



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/17191/2013

## THE IMMIGRATION ACTS

Heard at: Field House  
On 29 August 2014

Determination Promulgated  
On 10 September 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE J F W PHILLIPS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

AYAN MOHAMED OSMAN  
(anonymity direction not made)

Respondent

### Representation

For the Appellant: Mr S Whitwell, Home Office Presenting Officer  
For the Respondent: Mr A Masood, Aden & Co

## DETERMINATION AND REASONS

1. This is an appeal by the Secretary of State against the determination of First-tier Tribunal Judge Troup in which he allowed the appeal of Ms Osman, a citizen of Somalia, against the Entry Clearance Officer's decision to refuse to grant leave to enter as the spouse of the sponsor Faisal Ali who is a British citizen. I shall refer to Ms Osman as the Applicant, although she was the Appellant in the proceedings below.

2. The application under appeal was made on 22 July 2013 and was refused by reference to paragraph EC-P.1.1 of Appendix FM of the Immigration Rules (HC395) on 1 August 2013. The Applicant exercised her right of appeal to the First-tier Tribunal. This is the appeal which came before Judge Troup on 11 June 2014 and was dismissed by virtue of the Immigration Rules but allowed by reference to Article 8 of the Human Rights Convention. The Secretary of State applied for permission to appeal to the Upper Tribunal. The application was granted by First-tier Tribunal Judge Chambers on 3 July 2014 in the following terms

The grounds seeking permission submit that an Article 8 assessment should only be carried out when there are arguably exceptional circumstances not recognised by the Immigration Rules.

The necessary requirements set out in the grounds were not addressed in the decision. A failure to give sufficient reasons amounts to an error of law.

3. At the hearing before me the Applicant was represented by Mr Masood who submitted an appeal bundle. Mr Whitwell appeared to represent the Secretary of State.
4. At the outset of the hearing I asked the representatives whether it was accepted that the minimum income requirement referred to in paragraphs 19 and 22 of the determination as £22,400 was in fact £18,600 as the Applicant's child is British. Both agreed that this was the case. Mr Masood conceded that the Sponsor's income at the date of decision could only be shown to be £17,400 as he was unable to provide the required evidence to demonstrate the higher figure put forward in the entry clearance application. Mr Masood also accepted that the Applicant did not meet the English language requirements of the immigration rules.

### **Background**

5. The Applicant was born in Somalia on 10 March 1990 and presently resides in Addis Ababa, Ethiopia. The Sponsor, also from Somalia, is the Applicant's cousin. He arrived in the United Kingdom in 1992 and is a British Citizen. The Applicant and the Sponsor began a relationship in 2009, they met for the first time in 2010 and they married in Yemen on 25 August 2010. The Applicant first made an application for entry clearance to join the Sponsor in the United Kingdom the month after their marriage but this did not progress as the British Embassy in Yemen closed. On 19 May 2011 the Applicant gave birth to the couple's son, Mohamed Faisal Ali, in Yemen. The application under appeal was made to the Entry Clearance Officer in Addis Ababa on 22 July 2013. It was refused because the Entry Clearance Officer did not accept that the couple had met, that they were validly married, that their relationship was genuine and subsisting or that the Applicant met the English language requirements of

the Immigration Rules. No assessment of whether the Applicant met the minimum income requirements of the Immigration Rules was made.

6. At the hearing before the First-tier Tribunal evidence was presented pertaining to the marriage and its subsistence including DNA evidence confirming that the child was related as claimed to both parents. The First-tier Tribunal's finding that that this is a genuine and subsisting marriage is not challenged before me. Similarly, and as confirmed above, the finding that the Applicant does not meet the requirements of the Immigration Rules concerning maintenance and English language is not challenged.

### **Submissions**

7. On behalf the Secretary of State Mr Whitwell relied on the grounds of appeal to the Upper Tribunal. He said that there were two issues. In the first place the determination makes no finding of arguable, exceptional or compelling circumstances justifying the consideration of the appeal outside the terms of the Immigration Rules in accordance with Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 640 (IAC). Nothing in paragraphs 20 to 22 of the determination could be said to be an implicit reference to such a finding. Secondly and in any event the proportionality finding in paragraph 22 of the determination is inadequately reasoned. I was referred to paragraphs 134 and 135 of MM (Lebanon) [2014] EWCA Civ 985 and to AAO v ECO [2011] EWCA Civ 840.
8. For the Appellant Mr Masood said that the Judge must have considered Gulshan. The case was referred to in submissions and a copy of the case, handed to the Judge, was on the Court file. Paragraph 22 of the determination clearly details exceptional circumstances. I was reminded that the First-tier Tribunal is a specialist Tribunal, as such the Judge should be presumed to have directed himself to the relevant case law even if he did not specify this. I was referred to AH (Sudan) v SSHD [2007] EWCA Civ 297 and R (Iran) v SSHD [2005] EWCA Civ 982. So far as proportionality is concerned the Judge has considered all of the circumstances. In particular the Appellant's British citizen child is only two years old and the Sponsor's income of £17,400 is sufficient for him to maintain his wife. Ms Masood accepted that the Sponsor may be able to increase his income if there was a subsequent application but, as he explained in his witness statement the Applicant has been living in Ethiopia illegally with her two year old child and as such would be unable to study for the English language test.

### **Error of law**

9. In my judgement the decision of the First-tier Tribunal discloses a clear and material error of law. Having found that the Applicant did not meet the requirements of the Immigration Rules the determination moves on to a consideration of Article 8 ECHR without any explanation of why it was necessary to do so. The determination does not make any reference to Gulshan or indeed Nagre v SSHD [2013] EWHC 720 (Admin), upon which Gulshan was founded, and whilst it is not necessary for a Judge to make specific reference to the source of the case law that he follows it is necessary to show that he is following the principles of that case law. The determination patently does not do that. The necessity to do so is readily apparent where the rules provide a complete and achievable code. In the circumstances of this appeal they do. The Applicant failed to meet the requirements of the Immigration Rules for two very specific reasons. The first was that she did not meet the English language requirements of the Rules and the second was that she did not, through her sponsor, meet the minimum income requirements.
10. It is not in my judgment necessary to go on to consider the issue of proportionality at this stage because the error of law in failing to follow the established case law is material to the decision to allow the appeal. I set aside the decision of the First-tier Tribunal.

### **Remaking the decision**

11. In remaking the decision the first aspect to consider is whether there are sufficient reasons to conduct an Article 8 exercise. The Court of Appeal in MM (Lebanon) rejected at paragraph 128 the “arguably good grounds” test from Nagre which is repeated in Gulshan. MM (Lebanon) adopted a simple approach – if the rule or rules constituted a complete code then there is no need for an Article 8 proportionality test.

133. . . . a particular IR does not, in each case, have to result in a person's Convention rights being "guaranteed". In a particular case, an IR may result in a person's Convention rights being interfered with in a manner which is not proportionate or justifiable on the facts of that case. That will not make the IR unlawful. But if the particular IR is one which, being an interference with the relevant Convention right, is also incapable of being applied in a manner which is proportionate or justifiable or is disproportionate in all (or nearly all cases), then it is unlawful.

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", 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. 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.

12. The question therefore will not normally be whether the Immigration Rules are compliant with the requirements of Article 8 ECHR but rather whether the application of those rules in a particular case results in a breach of Article 8. Where a judge finds that the requirements of the rules are not met then before going on to conduct what was described in Gulshan as a freewheeling Article 8 exercise the question of why the application of the rules is insufficient must at least be considered.
13. So far as the particular circumstances of this matter are concerned it is apparent that the rules do constitute a complete code. The code has a number of parts and the Applicant falls short on two of them. If the Applicant can meet the English language and maintenance requirements then her entry clearance application will be successful. The fact that these are specific and potentially remediable requirements emphasises not merely the completeness of the code but also the illogicality of looking outside that code. It may still be arguable that where it is impossible for an applicant to meet the requirements of the Immigration Rules then it is right to look at why it is impossible to meet the rules and balance the public interest in meeting the requirements of the rules against the particular circumstances of the applicant. However where it is within the reasonable capability of the applicant to meet the requirements of the rules it is difficult to see how there can be any justification in departing from them. In this case Mr Masood accepts that it is possible for the Sponsor to earn more money to meet the minimum income threshold. Indeed this is borne out by the fact that it was his case, in terms of the application and the appeal to the First-tier Tribunal, that with full and part time work the amount he earned was in excess of the now accepted minimum requirement of £18,600. The problem was that he was not able to provide the specified evidence. In respect of the English language requirement Mr Masood submitted, without any evidential basis, that it was difficult for a single mother living in Addis Ababa without a right of residence to undertake and pass the required English language course. I do not accept that this assertion, made I emphasise without any evidential basis, is correct. Indeed it is to be hoped that in the year or more that has now passed since the making of this application for entry clearance the Applicant will have been undertaking English language studies with a view to submitting a new application which will meet the requirements of the Immigration Rules.
14. If it were necessary to consider the Applicant's situation outside the terms of the Immigration Rules then, as identified by the First-tier Tribunal Judge, the first four elements of the five stage test set out by Lord Bingham in Razgar [2004] UKHL 27 can be quickly dealt with. The

Applicant shares a family life with the Sponsor and their child. The refusal of entry clearance prevents the immediate continuation of that family life so the consequences of the decision are of sufficient gravity to engage the Convention. The decision being in accordance with the Immigration Rules is made in pursuance of a legitimate aim. So far as proportionality is concerned the public interest in meeting the requirements of the Immigration Rules must be balanced against the elements set out in paragraph 22 of the First-tier Tribunal Judge's decision. There are however two elements omitted from that balance. The first is the remediable nature of the failure to meet the requirements of the rules. The effect of this is that there is no reason why the separation caused by the decision needs to be long term. This diminishes the weight to be given to the positive elements in the balance. The second is that with my decision being made after the implementation of section 117 of the Nationality Immigration and Asylum Act 2002 the nature of the public interest as decided by parliament has to be given specific regard. In this respect positive weight is given by the fact that the Sponsor, although not earning sufficient to meet the requirements of the Immigration Rules does appear to earn sufficient to support his family. The fact that the Appellant does not speak English means that no positive weight can be given in this regard.

15. The fact that the Appellant lives in Ethiopia with her British citizen child does not in my judgement have any significant bearing on the proportionality balance. There was no evidence before either the First-tier or the Upper Tribunal that the child is adversely affected in any particular way. In general terms it is usually in a child's best interest to reside with both parents but this is a very young child who has been in the day to day care of his mother the Applicant since birth. Children often live with only one parent for extended periods of time without adverse consequences. In this case the unification of the family is delayed only by the failure of the Applicant to meet two specific and remediable elements of the Immigration Rules. Paragraph 162 of MM (Lebanon) is a reminder that

... there is no legal requirement that the IRs should provide that the best interests of the child should be determinative. **Section 55** is not a "trump card" to be played whenever the interests of a child arise.

16. In my judgement taking all of these matters into account the decision of the Entry Clearance Officer is not a disproportionate interference in the family life of the Applicant. The prime reason for this is that the Applicant whilst failing to meet the requirements of the Immigration Rules has failed to demonstrate either that she will not be able to meet those requirements in a subsequent application or that her separation from her Sponsor until she meets those requirements has any specific adverse consequences.

**Summary**

17. The decision of the First-tier Tribunal involved the making of a material error of law. I set aside that decision.
18. I remake the decision by dismissing the Applicant's appeal both by virtue of the Immigration Rules and Article 8 of the Human Rights Convention.

**Signed:**

**Date:**

**J F W Phillips  
Deputy Judge of the Upper Tribunal**