IAC-AH-PC-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/01515/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 28 April 2015	**On 14 May 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

MOHAMED MOHAMUD GACAL
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Taimour Lay, Counsel instructed by Tower Hamlets Law Centre
For the Respondent: Ms A Fijiwala, Specialist Appeals Team

DECISION AND REASONS

1. The appellant appeals to the Upper Tribunal from the decision of the First-tier Tribunal dismissing his appeal against a decision by an Entry Clearance Officer to refuse to issue him with entry clearance as the spouse of a person present and settled here. The First-tier Tribunal did not make an anonymity direction, and I do not consider that the appellant should be accorded anonymity for these proceedings in the Upper Tribunal.

2. The appellant is a national of Somalia, whose date of birth is 24 January 1953. In December 2013 he applied for entry clearance from Addis Ababa, Ethiopia. In his application form, he said he had resided at his current address in Addis Ababa for three years. He had come to Ethiopia in 2009 due to the civil war in Somalia. His sponsor was Amina Abdi Ali, a British national whose date of birth is 1 February 1949. She had been born in Somalia, and had been living in the UK since 20 April 2002.

3. In a covering letter dated 26 September 2013, the appellant's representatives, Tower Hamlets Law Centre, said that the appellant had married the sponsor on 18 July 2012. Mrs Ali had met her husband in June 2012 when visiting Ethiopia. The appellant was known to the sponsor's mother, and she had introduced them. He had lost all his family during the war in Somalia, and he suffered from post traumatic stress and depression as a result of this. The sponsor was keen for the appellant to join her in the UK so she could look after him, and with her love and support to encourage him to recover from his depression and PTSD. Mrs Ali's previous marriage had ended by divorce on 7 May 2010. The appellant would be adequately maintained by Mrs Ali in the UK. She did not work as she cared for her disabled son who required full-time care. She was in receipt of disability living allowance on his behalf, amounting to £100.15 per week. She also received a carer's allowance in the amount of £58.45 per week. Under E-ECP.3.3, she was exempt from the minimum income threshold. She intended to use the DLA and the carer's allowance that she received in order to support the appellant as well as her son. She had provided a tenancy agreement confirming that her council property had three bedrooms. It also had a separate living room. She lived there with her two adult sons (one of whom was her disabled son).

4. On the topic of the English language requirement, they were instructed that as a result of the appellant's mental condition he was unable to meet this requirement and so he requested an exemption on this basis. A medical report was attached.

5. Under the heading of Article 8 ECHR, they said that Mrs Ali's disabled son had a severe learning disability and autism, which manifested in severe communication and behavioural difficulties. He also suffered from severe physical problems including severe reflux oesophagitis. She cared for her son in all aspects of daily living, which included feeding him, helping him to bathe and go to the toilet, giving him his medication and sitting with him, and talking to him and generally keeping a close eye on him. She was therefore unable to leave him on his own. When she travelled to Ethiopia, she had to take him with her and this was quite difficult for him to cope with. So she had not been able to consider further trips to Ethiopia to visit her husband. For the above reasons, she would not be able to live permanently in Ethiopia with her husband, and this was an insurmountable obstacle to family life taking place there.

The Reasons for Refusal

6. On 16 December 2013 an Entry Clearance Officer in Nairobi (post reference Nairobi\440289) gave his reasons for refusing the application. He claimed to be exempt from the English language requirement as he had schizophrenia. He had

submitted a copy of a letter from the Bole Higher Clinic in Addis Ababa which said he had schizophrenia. But he had not provided the original letter as required. The letter was of a format easily produced at a low cost and did not satisfy him that it was produced by a medical professional as claimed. He was not satisfied therefore that he had a physical or mental condition which would prevent him from meeting the requirement. He also noted the letter did not say that he was unable to learn English. So he was not satisfied he was exempt from the English language requirement under paragraph E-ECP.4.2. His application was therefore refused under paragraph EC-P.1.1(d) of Appendix FM of the Rules.

7. He also considered whether his application raised or contained any exceptional circumstances which, consistent with the right to respect for family life contained in Article 8 ECHR, might warrant consideration by the Secretary of State of a grant of entry clearance to come to the United Kingdom outside the requirements of the Rules. He had decided that it did not.

The Grounds of Appeal to the First-tier Tribunal

8. In the grounds of appeal to the First-tier Tribunal, it was argued that the Entry Clearance Officer had erred in law or failed to exercise discretion appropriately. Verification from the doctor "will be obtained" with an explanation regarding the appellant's inability to learn English as a result of his medical condition.

The Entry Clearance Manager's Review

9. On 17 March 2014 an Entry Clearance Manager gave his reasons for upholding the refusal decision. The sponsor had lived in Ethiopia for three years where English language facilities were available. The appellant had not provided any other evidence of his claimed medical condition which made him exempt from the English language requirement. The original medical letter from Bole Clinic had still not been provided.

The Hearing before, and the Decision of, the First-tier Tribunal

10. The appellant's appeal came before Judge McDade sitting at Taylor House in the First-tier Tribunal on 4 December 2014. The appellant was represented by Mr Lay of Counsel, and the Entry Clearance Officer was represented by a Presenting Officer.

11. In addition to the medical certificate provided with the application, which was dated 15 November 2013, reliance was placed on two further certificates.

12. Page 4 of the appellant's bundle was a copy of a medical certificate purportedly issued by Bole Higher Clinic on 28 January 2014. It certified that the patient had been examined on that day, and that he had poor concentration and was unable to remember so it was difficult for him to retain languages.

13. Another document which was handed up loose was a document dated 27 October 2014 purportedly emanating from Dr Tefera Muche, psychiatrist at the Bole Higher Clinic. He said that the patient was having follow-up at the clinic with chief complaints of poor sleep, poor appetite and "talking alone of long duration". At the same time he was forgetful. There was no family history of mental illness. On a

mental state examination, his speech was coherent, he had good eye contact, and he denied any hallucinations and delusions. He had no cognitive deficit and had insight. The "impression" was that he had schizophrenia. The treatment that he was receiving was Chlorpromazine 100mg at bedtime. Dr Muche concluded by saying that because of his mental problem he could not concentrate due to the fact that he did not have any attention and concentration.

14. The judge received oral evidence from the sponsor.

15. In his subsequent decision, he addressed the English language exemption question at paragraph [3]. He did not find Mrs Ali to be an entirely straightforward or satisfactory witness. The appellant's case was that he was incapable of successfully completing an English language test because he suffered from schizophrenia. The sponsor did not give oral evidence that she had witnessed her husband manifest any symptoms while she was with him, only that he was not sleeping or eating properly. She stated that these problems resolved as soon as he was placed on medication.

16. As far as the documents that purported to be medical evidence were concerned, he considered them to be wholly unreliable. The appellant was said to have submitted an original of the medical certificate dated 15 November 2013, but there was no evidence that any original was attached to the application. He found that the doctor's recommendation on the certificate was "somewhat curious". It was more designed to assist the appellant's application than to outline any treatment plan.

17. So far as documents 2 and 3 were concerned (the documents dated 28 January and 27 October 2014, it was conceded that no originals of the documents had been provided. He noted that the document dated 28 January 2014 said nothing about his schizophrenia. The third document gave no diagnosis of schizophrenia, but gave an "impression" of such. Again there were no symptoms of schizophrenia discussed. The judge concluded:

> I am not persuaded that these documents taken together go any way to suggest the appellant does suffer from schizophrenia. The methodology used to reach such a diagnosis appears woolly in the extreme. In all the circumstances I can give these documents no weight and I hold, to the requisite standard, that the appellant is not incapacitated as claimed but there is no reliable evidence before me to enable me to conclude that he is mentally incapable of undertaking an English language test.

18. The judge went on to address an alternative submission that, even if the English language test was not satisfied, the appellant qualified for entry clearance under Section EX.1(b) of Appendix FM in that the appellant had a genuine and subsisting relationship with his wife, and there were insurmountable obstacles to family life with his partner continuing outside the UK.

19. The judge acknowledged that the sponsor had a 21 year old dependant who had severe physical and mental problems, and that she assisted him with his care. But in her oral evidence she stated that social services did everything for him, and it was only after prompting that she stated that she helped to wash and dress him. He also noted that the sponsor's other son also assisted his brother with his care needs. While there was a level of dependency between the sponsor and her son, she did not undertake the majority of his care. He fully acknowledged that were the sponsor to

relocate to Ethiopia, this would cause her disabled son difficulties, perhaps more emotionally than physically.

20. The judge considered it was important to look at the facts of the relationship between the appellant and his wife. These were that having arrived in Ethiopia on 29 June 2012 and never having met her future husband nor having any intention to do so and on the basis that he had been helpful to her with her baggage from the airport, some two weeks later she married him. Four weeks after the marriage she returned to the United Kingdom, and neither party had had face-to-face contact with each other since. There was no evidence of any exchanges of greeting cards or photographs or anything else other than producing a phone bill in evidence to show that phone calls had been made to various numbers in Addis Ababa to one number more than others. As far as evidence of remittances from the appellant to Addis Ababa was concerned, none of these had gone to the appellant. Moreover he noted that most of them were sent in 2014, and none more than one month before the application.

21. The judge concluded that any tenuous bond between the appellant and her husband that might have existed in the five weeks or so that they had face-to-face contact with each other in Ethiopia had been weakened by the absence of any face-to-face contact between them since. The sponsor could have gone to visit her husband in Ethiopia if she wanted to, but she chose not to do so. She did take her son with her on the last occasion, and so there appeared to be no reason why she could not have done so on this occasion if she felt that were necessary.

22. He held that whilst the marriage existed on paper, it was not a subsisting one in terms of emotional support; and that the financial support would be unlikely to be sustained were it not for the application and subsequent appeal. He considered the evidence of financial support to be wholly self-serving.

23. There was no good or sufficient reason to go on to consider Article 8. But if he were to do so, he would hold that there was no family life between the appellant and her husband, and so the Entry Clearance Officer's decision could not therefore be seen to be an interference with it.

The Application for Permission to Appeal

24. Mr Lay settled the appellant's application for permission to appeal to the Upper Tribunal. Ground 1 was that in finding there was no family life between the appellant and his wife in the UK, the judge had failed to have regard to material evidence and/or had treated the available evidence in an irrational way.

25. Ground 2 was that there was procedural unfairness arising from a failure to raise the question of the genuineness of the marriage in the course of the hearing so that the appellant's spouse could deal with it in her evidence.

26. Ground 3 was that the judge had erred in his approach to E-ECP.4.2(b) and/or the medical evidence. The medical reports did establish to the requisite standard that the appellant had a disability (physical or mental condition) which prevented him from meeting the English language requirement. By focusing solely on whether or not the appellant had a diagnosis of schizophrenia, the judge had not had regard to the symptoms ascribed in the medical reports, the prescription medication that the

appellant was taking, and the oral and written evidence of the appellant's wife as to the appellant's inability to sleep, concentrate and learn.

The Grant of Permission to Appeal

27. On 26 February 2015 First-tier Tribunal Judge Osborne granted permission to appeal on all grounds raised.

The Error of Law Hearing in the Upper Tribunal

28. At the hearing before me to determine whether there was an error of law, Ms Fijiwala submitted that there was no error of law in the judge finding that the appellant had not discharged the burden of proving that he was exempt from the English language requirement. But the judge had been wrong to go on to consider in the alternative whether the requirements of EX.1(b) were met. EX.1 was parasitic, and a person seeking entry clearance could not take advantage of it. She produced an archive version of the Rules in force at the date of decision, which showed that EX.1 was not listed as a potential ground of eligibility for entry clearance, whereas it was listed as a potential ground of eligibility for leave to remain.

29. Ms Fijiwala conceded that the judge had also been wrong to make adverse findings about the subsistence of the marriage.

30. On behalf of the appellant, Mr Lay maintained the judge had adopted a too narrow approach to E-ECP.4.2(b). He also queried whether the appellant could not take the benefit of EX.1(b), although he recognised that the decision of Upper Tribunal Judge Clive Lane in appeal number OA/04256/2013 promulgated on 30 April 2014 (unreported but publicly accessible on the Upper Tribunal website) was against him on this question.

31. I ruled in favour of the respondent on ground 3 and in favour of the appellant on ground 2. My reasons are set out below. As credibility was in issue, and the appellant had not received a fair hearing on his alternative Article 8 claim, I was satisfied that this was an appropriate case for remittal to the First-tier Tribunal for a de novo hearing on the appellant's Article 8 claim. Both parties were in agreement that this was the appropriate course.

Reasons for Finding no Error of Law in the Dismissal of the Appeal under the Rules

32. In order to show that he is exempt from the English language requirement, the appellant had to show that at the date of application he had a disability (physical or mental condition) which prevented him from meeting the requirement; or that there were exceptional circumstances which prevented him from being able to meet the requirement prior to his entry to the UK.

33. I consider the judge gave adequate reasons for finding that the appellant had not discharged this burden. He clearly took into account all the evidence which bore upon this issue, which was the oral evidence of the sponsor, the contents of the three medical documents relied upon, and also the fact that they were all copies. They thus did not have the probative value of original documents.

34. It was accepted by the appellant's representative that the second and third documents were copies, and it was open to the judge to draw an adverse inference from the fact that no attempt had been made apparently to produce the originals for inspection. The appellant had apparently obtained the second and third documents from the clinic, and had sent copies of them to his wife as e-mail attachments. On the face of it, there was no reason why he could not also have posted the asserted original documents to the sponsor or to his legal representatives in the UK. As to the first document, it was asserted that the original had been provided to the Entry Clearance Officer, but this was disputed by the Entry Clearance Officer. As the burden of proof rested with the appellant, it was open to the judge to find on the balance of probabilities that the original of the first document had not been provided to the Entry Clearance Officer.

35. It was clearly open to the judge to find that the diagnosis of schizophrenia was not satisfactorily or credibly explained, for the reasons he gave. Mr Lay's argument is that the judge should nonetheless have found that the appellant came within subparagraph (b) in the light of the additional information provided about his condition in the second and third documents, in particular the information that the appellant found it difficult to concentrate as a result of his mental condition, even if the mental condition was not in fact schizophrenia.

36. It was open to the judge to find that the "woolly diagnosis" of schizophrenia undermined the general credibility of everything said about the appellant's condition and symptoms in the medical certificates. Indeed, given the judge's concerns about the failure to provide originals and the evidence of the sponsor, it is difficult to see how the judge could have rejected the diagnosis of schizophrenia while at the same time finding that the appellant had credibly established to the required standard of proof that he had a disability which prevented him from meeting the English language requirement. The medical evidence did not purport to identify any other condition apart from schizophrenia as giving rise to him having poor concentration and being unable to remember. At the same time, as the judge found, the symptoms of poor concentration and inability to remember are not symptoms of schizophrenia. Moreover, as noted by the judge, the third document spoke of positive and normal aspects of the appellant's demeanour such as coherent speech, insight, no cognitive deficit and denying any hallucinations and delusions. On the face of it, the psychiatrist has not observed the patient being forgetful or displaying poor concentration in the course of his mental state examination of the patient.

37. The significance of the oral evidence of the sponsor is that, according to her, the appellant's problems of not sleeping properly or eating properly resolved as soon as he was placed on medication. As he was on medication before the date of application, according to the first document, the import of the sponsor's evidence is that he had recovered by the date of application.

38. For the above reasons, it was open to the judge to find that the appellant had not discharged the burden of proving that he was exempt from the English language requirement under paragraph E-ECP.4.2. Moreover, the judge gave adequate reasons for reaching this conclusion.

Reasons for Finding an Error of Law in the Disposal of the Alternative Claim under Article 8 ECHR

39. The judge erred in law in accepting Mr Lay's invitation to consider in the alternative whether the appellant qualified for leave to enter under EX.1. EX.1 has no application in out of country entry clearance cases. In argument before me, Mr Lay questioned the logic of EX.1 not being available to applicants for entry clearance. The short answer is that logic does not come into it. The Rules simply do not enable an out of country spouse to qualify for entry clearance on the alternative basis that there are insurmountable obstacles to family life between the British national and the foreign spouse being carried on outside the United Kingdom. But it is not necessary to look very far to discern the policy consideration which underlies the exclusion. Where EX.1 is shown to apply, the applicant does not *also* have to show that the interference with family life is disproportionate. So, in excluding applicants for entry clearance from invoking EX.1, the Secretary of State is preserving the position which obtains in a freestanding proportionality assessment outside the Rules: namely, a balancing of the gravity of the interference with family life against the public interest in firm and effective immigration controls. This is illustrated by the reasoning of Upper Tribunal Judge Clive Lane in the case of **Thomas** produced by Ms Fijiwala:

> This was an application for entry clearance which had failed (narrowly) because of the couple's inability to meet the financial requirements of the Immigration Rules. As noted above, the judge appears to have been particularly influence by what he regarded as the "totally unnecessary step" of the children of the sponsor … having to abandon their studies in the United Kingdom in order to relocate to schools in New Zealand. As Mrs Pettersen pointed out, the Entry Clearance Officer did not require the children to undertake that step. I agree with her submission that, notwithstanding the requirement of decision makers to have regard to the promotion of family life as well as avoiding disproportionate interference with it, the lives of the sponsor and her children in the United Kingdom had been altered in any way by the Entry Clearance Officer's refusal. Considering Article 8 ECHR, the judge appears to have had no regard to the public interest concerned with the management of immigration control manifested through the Immigration Rules which contain legitimate financial requirements for those seeking to settled in the United Kingdom … I repeat my observation above that the interference which had been caused in the existing family lives of the appellant, sponsor and her children is negligible whilst the public interest concerned with excluding those individuals from the United Kingdom [who] cannot satisfy the Immigration Rules is a strong one. Whilst I am sure that this family would wish to be living together, I cannot see that the circumstances are especially compelling or unusual. The proper course of action for this appellant is to make a further application for entry clearance as and when he is able to meet the requirements of the Immigration Rules.

40. Although the appellant cannot avail himself of EX.1, if in fact there are insurmountable obstacles to him carrying on family life with the sponsor in Ethiopia this is a relevant consideration in the proportionality assessment outside the Rules. But it is not a decisive one (as it is under the Rules).

41. The strength of the family life tie between the appellant and the sponsor is also a relevant consideration in the proportionality assessment. Having received oral evidence from the sponsor, it was open to the judge to raise a concern as to whether

the marriage was subsisting. Mr Lay acknowledged this in the course of argument. Where the judge went wrong was not raising his concern at the hearing, so as to give Mr Lay the opportunity to adduce further oral evidence from the sponsor and to address his concern in submissions. The evidence for the hearing had not been prepared on the basis that the subsistence of the marriage was going to be an issue. So procedural fairness required that the judge's concern on this question should be flagged up in the course of the hearing.

42. In consequence, the appellant has been deprived of a fair hearing in the First-tier Tribunal on his alternative claim under Article 8 ECHR. Thus the decision on the Article 8 claim is vitiated by a material error of law, such that it should be set aside and remade.

Conclusion

43. The decision of the First-tier Tribunal dismissing the appeal under the Rules did not contain an error of law, and accordingly the decision stands.

44. The decision of the First-tier Tribunal dismissing the alternative claim under Article 8 ECHR contained an error of law, such that the decision under Article 8 ECHR should be set aside and remade.

Directions

45. The appellant's appeal under Article 8 ECHR is remitted to the First-tier Tribunal at Taylor House for a de novo hearing before any judge apart from Judge McDade.

46. The time estimate is two hours, and a Somali interpreter will be required.

47. None of the findings of fact made by the previous Tribunal in relation to the Article 8 claim will be preserved.

Signed Date **28 April 2015**

Deputy Upper Tribunal Judge Monson