Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/18908/2012

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 9 August 2013	**On 21 August 2013**
	…………………………………

Before

UPPER TRIBUNAL JUDGE ESHUN

Between

ABDELBAGEE IDRIS AHMED MOZAMEL

Appellant

and

ENTRY CLEARANCE OFFICER - CAIRO

Respondent

Representation:

For the Appellant: Mr E Eaton, Counsel
For the Respondent: Mr E Tufan, HOPO

DETERMINATION AND REASONS

1. The appellant is a citizen of Sudan born on 1 January 1982. He has been granted permission to appeal the determination of First-tier Tribunal Judge Buckwell dismissing his appeal against the decision of the Respondent made on 1 September 2012 refusing him entry clearance to the UK as the spouse of Wifaq El Sheikh in the

© CROWN COPYRIGHT 2013

UK for settlement. The refusal was made under paragraph 281 of HC 395 as amended and Article 8 of the ECHR.

2. The appellant made his application on 4 July 2012 and the decision of the respondent was made on 1 September 2012. In accordance with **AS Somalia and another [2009] UKHL 32** the Tribunal is limited to considering evidence as at the date of the respondent's decision.

3. The appellant's sponsor is a British citizen born on 27 May 1982. She lives in London. The appellant first met her in 2008 in Sudan. Their marriage took place in Khartoum on 5 September 2011. It was not an arranged marriage but the parties are related. The respective mothers are cousins. They stayed together as man and wife following the marriage until 15 October 2011. The judge accepted that the relationship between the appellant and the sponsor was genuine.

4. The sponsor who gave evidence at the hearing said she occupied a one bedroom property and it was the intention of the couple that they would reside there if the appellant were granted entry clearance to settle with her in the UK. The judge accepted that the sponsor occupied a housing association property in Tower Hamlets. Although her landlords at one stage sought possession of the flat due to her rental arrears, a court order was in place and evidence subsisted to show that the sponsor was adhering to the rental payment requirements under that order. As to her future intentions she indicated at the hearing that when circumstances permit, she would wish to pay off arrears with larger sums. Of greater significance in this respect was the letter from the housing association dated 30 April 2013. Although dated more recently, the judge was satisfied that it reflects the view of the housing association generally. On that basis the judge was satisfied that the accommodation requirements under paragraph 281 were met as at the date of the respondent's decision.

5. The outstanding requirement on which the judge needed to make a finding was the issue of maintenance. He bore in mind that he had to consider evidence as at the date of the respondent's decision, 1 September 2012.

6. The evidence before the judge was that at the date of the application the sponsor was employed on a part-time basis as a volunteer administrator with the Salama Community Association in Brixton. In addition she was studying homeopathic medicine. She was in receipt of her student loan/grant in the sum of £7,700. Her rent arrears as at 3 May 2012 exceeded £2,500. She received funds on a monthly basis in the approximate sum of £120 from her husband. That was the evidence before the ECO.

7. At the hearing before the judge, a schedule of stated income and outgoings with respect to the sponsor was provided. It stated that the sponsor on a monthly basis had an excess of income over outgoings in the sum of £350.14. The income comprised of the earnings of the sponsor at the time which was £421.53 a month plus

a sum contributed to her finances by way of the student loan/grant in the sum of £7,662 for the academic year 2011/2012. According to the schedule this gave her £638.50 per month. The sponsor in evidence said that the payment was to cover the period until the end of September 2012, which the judge accepted. In the schedule it was stated that the sponsor was required to demonstrate a weekly income in the sum of £111.45. On a monthly basis there was a deficit of £132.81, but it was stated that she had savings as at 17 May 2012 in the sum of £3,580.06.

8. The judge noted that in the sponsor's NatWest Select Account the credit balance stood at £18.91 as at 19 July 2012. It did not increase until 6 November 2012 (after the date of the decision). In relation to the appellant's NatWest First Reserve Account, there was a credit balance in the sum of £840.52 as at 20 August 2012. In the financial statement provided for the appeal, a credit balance in the sum of £3,580.06 was relied on. The judge noted however that the balance was at 17 May 2012. By 3 July 2012 (the day before the respondent received the appellant's application) that balance had reduced to £2,130.52. By the date of decision it had reduced to £840.52. The judge found therefore that the savings figure quoted in the financial schedule was incorrect for the purposes of the consideration of the finances of the sponsor overall as at the date of either the respondent's receipt of the application or the date of the respondent's decision.

9. The judge noted that the income calculated included the student loan. He found it relevant however to take into account the balances in the accounts held by the sponsor. With respect to the Barclays Student Additions Account, as at 7 August 2012 there was a credit balance in the sum of £130.53. No copy of the August/September statement for that account was provided. From the September/October statement the judge saw that the opening balance in that account on 13 September 2012 had reduced to £70.99. A Barclays Higher Education Account held in the name of the sponsor had a credit balance in the sum of £113.24 as at 30 August 2012.

10. The judge noted that although the sponsor was paying rent subsequent to a county court order, it remained the fact that the sponsor had arrears in relation to her rent which exceeded £2,000. Although the time period is after the date of decision, the sponsor indicated at the hearing that she was now in receipt of benefits. She had also said that she was paying £111.45 rent each week. This meant that she was contributing £5,795.40 for the rent on an annual basis. However more recent statements from the landlords indicated that she was paying only £200 each month (at least since November 2012). In addition she currently receives housing benefit in the sum of £548.40 each month and has done so since November 2012. That appeared to be contrary to her evidence.

11. The judge noted that the appellant's representative did not put forward figures in relation to any income or savings of the appellant himself which might be taken into account in considering whether the maintenance requirements of paragraph 281 were satisfied. There was no official documentation or any official calculation of

sums claimed to be held or earned by the appellant himself. His representatives had not sought to include any element of the income or claimed savings of the appellant himself in the financial schedule presented.

12. In light of the financial information before him the judge did not find that the finance available to the sponsor was sufficient to meet the requirements of paragraph 281 of HC 395 with reference to maintenance as at the date of decision.

13. Counsel relied on his grounds.

14. In his first ground, he argued that the judged failed to apply **KA and Others (Adequacy of maintenance) Pakistan [2006] UKAIT 00065** which sets out the benchmark for adequacy of maintenance; that the applicant and sponsor would be at least as well off as an equivalent couple in receipt of benefits. Accordingly, the correct test for maintenance is whether the sponsor's income, at the date of decision, is the same as the couple would be entitled to if they were in receipt of income support. In the grounds it was said the appellant's per calendar monthly income at the date of decision was £1,059 but at the hearing it was £1,060, a difference of £1. The income support rate for a couple at the date of decision was £111.45 per week. According to the schedule this was £482.95 a month. Counsel submitted that the judge erred in considering the sponsor's levels of savings and other financial outgoings (over and above housing) costs in concluding her income was insufficient. It was irrelevant to weigh the sponsor's income against her expenditure. In considering whether the sponsor's income reached £482.95 per month, it was irrelevant to weigh the sponsor's income against her expenditure.

15. I find that although the judge did not specifically mention that he had considered the financial evidence in the context of **KA**, this was not material to his decision. The schedule provided by the sponsor gave her monthly income as £1060.30. This was made up of earnings of £421.53 per month from her employment at Salama Community Association, and a student loan of £638 per month. The only expenditure that was deducted from the income was her rent of £709.89 per month, which left her with a total income of £350.14 per month, which did not reach the income support level of £482.95 per month for a couple in receipt of benefits. No other financial outgoings were taken into account in the schedule. Consequently, on the evidence in the schedule alone, the sponsor's income was not sufficient to meet the maintenance requirement under the Immigration Rules. This would explain why the judge, at paragraph 41, considered the funds in the sponsor's savings account to see whether those funds were sufficient to meet the deficit identified in the schedule of income and outgoings. In light of the rapid depletion of funds in the various bank accounts held by the sponsor by the date of decision, the judge's finding that the finance available to the sponsor was insufficient to meet the requirements of paragraph 281 of HC395 was sustainable and without legal error.

16. The second ground Counsel relied on was his argument that the judge failed to consider prospects of the appellant gaining employment. He relied on Chapter 9.5 of the ECO guidance which states "*The ECO must be satisfied that the applicant has reasonable prospects of obtaining employment in the UK. It is not necessary to see actual evidence that a specific job has been arranged. However, you should always consider whether plans are realistic.*" In light of this guidance Counsel argued that the appellant is a qualified doctor and he intends to find work in the UK. The judge erred in failing to consider whether on the balance of probabilities the appellant would be able to find work within a reasonable time.

17. The respondent's Rule 24 reply stated that the judge did not materially err in law in not considering whether the appellant had prospects with regards employment in the UK. He was constrained by the 2002 Act to considering facts at the date of decision and/or evidence appertaining to circumstances at the date of decision. There was no evidence of prospective employment, and therefore no requirement to consider it.

18. Mr Tufan drew my attention to the grounds of appeal lodged by the appellant against the decision of the Entry Clearance Officer. There was no mention in the grounds that because the appellant was a doctor, there was a reasonable prospect of the appellant obtaining employment within a reasonable time after his arrival in the UK. That issue had been raised by the judge himself at paragraph 22 of the determination. He had asked the sponsor whether her husband had made enquiries about potential employment in the United Kingdom. She said he had taken but failed the MRC test and that he was planning to take the PLAB test.

19. Whilst I accept that the judge failed to consider whether at the date of decision the appellant had a reasonable prospect of obtaining employment in the UK. I find that his failure did not materially affect his decision. The only evidence that the appellant intended to find work in the UK as a doctor came via the sponsor's evidence that he was planning to take the PLAB test. There was no evidence from the appellant himself as to his realistic chance of passing the PLAB test to enable him to find work in the UK as a doctor. In the absence of such evidence, I find that the judge did not materially err in law by not considering this issue.

20. Thirdly, Counsel argued that having found that the appellant and the sponsor intended to live permanently with each other for the purpose of paragraph 281(iii), the judge perversely concluded that they did not enjoy family life. His argument was in respect of the judge's finding at paragraph 46. The judge found as follows:

> "46. With respect to human rights grounds it is clear to me that any family life rights enjoyed between the appellant and the sponsor have been whilst the sponsor has visited him in Sudan. She is able to continue to visit Sudan, a country with which she is now familiar. On that basis I do not find that the decision by the respondent, whilst I accept the lower threshold in that

regard, engages the terms of Article 8(1) of the European Convention. Accordingly I do not proceed to consider proportionality."

21. I do not read into paragraph 46 that the judge found that the appellant and the sponsor did not enjoy family life. The judge had accepted that the relationship between the appellant and the sponsor was genuine. This means that as a married couple they enjoyed family life together which satisfied the first of the **Razgar** questions. The judge however found that Article 8(1) was not engaged because the respondent's decision did not interfere with the family life they currently enjoyed, which consisted of the sponsor visiting the appellant in Sudan. I find not error of law in the judge's decision.

22. Counsel further argued in his grounds that the judge failed to consider the sponsor's pregnancy in his assessment of Article 8 and that the sponsor and appellant's child will be born a British citizen. On this issue I agree with Mr. Tufan's submission that at the date of the ECO's decision the sponsor was not pregnant. Since the judge was constrained by the 2002 Act and by the decision in **AS Somalia** to considering facts at the date of decision, his failure to consider the sponsor's pregnancy which occurred after the date of decision does not amount to an error of law.

23. I that the judge did not err in law. The judge's decision dismissing the appellant's appeal shall stand.

Signed Date

Upper Tribunal Judge Eshun