**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: OA/04726/2013

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Determination Promulgated** |
|---|---|
| **On 21 February 2014** | **On 6 March 2014** |

**Before**

**UPPER TRIBUNAL JUDGE KOPIECZEK**

**Between**

**WAYNE ANTHONY NELSON**

Appellant

**and**

**ENTRY CLEARANCE OFFICER-KINGSTON**

Respondent

**Representation:**

For the Appellant: Mr A. Bandegani, Counsel instructed by Irvine and Co., Solicitors
For the Respondent: Ms J. Isherwood, Home Office Presenting Officer

**DETERMINATION AND REASONS**

*Introduction*

1. The appellant is a citizen of Jamaica, born on 21 September 1968. On 12 October 2012 he applied for entry clearance as a partner. His appeal against the decision to

refuse that application was dismissed by First-tier Tribunal Judge Roopnarine-Davies after a hearing on 20 November 2013.

2. The application for entry clearance was refused with reference to the Immigration Rules ("the Rules") under Appendix FM, section E-ECP, in particular in relation to the financial requirements because the appellant did not provide specified documents as set out in the Rules.

3. The First-tier judge found that the appellant had not provided the specified documents. Although she found that some of the sponsor's income had been established, it could not be established the basis on which the income was received. It was however, accepted by the First-tier judge that the appellant and his wife had savings of £18,000 but these were not savings at a sufficient level under the Rules because in the absence of satisfactory evidence of income of £18,600, savings of £62,500 needed to be shown.

4. The grounds of appeal on which permission to appeal to the Upper Tribunal was granted contend that the judge failed to give appropriate consideration to the fact that the sponsor was in receipt of disability living allowance ("DLA") and therefore only needed to show adequate maintenance. Other grounds related to suggested errors in the proportionality assessment under Article 8 of the ECHR. Those grounds were supplemented by a skeleton argument at the hearing before me.

*Submissions*

5. I heard initial submissions from Ms Isherwood. She submitted that it was for the first time at the hearing before the First-tier Tribunal that the appellant's partner was said to be in receipt of DLA at the time of the decision. The appellant had said on the visa application form ("VAF") at question 3.1 (and 3.64) that the sponsor was not in receipt of such a benefit. There was no reference to DLA in question 4.12 concerning the receipt of any money from public funds. No such evidence was submitted in advance of the Entry Clearance Manager's Review, or in the appellant's solicitors' letter dated 15 October 2012 in support of the application for entry clearance. It was not raised as an issue in the grounds of appeal to the First-tier Tribunal which contended that the appellant was able to meet the financial requirements.

6. Mr Bandegani agreed that the issue was only raised at the hearing but contended that that was irrelevant. The First-tier judge nevertheless had evidence which was relevant in terms of the date of decision. Under the Immigration Directorate's Instructions ("IDI's") the appellant only had to establish adequate maintenance.

7. In relation to the contention that the judge should have taken into account the fact that by the time of the hearing the appellant and the sponsor had a child and the sponsor had been granted British citizenship, Mr Bandegani contended that AS (Somalia) [2009] UKHL 32 could be distinguished on the basis that the House of Lords did not consider the duty under section 55 of the Borders, Citizenship and

Immigration Act 2009. In addition, the appellant in the appeal before me was in fact in the UK at the time of the hearing which, it was said, was another distinguishing feature.

8. Ms Isherwood in reply submitted that notwithstanding that there did appear to be evidence before the First-tier judge of the sponsor being in receipt of DLA, that was not sufficient given that the judge was not satisfied as to the evidence of the sponsor's outgoings.

9. In relation to Article 8, AS (Somalia) did consider the question of children coming to the UK. The judge was correct not to take into account the British citizenship of the sponsor and their child.

10. Mr Bandegani's further submissions were to the effect that the outcome of the appeal could have been different but for the errors of law. The judge did not reject the evidence of income, only finding that there was a lack of clarity as to the source of the income. If there is doubt about the issue of maintenance the matter needs to be looked at again.

*My assessment*

11. The application for entry clearance failed on the issue of the appellant's ability to meet the financial requirements of the Rules. The minimum income levels as set out in Appendix FM do not apply in the case of a person who is in receipt of DLA (or certain other public funds). That is the effect of sections E-ECP.3.1(c) and E-ECP.3.3. Where the applicant's partner is in receipt of DLA the requirement under E-ECP.3.3.(b) is that the applicant:

> "must provide…evidence that their partner is able to maintain and accommodate themselves, the applicant and any dependants adequately in the UK without recourse to public funds."

12. The First-tier judge concluded that the appellant was not able to meet the requirements of the Rules in terms of the level of funds, relying on income from employment or self-employment, for the reasons explained above. However, the judge referred at [4] to evidence that the sponsor had stopped working in August 2013 and has been in receipt of DLA "since April 2013".

13. There was no oral evidence at the hearing before the First-tier Tribunal and the hearing proceeded by way of submissions only. It is not clear therefore, where the information about the appellant having been in receipt of DLA since April 2013 came from but it would seem to have come from submissions. The grounds and the appellant's skeleton argument refer to two letters in relation to DLA, having been handed to the judge at the hearing. There are two letters on the Tribunal file (and in the appellant's bundle), dated 24 February 2010 and 21 December 2012, addressed to the sponsor, the appellant's partner. The former refers to DLA to the sponsor from 22 December 2008 to 21 December 2012. The latter refers to DLA to the sponsor from 21 December 2012 to 21 December 2014.

14. The significance of the dates is that the application for entry clearance was made on 12 October 2012 and the decision made on 7 January 2013. It would appear that the judge considered that the receipt of DLA could not have had any impact on the appeal because it was evidence that post-dated the decision, she having concluded that DLA was received from April 2013.

15. Ms Isherwood did eventually concede that there was evidence before the First-tier judge which revealed that the sponsor was in receipt of DLA at the date of the decision, albeit that the ECO was not aware of that fact. The ECO was not aware of it because it was not brought to his/her attention.

16. Whilst the judge was wrong in finding that the appellant's partner was receiving DLA only after the date of decision, that is not determinative of the question of whether she erred in law by assessing the financial requirements in relation to the precise financial thresholds set out in the Rules, as opposed to in terms of adequate maintenance.

17. It is as well to remember the findings that the judge made in relation to the financial evidence that she heard. There is no challenge to the judge's findings in this respect. The findings are set out at [6] and [7]. They are that the appellant had not provided the specified evidence in relation to his partner's self-employment, including "scant" evidence of ongoing self employment as required by paragraph 7(g) of Appendix FM-SE. She found that the absence of audited accounts as required by paragraph 7(h) and the "corresponding scrutiny associated with them undermines the veracity of the earnings." Although personal bank statements had been provided for May to October 2012 there had been little attempt to show that the source of the deposits had been from the claimed trade of ladies fashion and that there was "scant" evidence of the nature of the business. She concluded that little weight could be attached to the unaudited accounts.

18. At [7] the judge stated that she accepted that the sponsor had received £4,764 from the South London and Maudsley NHS Trust between 24 October 2011 and 24 January 2012 but due to the failure to produce specified documents it was difficult to ascertain whether those payments were from a job or other payments. The judge went on to state that "There is a consistent lack of clarity about the various claims and little attempt to substantiate the claims to the required standard", for example little attempt to show that the sponsor worked for 10 years at an NHS Trust until made redundant in 2012, as had been claimed on the VAF. It was concluded that all that could be said, on balance, was that she received approximately £5,900 income for the tax years 2011-2012 and 2012-2013. The £18,000 savings that they have was not a sum that met the requirements of the Rules which required savings of £62,500 where the evidence did not show income of £18,600.

19. It is also important to bear in mind that the basis of the application for entry clearance was in terms of the appellant's income from employment and self-employment. It was never suggested in the application for entry clearance that the

appellant only had to show adequate maintenance because his partner was in receipt of DLA. Neither was this raised in the grounds of appeal to the First-tier Tribunal. Furthermore, it is clear from the determination of the First-tier judge that the case was advanced before her on the basis of income from employment and self-employment, rather than in relation to adequate maintenance because of the receipt of DLA. The judge made reference to evidence of DLA and it does appear that the letters in relation to DLA that were produced at the hearing were not referred to in the determination. However, the DLA/adequate maintenance argument was nevertheless not advanced before her.

20. I do not consider that the need only to show adequate maintenance was a matter that was 'Robinson' obvious, particularly in the light of the way the case was put. In these circumstances I do not accept that it could be said that the judge erred in law in not dealing with an issue that was never advanced before her.

21. Even if it could be said that the judge erred in law, it was not an error of law that could have affected the outcome of the appeal. It was accepted before me on behalf of the appellant that there was a requirement to provide specified evidence, even in cases where DLA is relied on and only adequate maintenance needs to be shown. Mr Bandegani was not in a position to make submissions to me as to what evidence the appellant would have needed to provide to make good the case in terms of adequate maintenance.

22. Paragraph 6 of the Immigration Rules provides that "adequate" and "adequately" in relation to a maintenance and accommodation requirement means that after income tax, national insurance contributions and housing costs have been deducted there must be available to the family the level of income that would be available to them if the family was in receipt of income support. This reflects what is in the IDI's relied on by the appellant. It also reflects the decision of KA and Others (Adequacy of maintenance) Pakistan [2006] UKAIT 00065.

23. Although it is said in the skeleton argument for the proceedings before me at [5] that the appellant provided evidence that adequate maintenance could be met, there is no analysis of the evidence or the basis on which it is said that the evidence supports the claim of adequate maintenance, apart from the statement that the appropriate income support yardstick is "around £70 per week".

24. I have not been provided with precise information as to the income support rates. However, this is information in the public domain. At the date of decision, the rate for 2012/2013 for a couple over the age of 18 was £111.45. It may be, although again no information was provided to me on the issue, that Ms Wellington the appellant's partner, may be entitled, if receiving income support, to a disability premium, given her receipt of DLA. The rate for a couple at the relevant time was £43.25 although again, I was not provided with any information on the issue on behalf of the appellant and whether there would be any entitlements in terms of a disability premium was not the subject of any evidence or argument before me,

notwithstanding that the appellant relies on the hypothetical yardstick of income support.

25. According to the letter from the DWP dated 21 December 2012 Ms Wellington was awarded DLA at the rate of £54.05 per week for mobility from 22 December 2012 until 21 December 2014, and £20.55 per week for the same period. The total is therefore £74.60 per week.[1] In order to meet the income support level the appellant needs to show income of at least £111.45 with an additional £64.99 for each of the sponsor's children who were under 18 at the date of decision, with a family premium of £17.40. The total therefore would be £258.83. That is aside from any question of whether that figure would be increased by reason of any disability premium. Unless the appellant can rely on some other source of income, the income support yardstick is not met in terms of income.

26. As has been seen, the First-tier judge was not satisfied as to the evidence in relation to Ms Wellington's income. She did find that £5,900 had been received for the tax years 2011/2012 and 2012/2013 (see [7]) which appears to be a rough addition of £4,764 and £1,163. However, in fact only the £1,163 was anywhere close to the date of decision or application, having been received in August 2012 (the application having been made on 12 October 2012). In any case, the judge also concluded that under the Rules this income could not be taken into account as the specified documents had not been provided.

27. Again, although I was not referred to the Rules in relation to specified documents where adequate maintenance only is required to be shown, paragraphs 12 and 12A of Appendix FM-SE would seem to be relevant. A person only having to show adequate maintenance because, for example, the person is in receipt of DLA, the Rule requires much the same by way of documentary evidence as was found by the First-tier judge not to have been provided.

28. Although the First-tier judge found that the appellant and his partner have savings of £18,000, paragraph 11 of Appendix FM-SE as it applied at the date of decision requires, in summary, that the cash savings must have been held in an account for at least six months prior to the date of application. Paragraph 11 applies in relation to savings by virtue of paragraph 12A(e).[2] There is no analysis on behalf of the appellant in terms of whether this requirement is met. On my own assessment of the bank statements (in the appellant's, his partner's or joint names) in the appellant's and respondent's bundles, the six months requirement is not met. The level of savings that the appellant and his partner can rely on as helping to establish that the maintenance requirement is met has not been explained, either in terms of the period of time for which they have, jointly or severally, held savings or how long those savings would last.

29. Accordingly, I am not satisfied that the First-tier judge erred in law in her assessment of whether the appellant was able to meet the financial requirements

[1] I note that in Ms Wellington's bank statement, amounts of £82.20 appear as the payments from the DWP.
[2] Paragraph 12A was inserted into the Immigration Rules on 6 September 2012

of the Rules. Although there was evidence before her that the appellant's partner was in receipt of DLA, the case was advanced on the basis that the appellant was able to meet the relevant requirements through his partner's income from employment and self-employment. In any event, on the basis of the evidence that was put before the First-tier judge, even if it could not be said that there was an error of law in terms of the failure to assess the adequacy of maintenance, that is not an error that could have affected the outcome of the appeal on the evidence before her.

30. In relation to Article 8 of the ECHR it is said that the judge erred in law by failing to take into account evidence that the appellant and his partner have a child, born on 13 November 2013, and that his partner was granted British citizenship in July 2013. Both events are said to have been "foreseeable" and thus the restriction on post-decision evidence mandated by section 85A of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") did not prevent the judge from taking that evidence into account.

31. This argument in my view has no merit. In relation to their daughter, she was born 10 months after the date of decision. The child's birth could not possibly be said to evidence of the circumstances "appertaining" at the time of the decision. The argument as set out in the skeleton argument at [11] and in submissions, to the effect that it is foreseeable that a married and committed couple could have a child in the first year of marriage is simply unsustainable. That presupposes that it is the norm and therefore foreseeable that such a couple would want to start a family in the first year of marriage, or at all for that matter. Furthermore, it presupposes that the couple are able to conceive in that time. These are just the two most obvious reasons as to why the proposition of foreseability relied on has no merit.

32. I take the same view in relation to the grant of citizenship to Ms Wellington, an event that took place six months after the date of decision. A grant of citizenship does not automatically follow from a grant of indefinite leave to remain, still less within any particular time period. No evidence was adduced which indicated that a grant of citizenship was to be made and/or that it would be granted.

33. Having rejected those arguments, it follows that the contention in relation to the financial requirements as set out in the Rules, relying on the decision of Blake J in MM [2013] EWHC 1900 (Admin**)** has no foundation. That was a decision relating to British citizen and refugee sponsors. At the date of decision the appellant's partner was not a British citizen and evidence in relation to her citizenship could not be taken into account for the reasons I have given.

34. Lastly, it was argued that the decision in AS (Somalia) [2009] UKHL 32 (which confirms that the limitation on evidence as to the date of decision in entry clearance cases applies in relation to human rights grounds) can be distinguished on the facts of this appeal, although the skeleton argument does not in fact refer to AS (Somalia). It is said that the House of Lords did not consider section 55 of the

Borders, Citizenship and Immigration Act 2009 (because the Act had not been passed). However, I cannot see that section 55 makes any difference in that the House of Lords concluded that section 85(5) of the 2002 Act was not incompatible with the European Convention. Section 55 would not have altered that conclusion. Their Lordships considered the 2002 Act in the context of cases that may involve children.

35. It is also said that this appellant's case is different from the run-of-the-mill entry clearance case because the appellant was in the UK "at the relevant time", as it was put in submissions. According to the appellant's witness statement he arrived on 26 January 2013, pursuant to a grant of entry clearance as a visitor. The refusal of entry clearance decision (as a partner) was made on 7 January 2013. Be that as it may, the appellant is still in the UK and was present at the hearing of the appeal before the Upper Tribunal. That he is in the UK is a relevant factor it is suggested. As I understood the argument, it was suggested that there is no practical difference between his case and one in which the appellant is applying for leave to remain from within the UK.

36. I do not agree. Aside from anything else, the appellant's presence in the UK cannot affect the application of section 85(A) of the 2002 Act in relation to what evidence can be taken into account. In the second place, the logical conclusion of the argument is that an appellant would be able to circumvent the statute either by entering the country illegally, or by overstaying. As to the latter, it is the case that this appellant is now an overstayer, as is implicitly accepted in his witness statement at [2], regardless of whether or not his legal representatives have or have not given him advice about that. It could not be said that the decision in AS allowed for a distinction to be made in cases similar to that of this appellant where the person is in the UK. Their Lordships were clearly considering the distinction in the 2002 Act between entry clearance cases and those where an application was made from within the UK, which do not attract the same restriction on the admissibility of evidence.

37. In summary, I am not satisfied that there is any error of law in the decision of the First-tier Tribunal, or any that could have affected the outcome of the appeal.

*Decision*

38. The decision of the First-tier Tribunal did not involve the making of an error on a point of law. The decision of the First-tier Tribunal to dismiss the appeal under the Immigration Rules and on human rights grounds stands.

Upper Tribunal Judge Kopieczek

4/03/14