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Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: OA/01598/2014**

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 7th April 2015	**On 6th May 2015**

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL FARRELLY

Between

MR AHMED BAKAR MOHAMED
(NO ANONYMITY DIRECTION MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms Brissett, Counsel, instructed by Aden and Co, Solicitors.
For the Respondent: Mr Duffy, Home Office Presenting Officer.

DECISION AND REASONS

Introduction

1. The appellant is a Somali national presently living in Kenya. He married his sponsor, Mrs Sacdiya Awaeys Noor, in Kenya on 6 May 2013. She is originally from Somalia and holds British citizenship. She was previously married and has five children. She obtained a divorce in Kenya on 10 August 2012.

2. He applied for entry clearance to join his sponsor. The application was considered under appendix FM of the immigration rules and was refused on 14 November 2013.

3. His sponsor is reliant upon State benefits and the bulk of the family income relates to payments in respect of her children. She has a son who has a disability. He receives Disability Living Allowance and the sponsor receives Carer's Allowance.

4. The entry clearance officer was not satisfied the sponsor was legally divorced and therefore free to marry. Furthermore, it was not accepted that the relationship was genuine, subsisting and the parties intended to live together permanently in the United Kingdom.

5. The application was also refused on the basis it had not been established that the family could be adequately maintained and accommodated without recourse to additional public funds. The sponsor's total weekly income from benefits amounted to £485.12. As a comparator the applicable Income Support level for a couple with five children amounted to £408 per week. Whilst the sponsor's income exceeded this, five children had to be supported and there would be council tax and utilities to pay. The tenancy agreement submitted was dated February 2012 and the entry clearance officer was not satisfied the family could be adequately accommodated without recourse to additional public funds.

6. The final ground for refusal related to the English language requirement under paragraph E-ECP.4.2. The appellant was not exempt from this and had not passed an English language test from an approved provider.

7. On review by the entry clearance manager the refusal was maintained. It was accepted that the marriage was valid; genuine and subsisting.

The First–tier Tribunal

8. The appellant appeal was dismissed by Judge Napthine in a decision promulgated on 24 November 2014. The judge expressed dissatisfaction with the entry clearance manager's concession in relation to the marriage on the basis detailed reasons had not been given. However, the judge did not seek to go behind the concession.

9. On the question of maintenance and accommodation the judge upheld the entry clearance officer's decision. The judge emphasised the interests of the children and took the view that whilst the sponsor's income from benefit exceeded the applicable income support level for a couple the balance was not truly available. This was because the bulk of the Benefits paid were for the children's needs, particularly the child with a disability. Regarding accommodation the tenancy agreement provided that no more than six people may live in the property. All but one of the sponsor's children was over 10 years of age and the judge concluded the property was fully occupied as it was. The judge also emphasised the impact on the children of another occupant and presumed there would be additional physical requirements for the child with a disability. The judge indicated the property as it was, was overcrowded

and concluded it had not been shown they would be adequate accommodation if the appellant joined the household.

10. Finally, the judge dealt with the English language requirement. It had been argued that the appellant should be exempt from the test. This was because he had been unable to attend courses or to take the test because of his circumstances, namely, he was living in a refugee camp. The judge was not satisfied the appellant's circumstances were as claimed, pointing out no evidence had been led that he was resident in a refugee camp. In any event the judge did not accept he was restricted to the confines of the camp, pointing out he said he first met the sponsor in a shopping mall; had attended the wedding of her sister and was free to attend his own wedding. Furthermore, the sponsor gave evidence to the effect that the appellant had been given a three-month travel permit.

11. Having dealt with the appeal under the immigration rules the judge referred to the decision of Gulsham (Article 8 - New rules - Correct Approach) [2014] Imm AR 2. The judge concluded for Article 8 purposes. There were no compelling circumstances not sufficiently recognised by the rules.

The grounds of appeal to the Upper Tribunal

12. In the grounds of appeal it was claimed at the First-tier Tribunal the presenting officer had indicated acceptance the maintenance and accommodation grounds were met. Regarding the English language requirement reference was again made to the claim that the appellant was living in difficult circumstances in a refugee camp. The grounds of appeal state that there was a basis for allowing the appeal outside the rules given the acceptance that the marriage was genuine; that the sponsor was now pregnant; and the difficult circumstances the appellant faced in the refugee camp.

13. Permission to appeal was granted by Judge Levin of the First-tier Tribunal. Reference was made to the decisions of KA and others (Adequacy of maintenance) Pakistan [2006] 00065 and MK (Somalia) v Entry Clearance Officer [2007] EWCA Civ 1521. On the basis the sponsor's income exceeded the applicable income support level it was arguable the judge erred in law in considering the question of maintenance.

14. It was also accepted as arguable that the judge erred in law by following the Upper Tribunal decision of Gulsham (Article 8 - New rules - Correct Approach) [2014] Imm AR 2 in light of the Court of Appeal judgement in MM (Lebanon) and others [2014] EWCA Civ 985.

15. The respondent, further to rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008 indicated ongoing opposition to the appeal. It was sought to distinguish MK (Somalia) v Entry Clearance Officer [2007] EWCA Civ 1521 on the basis the disability living allowance in the present appeal was being paid for the benefit of the sponsor's child rather than the sponsor. Regarding the judge's approach to Article 8 the respondent sought to distinguish the present appeal from the situation in MM (Lebanon) and others [2014] EWCA Civ 985 as it was concerned with the level of income required by the respondent to support an application for entry clearance. It

was said that the First-tier judge followed the approach set out in Nagre, R (on the application of) v Secretary of State for the Home Department [2013] EWHC 720 (Admin) as approved by the Court of Appeal in MF Nigeria [2013] EWCA Civ 1192, namely, it was only if there was a good arguable case that there was any need to carry out the traditional proportionality exercise in relation to Article 8.

Error of law

16. Mr Duffy stated that the notes from the First-tier Tribunal indicated there was agreement between the then presenting officer and the appellant's representative with regard to maintenance and accommodation. I have considered the record of proceedings. The bulk of the judge's note is concerned with the English language test .The judge then raised other matters with the sponsor arising from the refusal letter. It is recorded in the note of the submissions that counsel for the appellant indicated maintenance and accommodation was ` accepted' by the presenting officer and so no submissions were being made on the point.

17. It is not apparent why the judge then pursued this point in the Determination .In any event it was my conclusion in that the judge erred in law in how maintenance was dealt with. This was in light of the majority decision of the Court of Appeal in the Court of Appeal decision in MK (Somalia) v Entry Clearance Officer [2007] EWCA Civ 1521. The minority judgement of Lord Justice Pill does accord with Judge Napthine's approach. At paragraph 14 Lord Justice Pill refers to DLA being for the particular needs of a disabled person and the absence of control over how it is spent does not converted into a benefit which can be treated as family income or the joint income of the disabled person and their spouse. Lord Justice Sedley, giving the majority decision took the opposite view: monies paid to the claimant of DLA could be spent as they choose and can be used for the upkeep of another. Lord Justice Rimer at paragraph 24 accepted the argument a person seeking entry could assert they would become the sponsor's carer. In MK (Somalia) v Entry Clearance Officer [2007] EWCA Civ 1521 it was the sponsor who was in receipt of the benefit whereas in the present appeal it is the sponsor's child. However, it seems to me that the same principle applies. Mr Duffy has not raised any issue in relation to accommodation.

18. Regarding the English language qualification the appellant's representative argued that given his circumstances as a refugee in Kenya he should have been exempt under E-ECP.4.2 (c) on the basis of exceptional circumstances preventing him from meeting the English language requirement. The appellant has now passed the necessary test .Mr Duffy made the point that the appellant's ability to study and take the English test could not have been as restricted as was claimed before the First-tier Tribunal as he now had the qualification. There was an absence of information about the circumstances whereby he took the test subsequent to the decision. His sponsor was present and whilst there was no Somali interpreter arranged she indicated she was able to give some information. She indicated that she sent her husband money so he could prepare for the test. She said conditions in the camp were very difficult with ongoing fights and that it was a dangerous environment. She said her husband

develop malaria and was taken outside the camp and he subsequently was able to prepare for the English test.

19. Mr Duffy suggested the appellant could make a fresh application. I was advised the sponsor was due to give birth at the end of the month. I asked Mr Duffy if requiring the appellant to make a fresh application would have similarities with the position in Chikwamba. He submitted that the position here was quite different from in Chikwamba. There, the appellant had been in the United Kingdom some time and would be returning to Zimbabwe where they would face difficulties. I accepted the merit in the points made. He also pointed out that Article 8 was not meant to be used as a general dispensing power and I was referred to the decision of Patel & Others v Secretary of State for the Home Department [2013] UKSC 72.

Conclusions

20. It is common case is that the English language requirement was not satisfied by the appellant at the time of decision. Judge Napthine did not find the appellant to be exempt. The judge referred to the lack of evidence that he was in a refugee camp and refers to instances where he was not confined to the camp. The judge also refers to the public interest that person seeking to remain in the United Kingdom speak English. I find no error of law in the judge's conclusion that the appellant was not exempt.

21. My conclusion therefore is that any error on the part of Judge Napthine in relation to how maintenance was dealt with would not have made any material difference to the negative outcome under the rules. The absence of the necessary English language qualification was fatal to the application.

22. I also do not see any material error in law in Judge Napthine's conclusion in relation to Article 8. The judge had concluded that nothing arose which indicated arguably good grounds for granting entry clearance outside the immigration rules. The judge was aware the appellant's sponsor was pregnant. Reference was made to the best interests of the children being a primary consideration. Regard was had to part 5A of the Nationality, Immigration and Asylum Act 2002 and the relevant public interest considerations.

23. The judge relied upon the decision of Gulsham (Article 8 - New rules - Correct Approach) [2014] Imm AR 2, finding there were no compelling circumstances not sufficiently recognised under the rules. MM (Lebanon) & Others, R (On the Application of) v SSHD [2014] EWCA Civ 985 refers to situations when the immigration rules provide a complete code for dealing with a person's Convention rights in which case the balancing exercise and the way the various factors are to be taken into account in an individual case must be done in accordance with that code. If the relevant rules are not such a complete code then the proportionality test will be more at large.

24. Judge Napthine at paragraph 45 and 47 indicated consideration was given to the specific circumstances and the Judge did not see any matters of significance that were

not adequately recognised. I can see no error of law in this. It remains open as the presenting officer has suggested for the appellant to make a new application now that he appears to meet the requirements of the rules.

25. In conclusion therefore, whilst I find there was an error of law in the treatment of maintenance this was not a material error. This was because the appeal was bound to fail as the English language requirement was not satisfied. The judge was entitled to conclude the appellant was not exempt. I also find no error of law in the judge's consideration of Article 8.

Decision

26. The decision of the First-tier Tribunal promulgated on the 24 November 2014 dismissing the appealed does not contain a material error of law and shall stand.

FJ Farrelly
A Deputy Judge of the Upper Tribunal