Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: OA/07756/2013

THE IMMIGRATION ACTS

Heard at Glasgow	**Determination Promulgated**
On 5 March 2014	**On 4 April 2014**

Before

MR C M G OCKELTON, VICE PRESIDENT
UPPER TRIBUNAL JUDGE DEANS

Between

ZAKIA KAMAL MOHAMED ABAS

Appellant

and

THE ENTRY CLEARANCE OFFICER, CAIRO

Respondent

Representation:

For the Appellant: Mr Stevenson, instructed by McGill & Co. Solicitors
For the Respondent: Mr J Parkinson, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, a national of Sudan, appealed to the First-tier Tribunal against the decision of the respondent on 20 February 2013, refusing her entry clearance as the spouse of Abdelrazig Mohamed Abdalla. The application was made under the Immigration Rules and it is now not in dispute that it cannot succeed under the

Immigration Rules. In the covering letter attached to the application, consideration was sought outside the Rules, by reference to Article 8 to the European Convention on Human Rights and the best interests of the children of the appellant: the appellant's husband has two other children from a previous marriage.

2. In the First-tier Tribunal, the appeal was heard by Judge Burns, who found that the appellant could not meet the requirements of the Rules. He found that the Entry Clearance Officer had entirely failed to consider the matter outside the Rules, and, instead of making a decision himself, purported to remit the matter to the respondent in order to consider whether entry clearance should be granted outside the Rules on the basis that it would be disproportionate to refuse it. It is that element of the judge's decision that is the subject of the appeal to this Tribunal. Leave was sought and granted on the basis that the judge was required to determine the issue under Article 8, which had been raised as a ground both on application and on appeal.

3. We agree. The judge was required to make such a determination.

4. The difficulty for the appellant and for Mr Stevenson representing him is, however, to show that the judge's determination ought, or even could have been, in the appellant's favour. Although the letter sent with the original application deals at length with Article 8 and s.55, it does so in almost entirely general terms. The only specific references to individual facts consist in a statement of the names of the children and their ages. As Mr Stevenson readily acknowledged, the mere existence of children cannot require a decision in an applicant's favour.

5. The appellant's difficulties go further than that however. At the date of the decision her husband was (if we may so put it) emerging from bankruptcy. That, in fact, is the principal reason why he was unable to supply the documents which might have enabled the appellant to succeed under the Rules. At the date of the decision he had just begun a new business. It looks as though on that date the business had been running for about a week. The application was supported by a letter from a professional (not, we think, an accountant); the appeal was supported by another letter from the same person. They are not entirely consistent in relation to the financial prospects for the sponsor and his firm. In any event, they are of course, almost wholly speculative. The position is that the appellant is unable to show that, if she had been admitted to the United Kingdom as a result of a visa granted on the date of the decision under appeal, there would have been sufficient money to enable all the members of the family to live in reasonable dignity. In particular, although the best interests of the children are asserted in general terms, it is very far from easy to see how those interests would be served by spreading the modest family income even more thinly in order to support the appellant as well as them. We should add that this is not a case where the evidence is that the family members have not been able to see each other regularly; nor is it a case where it is said that the circumstances of the family abroad point of themselves to admission to the Untied Kingdom. The position is, unfortunate as it may be, that the evidence available in relation to the position at the date of the decision shows neither that the appellant could meet the

requirements of the Rules nor that it would be disproportionate in her case to maintain the *status quo,* nor that the children's best interests would be served by her admission for settlement.

6. As we remarked at the hearing, this appears to us to be a case which would probably benefit from a new application, in which (whether or not made in the hope of succeeding under the Rules) there can be a proper statement on what the circumstances would be if the appellant were to be admitted to the United Kingdom, so that an assessment can be made of whether there is a viable claim outside the Rules. So far any new application is concerned, we emphasise that the dismissal of this appeal implies no judgement that any of the evidence we have seen was not worthy of credit: the position simply is that the evidence is wholly insufficient to make the case the appellant seeks to make.

7. The First-tier Tribunal Judge erred by failing to decide the Article 8 issue. He ought to have decided it, but, for the reasons we have given, we regard it as inconceivable that he could have decided it other than by dismissing the appeal on those grounds. We therefore substitute a determination, dismissing the appeal on all grounds.

C M G OCKELTON
VICE PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
Date: 31 March 2014