Upper Tribunal
Immigration and Asylum Chamber **Appeal Number: OA/16421/2012**

THE IMMIGRATION ACTS

Heard at Field House	**Promulgated on:**
On 28 August 2013	**On 29 August 2013**

Before

Upper Tribunal Judge Kekić

Between

Fatou Jobe Jadam

Appellant

and

Entry Clearance Officer

Respondent

Determination and Reasons

Representation
For the Appellant: Mr Y Darboe, Solicitor
For the Respondent: Mr I Jarvis, Senior Home Office Presenting Officer

Details of appellant and basis of claim

1. This appeal comes before me following the grant of permission on 17 July 2013 by First-tier Tribunal Judge Robertson in respect of the determination of First-tier Tribunal Judge Mitchell who dismissed the appeal by way of a determination promulgated on 14 June 2013.

2. The appellant is the wife of the sponsor, Ansu Jadamu. Her date of birth is 25 March 1974 and she is a Gambian national. The sponsor is also of Gambian origin. He entered the UK as a visitor in September 2003, overstayed, married

and divorced and eventually obtained ILR through another marriage to a woman he also subsequently divorced. He married the appellant in November 2011 but it is said they had been previously married in 1994 and had two daughters.

3. On 19 July 2012 the ECO refused the application. He was not satisfied that the marriage was subsisting or that the parties intended to live together, nor was he satisfied that the appellant would be adequately maintained or accommodated. He also considered that the decision was justified and proportionate in the interests of maintaining effective immigration control. Judge Mitchell heard oral evidence from the sponsor and concluded that although the marriage was genuine and subsisting, it had not be shown that accommodation was adequate or that the appellant would be maintained without recourse to public funds.

4. Permission to appeal was granted on the basis that the judge arguably misapplied the guidance of KA (adequacy of maintenance) Pakistan [2006] UKAIT 00065 in that the sponsor's income was higher than the minimum income support allowance. It was also argued for the appellant that the judge failed to take account of the sponsor's Barclays bank account and that in any event he was wrong to have taken maintenance as an issue because that point had been conceded by the ECM in a review.

Appeal hearing

5. The appeal came before me on 28 August 2013. The sponsor attended the hearing. An interpreter was booked at the appellant's request but in the event was not required as the sponsor spoke and understood English.

6. I heard submissions from Mr Darboe. He argued that the judge erred in not applying KA. He submitted that the sponsor earned over £25,000 and based on that figure the judge should have been satisfied that adequate maintenance was available. He further submitted that although the sponsor currently spent all his money, he would not do so if the appellant joined him. He argued that in any event the rules did not require a certain figure to be available in the sponsor's account and that he had an overdraft facility to rely upon. He submitted that although the sponsor was sending money to Gambia every month for the building of his house, he would stop doing that if the alternative was that his wife would starve here. The final argument was that the ECM had conceded the maintenance issue.

7. Mr Jarvis responded. He submitted that there was no error in the determination. The problem for the appellant was that the case had not been properly put and could not now be re-argued on issues that had been overlooked. KA had been misquoted; the issue was not just a notional income

but the availability of funds for maintenance. The sponsor's oral evidence of outgoings was inconsistent with the documentary evidence. There was no evidence to support the submission that the sponsor would change his spending habits if the appellant was admitted. He may be committed to continue with the payments for his house. An overdraft was not an acceptable means of maintenance as it could be withdrawn at any time; Adeyemi-Doro [2011] EWCA Civ 849 was relied upon. The burden had not been discharged.

8. In reply, Mr Darboe repeated his submission that the sponsor's income was sufficient to meet maintenance costs.

9. At the conclusion of the hearing I dismissed the appeal. I now give my reasons.

Conclusions

10. I do not accept that the respondent made the concession that is alleged by the appellant's representatives. Indeed, I cannot see how they interpreted his review as a concession of any kind. In his review the ECM states:

"The grounds of appeal seek to address the main concerns of the ECO as detailed in the refusal notice in the form of bank statements, housing information and payslips. There is still no documentary support that evidences that the couple have been in a sustainable relationship since 1992…The grounds of appeal do not satisfactorily address the reasons for the decision as detailed in the ECO's notice of refusal. No new, original, independent documentation has been produced as evidence to tip the balance of probabilities in the appellant's favour. I have not been persuaded to reverse the original decision".

11. I cannot see that any concession was made by the respondent. Had the maintenance and accommodation issues been conceded, this would have been made clear. It is plain from the review that the ECO's reasons for refusal were all maintained. It follows that maintenance and accommodation were live issues.

12. With regard to accommodation, the only evidence adduced is for a short term tenancy in someone else's name with the sponsor named as an occupant. There was no evidence to confirm the amount of his rent, no evidence that it was paid and no evidence of the size of the property or whether the landlord had agreed to the appellant living there or whether that would change the amount of rent due. The judge considered the issue of accommodation at paragraphs 24 and 25 and concluded that adequate accommodation was not available. There has been no challenge to this finding in the grounds for permission to appeal. When I pointed this out to Mr Darboe, his response was that he would have argued that at a re-hearing. That rather misses the point.

In the absence of any challenge to the finding that one of the requirements of paragraph 281 has not been met, the appeal cannot succeed under the Immigration Rules regardless of the merit, if any, on the issue of maintenance. On that basis the judge's decision to dismiss the appeal stands. There can be no re-hearing. Had the appellant wanted to challenge the accommodation finding, this should have been raised in the grounds or at the hearing by way of an application to vary the grounds. Neither was done.

13. The issue on maintenance therefore becomes academic in that context. However, for the sake of completion, I consider the argument. I accept that in many cases, it would be enough to show that the sponsor earned over and above the income support level of maintenance (at least under the old rules). However, as Mr Jarvis submitted, the sponsor's income cannot be looked at in isolation. His outgoings must also be considered to assess whether funds would be available for the appellant's support. The judge took account of the documentary evidence and the sponsor's oral evidence. Plainly the two did not accord with each other. He noted that despite the sponsor's claim of low outgoings, he was consistently overdrawn almost to the limit of his overdraft and occasionally above it and had no money to spare. The grounds make reference to a Barclays bank statement which was allegedly overlooked by the judge but no such statement appears in any of the bundles. The sponsor has no savings and his outgoings are consistently higher than his income. On that basis the judge was entitled to find that his finances were precarious and that adequate maintenance would not be available for the appellant without recourse to public funds.

14. Mr Darboe submitted that it was perverse for the judge to assume that the sponsor would continue to send money for the building of his house in Gambia if it meant his wife would starve here and that it was obvious that the sponsor would change his spending habits if necessary. The judge did, however, consider whether that might happen but found that no evidence to that effect had been called. As such, it remains a submission and nothing more. Mr Jarvis is also right to point out that there was no evidence as to whether the sponsor was committed to paying a certain amount for his house in Gambia. No evidence was called on that point either and it may well be that the sponsor is not in a position to cease payments without penalty. The reliance on an overdraft facility is not acceptable given its unreliability.

15. I have taken KA into account when assessing the determination of the First-tier Tribunal. As pointed out by Mr Jarvis, the Tribunal did not simply take the sponsor's income into account in that case; it also considered his financial commitments and ability to save.

16. The difficulty for the appellant in this case is that the evidence has not been properly put. It may be that the sponsor is just a spendthrift and could curb

his extravagances if necessary, or it may be that he has a lot more financial obligations than he let on; we do not know as his commitments, expenditure and intentions were not explored at the hearing. Although Mr Darboe asked me to look at the Record of Proceedings for confirmation that the sponsor was asked whether he could change his spending habits, I cannot see any reference to such evidence in the judge's transcript. Where the sponsor's evidence shows that he is just scraping by on his income and a generous overdraft, attempts should have been made to clarify his financial situation as part of the preparation for the case. On the available evidence the judge was entitled to find that adequate maintenance would not be available in the particular circumstances of this case.

17. However, as explained earlier, even if the judge had made an error in his approach to maintenance, this would not result in the determination being set aside as his finding on accommodation remains unchallenged and on that basis the requirements of the Immigration Rules have not been met.

18. There has been no challenge to the Article 8 findings.

Decision

19. The First-tier Tribunal did not make any errors of law. The decision to dismiss the appeal under the Immigration Rules and on Article 8 grounds stands.

Signed:

Dr R Kekić
Judge of the Upper Tribunal
28 August 2013