Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/18699/2016**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 19th of December 2017	**On 11th of January 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

ME ABDIFATAH ABDIKADIR MOHAMED
(ANONYMITY ORDER NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER - Pretoria

Respondent

Representation:

For the Appellant: Mr A. Chelliah, Solicitor
For the Respondent: Mr C Avery, Home Office Presenting Officer

DECISION AND REASONS

The Appellant

1. The Appellant is a citizen of Somalia born on 15th of February 1989. He appeals against a decision of Judge of the First-tier Tribunal Eldridge sitting at Harmondsworth on 16th of August 2017 who dismissed the Appellant's appeal against a decision of the Respondent dated 1st of July 2016. That decision was to refuse the Appellant's application for leave to enter the United Kingdom as the partner of a person present and settled here. The Appellant wished to join his wife Ms Hindiya Ali a British citizen of Somali heritage (the Sponsor).

2. The Sponsor was born on 1st of January 1990 in Mogadishu, Somalia. She entered the United Kingdom on 30th of September 2006 and was granted indefinite leave to

enter and remain and thereafter naturalised as a British citizen in 2009. The Appellant and the Sponsor were married in accordance with Sharia law and custom on 27th of November 2015, the Sponsor returning to the United Kingdom on 22nd of December 2015 because of work commitments. In her statement made for these proceedings at first instance dated 8th of August 2017 she said she had been unable to travel to see the Appellant since then. As at the date of the statement she had two jobs, one as a carer and the other as a shop assistant working part-time. Her accommodation consisted of a one bedroom flat privately rented. She had sent money to the Appellant and produced money transfer receipts.

3. The Appellant had travelled to Kampala in Uganda to submit the application for entry clearance. Certain documents had subsequently been lost by the Respondent in transit between the entry clearance posts in Pretoria and Kampala. The Respondent refused the application considering that the Appellant had not shown he could meet the financial requirements of Appendix FM of the Immigration Rules with the documents specified in Appendix FM-SE of the rules. The Respondent also considered that the Appellant could not meet the English language test requirement. No other issues were taken under the rules.

The Decision at First Instance

4. The Judge accepted that the Appellant and Sponsor were partners within the meaning of Appendix FM and their relationship was genuine and subsisting. The Appellant had submitted a certificate showing that he had passed the English language test although his application form had applied for exemption from the language requirement on the grounds that there was no entry clearance post in Somalia. The language certificate was dated 29th of July 2016 after the refusal four weeks earlier on 1st of July 2016. The reason it was dated after the decision was because the original certificate which had shown the test date as 9th of April 2016 had been lost by the Respondent. The Judge accepted that the test certificate was genuine and that the Appellant had taken and passed the English language test on 9th of April 2016.

5. That left the second objection which was that the Appellant could not show he met the financial requirement of an annual income of £18,600. This had to be demonstrated for the six months qualifying period between October 2015 and March 2016 through payslips supported by appropriate bank statements and a letter from an employer confirming employment and salary. Only five payslips were produced to the Judge all in the identical sum of £554.64 p. This did not meet the requirements of six payslips and it was not possible to see any of the net sums concerned being paid into any bank account. The only letter available from the employer was dated 17th of July 2017 after the refusal, there was no such letter with the application. The Sponsor's employer Yusra Limited was unlikely to pay the Sponsor in cash when she held a bank account. The Judge did not accept that this employment was genuine or that the claimed remuneration was paid and received.

6. The Sponsor's main employer was said to be a company called Sevacare limited. A letter from the branch manager dated 25th of February 2016 did not state the rate of remuneration for the Sponsor's employment as it was meant to. Although there were payslips for the period between October 2015 and March 2016 there were no payslips for the beginning of March 2016. The Sponsor was paid on a strict four-weekly basis rather than per calendar month. It was not possible from the bank statements to trace any payment in for the first pay slip dated 13th of October 2015. The evidence rules for this employment were not met either. The application failed under the financial provisions of the Immigration Rules.

7. The Judge went on to consider the appeal outside the rules under Article 8 taking into account section 117B of the Nationality Immigration and Asylum Act 2002. That the Respondent had lost documents submitted with the application was not in this particular case a material factor since documents such as an employer's letter or wages information could have been duplicated in time for the appeal but that had not happened. There was a distinction between financial documents and the loss of the English language test certificate. There was family life between the Appellant and the Sponsor and the decision to refuse entry clearance interfered with that family life being developed but the issue was the proportionality of the interference. There was no economic self-sufficiency under section 117B and it was not disproportionate to expect this couple who had married in the face of the Appellant's nationality and lack of immigration status to demonstrate clearly that they could meet the requirements of the rules. There were no additional factors of a compelling nature that would warrant further consideration outside the rules. He dismissed the appeal.

The Onward Appeal

8. The Appellant appealed against this decision arguing that the Sponsor had two employments and had provided payslips for both. The bank statement did not show the income received because the Sponsor received cash in hand. The grounds also dealt with the issue of the English language test certificate although as the Judge had found in the Appellant's favour that was not strictly necessary. The Respondent, the grounds argued, had been very careless and had misplaced the Appellant's and Sponsor's documentation.

9. The Respondent should have first seen whether the Appellant could meet the Immigration Rules but if the Appellant could not then the Respondent should have considered the 2nd stage Article 8 claim on a freestanding basis. The decision to permanently separate a husband and wife undermined the spirit of Article 8.

10. The application for permission to appeal came on the papers before Judge of the First-tier Tribunal Boyes on 11th of October 2017. In an extremely brief decision he granted permission writing: "The grounds assert that the Judge reached incorrect conclusions in relation to Article 8. The grounds are arguable and permission to appeal is granted".

11. The Respondent replied to this grant on 9th of November 2017 writing that it was a not at all clear why Judge Boyes had given permission to appeal. Such a brief grant was contrary to the guidance given in the case of **MR [2015] UKUT 29.** It was unsatisfactory merely to state that the grounds were arguable. In any event Judge Eldridge had considered the evidence and found that the requirements of Appendix FM and FM-SE were not met. It would not be disproportionate for the Appellant to have to make a further application. There were no material errors of law in the determination.

The Hearing Before Me

12. For the Appellant, it was argued that this was not a usual case. The Judge had made a finding of a genuine relationship. It was disproportionate to expect the couple to demonstrate they met the requirements of the rules as there was a financial dependency in this case. This was an Article 8 appeal. The Sponsor had two sources of income and payslips to support that. Her average salary per week was £244.86 p which was above the income support level. The English language test requirement was met.

13. For the Respondent, it was argued that the Appellant could not meet the Rules and that was the Judge's starting point. The Appellant's argument in this case as to dependency if correct would make the financial requirements of the Immigration Rules pointless. There needed to be an evidential basis for the demonstration of an income level. That level had been challenged in the higher courts who, broadly speaking, had found in favour of the Respondent. There was no material error of law by the Judge and no reason to go outside the terms of the Rules. As there was no issue of deception here, once the Sponsor could prove she met the Rules there would be nothing to stop the Appellant from applying again with fresh evidence. At the conclusion of submissions, I reserved my decision.

Findings

14. Although this was an appeal under Article 8 it was important for the Judge to establish whether the Appellant could meet the requirements of the Immigration Rules and for the reasons he gave he found that the Appellant could not meet those requirements because the documentation to support the Sponsor's income was unsatisfactory. Before me there was not a substantive challenge to that finding, the Appellant appeared to be arguing that where there was evidence of a dependency, in this case the Sponsor remitting money to the Appellant in Somalia and/or Uganda, a dependency arose and the financial requirements of Appendix FM no longer applied. This is not correct, the requirements of Appendix FM do apply in a case such as this.

15. The Judge did not accept that the Appellant's financial documentation was at all adequate. One of the major problems was that the Sponsor could not match her income to her bank statement entries. That was a matter for the Judge to draw a conclusion upon and I find that his reasoning in this respect was cogent and sufficient for the losing party to be aware of why they lost. It was perhaps

unhelpful that the grant of permission to appeal was so brief particularly as it did not distinguish between the Article 8 argument which was not accepted by the Judge at first instance and the issue of the English language certificate which had been accepted.

16. The grant of permission did not deal with the point made by the Judge that the loss of documents by the Respondent did not materially affect the consideration of the appeal because the sort of documents that were lost could be relatively easily duplicated. Be that as it may the onus was on the Appellant to show a material error of law in the Judge's determination. I find that that has not been demonstrated. If the Sponsor has adequate financial documentation which shows that she can meet the income requirement of £18,600 there is no undue hardship upon the Appellant to reapply. This was a point made by the Judge at paragraph 32 of his determination and echoed in the Respondent's reply to the grant of permission.

17. Given that the Judge had found that the Immigration Rules could not be met there was then significant weight on the Respondent side of the scales when looking at the matter outside Article 8 during the proportionality exercise. As the jurisprudence has made clear, see **SS Congo [2015] EWCA Civ 387** approved in the Supreme Court, for example, very compelling circumstances need to be shown in an out of country appeal why the interference with protected rights outweighs the public interest in immigration control. The Judge at first instance did not found that the public interest was outweighed and that was a conclusion open to him on the evidence. The Sponsor was evidently able to travel out to Somalia to meet and marry the Appellant and family life could be continued elsewhere. The reluctance of a UK based Sponsor to travel to the applicant's country of origin is not of itself a good reason to allow an appeal, see **Agyarko [2015] EWCA Civ 440** approved in the Supreme Court at **[2017] UKSC 11.** There were no very compelling circumstances in this case as the Judge correctly identified and I find no material error of law in the Judge's decision to dismiss the appeal. I therefore dismiss the onward appeal.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error of law and I uphold the decision to dismiss the Appellant's appeal

Appellant's appeal dismissed

I make no anonymity order as there is no public policy reason for so doing.

Signed this 19th of December 2017

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Judge Woodcraft

Deputy Upper Tribunal Judge

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed this 19th of December 2017

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Judge Woodcraft
Deputy Upper Tribunal Judge