Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/19134/2012

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 28 August 2013	**On 23 September 2013**

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Before

UPPER TRIBUNAL JUDGE LATTER

Between

ENTRY CLEARANCE OFFICER – ADDIS ABABA

Appellant

and

OSMAN FARAH

Respondent

Representation:

For the Appellant: Ms H Horsley, Home Office Presenting Officer
For the Respondent: Mr A Gilbert instructed by Camden Community Law Centre

DETERMINATION AND REASONS

1. This is an appeal by the Entry Clearance Officer, Addis Ababa against a decision of the First-tier Tribunal allowing an appeal by Osman Farah against a decision made on 30 August 2012 refusing his application for entry clearance as a spouse. In this

determination I will refer to the parties as they were the First-tier Tribunal, Mr Farah as the appellant and the Entry Clearance Officer as the respondent.

Background

2. The appellant is a citizen of Somalia born on 10 June 1943. He married his wife, the sponsor, in November 1972. She has been living in the UK since July 2005. She joined her daughter who had been granted refugee status in the UK under the family reunion policy. At that stage no application was made on behalf of the appellant as her daughter did not have adequate accommodation for both parents. There are other children living in Somalia but they are now independent. His daughter and son-in-law seek to sponsor the appellant so that he can now be reunited with his wife.

3. The appellant submitted an application for entry clearance online on 3 July 2012. He attended the visa application centre in Addis Ababa on 4 July 2012 to complete his application but was told he needed to book an appointment online. He paid someone to do this for him and was given an appointment on 20 July 2012. When he attended that appointment, he paid the specified fee. The respondent treated the application as made on 20 July 2012 and determined it under HC395 as amended with effect from 9 July 2012. It was accepted at the hearing before the First-tier Tribunal that the appellant could not meet those rules but it was argued that his application had been made or should be treated as having been made on 3 July 2012 and, in the light of transitional provisions, should have been considered under the provisions of para 281 of HC 395, which otherwise ceased to have effect from 9 July 2013.

4. The date of application is determinative of the outcome of this appeal under the rules because the First-tier Tribunal Judge found that the appellant could meet the requirements of para 281 and that finding has not been challenged.

5. The judge dealt with the issue of when the application had been made as follows:

> "30. An application is normally treated as having been 'made' at the time when the application fee is paid. Counsel was unaware of any legal authority concerning a case such as this, where there is no facility for payment of the application fee at the time when the application is lodged electronically. The respondent maintained that the application was not made until 20 July 2012 when the appellant attended an appointment to enrol his biometrics.
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> 31. A copy of the application form, which appears in the respondent's bundle states that application was submitted online on 3 July 2012. It contains the appellant's signature at the end. This is dated '03/07/2012' but '03' is crossed out and replaced by '20'. There is no evidence before me as to who changed the dates or when either date was written. The appellant claims that he was offered an appointment on 20 July 2012, which he attended. However, the respondent claimed that there were no delays at the visa processing centre at that time and that the appellant chose not to enrol his biometrics until after 9 July 2012.

> 32. In the absence of any specific authority on this issue, I find that the application was made on 3 July 2012. There is no evidence to support the respondent's claim that the appellant could have attended and enrolled his biometrics prior to 9 July 2012. Indeed the sponsor's evidence is that she and her husband went to the visa processing centre on 4 July 2012 to confirm that the application had been received. I accept this evidence and find that it potentially undermines the respondent's claim that it was the appellant's choice not to enrol his biometrics (and pay the application fee) after 9 July 2012. I agree with the appellant, that it is unfair for his application to be treated as having been lodged on 20 July 2012 when he had submitted online on 3 July 2012 and there was no opportunity for him to pay a fee at that stage. He attended on the date and time appointed and there is no dispute that he paid the fee and provided other relevant information on that date and without delay."

6. In the light of her findings that the requirements of para 281 were met, the judge went on to allow the appeal and having found that the appellant met the requirements of the relevant rules said that there was no need to go on and consider the appeal under article 8.

The Grounds and Submissions

7. In the grounds it is argued that according to para 30 of HC 395 an application for entry clearance is not made until any fee required to be paid under the Consular Fees Act has been paid; that the position regarding the payment of fees and the validity of an application is clarified at [16] of BE (application fee: effect of non-payment) Mauritius [2008] UKAIT 0089; that the judge erred in law by accepting that the application was made on 3 July 2012 when the fee was not paid until 20 July 2012 and consequentially erred by considering the application on the basis of rules which were only in place until 9 July 2012. The grounds further argue that the judge erred in law in accepting an offer of third party support from the appellant's sponsor as third party support was not permitted under the financial requirements of E-ECP 3.2 unless the specified evidence set out in Appendix FM-SE was submitted. However, that ground was not pursued before me as it relates to the provisions of Appendix FM and in any event it was conceded at the hearing that the appellant could not meet the requirements of the rules in force from 9 July 2012 [29].

8. Ms Horsley adopted the grounds. She relied on the Tribunal decision in Kaur (Entry Clearance – date of application) [2013] UKUT 00381 which confirmed that for an entry clearance application where there had been an online application and a later delivery of payment, it could not reasonably be said that the online application was accompanied by payment: [36]. She further relied on BE which had held that except in the case of cash payments, an application was accompanied by a fee for the purpose of the relevant regulation if it was accompanied by authorisation as would enable the respondent to receive the entire fee in question without further recourse having to be made by the respondent to the payer and relied at [16] on the comment that there would in practice be a wide range of reasons why an application was

unaccompanied by a fee, ranging from deliberate deceit or omission to innocent inadvertence and that any system which expressly sought to distinguish between various kinds of failure risked being administratively unworkable. She submitted that it could not be argued that there had been any procedural unfairness. The appellant had been advised to apply for an appointment, had done so and then attended on the given date of 20 July 2013.

9. Mr Gilbert submitted that the determination in Kaur had to be read in the light of the determination in Basnet (validity of application - respondent) [2012] UKUT 00113, QB v Secretary of State [2010] EWHC 483 (Admin) and Secretary of State v Raju [2013] EWCA Civ 754. He argued that the judge had been entitled to find that an unfair procedure had been followed. The application had been submitted online on 3 July 2012 but there was no procedure enabling him to make a payment online with the application. He had gone the next day to the visa centre and had been told that he should obtain an appointment. The only one he was offered fell after 9 July 2012. He submitted that the respondent had failed to put into place a procedure enabling the appellant to make his payment with his application. The Tribunal in Kaur had not had the benefit of the Court of Appeal's judgment in Raju, which held that the rules made it clear that there was a specific date when an application was made for the purposes of the rules. He submitted that Kaur had been wrong to hold that an application not accompanied by a fee was a nullity when the rules made specific provision about when an application was made.

Discussion

10. The issue I must consider is whether the judge erred in law by finding that the application had been made on 3 July 2012. It is provided by para 30 of HC 395 that:

> "30. An application for an entry clearance is not made until any fee required to be paid under the Consular Fees Act 1980 (including any regulations or orders made under that Act) has been paid."

As pointed out in Kaur the date of application is defined in para 6 as follows:

> "Date of application means the date of the application determined in accordance with paragraph 30 or 34G of the rules as appropriate".

Kaur also refers to the Fees Order and the Fees Regulations made in 2011. In particular reg 37 of the Fees Regulation provides as follows:

> "37. Where an application to which these regulations refer is to be accompanied by a specified fee, the application is not validly made unless it has been accompanied by that fee."

11. The Tribunal said at [36] –

> "In contrast where there has been an online application and a later delivery of payment, it cannot reasonably be said that the online application is accompanied by payment; there is insufficient proximity in time. It follows that in this scenario the online application is not accompanied by a payment, and so is not valid. An application which does not comply with a statutory requirement necessary for it to be valid is a nullity unless otherwise provided for. That said an online application once printed out and signed, then lodged with a payment would be accompanied by a fee and so would be a valid application."

12. The Tribunal rejected an argument than an application could, where the fee is paid later, be deemed to have been made when the form was sent as was a submission that para 34G (iv) could be construed to include applications made overseas. The position was summarised as follows in [40]:

> "...i. The date on which an application for entry clearance is made is not effectively established by paragraph 30 or any other provisions of the Immigration Rules, and has therefore to be established by reference to statute and secondary legislation;
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> ii. An application for entry clearance that does not comply with the requirement in regulation 37 of the Immigration and Nationality (Fees) Regulations 2011 (SI 2011/1055) to be accompanied by payment of a fee is a nullity – it is not an application for the purpose of the Immigration Rules or any statutory provisions;
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> iii. An application for entry clearance is made on the date on which payment of the relevant fee is made. If the application is made online, and payment of the relevant fee is also made online, contemporaneously with submission of the online application, the date of application is the date of submission. If payment of the relevant fee is not made until the printed application form is submitted, the date of application is the date on which those are handed over."

13. The basic position is clear from para 30 of HC 395 and the determination in Kaur that an application for entry clearance is not made until any fee required to be paid has been paid. Mr Gilbert argued that in the light of the Tribunal decision in Basnet the appellant had been a victim of procedural unfairness as he had in effect lost the opportunity of paying the fee before 9 July 2012.

14. However, the appeal in Basnet concerned an in-country application where it was asserted that the relevant application fee had not been paid and that there was therefore no valid appeal. The Tribunal held that the judge in that case had erred by considering that non-payment for whatever reason even if the fault of the respondent was fatal to the validity of the application and the subsequent appeal. It was the applicant's contention that he had submitted details enabling payment to be obtained by the respondent who said that the details provided did not match the information held by the bank. The Tribunal was concerned about why the payment had failed. It noted that payment might fail for many reasons and that, although the burden of proving that an application had been validly made would normally fall on an applicant in these circumstances, when the application was received in time the

question of whether it was accompanied by accurate billing data could only be answered by the respondent. For this reason the evidential burden of demonstrating that the application was not accompanied by such authorisation of the applicant or other person purporting to pay to enable the respondent to receive the fee in question must fall on the respondent.

15. The Tribunal then went on to consider what measures should be adopted to prevent similar disputes in the future. It held that the absence of such measures or cogent reasons why they could not be adopted might well result in a decision that the consideration of the application had been unfair and therefore not in accordance with the law. The judgment in QB does not take the matter any further as it deals with the application of a policy nor does Raju as this appeal concerns para 30 not para 34 of the rules.

16. In the present case there is no dispute about why payment was not made. The argument of unfairness is based on the assertion that there was no method of sending an authorisation to take payment with the online application and no opportunity of making payment before 9 July 2012. Although the application was made online on 3 July 2012, there was no provision in the form enabling payment to be made with the application. That without more does not amount to procedural unfairness. The judge accepted that the appellant and the sponsor had attended the visa application centre the following day but had been advised to make an appointment. This is not an unreasonable procedure to follow. The appellant then paid someone to do this for him but the appointment given was 20 July 2013. The appellant's grounds of appeal to the First-tier Tribunal say in ground 1 that the application was submitted online and at the same time he was obliged to make an appointment to submit the fee and supporting documents to enrol his biometrics. The earliest appointment that was offered was 20 July 2012 which he attended.

17. The only evidence about what other appointments might have been available come from the Entry Clearance Manager's comments. She said:

> "While I note the appellant's comments in respect that his application should have been considered under the old Immigration Rules, he has provided no evidence to confirm he was not given an appointment to enrol his biometrics until 20 July 2012. There were no known delays at that point in time at the visa application centre and it is considered it was the appellant's choice not to enrol his biometrics until after 9 July".

18. This really does not take the matter any further. There is no indication of the usual waiting time for an appointment. The most that can be inferred is that an earlier appointment might have been available but on the other hand, if that was the case, there is no is no obvious reason why it was not offered. There is no reason to believe the appellant was deliberately given an appointment after 9 July 2012 so the matter would be covered by the new rules rather than the old ones. Generally, it does not seem unreasonable when applying for an appointment on or after 4 July 2012 to be offered one on 20 July 2012. That is not suggestive of any unreasonable delay. There is no evidence to suggest that when applying for his appointment any specific

request was made for an appointment before 9 July 2012 or that it was refused. The judge's comment it was unfair for his application to be treated as having been lodged on 20 July 2012 when he had submitted it online on 3 July 2012 and that there was no opportunity for him to pay at that stage would only be arguable if there was some evidence that the appellant had in fact been deprived of an opportunity of making a payment before 9 July 2012 having specifically sought to do so.

19. I am not therefore satisfied that there has been any procedural unfairness capable of supporting an argument that the respondent's decision on when the application was made was not in accordance with the law. I am satisfied that the judge erred in law and that her decision should be set aside. In the light of the concession made at the hearing that the appellant's claim could not succeed under the amended rules the appeal must be dismissed on that ground.

Further Submissions

20. In the light of the fact that the appeal cannot succeed under the rules, I heard further submissions in relation to article 8. Ms Horsley submitted that that refusal of entry clearance would not amount to a breach. Although the judge accepted that there was a genuine relationship between the appellant and the sponsor, there would be no interference with their specific family life as they had been living in different countries. The family life they had enjoyed would continue. This was a situation, so she argued, where the appellant and sponsor were seeking to choose to reside in the UK but article 8 could not be used simply to give effect to a personal choice. Financial thresholds were set out in the rules which it was accepted that the appellant could not meet.

21. Mr Gilbert submitted that proper weight should be given to the fact that the judge had found that the maintenance and accommodation requirements of the previous rules were met. To succeed under article 8 it was not necessary to show that there were exceptional circumstances. However in this case there were features which could properly be described as exceptional: the sponsor had come to the UK because their daughter needed help [25] when their child had meningitis [26]. He submitted that to require the sponsor to return to Somalia for family life to be continued was neither necessary nor proportionate to a legitimate aim.

Discussion

22. The First-tier Tribunal Judge accepted that the appellant and the sponsor have been married since 1972 and that they have three children. The sponsor came to the UK in 2005 in order to help her daughter look after her children. In her witness statement dated 6 June 2013 the sponsor explains that her daughter gave birth to her first child in 1998 but sadly when he was 2, he suffered from meningitis and had serious mental and physical disabilities as a result. Subsequently, her daughter she had four more children and contacted her to explain the difficulties she was having coping with the children and for this reason she applied to come to the UK. She also explained that

the appellant would soon be 70 and she was increasingly worried about his health and, as she got older, it was more difficult for her to travel to see him. She suffers from diabetes and has high cholesterol. When she does visit, she can only take two months' worth of medication with her.

23. I am satisfied that family life is engaged and that the refusal of entry clearance amounts to an interference within article 8(1). The refusal of entry clearance is in accordance with the law and for a legitimate aim within article 8(2). The issue therefore is whether the refusal is necessary and proportionate to a legitimate aim.

24. When assessing proportionality proper account must be taken of the requirements of the rules as at the date of decision. In MS v Secretary of State [2003] CSOH 81, Lord Brodie said that there could be no real doubt but that the respondent by securing that the changes to the rules were debated in both Houses of Parliament without any formal expressions of disapproval must be taken to have the support of the legislature for her approach to the question of when it is proportionate to remove from the UK someone with no right to remain. The position must be the same when assessing the position of someone seeking to challenge a refusal of entry clearance as being in breach of article 8.

25. Lord Brodie noted that in Huang [2007] 2 AC 167, the House of Lords had commented that those who would be entitled to succeed under article 8 would be a very small minority and that it must follow now the respondent had specifically addressed the impact of article 8 in drafting changes to the rules and had obtained the endorsement of Parliament as to the proportionality of the way she had done so that those who might now be expected to succeed under article 8 would be a very small minority indeed.

26. The appellant is unable to meet the financial requirements of the new rules and cannot rely on third party support save in circumstances prescribed in Appendix SM-SE. I accept that there are compassionate circumstances but I am not satisfied that they are sufficiently compelling to make the refusal of entry clearance disproportionate. The appellant and the sponsor have been living apart since July 2005 and are unable to meet the requirements of the current rules. The refusal of entry clearance cannot properly be categorised as disproportionate to a legitimate aim and I am satisfied that the refusal of entry clearance is necessary and proportionate to a legitimate aim.

Decision

27. The First-tier Tribunal erred in law. I set aside the decision. I re-make it by dismissing the appeal both under the immigration rules and under article 8.

Signed Date: 20 September 2013
Upper Tribunal Judge Latter