Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/07524/2017

THE IMMIGRATION ACTS

Heard at Royal Courts of Justice, Belfast	**Decision & Reasons Promulgated**
On 4 April 2019	**On 29 April 2019**

Before

UPPER TRIBUNAL JUDGE DAWSON

Between

AMGAD [S]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellant: Mr S Bassett, instructed by P A Duffy & Co Solicitors
For the Respondent: Mr M Matthews, Senior Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Egypt, born on 28 April 1987. He has been granted permission to appeal the decision dated 16 March 2018 by First-tier Tribunal Judge Fox who dismissed his appeal against the Entry Clearance Officer's decision refusing his application to join his spouse [NN] in the United Kingdom.

2. It was accepted by the appellant that he could not meet the requirements of the Immigration Rules as a spouse by reference to the financial

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requirements. The judge also dismissed the appeal by reference to Article 8. His approach is set out in paragraphs 24 to 31 of the decision.

3. The grounds of challenge closely typed over eight pages and thus exceeding the decision in length raised a number of challenges which were succinctly considered on a renewed permission application by Deputy Upper Tribunal Judge Chapman in the following terms:

> "2. The grounds in support of the application assert that the Judge erred materially in law: (i) in failing to consider the best interests of the Appellant's child; (ii) in failing to provide reasons for his findings and (iii) in being influenced by a suspicion that the Appellant may have already contravened immigration control by being in the UK as a visitor [8] refers, whereas the Appellant entered the UK lawfully in possession of a multi-entry visit visa, which he could have adduced given the opportunity and the Judge's decision was contrary to the overriding objective.
>
> 3. The basis of the refusal of entry clearance was the inability of the Appellant and his Sponsor to meet the financial requirements, either through the Sponsor's being employed in the UK or savings by the Appellant. It was apparent at the time of the Judge's consideration that this requirement was still not met. The Judge correctly directed himself with regard to the judgment of the Supreme Court in MM (Lebanon) [2017] UKSC 10 as to the lawfulness of the financial requirement under the Rules. There was no evidence of third party financial support before the Judge. However, it would appear that the inability of the Sponsor to meet the financial requirements, despite being a teacher, is temporary due to the fact that she was on maternity leave.
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> 4. The Supreme Court at [109] found that the requirements of Appendix FM of the Immigration Rules do not give effect to the Secretary of State's section 55 duty to take into consideration the best interests of the children. Whilst the Appellant's daughter was born after the entry clearance application had been refused it is clear from the evidence submitted and [26] of the decision that the Judge was aware that there was now a child of the marriage. Given that she is a British child residing in the United Kingdom it is arguable that the Judge failed to consider her best interests.
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> 5. Ground 2 is not particularized in respect of which findings are impugned for a lack of reasons and does not raise any arguable error of law.
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> 6. There is nothing in the third ground of appeal: all the Judge was saying at [7] and [8] is that he accepted that the Appellant was present in the UK as a visitor and would leave in good faith but were this not the case then the Respondent has the power to address any abuse."

1. Mr Mathews raised a matter of the FtT's jurisdiction to consider the child best interests which he contended it was disqualified from doing so since the birth was a 'new matter' captured by section 85(5) of the Nationality, Immigration and Asylum Act 2002.

2. The relevant chronology is as follows:

   (a) 13 March 2017: application for entry clearance made.

   (b) 17 May 2017: application refused.

   (c) 25 June 2017: date of notice of appeal accompanied by letter dated 29 June 2017 that refers to the appellant's wife's pregnancy and the due date of 8 August 2017.

   (d) 3 July 2017: notice of appeal received by the Tribunal.

   (e) 14 August: child born.

   (f) 23 November: Entry Clearance Managers review.

   (g) 25 January 2018: a letter of this date sent to the Tribunal that refers to the birth of the child. On the same date the appeal was allocated to the Judge Fox to decide the case without a hearing.

3. Reliance was placed on the Tribunal decision *in Mahmud (s.85 NIAA 2002 – 'new matters': Iran)* [2017] UKUT 488 (IAC) by Mr Mathews in support if his contention that the birth was a 'new matter' with specific reference to para [31]:

   > "31. Practically, a new matter is a factual matrix which has not previously been considered by the Secretary of State in the context of the decision in section 82(1) or a statement made by the appellant under section 120. This requires the matter to be factually distinct from that previously raised by an appellant, as opposed to further or better evidence of an existing matter. The assessment will always be fact sensitive. By way of example, evidence that a couple had married since the decision is likely to be new evidence but not a new matter where the relationship had previously been relied upon and considered by the Secretary of State. Conversely, evidence that a couple had had a child since the decision is likely to be a new matter as it adds an additional distinct new family relationship (with consequential requirements to consider the best interests of the child under section 55 of the Borders, Citizenship and Immigration Act 2009) which itself could separately raise or establish a ground of appeal under Article 8 that removal would be contrary to section 6 of the Human Rights Act."

4. By way of response Mr Bassett accepted the chronology set out in [5] above but nevertheless relied on notification by the appellant in his entry clearance application in part 8. In response to question 95, the appellant explained:

   > "My wife really wants to return home. Coming to Qatar was a chance for her to gain experience in teaching and provide an income for herself now that we are married and expecting our first child. We want to be settled in one place to give our child a stable environment with a family network of support and love to grow up in. We do not know how our life will be in Northern Ireland, but after living away from our homes for a few years we are now ready to settle. My wife really misses her family and friends and I

know that she needs them close to her especially through her pregnancy and her parents really want to be part of their grandchild's life. We have saved some money to help us guarantee an easy start and we have good intentions to make our life in Northern Ireland work for us and our baby. We hope that the transition from our life here in Qatar and our life there will as [sic] easy as it can be, and that it brings happiness to us."

5. In my judgement this does not avail the appellant. The fact of pregnancy does not mean that the Entry Clearance Officer was obliged to consider the application on the expectation of the birth of a child. Section 85(5) of the Nationality, Immigration and Asylum Act 2002 provides, relevant to this matter:

> "s.85 (1) An appeal under section 82(1) against a decision shall be treated by the Tribunal as including an appeal against any decision in respect of which the appellant has a right of appeal under section 82(1).
>
> …
>
> (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) 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."

6. Notice under section 120 was not served on the appellant. Section 85(5) is in mandatory terms. Mr Bassett candidly accepted that my decision on this aspect would be determinative of the appeal.

7. The appeal before the First-tier Tribunal was on the papers. It was on human rights grounds. Specifically in respect of the birth of the child, Judge Fox explained at [26]:

> "26. The appellant relies upon the birth of a child to assert that his circumstances should permit him to effectively circumvent immigration control. The appellant and sponsor both lived in Qatar and they were both aware of the conditions associated with the permission to reside

> there. Conversely the appellant requires the respondent to waive the conditions of entry to suit his personal circumstances."

8. The grant of permission focused on an arguable failure by the judge to consider the child's best interests. I am satisfied that the birth of the child was a new matter within the meaning of section 85(6) and accordingly the First-tier Tribunal had no jurisdiction to consider this aspect. It follows that any consideration of the child's rights and interests could not form part of the appeal. The only arguable error by the First-tier Tribunal related to the presence of a child in the relationship. The judge had no jurisdiction to deal with that aspect and his error in not having regard to the child's best interests does not require his decision to be set aside. Accordingly, this appeal must be dismissed. I have sympathy for the appellant and his wife however it remains open to him to reapply for entry clearance in the light of the birth of the child.

Signed Date 23 April 2019

UTJ Dawson
Upper Tribunal Judge Dawson