



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/12973/2015

THE IMMIGRATION ACTS

Heard at Field House
On 18 October 2017

Decision & Reasons Promulgated
On 2 November 2017

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

ENTRY CLEARANCE OFFICER - ISLAMABAD

Appellant

and

MR AHAD ABDUL SHARIFEE
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr T Melvin, Home Office Presenting Officer

For the Respondent: Mr R Ahmed, Counsel instructed by Jj Law Chambers

DECISION AND REASONS

1. I shall refer to the Respondent as “the Appellant” as he was before the First-tier Tribunal.
2. The Appellant is a citizen of Afghanistan. His date of birth is 2 February 1973. He made an application for entry clearance to join his partner, Safia Sayed, (the Sponsor) here. That application was refused by the ECO on 10 August 2015. The Appellant appealed and his appeal was allowed by Judge of the First-tier Tribunal Boyes.

3. The ECO was granted permission by Judge of the First-tier Tribunal Ford on 16 August 2017, but on 2 September sought renewal, based on the interpretation of Judge Ford's decision that he had refused permission on grounds 1 and 2 and granted permission on ground 3 only.
4. Upper Tribunal Judge Jordan, in his decision on 29 September 2017, concluded, on a proper construction of the grant of permission, Judge Ford did not limit the grant of permission. He decided that the ECO was entitled to argue ground 1. In any event, Judge Jordan concluded that in his view ground 1 is arguable. There was no specific reference to ground 2. However, in the light of paragraph 1 of Judge Jordan's decision, it is clear he concluded that Judge Ford decision was that all grounds are arguable. There was no issue taken by Mr Ahmed in respect of the grant of permission and Judge Jordan's decision.
5. It is necessary to set out the salient parts of the ECO's decision;

"With your application you have provided an employment letter and payslips from Tactical Finishing Solutions Ltd and an employment letter and pays slips from Completely Care. Official checks made with Her Majesty's Revenue and Customs (HMRC) in the UK regarding your sponsor's income have revealed the following:

For the 2014/2015 tax year HMRC records show the following

- 1) Completely Care Total Pay £9,351.90 Total tax £0.00
- 2) Tactical Finishing Solutions Ltd - Total Pay £4,678.26 Total tax £935.60

You state on your Appendix 2 that your Sponsor earned £20,762 from employment with Tactical Finishing Solutions Ltd. The HMRC checks have revealed that your Sponsor actually earned only £9,351.90. You made no mention on your Appendix 2 of any employment with Completely Care. However, the HMRC checks have revealed that your Sponsor earned £4,678.26, making a total of £14,030.16. This is below the income threshold. Given this I am satisfied that false representations have been made in your application."

6. The judge heard evidence from the Sponsor, her father and brother. The Sponsor's evidence was that she was, at the material time, employed by Completely Care Ltd and Tactical Finishing Solutions Ltd. Her evidence in respect of Completely Care Ltd was not in dispute and the judge accepted that during the material tax year the Sponsor earned £9,351.90 from this employment. However, her evidence was that she was also employed by Tactical Finishing Solutions and received a gross salary of £20,762.00. She submitted documentary evidence in support of this.
7. In relation to this aspect of the case, the judge made the following findings;

"19. There is no force in the Respondent's argument that the Sponsor's claimed income with Tactical Finishing Solutions Limited is not reflected in the records

held by HM Revenue and Customs. As asserted by the Appellant, the claimed employment only began on the 1 September 2014 and so the recorded income of £4678.26 would only be for a 7 month period. The only basis upon which the Respondent asserts that there was a misrepresentation at the time of the application is in respect of the amount that the Sponsor earned in that employment. The burden of proof is on the Respondent where an allegation of deception is made. The Respondent has not shown that the Appellant made that particular misrepresentation.

20. However, that is not the end of the matter, even if the Respondent is unable to demonstrate deception, the burden of proving that the Sponsor was in the employment concerned at the time of application falls upon the Appellant because the Respondent does not accept that the financial requirements are met.
21. The Respondent has produced a document verification report dated the 16 June 2015. In that report HM Revenue and Customs recorded a nil turnover and trading profits for 2013 Tactical Finishing Solutions Limited and that the company was recorded as 'Company Dormant'.
22. Checks were also on the history of the company. The following website link was checked:

<https://companycheck.co.uk/company/07891456/TACTICAL-FINISHING-SOLUTIONS-LTD>

23. The checks found that the company was listed as a non trading company with Companies House and that the latest returns were overdue. It can also be seen from the link concerned that the nature of the business is listed as 'packaging activities'. The last accounts were made up to the 31 December 2013. Two directors are listed, Mr Mukhtar Ahmed, who was appointed on 23 December 2011 and resigned on 9 January 2013, and Mr Mohammed Hussain who was appointed as a Director on the 9 January 2013.
24. The Appellant has provided two letters from Tactical Finishing Solutions dated 23 March 2015 and 23 April 2015. The letters are signed by Mr Mukhtar Ahmed, Director. According to the above link he was not a Director of the company in 2015.
25. On the wage slips provided it records that Tactical Finishing Solutions Limited paid the Sponsor by BACs. There are no bank transfers from Tactical Finishing Solutions to the Sponsor's account, only credits which it is claimed are from Tactical Finishing Solutions. I asked the Sponsor how her salary from Tactical Finishing Solutions was credited to her account and she said that the credits could be seen on the bank statements, but she did not know how the money got into her account.
26. The Sponsor stated that Tactical Finishing Solutions Limited provides business and accounting advice, which is contrary to the stated purpose of the company as recorded with Companies House. She found out about the employment through a friend. The business has two employees, a father and his son. She does not remember the son's name but the father's name is Mohammed Naem. I asked who Mukhtar Ahmed was and she said that she did not know. She stated that

she worked full time at the beginning and part time from March 2015. I asked her what her role was and she stated that she set up appointments, sent emails and replied to telephone calls. It was mainly Mohammed Naeem working there with her.

27. In respect of this particular employment, I found the Sponsor's evidence to be very lacking in detail and externally inconsistent. I do not consider it credible that she would not know how the funds were credited to her account. Her evidence regarding her role was vague. She knew little about who worked in the company. If this is coupled with the issues that arise in relation to the two letters provided by the company, which were signed by a person claiming to be a director, even though it is clear that he was no longer a director by that point, and the fact that it states in her wage slips that she was paid by BACs when her own evidence is that her funds were deposited into her account, then the evidence is insufficient to demonstrate that she was employed as claimed, or that she earned sufficient to take over the financial threshold at the date of the application.
28. In addition, there is no evidence, from the website link provided at least, that the company was actively trading after December 2013. I also note that the Sponsor stated that Mohammed Naeem worked for the company. I note that the letter from Rosemount Accountancy South is signed by a Mohammed Naeem, who is a director of that business.
29. Taking into account all of the above, the Appellant has not shown that the Sponsor was employed by Tactical Finishing Solutions Limited as claimed. The evidence falls far short of demonstrating that she is.
30. As the Sponsor has not demonstrated that she was earning £18,600 the (sic) date of the application, the Appellant cannot meet the requirements of Appendix FM as a partner, because none of the exceptions to the maintenance requirements apply in this case, there is no provision for third party support within the rules, and section EX is not applicable to applications for entry clearance."

8. The judge considered Article 8 outside of the Rules and made the following findings:-

"33. The Sponsor is a British citizen. She was born in Afghanistan. The Appellant and Sponsor became engaged in 2013 and married in Afghanistan in 2015. The Sponsor visited Afghanistan in 2016. The Sponsor's parents and siblings reside in the UK. She has one brother and four sisters. She lives with her parents and brother. She has uncles residing in Afghanistan as well as her parent's in law (sic) who the Appellant is currently residing with.

...

35. A letter has been provided from Doctor Charles Roher, Consultant Neonatologist at Oxford University Hospitals dated 19 April 2017. He states that he is currently concerned with the care of the Appellant's son, who was critically ill from birth and is a long-term patient on their Neonatal Intensive Care Unit at John Radcliffe Hospital, Oxford. He states that *'the condition of the child, as well as the need for the*

child's mother [sic], would make it necessary for Mr Sharif to be in Oxford as soon as possible.'

36. The Appellant's son had not been born at the date of application, decision or entry clearance manager's review. There has therefore been no consideration of the family's current circumstances by the Respondent. Consequently, as the Respondent was not represented at the hearing, I have considered whether the birth of the Appellant's son constitutes a new matter for purposes of section 85(6) of the Nationality, Immigration and Asylum Act 2002. I do not consider that it does. For a matter to be a 'new matter' for the purpose of section 85(6) it must, inter alia, 'constitute a ground of appeal of a kid listed in section 84...'.
37. In this case the Respondent treated the application as a human rights claim taking into account the impact of that decision upon the couple's family life. In essence, even though a child has now been born, that child was born as a consequence of the relationship between him and his wife. The Appellant continues to rely upon the same ground, that is Article 8 of the ECHR (family life), as considered by the Respondent. The Appellant does not argue that he falls within a different category of the rules as a consequence of the birth of his son. The birth of the Appellant's son is relevant to the assessment of whether the Sponsor can presently reside in Afghanistan. The change in the factual matrix as a consequence of an addition to the family unit is, of course, relevant to the assessment of proportionality, but it is not discrete (sic) claim that can be separated from Appellant's claim based upon the relationship with his wife.
38. I am satisfied on the basis of the evidence before me that the couple have a child together. I am satisfied their son was born very prematurely at 28 weeks and that, as at the date of the hearing, he remained in neonatal intensive care.
39. The Respondent does not dispute that the Appellant and Sponsor are in a genuine and subsisting relationship and that they intend to live together permanently. At the present time at least, it would not be reasonable to expect the Sponsor to relocate to Afghanistan to be with the Appellant because their son is in hospital in the UK and she visits him daily. The Respondent's decision therefore interferes with the enjoyment of family life between the Appellant and the Sponsor and the Appellant and his son. Article 8(1) is therefore engaged on family life grounds.
- ...
43. The Respondent does not dispute that the Sponsor is a British citizen. According to the application form, she was issued with a British passport on 6 February 2015. This is prior to when her son was born. Therefore, as he was born in the UK, by virtue of section 1(a) of the British Nationality Act 1981, he is a British citizen.
44. At the date of the hearing, the Appellant's son was in neonatal intensive care. Whilst the medical evidence does not specifically address it, I am satisfied on the balance of probabilities that the Appellant's son could not presently travel to Afghanistan and reside there with his parents. It is clearly in his best interests that he has both of his parents present in his life during his early development

and at key milestones in his life, which in view of his premature birth and the need for extensive medical intervention, is likely to be a difficult time for both him and his parents. He cannot realistically be expected to leave the UK, less so could it be said to be reasonable to expect him to do so.

45. However, whilst what is in the child's best interests is a primary consideration, it is not the only consideration. I have also had regard to the other factors identified in section 117B when assessing proportionality.

46. There is no suggestion by the Respondent that the Appellant does not meet the English language requirements so section 117B(2) is of no relevance. The Appellant is outside the UK and so section 117B(4) and (5) have no application.

...

54. Section 117B (6) refers to a person's removal rather than exclusion from entry, so is not applicable in strict terms as this is an entry clearance case. However, the Appellant's inability to enter the UK will result in an ongoing physical separation between him and his son, who is a British citizen, unless his son becomes fit to travel to Afghanistan in the future. I have had regard to this and what is in his best interests when undertaking the balancing exercise in this case.

55. I have not been provided with any details regarding the long term prognosis for the Appellant's son and so I do not know whether or not he is likely to be medically fit to travel in the future. However, the position as at the date of the hearing was that he was in neonatal intensive care. It is clear from the consultant's report that he has been very ill. Unless the Appellant is granted entry clearance he will not be able to see his son in person or physically bond with him. I consider that this amounts to very strong and compassionate circumstances in favour of granting the Appellant entry clearance that outweighs the public interest in this case, because if the Appellant is not able to enter the UK to join his wife and son then he will not be able to have any meaningful family life with his son at the present time."

9. The judge considered maintenance and made the following findings:-

"48. I am not satisfied that the Sponsor's earnings met the financial threshold of £18,600 when she was last working. On the face of it, the couple have therefore not demonstrated that they will be self sufficient. The public interest that requires that persons who seek to enter or remain in the United Kingdom be financially independent therefore does weight against them.

49. However, offers of third party support have been made by the Sponsor's father and brother. Both gave evidence at the hearing. Both are British citizens. The Sponsor's father's evidence is that he is the president of Alhayat Equipment Limited and has an annual income from this business of £21,000 as well as a (sic) roughly £5000 from the rental of a car as private hire. He stated that his daughter lives with him in the family home and that a room will be provided for the Appellant and Sponsor's use. The Appellant will be maintained and accommodated without recourse to public funds.

50. However, no evidence has been provided of the Sponsor's father's income. I am therefore (sic) cannot be satisfied that he can provide cash support to the Appellant on the evidence before me. However, I accept that the Sponsor presently lives in the family home, so if the Appellant joins her in the same room there will be no significant additional accommodation and utility costs. I therefore accept that he can accommodate the Appellant, Sponsor and their son without the Appellant needing to have recourse to public funds (which is not disputed by the Respondent).
51. The Appellant's brother also lives in the family home. His evidence is that he will provide any financial support needed until the Appellant has established himself in the UK. He stated in live evidence that he works as a receptionist at Almond Tree Hotel and earns gross around £19,000 per annum. He has provided a Barclays bank statement covering the period 14 April to 16 May 2017. This shows a payment on the 3 May 2017 of £1,350.05 from the Almond Tree Hotel. This would equate to £16,200.26 per annum net. There is a closing balance £3,821.18 on the account. I accept that he is employed as claimed and earns around £19,000 per annum gross. As he lives in the family home I accept that it is likely that he has some disposable monthly income and savings with which he can provide financial assistance to the Appellant.
52. The evidence provided of third party support in this case is just about sufficient to demonstrate that the Appellant can be supported within the Sponsor's family home, also taking into account that the Sponsor is in receipt of child benefit and child tax credit which she is entitled to in her own right. However, no undertakings have been provided and the supporting documentary evidence is limited. The evidence before me is not comprehensive enough for me to make a finding as to the specific additional funds that are available to the couple each week. Therefore whilst I have taken into account the availability of this support when carrying out the balancing exercise, I attach less weight to this factor than finding the evidence before me had been stronger and more specific.
- ...
54. Section 117B(6) refers to a person's removal rather than exclusion from entry, so is not applicable in strict terms as this is an entry clearance case. However, the Appellant's inability to enter the UK will result in an ongoing physical separation between him and his son, who is a British citizen, unless his son becomes fit to travel to Afghanistan in the future. I have had regard to this and what is in his best interests when undertaking the balancing exercise in this case."

Grounds of Appeal

10. The first ground of appeal is that the judge made a material misdirection in law, having taken into account the child of the family who was born post the date of the decision. Paragraphs 85(4) and (5) of the 2002 Act relied on which read as follows:-
- "(4) On an appeal under ... section 82(1) ... against a decision [the Tribunal] may consider any matter which ... [it] thinks relevant to the substance of the decision, including a matter arising after the date of the decision.

- (5) But the Tribunal must not consider a new matter unless the Secretary of State has given the Tribunal consent to do so.
- (6) A matter is a 'new matter' if –
- (a) it constitutes a ground of appeal of a kind listed in section 84, and (b)
 - (b) the Secretary of State has not previously considered the matter in the context of –
 - (i) the decision mentioned in section 82 (1), or
 - (ii) a statement made by the appellant under section 120".

11. In respect of this matter Mr Melvin made an application under paragraph 11 of the Practice Direction of the Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal of 10 February 2010 (as amended on 13 November 2014) to cite an unreported determination, namely the decision of Ali Rasuli Mahmud PA/05465/2016. Mr Melvin informed me that the case is to be reported.
12. The second ground of appeal is that the judge failed to make clear findings in relation to the issue of deception.
13. The third ground of appeal relates to the judge's findings in relation to third party financial support. It is argued that Section 117B (3) was not given adequate consideration when assessing proportionality.

Error of Law

14. It is beyond doubt that the judge attached significant weight to the child when assessing proportionality who was not born at the date of the decision. Following AS (Somalia) & Anor v SSHD [2009] UKHL 32, as this is an application for entry clearance, the judge was not entitled to take into account events postdating the refusal. In respect of the whether the position has changed since the enactment of section 85 (5) and (6) of the 2002 Act, the judge engaged with whether the birth of the child was a "new matter" and concluded, for reasons explained at paragraphs 36 and 37 that it was not. The judge reached this conclusion finding that, "For a matter to be a 'new matter' for the purpose of section 85(6) it must, inter alia, constitute a ground of appeal of a kind listed in section 84 ...". The judge considered that the ECO had treated the application as a human rights claim. Although a child had been born, that child was a consequence of the relationship between the Appellant and his wife. The Appellant continued to rely upon the same ground, namely Article 8 of the ECHR. The judge said:

"The change in the factual matrix as a consequence of an addition to the family unit is, of course, relevant to the assessment of proportionality, but it is not discrete (sic) claim

that can be separated from Appellant's claim based upon the relationship with his wife".

15. The judge concluded that the birth of the child was not a new matter because the change in the facts was not a "discrete claim". The judge took the view that it did not give rise to a new ground of appeal. However, in my view the judge erred in the interpretation of Section 85 (5) and (6). A new matter is not defined in the legislation as a "new" ground of appeal, but, with reference to section 85 (5), the issue is whether it "constitutes a ground of appeal of a kind listed in section 84." Here the matter raised is undoubtedly a ground of appeal listed in section 84 and, in addition, it is one that has not previously been considered (85 (6) (b)). The birth of the child is a new matter which was not a matter that the judge was entitled to take into account. The unreported case relied on by Mr Melvin is not binding, but there was no objection (by Mr Ahmed) to Mr Melvin citing the case. I have read it and independently reach the same conclusions as the Tribunal in respect of the analysis of section 85. For this reason alone the judge has materially erred and the decision to allow the appeal under Article 8 is set aside.

16. In relation to the issue of deception. Judge Jordan, in my view, concluded that all grounds were arguable. In any event, this is not material because the decision to allow the appeal has been set aside and it is incumbent on me to consider the totality of the decision to decide how best to proceed. In any event, it was not an issue raised by Mr Ahmed. Whilst, I accept that the burden of proof rests on the Secretary of State, the findings of the judge appear to me to be irreconcilable in respect of the issue of deception. The decision of the ECO was made under S-EC 2.2 (a) which reads as follows:-

"S-EC.2.2. Whether or not to the applicant's knowledge -

 - (a) false information, representations or documents have been submitted in relation to the application (including false information submitted to any person to obtain a document used in support of the application); or

..."

17. The judge was not satisfied the Sponsor was employed by Tactical Finishing Solutions as asserted, not because of insufficient evidence, but because she was not credible (see paragraph 27). In addition, the judge attached weight to the DVR (see paragraph 19). The DVR was evidence that the company is not trading and there was a website link relied on which the judge considered. On a proper reading of the ECO's decision, the misrepresentation was not (as was argued by Mr Ahmed) confined to whether the income claimed by the Sponsor was accurately reflected in the HMRC records. The misrepresentation alleged went beyond this narrow issue. By the time of the hearing, when the Respondent produced the DVR, the Secretary of State's position was very clear; namely, that the Sponsor was not employed by the company and false information has been given and false documents produced. It is not clear to me when the DVR was produced, but there was no application made for

an adjournment before the First-tier Tribunal. There was no counter challenge made by the Appellant before me, raising issues of fairness, or indeed challenging the findings made by the FtT. The case as advanced by the Secretary of State, corroborated by the DVR, was accepted by the judge. The judge accepted the DVR, taking into account all the evidence including letters relied on by the Appellant. The letters were purportedly written by the director of the company, whilst the judge concluded that the website link revealed that he was not the director at the time the letters were written. In addition, the judge concluded that the link established there was no evidence that the company was trading after 2013. The judge found the evidence of the Sponsor to be vague, inconsistent and not credible. There was no challenge to findings made by the judge in respect of the Sponsor and Tactical Finishing.

18. I reserved my decision at the hearing, and discussed the hypothetical position of the decision being set aside and the possibility of a re-hearing (and remittal) in respect of this issue. However, it is clear on a proper reading of the decision this is not necessary. The Appellant's case was that the Sponsor was employed and earned an income from Tactical Finishing Solutions. The Sponsor was found not to be credible. It was not the Appellant's case that there was a mistake or misunderstanding. Whether the Appellant was aware of the deception is not material. The conclusion reached by the judge, at paragraph 19, focuses on a very narrow aspect of the ECO's decision and does not take into account all material matters. The decision is perverse, considering the findings made by the judge. From the findings of the judge, the conclusion that the Respondent has discharged the burden of proof is inescapable. The Appellant could not meet the suitability requirements of the Rules because he submitted false information and made false representations.
19. There is no purpose to be served in a re-hearing. The Appellant cannot meet the requirements of the Rules. No further evidence was produced by either party in accordance with the direction of the Upper Tribunal.
20. I have taken into account paragraph 41 of the judgement in *R (MM (Lebanon)) v Home Secretary* [2017] UKSC 10;

"There is no general obligation to respect a married couple's choice of country in which to reside or to authorize family reunification. It will depend upon the particular circumstances of the persons concerned and the general interest. Factors to be taken into account are the extent to which family life would effectively be ruptured; the extent of the ties in the host country; whether there are 'insurmountable obstacles' (or, as it has sometimes been put in other cases, 'major impediments'...) in the way of the family living in the alien's home country; and whether there are factors of immigration control (such as a history of breaches of immigration law) or public order weighing in favour of exclusion".

21. The Appellant and the Sponsor married on 26 March 2015 when she was on holiday in Afghanistan. The Sponsor is a British citizen of Afghan descent. Article 8 (1) is engaged. I attach significance to the implications of the decision and the rupture to family life. The determinative issue is proportionality. The child is new matter that I

cannot factor into the assessment. There is no challenge to the findings of the judge in respect of the lack of credibility of the Sponsor and the findings in respect of the evidence of her earnings and the documents produced to support this. The inevitable conclusion is that there has been deception in respect of the Sponsor's earnings and this weighs very heavily in favour of the Respondent, whether the Appellant was aware of it or not. The Sponsor is a British citizen, but she does have familial ties to Afghanistan. However, I do not underestimate the difficulties she would face leaving her family here and the practical difficulties that would ensue should she chose to live in Afghanistan. I attach weight to this. However, I do not find that on the evidence at the date of the decision, prior to the birth of the child, the refusal would result in unjustifiably harsh circumstances that refusal would not be proportionate (*Agyarko [2017] UKSC 11*).

22. I am not persuaded the judge erred in respect of third party support in the light of *MM (20170 UKSC 10)*. He accepted that the evidence was insufficient. There was no challenge made by the Appellant in respect of the findings. The judge found that it likely the Appellant's brother has "some" disposable income (he earns £19,000 per annum gross) which he can provide to the Appellant, but there was no attempt to quantify this. There was no analysis of his outgoings and financial responsibilities. The judge found no evidence was provided of the Sponsor's father's income or that he could provide cash support. He accepted the Sponsor lives with him in the family home and that a room will be provided for the Appellant. The Appellant will be accommodated and this is a factor that weighs in his favour. However, the judge accepted that the evidence was limited in respect of third party support and this is undeniably the case. The Sponsor's earnings as accepted by the judge are £9,351.90, per annum, which falls short of that required under the Rules. The evidence is not such that would lead to a conclusion that the Appellant, in practice, would not become a burden on the state. There were no findings made in respect of the prospect of the Appellant earning an income and no evidence relied on in this respect. Presumably because the Appellant's case was that the Sponsor's earnings were sufficient to meet the Rules.
23. Should the Appellant make another application for entry clearance, the birth of his son (and any health issues) can be taken into account. However, there are no compelling or exceptional circumstances in this case, at the relevant time, that would materially reduce the weight to be attached to the public interest. This is particularly so in the light of the Appellant having relied on false information and documents. Considering the specific facts in this case and section 117B of the 2002 Act, I conclude that the interference to the Appellant's family life is proportionate.
24. No anonymity direction is made.

Signed *Joanna McWilliam*

Date 24 October 2017

Upper Tribunal Judge McWilliam