or a member of that person's family, was a party to the proceedings in which the previous determination was issued; or (b) the Tribunal gives permission.
8. An application for permission must comply with the requirements of paragraph 11.2 which provide that an application for permission to cite a determination which has not been reported must (a) include a full transcript of the determination, (b) identify the proposition for which the determination is to be cited and (c) certify that the proposition is not to be found in any reported determination of the Tribunal, the IAT or the AIT and had not been superseded by a decision of a higher authority. Permission will only be granted on such an application where the Tribunal considers it will be materially assisted by citation of the determination as distinct from the adoption in argument of the reasoning to be found in the determination. The Practice Direction identifies that such circumstances are likely to be rare particularly in the case of determinations which were unreportable. The meaning of "determination" is defined in paragraph 11.6 as including any decision of the AIT or the Tribunal.
9. No application was made for leave to rely upon the unreported determination. There was no attempt made to satisfy the formal requirements required by the Practice Direction or any reason established as to why the decision should be considered. The earlier decision clearly stood on its facts. Accordingly the decision of the Deputy Judge was not admitted.

Error of law finding

10. It was conceded the appellant was only relying upon the second and third grounds, relating to article 8 ECHR, it being accepted the appellant was unable to satisfy the requirements of the Immigration Rules as found by the Judge.

11. Guidance to caseworkers establishes that if an applicant for entry clearance or leave to remain as a partner, child or parent under Appendix FM does not otherwise meet the relevant requirements of the Immigration Rules, the decision maker must move on to consider, under paragraph GEN.3.2. of Appendix FM, whether, in the light of all the information and evidence provided by the applicant, there are exceptional circumstances which would render refusal a breach of ECHR Article 8 because it would result in unjustifiably harsh consequences for the applicant, their partner, a relevant child or another family member whose Article 8 rights it is evident from the information provided by the applicant would be affected. If there are such exceptional circumstances, entry clearance or leave to remain should be granted on the 10-year route to settlement. If not, the application should be refused. This approach was clearly adopted by the Judge too.

12. It is argued on the appellant's behalf that the evidence before the Judge showed that the sponsor earned sufficient income to enable him to support the appellant without recourse to public funds. In the appeal bundle received on 5 June 2019 the appellant provided a further copy of a number of documents including a document described as a 'Breakdown of 12 months earnings' for the Sponsor at page 8. This document shows that between June 2017 and May 2018 the sponsor earned a total of £19,302.33. Mr Ihebuzar also referred to the specific findings of the Judge at [15 – 17] of the decision under challenge which are in the following terms:

> "15. Within the appellant's bundle is a letter from the sponsor's employer (page 12), the letter confirms the sponsor works on behalf of Independent Contractor Security (ICS) as a security officer and has been employed since the 21 November 2013. The letter goes on to say that he works on a permanent basis but on flexible hours, his average earnings over the last previous thirteen weeks (the letter is dated 23 July 2018) have been £436.80 per week working an average of 56 hours.
>
> 16. The reasons for refusal letter indicates there is no issue with regard to the letter from the employer confirming his employment and gross annual salary. In the circumstances it is not clear to me if this was the letter before the ECO as it does not appear to confirm his gross annual salary. Nevertheless having regard to the reasons for refusal letter I am prepared to accept that the conditions of Appendix FM – SE have been met with regard to the letter from his employer.
>
> 17. Turning to the issue of the earnings in the six months prior to the application date. I have been provided with a schedule of the sponsor's earnings over the twelve months from June 2017 to May 2018. The schedule so far as I can tell was prepared by the appellant's solicitors. I have checked it against the wage slips and I accept it as correctly summarising the sponsors earnings over that twelve month period. The earnings total is £19,302.33 which is above the threshold of £18,600."

13. So far as the Immigration Rules are concerned the Judge noted there was no explanation for why the schedule of earnings provided was from June 2017 to

May 2018 when a more appropriate schedule would have detailed the earnings from April 2017 to the end of March 2018. Indeed, in Hameed (Appendix FM – financial year) [2014] UKUT 00266 (IAC) it was held that the financial year for purposes of Appendix FM is the tax year, not the year selected for accounting purposes. In addition to the incorrect accounting period the Judge also noted he had not been furnished with any evidence from HMRC such as P60's which remained the case before the Upper Tribunal. When this was point was raised the appellant seemed to indicate that such documents could be provided but a reaction from the appellant's representative indicated he thought otherwise. The reality is, however, that no such documents have been provided.

14. As well as being relevant to the position under the Immigration Rules the lack of satisfactory evidence relating to the appellant's position is also relevant to considering matters outside the Rules. In FK and OK Botswana [2013] EWCA Civ 238, Sir Stanley Burnton said that "The maintenance of immigration control is not an aim that is implied for the purposes of article 8.2. Its maintenance is necessary in order to preserve or to foster the economic well-being of the country, in order to protect health and morals, and for the protection of the rights and freedoms of others. If there were no immigration control, enormous numbers of persons would be able to enter this country, and would be entitled to claim social security benefits, the benefits of the National Health Service, to be housed (or to compete for housing with those in this country) and to compete for employment with those already here. Their children would be entitled to be educated at the taxpayers' expense...All such matters (and I do not suggest that they are the only matters) go to the economic well-being of the country. That the individuals concerned in the present case are law-abiding (other than in respect of immigration controls) does not detract from the fact that the maintenance of a generally applicable immigration policy is, albeit indirectly, a legitimate aim for the purposes of article 8".

15. The Judge finds at [20] that in light of the nature of the evidence provided he was not prepared to find that the sponsor's income for the period April 2017 to March 2018 was above the minimum income required. No arguable legal error is made out in relation to the dismissal of the appeal under the Immigration Rules.

16. The grant of permission refers to the decision of the Supreme Court in R(on the application of MM (Lebanon) and Others) v Secretary of State for the Home Department [2017] UKSC 10 in which the challenge to the acceptability in principle of the minimum income requirement failed. It was found the minimum income requirement pursued the legitimate aim of ensuring so far as was practicable that a couple did not have recourse to welfare benefits and had sufficient resources to be able to play a full part in British life. That legitimate aim justified interference with Article 8 rights. However:

(i) the rules left a gap regarding the welfare of children which was not adequately filled by the instructions to entry clearance officers particularly so far as treating the best interests of children as a primary consideration was concerned. The rules failed unlawfully to give effect to the duty under s55 of

the 2009 Act in respect of the welfare of children and the instructions were also unlawful;

(ii) So far as alternative funding sources were concerned (such as prospective earnings of the foreign partner or third party support), whilst it was not irrational for the Secretary of State to give priority in the rules to simplicity of operation and ease of verification, operation of the same restrictive approach outside the rules was a different matter and much more difficult to justify under the Human Rights Act. Nothing said in the instructions to case officers could prevent the tribunal on appeal from looking at the matter more broadly. There was nothing to prevent the tribunal, in the context of the Human Rights Appeal, from judging for itself the reliability of any alternative sources of finance in the light of the evidence before it. In so doing, it would no doubt take account of such considerations as were discussed in Mahad v Entry Clearance Officer [2009] UKSC 16 including the difficulties of proving third party support.

17. At [99] of MM (Lebanon), a paragraph specifically referred to by the Judge granting permission, the Supreme Court find:

> "99. Operation of the same restrictive approach outside the rules is a different matter, and 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. In doing so, it will no doubt take account of such considerations as those discussed by Lord Brown and Lord Kerr in *Mahad*, including the difficulties of proof highlighted in the quotation from Collins J. That being the position before the tribunal, it would make little sense for decision-makers at the earlier stages to be forced to take a narrower approach which they might be unable to defend on appeal."

18. The Judge at [24] proceeds to consider the matter outside the Immigration Rules and specifically finds he had not been provided with anything to suggest there were any exceptional circumstances which would require the matter being considered further. The Judge finds the decision to refuse the application is proportionate to the legitimate aim relied upon.

19. Mr Ihebuzar was asked what elements constituted circumstances sufficient to warrant it being found any interference with a protected right would be disproportionate such that the Judge's findings could be said to be infected by arguable legal error. Reference to the fact the appellant is now pregnant is not a matter that was before the Judge as this is a later occurring event which may

support a fresh application but not whether the Judge erred in law on the basis of the information made available to the First-tier Tribunal. The reality is that very little was offered other than a bare assertion that the appellant and sponsor wish to live together in the United Kingdom and that the sponsor could support his wife. Whilst that may be understandable the evidential issues identified by the Judge still continue before the Upper Tribunal supporting the submission by Mr Diwnycz that there was insufficient evidence to enable a finding to be made that the sponsor was able to support the appellant in the United Kingdom and that to find otherwise would be pure speculation.

20. The protected right is clearly the family life that exists between the appellant and her husband. The issue pursuant to article 8 ECHR will be the proportionality of the decision. On the one side of the balancing exercise is the desire of the appellant to join her husband in the United Kingdom so they can start or continue their married life together. On the evidence before the Judge the countervailing factors are however the inability of the appellant to satisfy the requirements of the Immigration Rules relating to entry as a spouse as set out in Appendix FM, the failure to set out the extent of the sponsor's financial position clearly which is material (in the article 8 exercise the assessment of the proportionality of the decision requires clarity in relation to which a settled pattern of sufficient income would have been of value), and the ability of the appellant to make a fresh application based on the new circumstances including the existence of the pregnancy and the furnishing of adequate documentation from HMRC together with from other sources to establish the correcting income position to demonstrate the economic welfare of the United Kingdom would not be adversely affected if the appellant was granted entry clearance in a situation where she cannot satisfy the Immigration Rules.

21. The conclusion of the Judge at [24] that he had not been provided with anything to suggest there are exceptional circumstances which would require detailed examination outside the Rules and the finding that the decision to refuse the application is proportionate having regard to the maintenance of effective immigration control; has not been shown to be a finding infected by arguable legal error based upon the evidence that was made available. The decision-maker clearly discharged the evidential burden upon the respondent to establish that the refusal is proportionate, and the appellant failed to establish sufficient evidence to counter this argument.

Decision

22. There is no material error of law in the Immigration Judge's decision. The determination shall stand.

Anonymity.

23. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed…….
Upper Tribunal Judge Hanson

Dated the 12 June 2019