Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: OA/23670/2012

THE IMMIGRATION ACTS

Heard at Newport, Wales	**Determination Promulgated**
On 24th March 2014	**On 4th April 2014**

Before

The President, The Hon. Mr Justice McCloskey and
Vice President Arfon-Jones

Between

HBS

Appellant

and

ENTRY CLEARANCE OFFICER, AMMAN

Respondent

Representation:

For the Appellant: Mr Glenn Hodgetts (of Counsel), instructed by South West Law Solicitors
For the Respondent: Mr Hibbs, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. This appeal has its origins in a decision made by the Entry Clearance Officer, (hereinafter the "*ECO*") for Amman, Iraq, whereby the Appellant's application for entry clearance to settle in the United Kingdom in the capacity of child or other dependant of a settled person was refused. By

its determination promulgated on 28th August 2013, the First-Tier Tribunal ("*the FtT*") dismissed the Appellant's appeal. The Appellant now appeals with permission to the Upper Tribunal.

2. The grant of permission to appeal to this Tribunal was based on an assessment that the FtT had arguably erred in law by treating the sponsor's disability living allowance as public, rather than personal, funds. The other grounds of appeal were also considered arguable. These formulate a total of four challenges to the decision of the FtT:

(a) (As noted above) the FtT erred in law in its treatment of the public funds issue, having regard to the decision in KA and Others (adequacy of maintenance) Pakistan [2006] UK AIT00065.

(b) The FtT's adverse credibility findings are vitiated by irrationality and/or a failure to take all material evidence into account.

(c) The FtT erred in law by failing to make any decision on the Appellant's entitlement under paragraph 297(1)(f) of the Immigration Rules, given the family relationship between the Appellant and the sponsor.

(d) The FtT's conclusion that there was no evidence of serious and compelling family or other considerations rendering the exclusion of the Appellant undesirable was irrational, being confounded by evidence precisely to this effect. Furthermore, this breached the Appellant's rights under Article 8 ECHR.

3. The relevant factual matrix, in brief compass, is that there are effectively two sponsors, who are husband and wife, both Iraqi nationals. The husband entered the United Kingdom in 2001 and his spouse did likewise in 2003. The Appellant's entry clearance settlement application was made in July 2012. In the application, it was stated that he was born on 1st July 1995 in Sulaymaniyah, Iraq and was seeking a settlement visa for a purpose described as "*to join parents*" in the United Kingdom. It is common case that the sponsors are said to be the Appellant's adoptive, rather than blood, parents.

4. In his application, the Appellant provided the first and family names of his mother and his mother's date of birth, together with his father's name. He described the main sponsor as his "*uncle/de facto father*". He stated that he lived with his sister and they received money monthly from the sponsors. The application further stated that the main sponsor, his adoptive father, had secured British citizenship with effect from 1st January 2011. He had visited the Appellant in Iraq in 2011 and 2012. Contact between them had been maintained in this way and by telephone. The application described the Appellant as deaf and dumb. The application, in conjunction with the accompanying solicitor's letter, specified that the Appellant was applying *qua* the child of the sponsors or, alternatively, their nephew.

5. In refusing the application, the ECO, firstly, found that the Appellant is not the child of the sponsors, referring to paragraph 301(1)(a) of the Rules. He gave no consideration to the alternative basis of the application. Secondly, the ECO concluded that the Appellant was not living in serious and compelling family or other circumstances rendering his exclusion from the United Kingdom undesirable: see paragraph 301(i)(c) of the Rules. Thirdly, given the absence of any written authority from the Council landlord permitting him to reside in the relevant property, the ECO pronounced himself not satisfied that there would be adequate accommodation for all, having regard to paragraph 301(iv) of the Rules. Fourthly and finally, the ECO noted the public benefits of which the sponsors were in receipt and concluded that there was insufficient evidence that they could adequately maintain the Appellant in the United Kingdom without additional recourse to public funds: paragraph 301(iv)(a) of the Rules. The ECO's decision was upheld on appeal by the ECO manager, in June 2013.

6. The FtT made a specific finding, in paragraph [19] of its determination, that there was no explanation why the sponsors had not made the Appellant's entry clearance application sooner. The difficulty with this finding is that in their letter dated 19th June 2012, which accompanied the application, the sponsors provided a lengthy explanation of this very issue. Our analysis is that the Judge simply overlooked this. In doing so, a material piece of evidence, which confounds this finding, was disregarded. While mindful that the threshold to be overcome in an error of law appeal is irrationality, we consider this finding unsustainable.

7. In the next succeeding paragraph, [20], the Judge made no clear findings about the claim that the sponsors had been sending money periodically for the upkeep and support of the Appellant and his sister in Iraq. It was incumbent on the Judge to either accept or reject the various elements of this claim, in whole or in part, giving appropriate reasons. There was a failure to do so.

8. In paragraphs [21] and [23] of the determination, the Judge purported to consider the test, enshrined in the Rules, of whether there were serious and compelling family or other considerations rendering the exclusion of the Appellant from the United Kingdom undesirable. The evidence bearing on this issue included a letter purporting to have been written by the Appellant's sister. While the Judge hints that this is not an authentic document, there is a failure to make a clear finding about it. The same applies to the Judge's consideration of other letters. Furthermore, the Judge made no enquiry relating to the first names used. We consider that, fundamentally, there is an absence of clear and properly reasoned findings in these passages.

9. In paragraph [24] of the determination, the Judge gave separate consideration to those parts of the application in which the Appellant had purported to provide particulars of his mother's name and date of birth. This is another troubling passage, in which the Judge appears to cast doubt on the Appellant's credibility, without making any clear and properly reasoned findings in relation to this discrete issue.

10. In paragraphs [26] and [27] of the determination, the Judge considered the question of whether, as claimed, the Appellant is disabled by virtue of being deaf and dumb. Again, there is a failure to make any clear and properly reasoned finding about this discrete issue, which was one of unmistakable importance.

11. Finally, it is beyond dispute that the focus of the Judge was confined to paragraph 301 of the Immigration Rules. The Judge, in common with the ECO, failed to consider the alternative basis of the Appellant's application under paragraph 297(i)f. We consider that it was incumbent on the Judge to do so and a clear error of law was committed in consequence.

12. It was also submitted to this Tribunal, without challenge, that some of the adverse credibility findings enshrined in the Judge's determination – specifically those relating to the particulars of the Appellant's deceased mother in the application and the authenticity and reliability of several letters – were not reflected in the letter of decision, were not advanced on behalf of the Respondent at the hearing and were not ventilated by the Judge in the presence of the parties. We consider that the hearing was procedurally unfair in consequence.

13. We decline to deal with the issue concerning the sponsor's weekly income and outgoings, including the specific issue of how the disability living allowance should be reckoned in the light of the decision in MK, given that, for reasons which we accept, the sponsors had not been able to comply satisfactorily with the evidential direction contained in the grant of permission to appeal.

DECISION

14. For the reasons elaborated above, we conclude that the decision of the FtT was infected by several material errors of law. We set it aside accordingly. Given the current state of the evidence highlighted immediately above, we remit the case for fresh decision by a differently constituted panel of the FtT.

Signed:

THE HON. MR JUSTICE MCCLOSKEY
PRESIDENT OF THE UPPER TRIBUNAL

IMMIGRATION AND ASYLUM CHAMBER
Date: 31 March 2014