Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/20266 2012

THE IMMIGRATION ACTS

Heard at Field House
On 22nd January 2014

Determination Promulgated
On 23rd January 2014
……………………………………

Before

UPPER TRIBUNAL JUDGE MARTIN

Between

MRS SOPHIA WUHIB WOLDEMARIAM

Appellant

and

ENTRY CLEARANCE OFFICER - ADDIS ABABA

Respondent

Representation:

For the Appellant: Ms N Brissett (instructed by Aden & Co, solicitors)
For the Respondent: Ms E Martin (Senior Home Office Presenting Officer)

DETERMINATION AND REASONS

1. The Secretary of State appeals to the Upper Tribunal against a decision of the First-tier Tribunal (Judge Gibb) by which he allowed, on Article 8 grounds, the Appellant's appeal against an Entry Clearance Officer's decision to refuse her entry clearance as a spouse. For the sake of continuity I shall continue to refer to the Secretary of State as the Respondent and Ms Woldemariam as the Appellant.

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2. The grounds seeking permission to appeal argue that in allowing the appeal on Article 8 grounds the First-tier Tribunal made an error of law, in particular in relying upon the case of MM [2012] EWHC 1900 (Admin).

3. The matter first came before me on 25th November 2013 and on that date I decided the First-tier Tribunal had indeed made an error of law on the basis that the Judge had applied MM incorrectly and his incorrect application of MM tainted his decision on proportionality as a whole. In particular he had taken into account irrelevant matters including the fact that the Appellant was pregnant at the date of the hearing. She was not pregnant at the date of decision and the judge had further erred in looking at the best interests of a child not yet in existence. A foetus cannot have Human Rights.

4. Ms Brissett wished to adduce additional evidence and so I adjourned the matter for a resumed hearing and gave directions.

5. In accordance with those directions I have an additional witness statement from the Sponsor and translated documents concerning the Appellant's business interests and finances in Ethiopia. I also heard oral evidence from the Sponsor.

6. It is only the decision under Article 8 that I set aside. The First-tier Tribunal's findings that the Appellant could not meet the requirements of the Immigration Rules is without error and stands.

7. The situation in this case is that the Sponsor came to the United Kingdom from Ethiopia in 1988 and claimed asylum. He was granted asylum and in 2002 granted British citizenship. In 2005 he travelled to Ethiopia because his mother was ill and all of his siblings were either in the UK or the USA. Whilst in Ethiopia he met the Appellant and they married in February 2008. The couple lived together in Ethiopia until the Sponsor returned to the UK in June 2009. The Sponsor was therefore living in Ethiopia between 2005 and June 2009.

8. The Sponsor then next saw the Appellant in June 2011 when he went to Ethiopia and she applied for a visit visa. That was granted and the couple spent time together in France and then came to the UK in August 2011. The Appellant returned to Ethiopia in October 2011. The Sponsor and Appellant did not then meet from October 2011 until after the decision to refuse her leave to enter was made in December 2012.

9. After the refusal, in March 2013, the couple travelled to India where the Appellant underwent IVF treatment which proved successful such that she is now pregnant.

10. This being an out of country entry clearance case the relevant date for my deliberations is the date of decision. The date of decision is December 2012 and at that time the Appellant was not pregnant.

11. The Sponsor works as a driver for Addison Lee private hire taxi company and it was established before the First-tier Tribunal that his gross income is £12,000 per annum. That is £6,600 below the amount stipulated by the Immigration Rules. Ms Brisset, on

the Appellant's behalf, relied solely on the authority of MM and in particular paragraphs 123 and 124 of that judgment where Mr Justice Blake said the following:-

> "Although there may be sound reasons in favour of some of the individual requirements taken in isolation, I conclude that when applied to either recognised refugees or British citizens the combination of more than one of the following five features of the rules to be so onerous in effect as to be an unjustified and disproportionate interference with a genuine spousal relationship. In particular that it likely to be the case where the minimum income requirement is combined with one or more than one of the other requirements discussed below. The consequences are so excessive in impact as to be beyond a reasonable means of giving effect to the legitimate aim.
>
> The five features are:
>
> (1) The setting of the minimum income level to be provided by the sponsor at above the £13,400 level identified by the Migration Advisory Committee as the lowest maintenance threshold under the benefits and net fiscal approach (Conclusion 5.3). Such a level would be close to the adult minimum wage for a 40 hour week. Further the claimants have shown through by their experts that of the 422 occupations listed in the 2011 UK Earnings Index, only 301 were above the £18,600 threshold[1].
>
> (2) The requirement of £16,000 before savings can be said to contribute to rectify an income shortfall.
>
> (3) The use of a 30 month period for forward income projection, as opposed to a twelve month period that could be applied in a borderline case of ability to maintain.
>
> (4) The disregard of even credible and reliable evidence of undertakings of third party support effected by deed and supported by evidence of ability to fund.
>
> (5) The disregard of the spouse's own earning capacity during the thirty month period of initial entry".

12. Mr Justice Blake specifically declined to strike down the requirements of the Rules as contravening the ECHR. Rather it seems to me he was saying that there would be occasions when it would be disproportionate to exclude an Appellant who did not meet the requirements of the Rules. Since then the Upper Tribunal has given guidance in Gulshan (article 8-new rules-correct approach) [2013] UKUT 00640 (IAC).

13. In this case I heard oral evidence from the Sponsor and I also had a number of documents which indicated that when the couple met and at the date of decision the Appellant owned a thriving curtain making business in central Addis Ababa which provided her with an income equivalent to £2000 per month. Additionally, the couple together own a three-bedroom villa in Addis Ababa which, if rented out,

would yield an income of some £500 per month. It was argued that the Appellant would be able to secure employment in the UK as she is highly skilled. It was asserted by the Sponsor that when she had been a visitor in the UK enquiries had been made with the likes of Marks & Spencer and John Lewis with regard to her skills and both expressed an interest in employing her. I place little reliance on that assertion, there being no supporting evidence. It also seems to be an unlikely scenario. It was also asserted that the Appellant had been one of the best wedding dress makers in Addis Ababa and she could continue to earn a living in that way. Again, I treat that assertion with considerable caution, there being no corroborative evidence.

14. The situation at the present time is that the Appellant is in India where she has been advised to remain because of her pregnancy and the business is being run by the five permanent and five part time staff. The Sponsor told me that he is maintaining his wife by sending £500 per month to her in India. He told me that she is unable to access her own money from Ethiopia. I found that a curious statement when I was being asked also to find that once in the UK the Appellant would be able to access funds from Ethiopia and yet whilst in India apparently cannot.

15. Based on the five features referred to by Mr Justice Blake in MM, Ms Brissett argued that I should look at the minimum income level of £13,400 rather than £18,600 and taking the Appellant's funds and earning capacity into account find that the spirit of the Rules was met.

16. I should look at the evidence of savings provided, namely that the Appellant herself had some £13,000 savings in an account in Ethiopia and I should take into account her earning capacity.

17. On that basis Ms Brissett argued the decision to refuse entry clearance to the Appellant was a disproportionate breach of hers and the Sponsor's right to family life. She argued that it was wholly unreasonable to expect the British Sponsor to live in Ethiopia with his wife as he had been granted asylum from that country and his evidence before me was that when he had been there between 2005 and 2009 he had been targeted and harassed on account of his political opinion, his ethnicity and the fact that he is a committed democrat.

18. I dismissed this appeal for the following reasons.

19. Gulshan), referred to above, gives further guidance on the Immigration Rules and Article 8. The Immigration Rules set out the requirements to be met by someone seeking leave to enter or remain in the UK and the Immigration Rules as a whole are a comprehensive list of those persons who Parliament has decided should be permitted entry to the UK, either temporarily or for settlement. The Rules themselves contain provision where a person can be granted leave to enter or remain in exceptional circumstances where they do not otherwise meet the requirements of the Rules and those are to be found in paragraph X.1.

20. X.1, for present purposes provides (X.1.(b)) that if the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British citizen, settled in the UK or in the UK with refugee leave or humanitarian protection, and there are insurmountable obstacles to family life with that partner continuing outside the UK then leave will be given.

21. Gulshan gives advice on what is meant by insurmountable obstacles and that it does not mean obstacles which cannot be surmounted as that is too high a test.

22. In the present case however obstacles, I find, barely exist at all and it would not be unreasonable, let alone insurmountable, even applying a lower test, to expect this couple to enjoy family life together in Ethiopia. I say so for the following reasons.

23. It is the Sponsor's and the Appellant's evidence that the Sponsor is a highly successful businesswoman with what in Ethiopian is an extremely high income of £2000 per month. I was told that figure represents her income; it is not the turnover. Even if she were to stop working altogether I was told that the premises that the business occupies are so valuable, being in central Addis Ababa that they would yield a rental income in the region of £2500 per month. Added to that the couple already own a three bedroom villa in Addis Ababa, which they have built since they got married. This couple can clearly live a comfortable life in Ethiopia and I have no reason to believe did not in fact do so after the marriage and before the Sponsor returned to the UK in June 2009.

24. The Sponsor, although he claims that he cannot live in Ethiopia because he will be targeted and harassed, in fact lived there for a period of four years; he said to look after his sick mother. No explanation has been offered as to why that is no longer necessary. The fact remains that he did in fact live in Ethiopia for a considerable period of time and there has been no credible evidence that he had any problems at all. When asked to particularise the harassment he was unable to say anything other than that he felt that he was being watched and followed. I do not accept that he was in any difficulties in Ethiopia. He has come and gone more than once. He owns property there. He got married there.

25. The simple fact is that there are Immigration Rules (Appendix FM) setting out what is required before a British citizen or a person settled in the UK can bring a spouse into the country. The Rules themselves set out exceptional circumstances when those requirements do not have to be met and they are restricted. The Appellant in this case falls a very long way from meeting the requirements of the Rules. The Rules require the Sponsor to have the money and he falls a long way short. If the Appellant has the means and wealth that I am told she has then it would be an easy matter for this couple to realise her assets and provide them to the Sponsor so as to bring themselves within the Rules. They have chosen not to do so. The ECHR recognises the rights of persons to enjoy family life however it does not recognise a right to choose where in the world they may exercise that family life. The Appellant and Sponsor have in the past enjoyed family life together in Ethiopia and there is no reason whatsoever why they would be unable to do so in future or why it would be

unreasonable to expect them to. All I have been told is that the Sponsor regards the UK at his home and would like his wife to live with him here rather than he with her in Ethiopia. That they are entitled to do if, and only if, they meet the requirements of the Rules. They do not. I find the decision does not represent a disproportionate interference with their rights to a family life. Indeed, the couple were enjoying family life together in Ethiopia until it was interrupted by the Sponsor choosing to return to the UK. He has a right to live in the UK but that does not mean he has to.

26. The appeal to the Upper Tribunal is allowed such that the decision of the First-tier Tribunal is set aside as containing material errors of law. I remake the decision such that the Appellant's appeal against the Entry Clearance Officer's decision is dismissed.

Signed Date 23rd January 2014

Upper Tribunal Judge Martin