Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/01744/2013

THE IMMIGRATION ACTS

Heard at Birmingham Sheldon Court	**Determination Promulgated**
On 4th July 2014	**On 21st July 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MR NAZAKAT HUSSAIN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER, ISLAMABAD

Respondent

Representation:

For the Appellant: Mr Mohammed Ikhlak (LR)
For the Respondent: Mr Neville Smart (HOPO)

DETERMINATION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge V A Osborne, promulgated on 20th February 2014, following a hearing at Stoke-on-Trent on 6th February 2014. In the determination, the judge dismissed the appeal of Mr Nazakat

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Hussain. The Appellant applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a male, a citizen of Pakistan, who was born on 5th June 1984. He appealed against the decision of the Respondent Entry Clearance Officer to refuse his application for entry clearance to join his wife, the Sponsor, Mrs Zulekha Perveen, a person present and settled in the UK.

The Appellant's Claim

3. The Appellant's claim is that she was not working at the time of her marriage with Mr Nazakat Hussain. After her marriage she remained in Pakistan with him for six months and then returned back to the UK in March 2010. By the time she returned to the UK she was pregnant and her daughter, Aalia, was born on 3rd July 2010. She then began employment with the Asian Learning Centre in January 2012. She and the Appellant kept in contact on a regular basis through telephone calls.

4. When the Sponsor went to the Tribunal hearing before Judge V A Osborne, she gave evidence and confirmed the facts relating to her marriage, stating that she first met her husband when she attended a family wedding in Pakistan in 2007, that her husband was her first cousin, and "in accordance with cultural traditions a marriage was arranged between her and the Appellant and the marriage subsequently took place in 2009" (see paragraph 17).

5. Her employment with the Asian Learning Centre ended when the centre closed down in February 2013. The Sponsor had not worked since January 2013. She was looking for alternative employment, but she had visited her husband in Pakistan, together with their daughter between April and July 2013. There was photographic evidence of the visit (see paragraph 21).

The Judge's Findings

6. The judge was satisfied that the relationship between the Appellant and his wife was a genuine one and that the marriage was a subsisting one (see paragraph 25). The main issue thereafter before the judge was that of "the adequacy of maintenance for the Appellant and his wife based upon his wife's earnings" (paragraph 26).

7. Since the application was made on 27th June 2012 (and therefore before the latest rule changes came into effect on 9th July 2013), all that the Appellant had to show was that there was a level of maintenance that was equivalent to the receipt of state benefits, which was an income of £833.51 per month together with housing costs.

8. There were bank statements before the judge from January 2012 to February 2013 and these showed that "child tax credit continued to be paid throughout the period ..." (paragraph 29). The judge held that,

> "This additional income does not appear to have been taken into account by the Entry Clearance Officer who determined the application in the first instance nor was it referred to at the hearing before me, but nevertheless I am satisfied based upon the Sponsor's employment that she would have been entitled to this additional income and it should have been taken into account in assessing the adequacy or otherwise of the maintenance" (paragraph 30).

9. The judge then went on to express satisfaction with the level of income funds by stating that,

> "Based upon the unchallenged figures as put forward by the Entry Clearance Officer I am satisfied that as at the date of the decision the Sponsor had sufficient funds to demonstrate that she had an income which exceeded the income support rates relevant at the time" (paragraph 31).

10. However, an issue was thereafter raised by the Presenting Officer in relation to the Sponsor's employment with the Asian Learning Centre, when attention was drawn to the Sponsor's contract of employment and the wage slips in two small bundles (see paragraph 33).

11. The judge explained that the significance of the two sets of payslips "was that they had been produced to demonstrate the increase in the Sponsor's income which would have been relevant as at the date of decision" (paragraph 35). Yet, the Presenting Officer,

> "Called into question the value of the second set of payslips, firstly because one of them had been misprinted but all the information appearing in the wrong place. Secondly the difference between the two payslips showed the Sponsor's gross income had gone up from £1,000 a month to £1,080 a month but although the Sponsor's payslips in the first bundle showed that she was being taxed on her income, the second set showed that no tax was being paid. Her name had been changed from Mrs Z Perveen in the first set to Miss P Zulekha in the second set" (see paragraph 36).

12. The judge then went on to say that this placed the Sponsor in some difficulty, and by extension the Appellant also, so that "in the absence of a P60 or P45 there is no further corroborative evidence" (paragraph 38). The judge took into account the fact that a child had now been born (paragraph 42). However, the Rules could not be met.

13. The judge thereafter gave consideration to Article 8 but held that there was nothing to prevent the Sponsor making a choice to live with her husband in Pakistan to avoid any further disruption to their family life.

14. A fresh application could be made but this would now fall to be assessed by reference to Appendix FM and the Sponsor would have to demonstrate an income of

at least £22,400 to satisfy the test set out in Appendix FM for the adequacy of financial maintenance (see paragraph 43).

Grounds of Application

15. The grounds of application state that there is a lack of consistency, and clear confusion, in the judge's initial findings at paragraph 31 where he states that "based upon the unchallenged figures as put forward by the Entry Clearance Officer I am satisfied that as at the date of decision the Sponsor had sufficient funds" and the findings thereafter made from paragraph 36 onwards up until paragraph 40 which take issue with the wage slips in a way that suggest that the judge was not satisfied, thus leading to the dismissal of the appeal.

16. On 30th April 2014, permission to appeal was granted.

The Hearing

17. At the hearing before me, Mr Ikhlak, appeared on behalf of the Appellant and placed reliance upon his Grounds of Appeal. In particular, he drew attention to the contradiction between the findings at paragraph 31 and the subsequent findings made in the determination.

18. For his part, Mr Smart also placed reliance upon his Rule 24 response dated 20th May 2014 and accepted that there was apparent confusion in what the judge was saying at paragraph 31 and what was subsequently found by him by looking at the wage slips.

19. Mr Smart submitted that the date of decision was 5th December 2012. The payslips were dated October and November 2012. The judge was entitled to take these payslips into account even after he had made his statement at paragraph 31. In taking these into account, the judge was entitled then to say that there were discrepancies in the payslips such that would lead him to take a contrary view. This the judge did. It was now open to the Appellant to apply again under the new rules where a minimum income of £18,600 would have to be shown.

20. In reply, Mr Ikhlak submitted that the judge did make a finding that the "unchallenged figures" led him to conclude that the Sponsor had sufficient funds to meet the Rules, but failed to make clear what additional income he was really referring to. There was an error of law and I should make such a finding and then remake the decision.

Error of Law

21. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside this decision and remake the decision. My reasons are quite simply that there is a lack of consistency between what was found by the judge at paragraph 31 on the basis of "unchallenged figures" which showed that the Sponsor had sufficient funds "to demonstrate that she had an income which exceeded the income support rates

relevant at the time" (paragraph 31); and what the judge subsequently found from paragraph 35 onwards, where he held that, "the first set of payslips are misleading because they appear to indicate that the Sponsor had been in employment for longer than claimed based upon the figures given for total gross pay to date ...." (paragraph 37).

Remaking the Decision

22. I have made the remade the decision on the basis of the findings of the original judge, the evidence before him, and the submission that I have heard today. I am dismissing this appeal for the following reasons.

23. First, I accept the judge's findings that the payslips simply do not make any sense whatsoever. For example, it is said that the Sponsor was employed from February 2012, and yet the first payslips only begins from October 2012, several months thereafter. Furthermore, by the time of this hearing, I have had from Mr Ikhlak, P60s for 2012 and 2013. These are at pages 9 to 10 of the latest bundle. The P60 for 2013 (at page 9) shows that the Sponsor had earned £10,800. This is the one that she would seek to rely upon. This is because the P60 (at page 10) for 2012, shows that she only earned £3,000. Yet, even if one were to look at the P60 for 2013, showing earnings of £10,800, it is difficult to see how this can be an accurate document given that the wage slips show that the Sponsor earned no such sum at all.

24. I am aware that clearly, there have been returns made by the employer, the Asian Language Centre, to Her Majesties Revenue & Customs. There is also a P45 (at page 8) confirming the employment. In these circumstances, it is a bold step to disbelieve a P60 because this is a document which is generated by the employer, and it is one which is intended to be a summary of an employee's employment record. Yet, it is a record which is based on a previous year's wage slips. An explanation is clearly called for as to why the P60 is so drastically inconsistent with the previous year's wage-slips. But, the Asia Language Centre no longer exists. At the same time, the Respondent authority has not been able to show that the P60 is a fraudulent document which has been forged. The situation is clearly unsatisfactory. It is also unsatisfactory because the Judge (see para 8 above) had initially found in favour of the appellant on the basis of the funds available in this sponsoring wife's bank account. If this was so, then the appellant could of course point to the availability of "income which exceeded the income support rates relevant at the time" (paragraph 31 of the Judge's determination).

25. Yet, ultimately, however, that finding of the Judge, I conclude, was based on the existence of an employment record as claimed by the appellant's sponsoring wife, which the Judge eventually then doubted, and this is why this appeal fails. This is clear from the Judge's observation that, "…. nevertheless I am satisfied *based upon the Sponsor's employment* that she would have been entitled to this additional income and it should have been taken into account in assessing the adequacy or otherwise of the maintenance" (paragraph 30).

26. The finding of the judge was inevitable on the evidence before him. The fact is that the background evidence in terms of wage slips is so much out of sync with the P60, that there is bound to be a question mark as to whether the Sponsor ever did work to the extent that she claimed to have worked, generating the amount of income that she claimed to have generated. I am not satisfied, on a balance of probabilities test, that she has been able to show this.

27. On the contrary, I find that the evidence points in the other direction and that there is considerable concern raised by the way in which these financial documents had been put together by the Asian Language Centre. I come to this conclusion notwithstanding the absence of an investigation by the Respondent confirming the P60 from the Asian Language Centre being a fraudulent document.

28. It is open to the Appellant to apply again. If he does so, it will now be under the new Rules. He will have to comply with Appendix FM. That must be the natural consequence of this appeal being dismissed.

29. I have taken into account the application of Article 8 ECHR. In circumstances where the Rules are meant to strike the right balance with respect to Article 8 in any event, being a "complete code" as expressed by the Master of the Rolls in **MF (Nigeria)**, I am not satisfied that the Appellant can point to "exceptional circumstances" in the sense that the consequences of this appeal being dismissed are "unjustifiably harsh" for him. This is because as the judge in this determination said originally, it is open to the Sponsor to go and live with the Appellant, which he had already done for six months, following her marriage.

Decision

30. The decision of the First-tier Tribunal did involve the making of a error of law such that it falls to be set aside. I have set aside the decision of the original judge. I remake the decision as follows. This appeal is dismissed.

31. No anonymity order is made.

Signed Date

Deputy Upper Tribunal Judge Juss 21st July 2014