



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/07537/2013

**THE IMMIGRATION ACTS**

Heard at Field House  
On 02 October 2013

Determination Promulgated  
On 06 December 2013

Before

THE HON. MR JUSTICE COLLINS  
SITTING AS A JUDGE OF THE UPPER TRIBUNAL  
UPPER TRIBUNAL JUDGE PERKINS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

AMALA NZEWI

Respondent

**Representation:**

For the Appellant: Mr I Jarvis, Home Office Presenting Officer

For the Respondent: Ms S Pinder, instructed by Owens Solicitors

**DETERMINATION AND REASONS**

1. The respondent is a citizen of Nigeria born on 13 December 1984. Having entered the United Kingdom with a student entry clearance on 16 September 2008, he was granted extensions until 13 October 2012. On 10 October 2012 his solicitors on his behalf made an application for leave to remain as the spouse of a British citizen. This

application was refused on 11 February 2013. His appeal was allowed by First-tier Tribunal Judge Ghaffar on 25 July 2013. The Secretary of State for the Home Department was given leave to appeal on 15 August 2013.

2. The respondent formed a relationship with the lady who is now his wife in 2010 and they were married in 2012. She is 28 years old. She is a British citizen who has lived all her life in this country and her whole family are here. She retains close ties with her family and would not want to be parted from them. There is no suggestion that this is other than a genuine marriage and that both husband and wife intend to live together permanently.
3. The Rules lay down detailed requirements which have to be met to justify leave to enter or to remain on the basis of marriage. The relevant ones for the purposes of this appeal relate to financial assets available to the spouses and whether there is a possibility of maintaining family life outside the United Kingdom. The relevant financial provision is a requirement that there is a specified gross annual income of at least £18,600 (see E-LTRP 3.2 of the Rules). Paragraph EX1 applied and, so far as material, it provides:-

“(b) the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen... and there are insurmountable obstacles to family life with that partner continuing outside the UK.”

This purports to deal with whether it would be proportionate in terms of Article 8 of the ECHR to refuse leave to remain in the UK where family life has been established.

4. The gross incomes of the respondent and his wife amounted to £17,836. Thus they failed by some £724 to meet the required sum of £18,600. The refusal letter went on to consider family life within Article 8 but, applying EX1, it was said that there was a failure to satisfy the EX1 requirements because:-

“...there are no insurmountable obstacles to family life with that partner continuing outside the UK.”

The decision letter went on to consider whether the respondent had any private life claim but, applying paragraph 276ADE of the Rules, decided that he failed to meet the requirements and so any such claim must fail. It is not necessary to consider private life since the respondent has not based any claim upon it. He relies on his family life established here with his wife.

5. The refusal of his application is clearly an interference with his and, perhaps more importantly, his wife's right to family life. The contrary has not been suggested by the appellant. Thus the burden rests upon the appellant to justify that interference. Article 8(2) allows interference only if it 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 freedom of others.”

6. On the facts of this case, the only material ground relates to the economic well-being of the country. That entitled the appellant to ensure that there are sufficient funds available to avoid married couples where one party is not a British or UK citizen needing to have recourse to any form of public funding. The amount of £18,600 as income is designed to ensure that there is no such recourse. In a recent decision R (MM & Others) v Secretary of State for the Home Department [2013] EWHC 1900 (Admin) Blake J considered the Rules relating to partners joining or remaining with British citizens. He was persuaded that the figure of £18,600 was not justified. It was apparently reached following advice from the Migration Advisory Committee as a figure which, albeit significantly in excess of the minimum wage amounts, precluded any grant of public funds including housing benefit. He decided that the combination of the financial requirements set out in the Rule was beyond a reasonable means of giving effect to the legitimate aim provided for by Article 8.2.
7. Blake J received some evidence from the appellant to seek to explain why the amount of £18,600 was specified. A level of income above the basic subsistence level for income support was needed to provide, as the witness before Blake J stated, ‘a reasonable degree of assurance that UK based sponsors and their migrant partner could support themselves and any dependants financially over the long-term and that the migrant partner’s integration in the UK would not be inhibited by lack of financial resources’.
8. The Supreme Court has made it clear in Quila v Secretary of State for the Home Department [2012] 1 AC 241 that an inability of a British citizen to continue to reside in the UK because he or she has entered into a marriage or permanent relationship with a foreign citizen is an interference with that citizen’s right to family life and right to live in the country of his or her nationality. Financial self-sufficiency is, as Blake J indicated at paragraph 100 of his judgment, a legitimate consideration.
9. In our view, the criticisms levelled by Blake J at the financial requirements in the Rules are entirely persuasive. However, we were informed that MM is under appeal. As will become clear, it is in our judgment not necessary to determine this case by refusing to apply the amounts in the Rule.
10. The fundamental point is that it is not for the appellant in the Rules, even though they are approved by Parliament, to dictate what is proportionate within Article 8.2 for all cases. The Tribunal and the courts will give considerable weight to the requirements set out in the Rules but they must decide for themselves whether on the facts of an individual case a refusal to allow a genuine partner to remain in the UK is proportionate. It may be that in many, probably the majority of cases, a failure to meet the requirements of the Rules will mean that a refusal is proportionate. But it

is incumbent upon the judicial decision makers to consider whether on the facts of an individual case such a refusal is indeed proportionate.

11. We accept that, as the Tribunal recognised in MF (Nigeria) [2012] UKUT 00393 (IAC), the Rules can properly be said to indicate the view taken of the public interest in relation to the interference with family life caused by the Rules. This, as we accept, means that a failure to meet the requirements of the Rule is a very significant consideration in reaching a conclusion on proportionality. Nevertheless, there is a duty to consider whether a refusal is in all the circumstances proportionate.
12. The second requirement which the respondent was said to have failed to meet lay in the failure to show that there was an insuperable obstacle to the couple residing in Nigeria. We are far from satisfied that there is a burden on an applicant to demonstrate that there is an insuperable obstacle.
13. First, it is far from clear that that is the correct test to apply when considering proportionality. While there is some indication that the ECtHR may be leaning towards that test, the decision of the House of Lords in Huang v Secretary of State for the Home Department [2007] 2 AC 167 establishes the test to be applied in the UK. In paragraph 20 of the committee's opinion delivered by Lord Bingham, this is said:-

“In an Article 8 case... the ultimate question for the appellate immigration authority is whether the refusal of leave to enter or remain, in circumstances where the life of the family cannot reasonably be expected to be enjoyed elsewhere, taking full account of all considerations weighing in favour of the refusal, prejudices the family life of the applicant in a manner sufficiently serious to amount to a breach of the fundamental right protected by Article 8. It is not necessary that the appellate authority... need ask in addition whether the case meets a test of exceptionality.”

Lord Bingham indicates that it was to be expected that the number of claimants not covered by the Rules as they then existed would be a very small minority.

14. An 'insurmountable obstacle' test seems to go beyond what is comprehended by a test based on whether family life can reasonably be expected to be enjoyed elsewhere. However, it is not necessary for us to decide whether the 'insurmountable obstacle' test is appropriate since proportionality can be decided outside the Rules if the circumstances so dictate.
15. There is however a second concern. As we have said, it is clear that the burden rests on the appellant to show that the interference with family life is proportionate. To set financial requirements or, for example, a need for an ability to understand, read and converse in English to a particular level and to follow the requirements of society here, produces no difficulty. However, merely to assert that there is no insuperable obstacle putting the burden on an applicant to establish that there is seems to us to impose an unjustifiable burden on an applicant. An applicant whether for leave to

enter or remain has to answer questions whether at interview or in writing. It would be simple for questions to be included which deal with whether there is any such obstacle. The appellant would then be able to judge whether the applicant qualified.

16. As we have said, the decision letter stated:-

“It has... been determined that there are no insurmountable obstacles to family life with that partner continuing outside the UK.”

On the facts of this case, both husband and wife were working in this country. The respondent's wife (whose rights should have been given separate consideration as a British citizen having not only a right to enjoy family life but to be able to live in her native country) had no knowledge of or connection with Nigeria. Neither husband nor wife had a job there so that it would, apart from the personal difficulties created by that lack of employment and income, not be unexpected if Nigeria refused entry to the respondent's wife. It clearly would if it applied immigration laws which were anything like our laws. Furthermore, the inability to live together here having regard to the respondent's wife's background and family ties would inevitably put a great strain on the marriage.

17. Again, we do not need to decide for the purposes of this appeal whether the failure to obtain any information from the respondent does show an unlawful imposition of a burden on the respondent. We are content, despite our concerns, to approach this case, as Judge Ghaffar did, on the basis that there was a failure to meet the lawful requirements of the Rules.

18. Since the financial requirements are aimed at ensuring that there is no likelihood of recourse to public funds, it is pertinent to consider the full circumstances. The respondent fell short of the £18,600 by a relatively small amount. The parties were both working and there was no suggestion that there had been any recourse to public funds nor that there was or would be a need for any such recourse. Whatever may have been the reasoning which led to the imposition of the figure of £18,600, it clearly was too high so far as this couple was concerned. Judge Ghaffar in our view correctly observed:-

“The earnings of the couple amounts to adequate maintenance and this not a situation when the couple are required to live below what is generally acceptable standard – the income support level.”

19. Judge Ghaffar concluded that there were a number of positive factors which persuaded him that refusal of the respondent's application would be disproportionate. We are satisfied that he was entitled to conclude as he did. It was obvious albeit there was no evidence which dealt specifically with it that to make the couple live in Nigeria (assuming that was possible) would create serious difficulties for the respondent's wife in particular and would inevitably place a great strain on the marriage. Even though great weight was to be accorded to the criteria set out in

the Rules, this was an example of a rare case in which in all the circumstances to find that the Article 8 rights prevailed was justified.

20. We can only allow an appeal if persuaded that the First-tier Tribunal's decision was vitiated by an error of law. While we have raised issues which in our view suggest that the Rules and practice as they stand may be unsatisfactory, we have reached our decision taking the Rules at face value. While it may be that Judge Ghaffar's reasoning and in particular his reliance on MM may not have been entirely correct, we are satisfied that the decision allowing the respondent's appeal was not wrong in law. Quite the contrary: we are satisfied that it was correct and we would have reached the same conclusion.
21. The appeal is accordingly dismissed.

Signed:

Date: October 2013

Mr Justice Collins  
Judge of the Upper Tribunal