Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/15346/2012
OA/15349/2012
OA/15350/2012

THE IMMIGRATION ACTS

Heard at North Shields	**Determination Promulgated**
On 8 August 2013	**On 19 August 2013**

Before

UPPER TRIBUNAL JUDGE DEANS

Between

ENTRY CLEARANCE OFFICER – AMMAN

Appellant

and

Mrs FAWZIA FARIQ MAHMOOD
Miss USRA FATQ TAHIR
Master ZHYAR FAEQ TAHIR

Respondents

Representation:

For the Appellant: Mr C Dewison, Home Office Presenting Officer
For the Respondents: Mr G Brown of Counsel

DETERMINATION AND REASONS

1) This is an appeal with permission by the Entry Clearance Officer against a decision by Judge of the First-tier Tribunal A D Smith MBE, TD allowing these appeals. The respondents are a mother and two children, all nationals of Iraq.

2) The appeal to the First-tier Tribunal was brought against decisions of the Entry Clearance Officer refusing the respondent's entry clearance as the spouse and children

of Mr Faik Tahir Qazi, who is the sponsor for their applications for entry clearance and is present and settled in the UK. There are two older children of the family, who were originally parties to the appeal, but their appeals were withdrawn before the First-tier Tribunal.

3) Before the First-tier Tribunal the appeals turned upon the issues of maintenance and accommodation. The issue of accommodation was decided in favour of the respondents on the basis of documentary evidence produced by the sponsor.

4) This left the issue of maintenance. The applications for entry clearance were made prior to the change in the Immigration Rules on 9 July 2012 and were therefore dealt with under paragraphs 281 and 297. It was accepted by the judge that maintenance would be adequate if the sponsor's income equalled the amount of income support which would be payable to a family of their composition, together with housing costs. The judge further considered that if there was a shortfall below this sum in the sponsor's income then savings could be taken into account to make up the shortfall over the period for which leave to enter would subsist, in accordance with Jahangara Begum [2011] UKUT 246.

5) The Judge of the First-tier Tribunal recorded that it was agreed between the parties that the level of income required to constitute adequate maintenance was £312.53 per week. This figure was derived by taking the level of income support for a couple with two children and adding to it £15.05 for mortgage payments and £38.89 per month for council tax. The judge noted that although these were the figures agreed by the parties for mortgage payments and council tax they appeared to be the wrong way round but nothing turned on this.

6) The judge noted that the sponsor is employed on a salary of £15,533 per annum. Overtime is not guaranteed but it may be worked if it is available. The judge referred to the sponsor's P60 for the year ending 5 April 2012 which showed earnings of £17,375.31 before tax and national insurance deductions. After deductions of £1,979 the net salary was £15,396. Dividing this by 52 gave weekly earnings after tax of £296. The judge noted, however, that in the 2 preceding tax years the sponsor received higher earnings. On the same calculation his average weekly income in 2010/11 was £310 and in 2009/10 it was £317.82. The employment in the previous years was with the same employer although the name of the employer had changed owing to a takeover.

7) The judge noted that the earnings figures for 2011/12 gave a short fall of about £16 per week. It appeared to the judge, however, that going back over a 3 year period, the appellant had earned significantly more, presumably on the basis that more overtime was available. If the average weekly earnings over the previous 3 years were taken into account then the sponsor's weekly earnings after deductions were £307. The sponsor had available to him savings of £1,298 at the date of decision, although this had increased to £1,936 by the date of the hearing. The judge noted that the sponsor's currently weekly income was very near to the level considered adequate. The shortfall on his weekly earnings arrived at by averaging the previous 3 years earnings gave a

figure of approximately £5 per week. The sponsor's savings were sufficient to bring the maintenance up to an adequate level without becoming exhausted. The period for which leave would be granted would be two years but the savings were adequate to support the family at this level for five years. Accordingly, the Judge of the First-tier Tribunal was satisfied that there would be adequate maintenance without recourse to public funds.

8) In the grounds of the application for permission to appeal the Entry Clearance Officer pointed out that the judge had calculated the shortfall in income of £5 per week by averaging out the sponsor's earnings over a 3 year period. The judge noted that the sponsor's earnings were lower in the tax year 2011/12 than in the 2 preceding years and surmised that more overtime was available in the previous years. The judge failed to reason adequately why the figure for overtime would be expected to increase in the foreseeable future as the sponsor's earnings showed a downward trend and at the date of decision there was no evidence that they were likely to increase. If the sponsor's earnings of £15,396 in the last tax year were taken, after housing costs had been met this left the family with a shortfall of £16 per week. The period for which leave would be granted would be 27 months, not 24, and this would mean that the sponsor would require £1,728 to meet the shortfall. The sponsor's savings were, however, no more than £1,298 at the date of decision.

9) Following the grant of permission to appeal the Entry Clearance Officer wrote to the Tribunal pointing out that there was an error in the calculation in the application for permission to appeal. The shortfall alleged of £16 had been multiplied by 108 weeks but the figure should have been multiplied by 117 weeks, which was the number of weeks in a 27 month period. If the 117 week period had been used then the amount required from the sponsor's savings was £1,872.

Submissions

10) At the hearing before me Mr Dewison, appearing for the Entry Clearance Officer, argued that it was inappropriate for the judge to average out the sponsor's earnings over 3 years. The date by reference to which earnings should be calculated was the date of decision. The judge's approach was wrong and arrived at a figure which was not representative. Mr Dewison hypothesised that if within the 3 year period the sponsor had been unemployed for a period then the average earnings over the 3 years would be much less.

11) The figures set out in the P60 for the year ending 5 April 2012 were, Mr Dewison continued, not disputed. The shortfall on the basis of these earnings was £16.66 per week. Furthermore the judge had used the period of leave for which the sponsor would have to rely on his savings as 2 years whereas the correct period was 27 months. The judge's methodology was flawed. The decision should be remade according to the evidence at the date of decision.

12) For the respondents Mr Brown submitted that there was no authority for the basis on which earnings should be calculated. He referred to the case of KA (Pakistan) [2006]

UKAIT 00065. The question was whether there would be adequate maintenance without recourse to public funds. The judge was entitled to assess the evidence to decide this. Mr Brown referred to the case of Yarce (adequate maintenance: benefits [2012] UKUT 00425. He submitted that the grounds of challenge were no more than a disagreement with the manner of assessment in the determination. The judge needed to look at the yardstick of £312.73. He was aware of KA. He looked at the sponsor's employment history. The judge was entitled to take a broad view in calculating the sponsor's average weekly income. The judge had also faced the disadvantage that there was no respondent's bundle before the First-tier Tribunal.

13) The question was raised of whether the judge was entitled to take into account the most favourable period for the respondents in calculating the sponsor's earnings. Mr Brown submitted that the judge was entitled to do this and there was no error of law arising as a result. There was no authority to prevent the judge from doing this. The disagreement by the Entry Clearance Officer was only with the method chosen by the judge for calculating earnings. If the sponsor's savings of £1,129 were divided by 117 weeks this gave £11 per week, which was more than sufficient to cover the shortfall. Mr Brown further referred in passing to a letter from the sponsor's employer stating that it was likely that the employer would be able to offer employment to the first respondent.

14) In response Mr Dewison submitted that it made no sense to arrive at a figure for earnings on the relevant date by averaging earnings over a 3 year period. The money from previous years would have been spent. It was necessary to look at the date of the decision, or the period around that day, which was established by the P60. Mr Dewison pointed out that there was a letter from the employer giving earnings for the period 1 January 2012 to 15 July 2012 and this period could have been taken, excluding the period after the date of decision. The average for the period in question was given by the employer as £340.94 gross or £278.76 net. Mr Dewison questioned whether the judge's decision was reasonable.

Discussion

15) Mr Brown referred me to paragraphs 27-29 of the case of Yarce, in which he submitted the relevant principles set out as follows:

> "27. The requirement to show that a person or persons can be maintained (or will maintain themselves) "adequately" without recourse to public funds has long been a feature of the Immigration Rules. It continues to be a requirement for various categories of person, in the amended rules that came into force on 9 July 2012 (but see esp. Appendix FM (Family Members) and Appendix FM-SE) Family Members – Specified Evidence)). The former version of the rules applies to the present appeal and those others where the decision concerned was made before 9 July. In order to establish that maintenance is "adequate" under those rules, an applicant needs to show that the resources available will meet or exceed the relevant income support level set by the United Kingdom Government ("the target figure"). This finding of the Asylum & Immigration Tribunal in KA (Pakistan) [2006] UKAIT 00065 has been approved by the Court of Appeal in AM v Entry Clearance Officer [2008] EWCA

Civ 1082 (a finding unaffected by the subsequent appeal to the Supreme Court) and French v Entry Clearance Officer (Kingston) [2011] EWCA Civ 35 (the KA principle is reflected in the definitions of "adequate" and "adequately" in the July 2012 rules). If the applicant is intending to live with a spouse or partner in the United Kingdom, the income support level that he or she must meet will be such level as has been set by the government in respect of the couple. Where children are included, the target figure will be increased by the relevant figure or figures for each dependant child.

28. KA (Pakistan) establishes that the target figure is an "objective" one. It is therefore immaterial that the applicant and/or any relevant family, as was described, can be shown to be more likely than not to live on less than that figure.

29. The present case requires an examination of the effect, if any, that the arrival of an applicant for entry clearance upon a sponsor's entitlement to certain benefits and, thus, on the ability of the applicant to demonstrate there are available resources at or above the target figure. It particularly raises questions about the effect of (a) payments from a third party; and (b) capital sums. In determining an immigration appeal, involving whether a person can be maintained and/or accommodated without additional recourse to public funds (within the meaning of paragraph 6 and 6A to C of the immigration rules: see the Schedule to this determination), it will often be vital that the judicial fact-finder determines the relationship between such payments/capital and the sponsor's entitlement to benefits, once the applicant has hypothetically arrived. Only by establishing this can proper findings be made as to the actual financial position of the individuals concerned."

16) Mr Dewison's principal submission on behalf of the Entry Clearance Officer was that the earnings should be calculated by reference to a period as close as possible to the date of decision. Mr Dewison acknowledged at the hearing that it would not be appropriate to look only at the date of decision. This might be a date on which the sponsor was not working or on which his earnings were inconsistent with his usual earnings. Mr Dewison acknowledged that a period had to be selected over which the sponsor's earnings were to be assessed. He maintained, however, that the judge was not entitled to have regard to a 3 year period as the 3 year period preceded the date of decision by too long and this amounted to an error of law. Mr Dewison further submitted that the approach taken by the judge in this decision for calculating earnings was unreasonable.

17) Mr Brown's position was that there was no authority which required the judge to have regard to a particular period. This appears to be correct. Certainly neither party could refer me to any such authority. Mr Dewison suggested two alternative periods which the judge might have taken to calculate the sponsor's earnings. One of these was the tax year ending 5 April 2012 and the other was the period of just over 6 months from 1 January 2012 until the date of decision. Mr Dewison acknowledged that either of these periods would have been acceptable.

18) To some extent, by suggesting these two alternative periods Mr Dewison revealed the flaw in his argument. To take the 6 months or so prior to the date of decision would at

least constitute a period leading up to the date of decision. To take the tax year ending on 5 April 2012, however, would be to take a period which ended about 3 months prior to the date of decision. In accepting that the period of the tax year up until 5 April 2012 would have been an appropriate period to which the judge might have had regard for the purpose of calculating the sponsor's earnings, Mr Dewison was implicitly accepting that the period to be taken into account need not end at or near the date of decision.

19) The approach of the judge was to take a long term average of the sponsor's earnings over a 3 year period. Mr Dewison suggested that this might not be appropriate because a 3 year period could contain, for example, a period of unemployment. This was not the case, however, with this particular sponsor who had worked throughout the 3 year period, as his tax records showed.

20) Essentially the argument came down to whether the judge was entitled to take into account a longer period, over which the sponsor's average weekly earnings were more favourable to the respondents' prospects of success, or obliged to have regard to a shorter period, which seemed to favour more the decision of the Entry Clearance Officer. Both periods ended at the same date, 5 April 2012.

21) I do not suppose there would be many appeals in which it would be appropriate as a matter of fact to calculate weekly earnings over a 3 year period. In the circumstances of this appeal, however, the judge decided that it was appropriate and, having heard the submissions of the parties, I am not persuaded that the judge made any error of law in selecting this 3 year period. Mr Dewison questioned whether it was reasonable for the judge to take a 3 year period into account but I do not consider that in so doing the judge made a decision which was so perverse that no reasonable judge would have made it.

22) I see nothing in the approach by the Judge of the First-tier Tribunal which falls foul of the requirements set out in KA (Pakistan) and Yarce. I am not persuaded that there is an error of law in the decision of the Judge of the First-tier Tribunal such that it should be set aside.

23) Mr Brown asked me to make a direction to the Entry Clearance Officer if the decision of the First-tier Tribunal was to be upheld. I note that no direction was made by the First-tier Tribunal. As I am not re-making the decision of the First-tier Tribunal I do not have jurisdiction to make a direction, in terms of section 12(4) of the Tribunals, Courts and Enforcement Act 2007.

Conclusions

24) The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

Anonymity

25) The First-tier Tribunal did not make an order pursuant to Rule 45(4)(i) of the Asylum & Immigration Tribunal (Procedure) Rules 2005.

Signed Date

Judge of the Upper Tribunal