



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: OA/09674/2013

**THE IMMIGRATION ACTS**

Heard at Manchester  
on 4<sup>th</sup> June 2014

Determination Promulgated  
on 5<sup>th</sup> August 2014

Before

UPPER TRIBUNAL JUDGE HANSON

Between

ENTRY CLEARANCE OFFICER - WARSAW

Appellant

and

YMER GUSHLLA  
(Anonymity direction not made)

Respondent

**Representation:**

For the Appellant: Mr Harrison – Senior Home Office Presenting Officer.

For the Respondent: Mrs Thana – Sponsor.

**DETERMINATION AND REASONS**

1. This is an appeal by the Secretary of State against a determination of First-tier Tribunal Judge S J Pacey promulgated on 13<sup>th</sup> March 2014 in which he allowed the above Respondent's appeal, under both the Immigration Rules and on human rights grounds, against the refusal of an Entry Clearance Officer to grant him leave to enter the United Kingdom for the purposes of settlement as the spouse of his sponsor.

2. There are two reasons for the refusal, firstly that it was said there was no evidence provided that the marriage was valid and, secondly, it was said the Respondent cannot satisfy the financial requirements as his sponsor will need a gross income of at least £18,600 a year whereas her employment details only revealed an annual income of £5,756.29 which could not be made up by relevant savings. The letter from the sponsor's employer did not comply with the Rules regarding the specified evidence required.
3. The Respondent is a citizen of Kosovo born on the 17<sup>th</sup> August 1975. He acknowledged in the grounds of appeal that his sponsor could not meet the current financial requirements of the Rules but said that if the appeal was allowed he will enter the United Kingdom allowing his sponsor to work additional hours for, as her husband, he is able to help with childcare.
4. The Judge notes that the income revealed by the sponsor was "well short" of the relevant threshold contained in the Rules but indicates that that was "not the end of the matter"[10]. The Judge refers to paragraph EX.1 of Appendix FM which would allow an applicant to succeed if they have a genuine and subsisting relationship with a partner who is in the UK and is a British citizen, settled in the UK or in the UK with refugee leave or humanitarian protection, and that insurmountable obstacles exist to family life with that partner continuing outside the UK exist.
5. The Judge states that in his mind there are insurmountable obstacles in the case and refers to the history at paragraph 12, following which he concludes that absent any finding in relation to insurmountable obstacles it appeared to the Judge that there are, in any event, exceptional circumstances in this case.
6. The Judge then states, in paragraph 14, that even if the Respondent had not succeeded under the Rules he would have needed to have considered the case as a stand-alone Article 8 case. Having found that the parties have a family life recognised by Article 8 the Judge then refers to the case of MM [2013] EWHC 1900 and finds the situation of the Respondent and his sponsor falls within the ambit of that decision. In the conclusions at paragraph 17 the Judge finds "Had I not, then, found for the Appellant under paragraph EX.1 (and/or "exceptional circumstances") I would have held that the decision under appeal was one disproportionate in Article 8 terms."
7. The Secretary of State sought permission to appeal asserting that in paragraph 9 of the determination the Judge finds that on the totality of the evidence the Respondent was unable to comply with the Rules yet thereafter appears to disregard this as a result of which any subsequent finding relating to the Rules is incorrect. The grounds also assert that allowing the appeal under Article 8 ECHR is wrong as the way in which the Judge approached his assessment is contrary to settled law.

8. In relation to the Judge's findings relating to the High Court decision in MM, the grounds assert that this is only a persuasive authority and that in relying upon this case in the way that he did, the Judge has materially erred especially in relation to the proportionality assessment.
9. The grounds also assert that paragraph 17, where the Judge found he would have allowed the appeal under EX1, indicates a further failing in the Judge's thinking as EX.1 is not applicable to entry clearance applications.

### Error of law

10. Before the First-tier Tribunal the Respondent was without legal representation and it appears the Judge did his best to assist the Respondent and his sponsor but, as stated in MG (Serbia and Montenegro) (2005) UKAIT 00113, sympathy for an individual did not enhance a person's rights under Article 8.
11. The Judge recognises that the level of maintenance available was not sufficient to satisfy the minimum required figure set out in the Immigration Rules and also appears to have accepted that, as a result, the requirements of the Rules could not be met. If this is so, the subsequent decision allowing the appeal under the Rules in paragraph 18 of the determination is a material legal error absent other provisions which permit such a decision to be made.
12. It is a legal error to allow an appeal under paragraph EX.1 as a freestanding element of the Rules. This is a challenge to an entry clearance decision and there is no mention of EX 1 in the relevant part of the Rules relating to such an application. See also Sabir (Appendix FM – EX.1 not free standing) [2014] UKUT 63 (IAC).
13. In relation to the approach to the Article 8 issues, it was necessary for the Judge to consider these in accordance with the approach set out by the Court of Appeal in MF (Nigeria) [2013] EWCA Civ 1192, the High Court in Nagre [2013] EWHC 720 (Admin) and by the Upper Tribunal in Gulshan [2013] UKUT 640, as confirmed in Shahzad (Art 8: legitimate aim) [2014] UKUT 00085. These judgments are made it clear that the question of proportionality must be looked at in the context of the immigration rules with no need to go on to a specific assessment under Article 8 if it is clear from the fact is that there are no particularly compelling or exceptional circumstances requiring that course of action to be taken. Such approach was recently confirmed by the Court of Appeal in Haleemundeen v SSHD [2014] EWCA Civ 558.
14. It is arguable that the Judge therefore erred in treating the matter as a stand-alone Article 8 case and going on to consider it outside the Rules and by reference to MF (Nigeria) [2012] UKUT 393 as that case had been overturned by the Court of Appeal, without more. I also find that in placing reliance upon the decision in MM the Judge failed to sufficiently analyse principles in the case or

to conduct a proportionality assessment in which equal consideration was given to the legitimate aim relied upon by the Secretary of State. It is not sufficient to state that had the appeal not been allowed under paragraph EX.1. It would have been allowed on the basis it was disproportionate in Article 8 terms without properly analysing why this should be so, or even whether there was a need to consider Article 8 outside the Rules.

15. I find the above Appellant has established a material legal error in the decision of the Judge. The determination shall be set aside. The findings made regarding the nature of the relationship and the Respondent and his sponsor's circumstances shall be preserved findings.

## Discussion

16. In proceeding to remake the decision the Upper Tribunal was able to hear oral evidence from the sponsor. That evidence related to her financial circumstances in which she confirmed that she did not earn the required £18,600 per annum due to family commitments and so Mr Gushlla could not meet the minimum financial requirements of the Rules.
17. The sponsor has two children who speak Albanian and who recently spent five weeks in Kosovo and enjoyed their visit. The sponsor has family in Kosovo, her mother and father, who the children stayed with whilst she and her husband were able to spend time together.
18. The sponsor entered the United Kingdom in 1999 lawfully with a spouse visa and her children are from that marriage. She and Mr Gushlla grew up in the same area and met when they were younger. Their respective prior relationships and medical issues were also discussed.
19. Such discussion reveals that Mr Gushlla's position remains similar to that which existed at the time of the application to the Entry Clearance Officer, in that the requirements of the Immigration Rules cannot be met. There was a need to identify compelling circumstances outside the Rules and although this appears to be a long-standing relationship with family and issues discussed with the sponsor, it was submitted by Mr Harrison that a lawful decision had been made that the Tribunal was unable to go behind. In relation to Article 8, he submitted this element depended upon the case of MM.
20. In [MM and Others v Secretary of State for the Home Department \[2013\] EWHC 1900 \(Admin\)](#) Blake J held that the Secretary of State for the Home Department's June 2012 amendments to the Immigration Rules HC 395 (as amended) concerning the maintenance requirements for the admission of spouses to the UK, including raising the minimum income level to be provided by a UK sponsor to £18,600, had a legitimate aim in promoting measures that required spouses to be maintained at a somewhat higher level than the bare

subsistence level set under previous interpretations of the Rules. He took the view that when applied to recognised refugees or British Citizens, the measures were so onerous as to be a disproportionate interference with family life, suggesting instead a figure of £13,400.

21. The first issue of note is that the category of applicants Blake J thought were adversely affected by the impact of the new rules was limited and did not include all applicants and secondly, of greater importance, is that the case has been overturned on appeal.
22. In MM(Lebanon) and others [2014] EWCA Civ 985 it was said that in setting the maintenance limits the Secretary of State had "discharged the burden of demonstrating that the interference was both the minimum necessary and strikes a fair balance between the interests of the groups concerned and the community in general. Individuals will have different views on what constitutes the minimum income requirements needed to accomplish the stated policy aims. In my judgment it is not the court's job to impose its own view unless, objectively judged, the levels chosen are to be characterised as irrational, or inherently unjust or inherently unfair. In my view they cannot be".
23. The importance of demonstrating the availability of sufficient funding in the eyes of the United Kingdom government is also demonstrated by the provisions of the Immigration Act 2014 where it is stated that 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.
24. The case of MM was not a challenge to a decision made by a decision maker such as the Entry Clearance Officer but to the lawfulness of the new Immigration Rules themselves, which failed. In relation to the Article 8 "question" the Court stated at para 132:

"...The only difference, when it is an IR that is being challenged in principle, as opposed to an individual *Article 8* decision, is that the "proportionality" questions have to be considered in principle. In that case, it seems to me the test must be whether, assuming the relevant IR constitutes an interference with a Convention right, the IR and its application to particular cases, would be inherently disproportionate or unfair. Another way of putting the test is whether the IR is incapable of being proportionate and so is inherently unjustified."

25. In paragraph 134:

Where the relevant group of IRs, upon their proper construction, provide a "complete code" for dealing with a person's Convention rights in the context of a particular IR or statutory provision, such as in the case of "foreign criminals",<sup>[152]</sup> then the balancing exercise and the way the various factors are to be taken into

account in an individual case must be done in accordance with that code, although references to "exceptional circumstances" in the code will nonetheless entail a proportionality exercise.<sup>[153]</sup> But if the relevant group of IRs is not such a "complete code" then the proportionality test will be more at large, albeit guided by the *Huang* tests and UK and Strasbourg case law.<sup>[154]</sup>

26. The provisions in the Rules relating to those subject to a deportation order were found to be a complete code as they contain a provision for consideration of exceptional circumstances' if the core requirements could not be met. Mr Gishlla's application was refused by reference to E-ECP of Appendix FM which states:

**Section E-ECP: Eligibility for entry clearance as a partner**

E-ECP.1.1. To meet the eligibility requirements for entry clearance as a partner all of the requirements in paragraphs E-ECP.2.1. to 4.2. must be met.

**Relationship requirements**

E-ECP.2.1. The applicant's partner must be-

- (a) a British Citizen in the UK, subject to paragraph GEN.1.3.(c); or
- (b) present and settled in the UK, subject to paragraph GEN.1.3.(b); or
- (c) in the UK with refugee leave or with humanitarian protection.

E-ECP.2.2. The applicant must be aged 18 or over at the date of application.

E-ECP.2.3. The partner must be aged 18 or over at the date of application.

E-ECP.2.4. The applicant and their partner must not be within the prohibited degree of relationship.

E-ECP.2.5. The applicant and their partner must have met in person.

E-ECP.2.6. The relationship between the applicant and their partner must be genuine and subsisting.

E-ECP.2.7. If the applicant and partner are married or in a civil partnership it must be a valid marriage or civil partnership, as specified.

E-ECP.2.8. If the applicant is a fiancé(e) or proposed civil partner they must be seeking entry to the UK to enable their marriage or civil partnership to take place.

E-ECP.2.9. Any previous relationship of the applicant or their partner must have broken down permanently, unless it is a relationship which falls within paragraph 278(i) of these Rules.

E-ECP.2.10. The applicant and partner must intend to live together permanently in the UK.

**Financial requirements**

E-ECP.3.1. The applicant must provide specified evidence, from the sources listed in paragraph E-ECP.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-ECP.3.2.(a)-(d) and the total amount required under paragraph E-ECP.3.1.(a); or
- (c) the requirements in paragraph E-ECP.3.3.being met.

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 as a dependant of the applicant, or has limited leave to enter or remain in the UK;
- (c) not a British Citizen or settled in the UK; and
- (d) not an EEA national with a right to be admitted under the Immigration (EEA) Regulations 2006.

E-ECP.3.2. When determining whether the financial requirement in paragraph EECP.

- 3.1. is met only the following sources will be taken into account-
- (a) income of the partner from specified employment or self-employment, which, in respect of a partner returning to the UK with the applicant, can include specified employment or self-employment overseas and in the UK;
  - (b) specified pension income of the applicant and partner;
  - (c) any specified maternity allowance or bereavement benefit received by the partner in the UK;
  - (d) other specified income of the applicant and partner; and
  - (e) specified savings of the applicant and partner.

E-ECP.3.3. The requirements to be met under 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; or
  - (v) carer's allowance; 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.

E-ECP.3.4. The applicant must provide evidence that there will be adequate accommodation, without recourse to public funds, for the family, including other family members who are not included in the application but who live in the same household, which the family own or occupy exclusively: accommodation will not be regarded as adequate if-

(a) it is, or will be, overcrowded; or

(b) it contravenes public health regulations.

<b>English</b>	<b>language</b>	<b>requirement</b>
E-ECP.4.1. The applicant must provide specified evidence that they-		
(a) are a national of a majority English speaking country listed in paragraph GEN.1.6.;		
(b) have passed an English language test in speaking and listening at a minimum of level A1 of the Common European Framework of Reference for Languages with a provider approved by the UK Border Agency;		
(c) have an academic qualification recognised by NARIC UK to be equivalent to the standard of a Bachelor's or Master's degree or PhD in the UK, which was taught in English; or		
(d) are exempt from the English language requirement under paragraph E-ECP. 4.2.		

E-ECP.4.2. The applicant is exempt from the English language requirement if at the date of application-

(a) the applicant is aged 65 or over;

(b) the applicant has a disability (physical or mental condition) which prevents the applicant from meeting the requirement; or

(c) there are exceptional circumstances which prevent the applicant from being able to meet the requirement prior to entry to the UK.

#### **Section D-ECP: Decision on application for entry clearance as a partner**

D-ECP.1.1. If the applicant meets the requirements for entry clearance as a partner the applicant will be granted entry clearance for an initial period not exceeding 33 months, and subject to a condition of no recourse to public funds; or, where the applicant is a fiancé(e) or proposed civil partner, the applicant will be granted entry clearance for a period not exceeding 6 months, and subject to a condition of no recourse to public funds and a prohibition on employment.

D-ECP.1.2. Where the applicant does not meet the requirements for entry clearance as a partner the application will be refused.

27. The rule does contain what appears to be a complete code in that it sets out mandatory requirements but does not contain any reference to exceptional



circumstances and so, as per the cases referred to above, it is arguable there is a need to undertake a proportionality exercise to ascertain whether exceptional/compassionate circumstances exist as per existing case law.

28. The Upper Tribunal accept there is family life recognised by Article 8 between Mr Gushlla and his sponsoring wife. Even if family life is yet to be established between him and his step-children they form part of the private lives of each other.
29. The family maintain contact by indirect, and when time and funds allow, direct means by visits to Kosovo where there are other family members who are able to assist.
30. I note the emotional impact of separation and the strong desire for this family to be together and of the fact the sponsor is being tested on a quarterly basis to check if she has breast cancer although, to date, her prognosis is negative. The sponsor is to be commended for her devotion to her husband and children and for the assistance she gives, when time permits, to help refugees in the North West with language issues.
31. The Secretary of State's case is as set out above, that unless Mr Gushlla is able to meet the requirements of the Rules admission should be refused as there is nothing exceptional about the case on the facts. When considering whether there are any non-standard and/or particular features demonstrating that maintaining the refusal will be unjustifiably harsh, the Tribunal must find that this has not been proved to be the case on the evidence and material made available, at this time. The sponsor referred to a situation in which she is unable to earn a greater income without her husband being admitted yet he cannot be admitted unless she earns the minimum level of income. I understand this dilemma but it has not been shown that no alternative positions are available or that alternative arrangements cannot be made so as to facilitate the sponsor. If it was established this was the case or she was diagnosed with an illness which required additional support that is not available in the UK it may be different, but that is not the case at the date of the hearing.
32. In Razgar [2004] UKHL 27 Lord Bingham said that decisions taken in pursuit of the lawful operation of immigration control will be proportionate in all save a small minority of exceptional cases identifiable only on a case by case basis. In the context of these comments it is arguable that a decision that accords with the Rules will generally be taken in pursuit of the lawful operation of immigration control.
33. In the case of [AAO v Entry Clearance Officer \[2011\] EWCA Civ 840](#) the Court of Appeal held that, given the weakness of family life and the lack of a positive duty which imposed on the UK an obligation that went beyond making systematic allowance for a right of entry which was governed by carefully

composed Immigration Rules and an overriding consideration of Article 8 on a case-by-case basis, it was not possible to say that there had been a breach of Article 8. As Strasbourg and domestic jurisprudence had consistently emphasised, states were entitled to have regard to their system of immigration control and a requirement that an entrant should be maintained without recourse to public funds was a fair and necessary limitation on what would otherwise be an overwhelming burden on all its citizens.

- 34. Having applied the current case law and the relevant rules, as the 2014 Act has no application to his decision, I find the Secretary of State has discharged the burden of proof upon her to the required standard to prove the decision is proportionate to the legitimate aim relied upon.

**Decision**

- 35. **The First-tier Tribunal Judge materially erred in law. I set aside the decision of the original Judge. I remake the decision as follows. This appeal is dismissed.**

Anonymity.

- 36. 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 direction pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 as there was no request for anonymity which is not justified on the facts.

Signed.....  
Upper Tribunal Judge Hanson

Dated the 4<sup>th</sup> August 2014