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Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/12156/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 11th November 2014	**On 12th December 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE HARRIES

Between

ENTRY CLEARANCE OFFICER

Appellant

And

MR MICHAEL ST GEORGE ANDERSON
(NO ANONYMITY DIRECTION)

Respondent

Representation:
For the Appellant: Mr P Nath, Home Office Presenting Officer
For the Respondent: Ms H Gore, Counsel

DECISION AND REASONS

1. The appellant in the Upper Tribunal is the entry clearance officer (ECO). The respondent in the Upper Tribunal, Mr St George Anderson, is referred to hereafter as the claimant. He was born on 17th November 1976 and is a citizen of Jamaica. The ECO was granted permission to appeal to the Upper Tribunal against the decision of First-tier Tribunal Judge Cohen (the Judge) who, in a determination

promulgated on 23rd June 2014, allowed the claimant's appeal under the Immigration Rules against the ECO's decision to refuse his application for entry clearance to the United Kingdom as the spouse of the sponsor, Mrs Wendy Davis, a British citizen. The ECO's decision was made on 4th June 2013 and was upheld on review after consideration of the grounds of appeal by an entry clearance manager (ECM) on 12th November 2013.

2. After a hearing before me on 3rd September 2014 attended by the sponsor, when the claimant was not represented, I was satisfied that the making of the decision of the First-tier Tribunal involved the making of an error on a point of law and I set aside the decision. The matter was adjourned for the decision to be remade at a continuation hearing before me today because the claimant wished to renew his legal representation and to consider the submission of further evidence.

3. The sponsor appeared again at the resumed hearing and the claimant was represented by Ms H Gore, counsel, who also had conduct of the case before the First-tier Tribunal Judge. I heard oral evidence from the sponsor and submissions on behalf of both parties at the end of which I reserved my decision which is now given with reasons.

4. Under the Immigration Rules the burden of proof is on the claimant and the standard of proof required is on the balance of probabilities. The appeal must be determined on the circumstances appertaining at the date of the decision to refuse.

5. Article 8 of the ECHR provides that:

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
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> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

6. The burden of proof in relation to Article 8 of the ECHR lies with the claimant. He must prove on the balance of probabilities that private or family life is established and will be interfered with as a result of the ECO's decision. Once he has established that he enjoys this protected right which is threatened with violation the burden shifts to the ECO to show that the interference is lawful and in pursuit of a legitimate aim. The ECO must show that the violation is justified and that it does

not impair the right any more than is necessary; in other words, whether the interference is proportionate.

7. The genuine and subsisting relationship between the claimant and sponsor is no longer challenged; it has been conceded and I am satisfied that this is consistent with the evidence. The claimant and sponsor married in Jamaica on 31st August 2012. The issue in the appeal is whether the financial requirements of the Immigration Rules are met. The claimant made his application on 15th March 2013 and needs to show that the sponsor has a minimum gross income of £18,600 per annum.

8. The evidence before the ECO was that the sponsor was in receipt of a student loan and grant from Student Finance England for the 2012/2013 academic year. She was in receipt from this source of a total of £17,128.94 which consisted of £6,855.00 by way of a maintenance loan and grants of £10,273.94. However, under the Immigration Rules the student loan of £6,855.00 could not be taken into account. The necessary specified evidence was not submitted for the payments of the sponsor's grant; her bank statements showing this income were not submitted.

9. Reliance was also placed on rental income received by the sponsor from property owned by her mother, but without evidence of the property or the sponsor's entitlement to the rent. HSBC bank statements submitted in the name of Wendy Davis and Ismay Ferguson showed entries described as rent but the ECO found no independent evidence that the sponsor had declared rental income to HMRC or to Student Finance England as additional income; the latter calculate grant entitlement from household income.

10. Savings held by the sponsor had not been held, as required by the Rules, continuously for the past 6 months at the date of decision and were excluded by the ECO. The calculation of savings needed is not challenged as follows. The sponsor relied upon £6,692.43 by way of savings, which added to the income from grants of £10,273.94 makes £16,966.37. In order to qualify £20,084.00 is needed: £18,600 - £16,966.37 = a shortfall of £1,633.36. The shortfall of £1,633.36 x 2.5 + £16,000 = £20,084.00, namely the required amount. The application was refused under Appendix FM.

11. Ms Gore stated at the outset of the hearing to remake the decision that the claimant's case is now put on the basis of gifts and savings. She called the sponsor, Mrs Davis, to give evidence. Mrs Davis confirmed in answer to my questions that she is expecting the claimant's child which is due to be born in January 2015; she said that she was feeling

well and able to give evidence. She adopted her most recent statement in evidence, dated 27th October 2014, as follows.

12. Her mother is the owner of 4 properties, the rental income from which is paid into an account jointly operated by Mrs Davis and her mother; Mrs Davis has unrestricted access to the income. Her mother has now relocated to Jamaica where she resides permanently; she allows Mrs Davis unrestricted access both to the properties and the account. Mrs Davis states that the rental income for 12 months had exceeded £30,000.00; she asserts that she has complied with the Immigration Rules to meet the income threshold and she and the claimant can overcome any accommodation and maintenance issues without recourse to public funds.

13. In cross-examination the sponsor relied upon submitted documents as evidence of the 4 rental properties, each of which is shown to have Mrs I Ferguson, the sponsor's mother, as the sole proprietor or owner. In her brief oral evidence in chief the sponsor was referred to page 65 of the bundle relating to one of the 4 properties, namely 5 Downscourt Road in London. The document in question is a tenancy agreement dated 10th December 2011 showing a six-month tenancy for a Mrs Carrington and the sponsor to be the landlord. In evidence the sponsor was uncertain about the departure date of this tenant. She recalled that she had, however, struggled to pay her rent and a top-up had been paid by Croydon Council for her.

14. The sponsor stated that she did not have evidence from the council to show this as they do not send statements; she has to go on-line to access the information. At page 35 and the following pages of her recent bundle the sponsor referred to a bank statement in the joint names of herself and her mother and identified rental payments, annotated by her in handwriting, purporting to be from rent on dates in July 2013 and thereafter in August and September 2013. In a short written statement the claimant confirms and adopts the sponsor's statement as his evidence. He states that they meet the requirements of the Immigration Rules and he was surprised and saddened at the refusal of the application by the ECO. He confirms the sponsor's pregnancy by him.

15. Ms Gore stated at the outset of the hearing before me that the claimant's case is now put on the basis of gifts and savings, the gifts being the only matter in issue. It is her submission that the ECO accepted income of £10,273.94 by way of grants as well as £6,000.00 in savings. The £10,273.94 was accepted subject to submission of the necessary bank statements and is no longer challenged. I accept that this is allowable income towards the necessary sum of £18,600. The

savings were not, however, accepted in the absence of the necessary evidence of the length of time for which they had been held.

16. In the grounds of appeal the claimant relies upon the child support payments, child tax credits and child benefits received by the sponsor. The ECM rejected these, correctly so in my view, as they are specifically excluded from income by paragraph 21 of Appendix FM-SE. Loans are no longer argued and I am satisfied that such income is also excluded under paragraph 21 of Appendix FM-SE.

17. It is difficult to unravel the evidence and basis of this appeal as the claimant has been without legal representation for part of the proceedings. The basis of the appeal has changed. The evidence of the sponsor and claimant relies in part on loans and benefits which are not allowed within the Rules. Grant income is now accepted as set out above, but reliance is still apparently placed on rental income. I set aside the First-tier Tribunal decision because the appeal was allowed including rental income which was not in accordance with specified evidence in under Appendix FM-SE. I do not take account of the rental income as there is a continuing failure for it to be supported with such as evidence as set out in paragraph 10 of FM-SE as follows.

> 10. In respect of non-employment income all the following evidence, in relation to the form of income relied upon, must be provided:
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> (a) To evidence property rental income:
>
> (i) Confirmation that the person or the person and their partner jointly own the property for which the rental income is received, through:
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> (1) A copy of the title deeds of the property or of the title register from the Land Registry (or overseas equivalent); or
> (2) A mortgage statement.
>
> (ii) personal bank statements for the 12-month period prior to the date of application showing the rental income was paid into an account in the name of the person or of the person and their partner jointly.
> (iii) A rental agreement or contract.

18. Whether or not the sponsor was shown as the landlord in tenancy agreements the evidence remains that her mother owns the properties, not the sponsor, and they do not therefore qualify. The bank statements to which I was specifically referred at the hearing on behalf of the claimant are after the date of decision. In her final submissions to me at the hearing Ms Gore submitted that the decision of the ECO is

not in accordance with the law because it failed to take into account the evidence, including that of gifts. Ms Gore submitted that the savings of the sponsor were acceptable, but without addressing the issue of how they overcome the insufficiency as set out by the ECO, including the failure to show that they had been continuously held for 6 months. I cannot identify such evidence from all the documents before me.

19. Ms Gore returned in her final submissions to reliance on the rental income which I have rejected for the reasons set out above. In order to circumvent the problem with the need for specified evidence it appears that the rental income is now relied upon as gifts to the sponsor from her mother. The sums are submitted to come within the requirements of Appendix FM-SE as third-party support under paragraph 1(b)(iii) and (e) as follows:

> (b) Promises of third party support will not be accepted. Third party support will only be accepted in the form of:
>
> ….
>
> (iii) gift of cash savings (whose source must be declared) evidenced at paragraph 1(a)(iii), provided that the cash savings have been held by the person or persons at paragraph 1(a)(iii) for at least 6 months prior to the date of application and are under their control.

20. Ms Gore submitted that the rental income is a gift as the sponsor has unfettered access to it and it amounts to over £12,000 per annum, received by way of payments of £1,600 per month. She submits that the addition of this sum to the sponsor's finances brings her within the financial requirements of the Rules. I reject this submission. I am not satisfied that the evidence supports the gifting of cash or meets the requirements of Appendix FM-SE in circumstances in which the case is newly put on this basis because of the failure of the rental income to meet the requirements of Appendix FM-SE. The reality is that the sponsor receives rental income. In a letter dated 8th March 2013 the sponsor's mother states that the sponsor is managing her properties in England and receives £500 - £1,000 per month, depending on what she does. The sponsor may have unfettered access to the rental account but it is nonetheless in join names.

21. I find that the claimant fails to discharge the burden upon him to show the financial requirements of the Immigration Rules to be met. The appeal is alternatively argued on the basis of Article 8 family life. Ms Gore made submissions that the appeal should be allowed in the light of the letter from the sponsor's son and the sponsor's inability to travel because she is in the late stages of her pregnancy. She submitted that

there are exceptional circumstances and the case warrants Article 8 consideration in accordance with the cases of Gulshan (Article 8 – new rules – correct approach) [2013] UKUT 640 and MF (Article8 – new rules) Nigeria [2012] UKUT 00393.

22. Mr Nath, on behalf of the ECO, opposed such consideration and submitted that there are no exceptional circumstances in the case relying on Gulshan and Nagre [2013] EWHC 720 (Admin). Taking account of all the submissions and the review of relevant cases undertaken in the cases of R (Ganesabalan) v SSHD [2014] EWHC 2712 (Admin) and R (on the application of Aliyu & Ors) v SSHD [2014] EWHC 3919 (Admin) I am satisfied that consideration under Article 8 is warranted. The ECO did not consider Article 8 at all and although the ECM did address Article 8 it was without any realistic engagement with the facts of the case.

23. There sponsor has two children whose interests are arguably not taken into account by the Immigration Rules so that a "complete code" is not provided by the Rules. I accept the existence of family life between the sponsor and claimant as husband and wife. There is clearly family life between the sponsor and her children, apparently now living with her in the United Kingdom and arguably between the claimant and those children who have lived with him in Jamaica in the past. If I accept that the first four questions posed in the 5-step Razgar approach can be answered in the affirmative, the legitimate aim being the maintenance of effective immigration controls, the fifth and critical question is of proportionality. Is the interference proportionate to the legitimate public end sought to be achieved?

24. In a written statement before the First-tier tribunal the sponsor states that she has resided in the United Kingdom for over 10 years in accordance with the Immigration Rules. From the time of this undated statement the sponsor states that she visited the claimant in Jamaica a few months ago. She has returned to the United Kingdom and is pregnant by the claimant; precautionary measures against a premature birth on medical advice will require her to rest 3 months into the pregnancy. She will need the necessary support from the claimant at this difficult time. She states that the claimant is of good character and will make a positive contribution to United Kingdom society.

25. The child of the sponsor and claimant has yet to be born. The children whose interests must be taken as a primary are the sponsor's two children who are stated by the claimant on his application form to be British citizens. There was very little oral evidence in support of the Article 8 aspect of the appeal and the recent statements from the sponsor and claimant do not make any reference to the children

involved in this case; nor is any of their previous evidence consolidated in relation to relevant family life issues. As far as I can identify the relevant evidence from the bundles of documents it is as follows.

26. The sponsor was born on 1st August 1972 in Jamaica but is now a British citizen. She appears to have dual nationality as the documents submitted include a copy of a current Jamaican passport held by her. In a letter dated 6th March 2013, not addressed to any person, the sponsor sets out her history with the claimant from the time they met in March 2008, apparently in Jamaica. They dated for 4 months before they lived together in Jamaica during which time claimant assisted with the sponsor's children, namely her son T D-T and her daughter TW; at this time the claimant was helping the sponsor to run her mother's business.

27. In this letter the sponsor states that the claimant eventually took over the role of being a father to her two children and he cared for them alone when she travelled. She returned to live in London to live permanently, on a date not provided, but continued her relationship with the claimant. They made their vows in 2012 and then decided to live in the United Kingdom. This letter concludes with the sponsor stating that her children adore the claimant.

28. The sponsor submits a birth certificate for her son, T D-T, now aged 9 years. He was born in the United Kingdom on 13th April 2005; the birth was registered in 2010 in the United Kingdom at which time the sponsor was living in Croydon. T D-T's father was born in Jamaica. In a letter dated 4th June 2014, not addressed to anyone, T D-T pleads for his stepdad to be allowed "to come and join us in England, he's fun and can help with my homework. Also he can help mum and things will be a lot easier". A birth certificate is submitted for the sponsor's daughter, TW, showing her to have been born on 2nd November 2002 in Croydon. Her father is other than T DT's; he was born in the United Kingdom.

29. The sponsor does not give evidence of the children's best interests, although they will no doubt be served by remaining with her. There is no information at all about their respective fathers or what contact or residence arrangements there may be between them. T D-T's father was born in Jamaica and may perhaps still be there. TW's father was born in the United Kingdom. Both children have their maternal grandmother in Jamaica and they have both lived with the sponsor there. The sponsor gives no evidence of her intentions should the appeal fail. She does not say whether she would return to Jamaica or remain in the United Kingdom. There is no evidence of the likely

impact upon the children should they return to Jamaica with their mother in order to have family life there with the claimant.

30. As British citizens the children are entitled to all the intrinsic value that brings with it, including schooling, health and social care. However, the limited evidence before me does not show that they will be deprived of these benefits as a consequence of the refusal of the application. I take account of the expressed wish of the sponsor's son to have the claimant in the England. However, there is no indication of the wishes of the sponsor's daughter or of the children's position in education, their social and family links within the United Kingdom by way of family or otherwise. In these circumstances I find that the evidence does not show the decision of the ECO to be contrary to the best interests of the children.

31. Moving to the wider balancing exercise in assessing proportionality, I necessarily attach significant weight to the public interest. Section 19 of the Immigration Act 2014 made amendments to the Nationality, Immigration and Asylum Act 2002 by introducing a new Part 5A which contains sections 117A, 117B, 117D and 117D which now apply to this appeal. Section 117B of the Act states that the maintenance of effective immigration controls is in the public interest.

32. In considering the impact of the decision on the claimant and sponsor I take account of the fact that it was the sponsor's choice to leave Jamaica and to return to live in the United Kingdom with her children, leaving the claimant behind in Jamaica with no certainty that he would be able to join them. I accept that the sponsor is unable to travel at the moment because of her pregnancy but this is a temporary situation. She has maintained contact by visits previously and there is no apparent bar to the claimant visiting her and the children in the United Kingdom.

33. I take account of the content of a letter dated 8th March 2013 from the sponsor's mother supporting the claimant's appeal. She states that she first met him in 2008; he has worked and lived with her, helping out as a bartender and cook in her bar and restaurant in Jamaica. She states that since then he has shown himself to be a dedicated husband, a hard-working and trustworthy young man.

34. I necessarily take into account the fact that the requirements of the Immigration Rules have not been met. However, it remains open to the claimant to make a renewed application for entry clearance; the merits of such an application may in due course include the birth and presence in the United Kingdom of his expected child. Taking account, as I must, of the factors set out in section 117B of the 2002 Act, in his

favour the claimant is presumably English-speaking. He does not, however, show himself to be financially independent.

35. Whilst the claimant has a genuine and subsisting parental relationship with qualifying children, it is not clear whether the children have such a relationship with their own fathers, or where they may be. In the light of all the relevant factors, including the sponsor's heritage and blood ties in Jamaica, the fact that the children have lived there previously, the evidence in my view does not show that it would not be reasonable to expect the children to leave the United Kingdom. Weighing all the factors in the balance and returning to the public interest I find that any interference caused by the decision of the ECO is proportionate to the legitimate public end sought to be achieved. The appeal fails on Article 8 ECHR grounds.

Notice of Decision

36. The appeal is dismissed under the Immigration Rules.

37. The appeal is dismissed under Article 8 of the ECHR.

38. The appeal of the ECO in the Upper Tribunal succeeds.

Anonymity

The position remains that the First-tier Tribunal made no anonymity order.

Signed: J Harries

Deputy Upper Tribunal Judge
Date: 8th December 2014

Fee Award

The fee award made in the First-tier Tribunal falls away in the light of the dismissal of the claimant's appeal in the Upper Tribunal.

Signed: J Harries

Deputy Upper Tribunal Judge
Date: 8th December 2014