



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/09992/2013

THE IMMIGRATION ACTS

Heard at Field House
On 2 March 2015

Decision & Reasons Sent on:
On 5 March 2015

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

ENTRY CLEARANCE OFFICER - CAIRO

and

DAVID ALI SHEIKH NUR
(NO ANONYMITY ORDER MADE)

Appellant

Respondent

Representation:

For the Appellant: Mr C Avery, Senior Home Office Presenting Officer
For the Respondent: Ms L Akande of Counsel

DECISION AND REASONS

1. This is an appeal with permission by the Secretary of State from the decision of First-tier Tribunal Judge Robinson, who allowed the claimant's appeal against refusal of entry clearance as a spouse. It was accepted that the claimant could not bring himself within the Article 8 ECHR provisions at Appendix FM and paragraph 276ADE of the Immigration Rules HC 395 (as amended). The First-tier Tribunal allowed the appeal on Article 8 ECHR grounds outside the Rules.

2. The facts are not in dispute. The claimant is a Somali citizen and his United Kingdom citizen spouse is of Somali origin. She is a recognised refugee and cannot be expected to go and live in Somalia with the claimant. The parties married in Egypt in 2012.
3. On 30 January 2013, the claimant applied to the Entry Clearance Officer in Cairo, Egypt, for entry clearance to enable him to join the sponsor in the United Kingdom. The sponsor's income was insufficient to meet the requirements of the Rules and the parties did not have the required savings to make up the shortfall. The application was refused. In the decision under appeal the Secretary of State said as follows:

"Your sponsor is not exempt from the financial requirements as defined by paragraph E-ECP 3.3. I am not able to take into account any potential employment you have available to you in the UK or any offers of financial support from third parties. In order to meet the financial requirements of the Rules your sponsor needs a gross income of at least £18,600 per annum. From the evidence provided your sponsor's gross income from her employment with Wellfield Education and New Look totals £11,538.30. In order to qualify you and your sponsor require $£7,061.7 \times 2.5$ plus £16,000 equals £33,654.25 in savings in order to meet the financial requirements. You have provided evidence that you have £6,256 in savings, however you and/or your sponsor have not held it continuously for the past six months and this amount is not sufficient to meet the financial requirements. I therefore refuse your application under paragraph ECP-1.1.(d) of Appendix FM of the Immigration Rules (E-ECP 3.1)."

The claimant does not dispute that that is a fair assessment of his application under the Rules and that he could not meet the Rules.

4. The claimant is living in Egypt where he is a student. He does not have employment there. Since their marriage, the sponsor has visited him twice, and also investigated the possibilities of working in Egypt if she joined him. It has not been suggested on the parties' behalf that she would not be permitted to live with the claimant in Egypt; rather, the claimant contends that as she is settled in the United Kingdom and has employment and family members here, it is unreasonable to expect her to do so. The sponsor's statement is set out in full at paragraph 9 of the determination and at paragraphs 15 to 18 she says this:

"15. Since my wedding took place in 2012 I have visited my husband on two occasions to meet him. The copies of my passport containing entry/exit stamps are included in the bundle 15. I could not stay for longer periods with husband in Cairo due to my employment commitments.

16. My husband is currently unemployed because he cannot engage in long-term employment commitments. He intends to start in employment immediately upon arrival in the UK.

17. My husband is fluent in Arabic, English and Somali languages and his prospects for employment are extremely high.

18. I keep in contact with my husband on the phone, emails and using Skype. I use Vonage for calling my husband in Cairo and the billing is shown in the bank statement.”
5. I am grateful to Ms Akande for her skeleton argument on behalf of the claimant which explains clearly at paragraphs 29-30 thereof, the circumstances relied upon on behalf of the claimant and sponsor as exceptional, and which she considered formed the basis of their successful appeal in the First-tier Tribunal. The circumstances are as follows: the claimant is a Somali citizen with limited leave to reside in Egypt, but no right of permanent residence there; the couple depend wholly on the sponsor’s income from her United Kingdom employment; the claimant is unemployed; the relationship between the claimant and sponsor; the unreasonableness of expecting the sponsor to give up her home and work in the United Kingdom, coupled with the lower likelihood of her finding employment in Egypt; the claimant’s three languages and good qualifications, which would enable him to find work easily in the United Kingdom; the level of the sponsor’s post-decision earnings, such that the couple are ‘financially self-sufficient’ and would now be able to meet the requirements of the Rules; the unlawfulness of expecting the sponsor, a refugee, to live with the claimant in Somalia; the sponsor’s private and family life and the lack of any family, social or cultural connections between the claimant, or the sponsor, and Egypt; the distress, hardship, cost and delay of any further application; and the maintenance of fair immigration control. Ms Akande contended that since the First-tier Tribunal Judge had mentioned the Home Office entry clearance guidance, he must have had regard to it, despite there being no further mention of it in his decision.
6. It is difficult to see what is exceptional about those factors. Many couples marry when one of them lives overseas and the other is in the United Kingdom. Sometimes difficult decisions will have to be made if they are unable to show the level of income which the Rules require, as to whether to continue to live separately or to live together in a country where they can do so, but in less convenient circumstances, and with the United Kingdom citizen leaving wider family members behind. These are the ordinary circumstances of a marriage contracted between nationals of different states. It is not suggested now, and it was not suggested at the hearing, that there was any legal obstacle to the sponsor going to Egypt to live with the claimant. The claimant is a highly qualified man who would be an asset to any employer once he decides to seek employment.
7. The core reasoning in the First-tier Tribunal determination is set out at paragraphs 35 to 39 thereof:
- “35. It is apparent that this couple are unable to live together in Somalia due to the sponsor’s refugee status. This was accepted on the respondent’s behalf at the appeal hearing.
36. I take the view that it would be unreasonable to expect the appellant and his wife to live in Egypt. It is apparent from his visa that the appellant has limited leave to live there. He went to Egypt to study. It is unknown whether the sponsor would qualify for a visa to live in Egypt and even if she were given leave to enter

it is very doubtful whether she would be able to find work there. Any move to Egypt would of necessity involve her giving up her work and home in the UK. Her parents and siblings reside here and are British citizens. Her family life outside her marriage is entirely based in the UK. Neither she nor her husband appears to have any family, cultural or societal connection to Egypt.

37. The respondent's right to maintain consistent and fair immigration controls is an important right which in most cases outweighs the right of an individual's right to enjoy family life in their country of choice. I have taken account of the findings of the High Court in *MN* relating to the financial requirements of the Immigration Rules which apply to British citizens and recognised refugees. I was informed at the hearing that an appeal by the Secretary of State is pending in the Court of Appeal.
38. When assessing the circumstances of the appellant and his spouse in the present case I take the view that based on their circumstances at the time of the decision to refuse the application they are financially self-sufficient. At the time of the appeal hearing their circumstances are such that the appellant satisfied the financial requirements of the Immigration Rules based on his wife's apparent earnings.
39. I considered whether it would be right to dismiss the appeal in the expectation that the appellant submit a fresh application which is likely to succeed. I take the view that this would involve significant additional cost and some delay. I consider that this course of action would involve hardship and distress which is unnecessary and not in the interests of justice."

The First-tier Tribunal Judge unfortunately did not engage with the guidance given by Mr Justice Sales (as he then was) in *Nagre* before concluding at paragraph 40 that the circumstances of the claimant and his spouse are exceptional and the decision to refuse entry clearance disproportionate.

8. There are two plain errors of law in the passage which I have just quoted, the first being the absence of a disciplined consideration of *Nagre* exceptionality, that is to say, the circumstances under which the Secretary of State's should exercise her residual discretion under Article 8 outside the Rules, and the second the reliance on the couple being 'financially self-sufficient' at the date of decision.
9. In relation to Article 8 outside the Rules, the failure to consider and apply the guidance in *Nagre* and subsequent cases which deal with exceptional circumstances has led the judge to conclude that the circumstances of these parties are such as to entitle them to the exercise of discretion outside the Rules. That was an error, and it is material, since had he given consideration to the question whether the circumstances of the parties were 'exceptional and compelling', in my judgment he could not properly have concluded in the claimant's favour. The parties married when the claimant was studying in Egypt. There is no evidence from the claimant as to why with his talents, he could not work there, or that his wife cannot join him in Egypt as it appears she has contemplated doing.

10. As regards the financial position of the claimant and sponsor at the date of application, applying the decision of the Court of Appeal in *MM & Ors, R (On the Application Of) v Secretary of State for the Home Department* [2014] EWCA Civ 985, the Secretary of State was entitled to set an income level which must be met by a sponsor wishing to be joined by her husband. At paragraphs 138-139 and 151 in the judgment of Lord Justice Aikens, he said this:

“138. ... The UK partner's statutory right to reside in the UK "without let or hindrance" is, in my view, a personal right. It cannot be extended to others. Nor can the rights of a person with refugee or HP status be extended to others. There is nothing in the 1971 Act or the common law that grants a "constitutional right" of British citizens to live in the UK with non-EEA partners who do not have the right of abode in the UK and who are currently living outside the UK. Of course, I accept that the UK partner (whether a UK citizen or a refugee or person with HP) is entitled to respect of his or her right to marry and to found a family. But those are not absolute rights; there is no absolute right to marry and found a family *in the UK* if it involves marriage to a non-EEA citizen who then wishes to reside in the UK. In *Quila* Lord Wilson accepted that the principle stated by the majority of the ECtHR in *Abdulaziz*, to the effect that *Article 8* did not impose a general obligation on a member state to facilitate the choice made by a married couple to reside in it, was "unexceptionable". With respect, I agree. In *Quila* the obstruction on the married couple exercising their choice of where to live was created by the total ban on marriage visas for those under 21. It was this total ban on all marriages with a non-EEA citizen under the age of 21 which constituted "a colossal interference" with *Article 8* rights.

139. In this case the obstruction on the choice of the married couple (or on two partners) to live in the UK is a financial one which effectively prevents all UK partners whose earnings and savings are below a certain amount (as calculated by the new MIR) from being able to sponsor the entry of their non-EEA partner. The new MIR must therefore constitute a very significant interference with the *Article 8* rights of a UK partner who cannot fulfil the new MIR conditions. Whether or not, in law, the non-EEA partners have "*Article 8* rights", plainly their private and family lives are affected if their UK partners cannot fulfil the requirements. ...

151. I am very conscious of the evidence submitted by the claimants to demonstrate how the new MIR will have an impact on particular groups and, in particular, the evidence that only 301 occupations out of 422 listed in the 2011 UK Earnings data had average annual earnings over £18,600. But, given the work that was done on behalf of the Secretary of State to analyse the effect of the immigration of non-EEA partners and dependent children on the benefits system, the level of income needed to minimise dependence on the state for families where non-EEA partners enter the UK and what I regard as a rational conclusion on the link between better income and greater chances of integration, my conclusion is that the Secretary of State's judgment cannot be impugned. She has 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.”

11. Having regard to that firm guidance, the First-tier Tribunal's views on whether the parties were financially self-sufficient at a level lower than £18600, or the required amount of savings to make up any shortfall, cannot engage Article 8 outside the Rules. Not only is there nothing exceptional about a sponsor spouse being unable to demonstrate the right income level, but there is clear authority that the Secretary of State is entitled to impose that restriction. A near-miss (which this was not) is still a miss and the judge was not entitled to have regard to the ability of the parties to manage on a lower income. There is nothing else in the parties' circumstances which reaches the level of exceptional and compelling compassionate circumstances for which the Secretary of State ought to have considered exercising her discretion outside the Rules.
12. The proper approach for these parties is that which the First-tier Tribunal rejected at paragraph 39: if the parties now meet the requirement of the Rules then the claimant should make a further application, submitting the evidence now available. Alternatively, the sponsor could proceed with her plans to live and work in Egypt if that is what the parties prefer.
13. Accordingly I find that there is a material error of law in the First-tier Tribunal's decision. I set it aside and substitute a decision dismissing the appeal.



Signed:

Upper Tribunal Judge Gleeson

Date: 4 March 2015

Approval for Promulgation

Name of Upper Tribunal Judge issuing approval:	Mrs J A J C Gleeson
Appellant's Name:	David Ali Sheikh Nur
Case Number:	OA/09992/2013

Oral decision (please indicate)

I approve the attached Decision and Reasons for promulgation

Name: Upper Tribunal Judge Gleeson

Date: 4 March 2015

Amendments that require further action by Promulgation section:

Change of address:

Rep:

Appellant:

Other Information:

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