Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/16582/2012

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 26th September 2013	**On 30th October 2013**

Before

UPPER TRIBUNAL JUDGE RENTON
UPPER TRIBUNAL JUDGE DAWSON

Between

MARCONE ALAN DOS SANTOS SILVA
(NO ANONYMITY DIRECTION MADE)

Appellant

and

ENTRY CLEARANCE OFFICER - BRAZIL

Respondent

Representation:

For the Appellant: Mr D Hart of Terence Ray Solicitors
For the Respondent: Ms Z Kiss, Home Office Presenting Officer

DETERMINATION AND REASONS

Introduction

1. The Appellant is a male citizen of Brazil born on 12th September 1976. He applied for entry clearance to the UK as the civil partner of the Sponsor, James Miller. That

application was refused by a Notice of Decision dated 9th August 2012 which was confirmed following a review by an Entry Clearance Manager on 4th February 2014. The Appellant appealed, and his appeal was heard by First-tier Tribunal Judge Symes (the Judge) sitting at Hatton Cross on 6th June 2013. He decided to allow the appeal under the Immigration Rules for the reasons given in his Determination promulgated on 27th June 2013. The Respondent sought leave to appeal that decision and on 17th July 2013 such permission was granted.

Error of Law

2. We must first decide if the decision of the Judge contained an error on a point of law so that it should be set aside.

3. The issues before the Judge were limited to those of maintenance and accommodation. The Judge found that the requirements of paragraph 281 of HC 395 were satisfied as to accommodation and that finding has not been challenged in this appeal. The Judge allowed the appeal as regards maintenance because although he was not able to calculate the disposable income of the Sponsor and therefore make the assessment necessary following the decision in **KA & Others (Adequacy of Maintenance) Pakistan [2006] UKAIT 00065**, he was satisfied that any shortfall there may be between the Sponsor's net income and the amount of the Appellant and Sponsor's combined entitlement to income support would be made up by capital made available by the Appellant's mother amounting to £3,169 and the likelihood of the Appellant earning an income from employment following his arrival in the UK.

4. At the hearing, we first allowed Ms Kiss to amend the Grounds of Appeal as drafted. Ms Kiss then referred to those grounds and submitted that the Judge had erred in law. He had failed to explain why he had relied upon a letter from Tesco, the Sponsor's employer, dated 3rd July 2012 to calculate the Sponsor's net earnings although its contents did not agree with the Sponsor's wage slips. This was a point argued before the Judge at the hearing. Further, the Judge had failed to take into account any housing costs of the Sponsor in calculating his net income for **KA** purposes, and had failed to explain why he had taken into account third party support from the Sponsor's mother following the decision in **Mahad & Others v ECO [2009] UKSC 16**. Overall the reasoning of the Judge was insufficient owing to the lack of evidence produced by the Appellant to satisfy the Immigration Rules.

5. In response, Mr Hart acknowledged that the Respondent's submissions had strength, but argued that they only amounted to a disagreement with the Judge's decision and did not reveal an error of law. The Judge had adopted a common sense approach and had decided the issues in the appeal on the balance of probabilities. He had exercised his discretion to use the letter of Tesco to establish the Sponsor's income.

6. We find an error of law in the decision of the Judge so that it is set aside. In our view, the Judge ignored the fact that the burden of proof was upon the Appellant to show that he met the maintenance requirements of the relevant Immigration Rule. Therefore it was for the Appellant to show that the income of the Sponsor less his housing costs was adequate applying the test given in **KA & Others**. Instead of

applying this burden, the Judge speculated as to the income of the Sponsor net of his housing costs and therefore as to the shortfall between that income and the entitlement of the Appellant and the Sponsor to income support. That being the case, it was further speculation by the Judge that such shortfall could be met by the capital of a third party or the Appellant's prospective earnings following his arrival in the UK.

7. Having reached that conclusion, we decided to remake the decision of the Judge on the basis of the evidence before him. The Appellant had not complied with the Direction of Principal Resident Judge Southern concerning any further evidence.

Remade Decision

8. We heard further submissions from the parties. Ms Kiss addressed us first when she argued that the Appellant had failed to show that there would be adequate maintenance for him. There was a lack of clear evidence as to the Sponsor's earnings. The information contained in the letter from Tesco, the Sponsor's employer, conflicted with that given in his wage slips. There was no evidence as to the Sponsor's housing costs. It was probable that the net income of the Sponsor less his housing costs would produce a shortfall that was likely to be in excess of £30 per week. However, it was not likely that this deficit would be made up by any earnings of the Appellant following his arrival in the UK. The Appellant had no employment arranged, and had not worked in the UK since 2003. It was also unlikely that such shortfall could be made up by the Appellant's mother. She lived in Brazil, and there was no indication as to her financial commitments there. It was pure speculation that she would be willing or able to finance even in part the Appellant's living expenses in the UK.

9. In response, Mr Hart referred us to his Skeleton Argument used at the First-tier hearing and argued there was sufficient evidence to indicate that in probability the Appellant would be maintained adequately in the UK. Mr Hart conceded that the Appellant could not succeed under Article 8 of the ECHR.

10. We find that at the date of decision, being 9th August 2012, that the Sponsor was employed by Tesco working fifteen hours per week. His earnings are given as £112.67 per week but it is not known if that is a gross or net figure. The Appellant's wage slips indicate that he earns something less, perhaps in the region of about £90 net per week. The Sponsor also received Employment and Support Allowance amounting to £71 per week. For the purpose of making the calculation given in **KA & Others** it is necessary to deduct the Sponsor's living costs. These are not known. However the probability is that having made that deduction the Sponsor's income is somewhat less than the entitlement of the Appellant and the Sponsor to income support which at the relevant time amounted to £111.45 per week. We are not satisfied that the Appellant has shown that any deficit can be made up by his potential earnings in the UK or any contributions from capital made by the Sponsor's mother resident in Brazil. There is no evidence of any employment arranged for the Appellant in the UK, and he has not worked in the UK since 2003. There is a letter

from the Appellant's mother stating that she will assist, and although there is evidence that she had savings of £3,169 at the relevant time, there is no evidence of her overall financial circumstances, nor of her willingness to take on a long-term commitment. We conclude that on this evidence the Appellant has failed to discharge the burden of showing that there will be adequate maintenance for him in the UK.

Decision

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

We set aside the decision.

We remake the decision in the appeal by dismissing it.

Anonymity

The First-tier Tribunal did not make an order pursuant to Rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and we find no necessity to do so.

Signed Date

Upper Tribunal Judge Renton

Fee Award

In the light of our decision to remake the decision in the appeal by dismissing it, we have considered the decision made by the First-tier Tribunal as to a fee award. We make no fee award as the appeal has been dismissed.

Signed Date

Upper Tribunal Judge Renton