



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/02732/2013

THE IMMIGRATION ACTS

Heard at Field House
On 14th April, 2014
Given extempore

Determination Promulgated
On 17th April 2014
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Before

Upper Tribunal Judge Chalkley

Between

ENTRY CLEARANCE OFFICER - ISLAMABAD

Appellant

and

ASMA ALOKOZAI

Respondent

Representation:

For the Appellant: Mr E Tufan, Senior Home Office Presenting Officer
For the Respondent: Mr P Ward, a Consultant with James & Co, Solicitors

DETERMINATION AND REASONS

1. The appellant in this appeal is the Entry Clearance Officer – Islamabad, but I shall refer to her as the claimant and I shall refer to the respondent as the respondent, to avoid confusion.
2. The respondent is a national of Afghanistan, who was born on 18th May, 1988. She made application to the claimant for entry clearance with a view to settlement as the spouse of a person present and settled in the United Kingdom under Paragraph 281 of Statement of Changes in Immigration Rules, HC 395, as amended (“the immigration rules”). Her application was dated 7

July, 2012, and it was considered by the claimant who refused the application on 20 November, 2012.

3. The claimant refused the application under paragraphs 281(i)(a), 281(ii), 281(iii), 281(iv), and 281(v).
4. The Notice of Refusal of entry clearance said this:

“You have applied to join your spouse Masood Alokozai in the United Kingdom.

You have submitted the following as evidence of your English language ability:

- a certificate for City & Guilds Entry Level 1 Certificate in Esol International (Spoken) (Preliminary Article 1).

In order to meet the English Language requirement you must provide an original English language test certificate or test certificates in speaking and listening from an English language test provider which clearly shows the applicant’s name and the qualification obtained (which must meet or exceed the level Article 1 (Basic Speaker) of the Common European Framework of Reference (CEFR). In order for the certificates to be valid you also need to submit the notification of candidate results to show that you have met Article 1 level in **speaking and listening**. You have also not provided any details about any other way that you consider you meet the English language requirement and have not stated you are exempt from the requirement. Therefore I am not satisfied that you meet the requirements of paragraph 281(1)(a)(ii) of HC 395.

You state your relationship began on 1/9/09 and you married on 1/9/10. You state you last saw your sponsor at the time of the application on 7/6/12. I note that you previously applied to join your sponsor (ISB/1666773) and your application was refused in December 2011 as you submitted false HSBC bank statements. You state you keep in contact by phone, email and Skype. You have provided phone cards as evidence of regular contact with your sponsor however these cards have no name or contact or usage details. There is no ability to show who has purchased or used them. I am also aware that these cards are readily available to purchase second hand even following full usage of the time and cost of the cards advertised actively. You have provided copies of emails. I note they are from you to your sponsor and your sponsor to you. However I note the emails are written in English. I have taken into account that **you have not submitted a City & Guilds showing your level of English in reading and writing**, but on the basis that this has been omitted and your level spoken of English is Article 1 level, the content of the emails is above Article 1 level. This leads me to doubt that the emails have actually been written by you or you are able to comprehend what your sponsor has written to you. You have not presented any evidence of Skype contact. I have taken into account the letter from Amin Exchange stating money transfers are sent regularly but there are no corresponding receipts. I attach little weight to this letter and financial dependency in isolation does not demonstrate a subsisting marriage. You state your sponsor has visited you twice and whilst I acknowledge the Afghan stamps in your sponsor’s passport there is no evidence to show your sponsor visited you during these visits by way of photographs or other evidence. I am not satisfied you enjoy the level of contact claimed or that your marriage is subsisting. In the absence of any other evidence that may allow me to consider regular contact with your sponsor, I am not satisfied that you intend to live permanently with your sponsor as spouse or civil partner and that the marriage or civil partnership is subsisting. 281(iii).

I note in your previous application for settlement (ISB/1666773) that you submitted false HSBC bank statements. You have not provided an explanation why you submitted false HSBC bank statements in this application. As you have applied for settlement, paragraph 320(7B) cannot be

applied and the application falls under paragraph 320(7C). Nonetheless submission of false documents in an entry clearance application undermines the credibility of your application. As evidence of funds available to you in the UK from your sponsor you have produced accounts (sponsor is self-employed taxi driver). The account statement shows that your sponsor's income for 7.5 months was £12,610 including national insurance and tax. This equates to £1,050 per month. The Department of Work and Pensions guidelines recommendations for maintenance are £111.45 per week per couple, £64.99 per child under 18, and £7.45 family premium per week. Therefore for your family the maintenance requirement would be £111.45 (£482.95 per month). You have submitted your sponsor's tenancy agreement which shows rent is £1,350 per month. I have noted your sponsor has £6,097 as of 30/04/12 in savings but given their financial commitments as detailed above I am satisfied that these funds will soon be exhausted after your arrival in the UK. It is apparent your sponsor's income is not sufficient to maintain and accommodate you and your additional family members in the United Kingdom without recourse to public funds. 281(iv)(v)

In your application you have stated that your sponsor is a self-employed taxi driver and I note he has an income of approximately £1,050 a month. The Barclays bank statements submitted in support of your application do not show any regular transactions or deposits that reflect amounts claimed as earnings, for example in April 2012 a total of £2,880 was credited to the account. This leads me to doubt that the Barclays bank statement is an accurate reflection of your sponsor's financial circumstances or that this money is available to you. You have failed to provide evidence to satisfy me that you will be adequately maintained in the United Kingdom without recourse to public funds. 281(v)

You state you intend to work in the UK but you are currently unemployed and supported by your spouse/family members. Given the current world-wide economic downturn and your low-level of English I am not satisfied that you will find gainful employment as easily as you believe in the current climate. You have not completed any research or sought advice for any employment in any particular field, nor have you shown any evidence of transferable skills to enable you to obtain employment in the United Kingdom. I note that you state you are unemployed and have provided no evidence of any educational qualifications, skills or work experience therefore I believe you will be seeking employment in an over saturated unskilled job market. I am not satisfied your job prospects in the UK are realistic. I am not satisfied you will find any meaningful employment that will relieve the financial burden you will impose on your sponsor. Therefore on the balance of probabilities I am not therefore satisfied that you can adequately maintain yourself in the United Kingdom without recourse to public funds. 281(v).”
[My emphasis]

5. The respondent appealed and her appeal was heard on 12th February, 2014, by First-tier Tribunal Judge S J Clarke at Taylor House.
6. The judge noted that the respondent had failed to submit notification of results of her English language test certificate, but did not note that the reason the Entry Clearance Officer refused the application was because she had only provided a test result in respect of her **speaking and listening ability**, not in respect of her reading and writing ability.
7. Unfortunately, the judge did not set out a précis or summary of the evidence she received and I was concerned to discover that the respondent had, apparently, submitted a bundle of documents the day before the hearing, but there are no respondent's documents in the file in the file. The Entry Clearance Officer does not appear to have received these documents either.
8. The judge also failed to make a note of the submissions made to her. This would not normally be quite so crucial, except that in paragraph 9 of her determination, Judge Clarke said that she

preferred the submissions made by the respondent's solicitor. Unfortunately a reader of the determination is not given any indication as to what those submissions may have been. The judge does not set out the requirements of paragraph 281 in her determination, but at paragraph 10, she noted that the respondent produced certificates of results which were in existence at the date of decision presumably in respect of the appellant's English language abilities. It is not clear what these certificates were, because the judge does not say, but the judge finds that the appellant has discharged the burden on her. I believe that the judge may have overlooked the fact that the Immigration Rules require that applicants must have passed their English Language test at one sitting, so that two or more certificates showing that an applicant had passed the test in some aspects at one sitting and then passed the test in other subjects at another sitting are not sufficient.

9. It is not clear exactly what burden the respondent has satisfied, because the judge does not appear to have appreciated that she was under the burden of proving that she was able to read, write and speak and listen in English to the required level.
10. The judge found that the marriage between the respondent and sponsor was subsisting, but she does not explain why she reached that conclusion. She may well in fact have been entirely correct to reach that conclusion, but without explaining why she did, the reader is left in doubt.
11. There is reference to a child, but there is no clear finding made by the judge that the child is in fact a child of the marriage. I was told today by Mr Ward that a birth certificate was produced, but the judge has made no clear finding on it. The judge does not say that she has examined the birth certificate.
12. The judge noted at paragraph 16 of the determination that the sponsor has now produced trading accounts showing that during the period April 2012 to April 2014 he made a net profit of £25,086. However, the date that the judge was concerned with was the date of the Entry Clearance Officer's decision, namely, November 2012 so that what would have been relevant would have been details of the earnings of the sponsor up to that date. Bearing in mind that the earnings for the previous twelve months were less than half the earnings for the subsequent twelve months, the accounts may have deserved closer examination and clear findings made on them.
13. Mr Ward sought to persuade me that the deficit, so far as the English language certificate was concerned, was that the **notification** of the English language test results had not been provided, but that is clearly not what the Entry Clearance Officer says in the Notice of Refusal. Mr Ward quite properly pointed out that the judge has considered the telephone records and noted that the date of conception of the child accords with the evidence provided of the sponsor's dates of his visit to Afghanistan and that the judge has therefore clearly examined the evidence properly.
14. Unfortunately, without knowing precisely what the evidence before the judge was, and without clear findings in respect of that evidence, I believe that the determination is defective.
15. In giving my decision extempore, it occurs to me that the judge has not actually said what the standard of proof is in the appeal. But that is not the reason that I am finding the determination cannot stand because it was not a point challenged by the claimant. It is merely a further indication of the inadequacy of the determination.
16. Unfortunately, the sponsor is not present. It appears that Mr Ward only yesterday received notification of the hearing from his client in Afghanistan. The Tribunal's file clearly indicates

that notice of the hearing was sent to both the sponsor and to Mr Ward and I apologise if there has been any failing on the part of the Tribunal, but according to the file notices were sent by first class post on 21 March 2013. For whatever reason, it appears that Mr Ward certainly did not receive his notice and the sponsor is not present.

17. It is not, therefore, possible for me to go on and correct the errors in the determination because the failure of the judge to make clear findings means that oral evidence will be required and to avoid any further delay and being mindful of the Senior President's Practice Statement, I am proposing to remit this appeal for hearing afresh by the First-tier Tribunal by a judge other than First-tier Tribunal Judge Clarke.
18. Any determination should be self-contained and both parties to the appeal should be able to properly understand the reasons why they have been successful or been unsuccessful. It is not sufficient simply to refer to evidence being recorded, for example in a Record of Proceedings and neither is it acceptable not to record at least a summary of the evidence, so that anyone reading the determination can ascertain whether adequate findings have been made.

Upper Tribunal Judge Chalkley