Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/20044/2012

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 9th October 2013	**On 26th November 2013**
Prepared	

Before
UPPER TRIBUNAL JUDGE JORDAN
UPPER TRIBUNAL JUDGE ROBERTS

Between

ENTRY CLEARANCE OFFICER - CAIRO

Appellant

and

MRS HANA TAHA ISSA TAHA
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr Wilding, Home Office Presenting Officer
For the Respondent: Mr M Rudd

DETERMINATION AND REASONS

1. This is an appeal brought by the Secretary of State against the decision of the First-tier Tribunal, allowing the appeal of Hana Taha Issa Taha against the decision of the Entry Clearance Officer Cairo, refusing her entry clearance as the spouse of a British citizen. For ease of reference in this determination we refer to Hana Taha Issa Taha

who is a citizen of Sudan, as the Appellant and the Secretary of State as the Respondent.

2. The Appellant applied to join her husband (the Sponsor) and made that application in May 2012. The Appellant and Sponsor married in 2009 in Sudan and lived together there. They have two sons, Amar born January 2011 and Mohammed born January 2012. Both children are British citizens. Currently Amar is living in the United Kingdom with his father while Mohammed remains in Sudan with his mother.

3. Whilst the Appellant and her Sponsor were living together in Sudan, Amar started suffering from renal problems. He started passing kidney stones which is very unusual in a child so young. The doctors in Sudan recommended that the child seek treatment in the United Kingdom. Consequently the Sponsor and Amar travelled to the United Kingdom to access the necessary treatment and the Appellant who at this stage was seven months pregnant with her second child, remained in Sudan.

4. The Sponsor is the principal carer for Amar and presently he is under the care of Great Ormond Street Hospital.

5. The Appellant subsequently gave birth to the couple's second child in January 2012 and in May 2012 she applied for entry clearance to join her husband in the UK.

6. The Entry Clearance Officer Cairo considered her application and refused it on two distinct grounds.

   (i) The Appellant had failed to demonstrate satisfactory evidence of her ability to speak English by providing an English language test certificate.

   (ii) The Appellant failed to provide satisfactory evidence that she could be adequately maintained within the meaning of paragraph 281 of the Immigration Rules.

7. The Appellant appealed that refusal and her appeal was heard by the First-tier Tribunal on 26th June 2013. In a lengthy determination the Tribunal summarised the Appellant's claim. They heard evidence from the Sponsor whom they found to be wholly credible and took account (perhaps not surprisingly in view of the HOPO's "apparent" concessions at paragraph 33) that the Appellant had now passed the English language test.

8. Even so the Tribunal concluded correctly that the Appellant could not meet the Immigration Rules because she could not satisfy the maintenance requirement. Therefore they considered Article 8 ECHR and concluded that the Appellant's appeal could be allowed under that provision.

9. The Respondent sought permission to appeal. This was granted on 20th August 2013 and thus the matter comes before us.

10. Pausing there it is correct to say that following the grant of permission, directions were issued to both parties, directing them that they should prepare for the hearing before us on the basis that if we decided to set aside the determination of the First-tier Tribunal, any further evidence including supplementary oral evidence that we may need to consider could be considered at the hearing before us. In the event there was no further evidence served upon us and no Rule 24 response. We heard submissions from both representatives.

11. Mr Wilding on behalf of the Respondent addressed us on what he termed the concerns raised by the First-tier Tribunal determination. The central issue and the one which the Tribunal had fallen into error, revolved around its reasoning in paragraph 43 of the determination. That paragraph states,

> *"It seems to me likely that the entry of the mother would, as a matter of fact, lead to a decrease in the amount of public funds being expended rather than an increase. I accept the evidence of the Sponsor that he has worked in the past as a machine operator. I accept that he cannot work at present due to the fact that he has to care for his child. It seems to me likely that, if the mother were to arrive, with the other child, then she would be responsible for the childcare and the husband would be free to take up employment as he has had in the past. Of course there are no guarantees that he would obtain such employment or obtain it immediately, but overall it seems that there is more likelihood of the family as a whole being less dependent on public funds if the mother is admitted than if she is not admitted. The second child is, of course, entitled to come to the UK in any event".*

12. Having found that the Appellant cannot meet the financial requirements of the Rules, the Tribunal speculated on what may or may not happen in the future; but there is no evidential analysis of the Appellant's financial situation, nor any proper evidential analysis of any prospect that the Sponsor may obtain employment in the future and thereby enable the Appellant to meet the requirements of the Immigration Rules.

13. Mr Wilding continued that in any Article 8 proportionality test the financial requirements must be factored into the balance and this the Tribunal had failed to do. Therefore they had erred and the decision must be remade as it is vitally important that the financial consideration be factored in.

14. Mr Rudd drew our attention to paragraph 28 of the determination and submitted that it was quite clear that it had been accepted by the Tribunal that the Appellant could not meet the requirements of the Immigration Rules and that this was an Article 8 claim only. The Judge's findings at paragraph 42 and 43 showed that the Judge had factored into his consideration the fact that the Appellant may well be a financial burden upon the State but this case fell into one of those which rendered it exceptional. He said there is no reason to overturn to the findings and decision of the First-tier.

15. We had canvassed with the parties, whether in the event we found that the First-tier Tribunal has erred, we would be in a position to remake the decision. We reminded

the representatives that directions had been served and that no further evidence had been forthcoming and that there had been no Rule 24 responses. Both representatives agreed that there was no challenge to the facts of this appeal.

Error of Law

16. Having considered matters we are satisfied that the determination of the First-tier Tribunal should be set aside for error of law. We are satisfied that the First-tier Tribunal Judge failed to make findings on the Appellant's ability to meet the financial requirements under the Immigration Rules. This failure means that he did not properly take into account the public interest element when assessing proportionality under Article 8 ECHR. The decision is therefore incomplete as a key element in the assessment is missing. As there is no challenge to the facts found by the First-tier Tribunal Judge we propose to remake the decision. All facts are preserved.

Remaking the Decision

17. Our starting point is that there is no challenge to the facts found by the First-tier Tribunal Judge. We note in particular that the child Amar has suffered serious medical problems for one so young. We into account that he is separated from his mother and younger sibling. We bear in mind that although not a paramount consideration, the best interests of a child are a primary consideration. This means that Amar's interests (and those of his younger sibling) must be considered first but they can be outweighed by the cumulative effect of other considerations. **SS Nigeria [2013]** following **ZH Tanzania [2012]**

18. We are satisfied that in this appeal Article 8 ECHR is engaged because there is evidence of family life between the Appellant, her husband and two children. As the representatives correctly pointed out the real focus in this case is that of proportionality under the **Razgar** test set out below.

Razgar -v- Secretary of State for the Home Department [2004] UKHL 27

(a) Is there an interference with the Appellant's right to respect for his family/private life etc?

(b) If so will such interference have consequences of such gravity as potentially to engage the operation of Article 8?

(c) If so, is such interference in accordance with the law?

(d) If so, is such interference necessary in a democratic society?

(e) If so, is such interference proportionate to the legitimate public end sought to be achieved.

19. We accept that Amar continues to require medical treatment and that must weigh heavily in the balance. However we also keep in mind that Amar is well cared for, by

his father and as a British child is receiving the medical care and attention to which he is entitled. There was no evidence before us that Amar's day-to-day needs were not being met by his father. His father sees to the large amount of daily medication that he has to take and manages the difficult side-effects which the medication produces. This is all continuously monitored by Amar's medical team and the periodic treatment he receives at Great Ormond Street Hospital.

20. We reject however the proposition that the entry of the Appellant would in all likelihood lead to a decrease in the amount of public funds being expended rather than an increase. We also reject the proposition that the Appellant's arrival would likely free her husband the Sponsor to take up employment. There was simply no evidence upon which to base those suppositions. Rather the reverse. The evidence before us is that the Sponsor last worked as a machine operator and a pay slip for 2005 was produced. That is a substantial period without employment.

21. The reality is that entry of the Appellant would entail this family of two adults and two children being dependent upon public funds and thus a burden on the tax payer.

22. We are strengthened in our view of this by reference to **AAO [2011] EWCA Civ 840** where it was stated,

> *"Strasbourg and domestic jurisprudence has consistently emphasised that States are entitled to have regard to their system of immigration control and its generally consistent application, and a requirement that an entrant should be maintained without recourse to public funds is an ultimately fair and necessary limitation on what would otherwise become a possibly overwhelming burden on all of its citizens".*

23. It is important to bear in mind that the consequences of a negative decision in this appeal does not necessarily mean that the family will always be kept apart even if the UK based family members do not return to Sudan.

24. There remains a possibility that the circumstances of the Sponsor may change and perhaps through finding suitable childcare arrangements for Amar and the obtaining of employment, that in due course may lead to a successful entry clearance application being made in the future. Therefore continual separation is not inevitable.

25. For the purposes of this determination however, we conclude that weighing all the evidence as we must, in the circumstances of this particular case, the decision of the Respondent is not a disproportionate interference with the family life of the Appellant.

DECISION

26. The First-tier Tribunal erred in law. We set aside that decision. We remake the decision. The appeal is dismissed.

No anonymity direction is made

Signature **Dated**
Judge of the Upper Tribunal

Fee Award

I have dismissed the appeal and therefore there can be no fee award.

Signature **Dated**