Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: OA/22646/2012
OA/22647/2012
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THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 9 April 2014	**On 27 June 2014**

Before

UPPER TRIBUNAL JUDGE CONWAY

Between

HELA HOTAK
ABDUL BASIT HOTAK
BANU HOTAK
(NO ANONYMITY DIRECTIONS MADE)

Appellants

and

ENTRY CLEARANCE OFFICER - ISLAMABAD

Respondent

Representation:

For the Appellants: Mr Saeed
For the Respondent: Mr Avery

DETERMINATION AND REASONS

1. The first appellant is a citizen of Afghanistan born in 1986. She is a married woman and the mother of the second and third appellants who were born in 2008 and 2010 respectively. Their nationality is an issue in this case.

2. They appealed against the decisions of the ECO made on 16 October 2012 to refuse their applications of 11 July 2012 for entry clearance to settle in the UK with the sponsor, the husband of the first appellant, and father of the second and third appellants.

3. The reasons for refusal were that the ECO was not satisfied that the appellants' husband/father met the financial requirement of a gross income of £24,800 per annum under paragraph E-ECP.1.1 of Appendix FM of the Immigration Rules. Further, the ECO was not satisfied with the English language test certificate provided by the first appellant. The certificate was not from an approved provider. The ECO refused the applications of the first appellant under paragraph EC-P1.1 (d), and those of the second and third appellants under paragraph EC-C1.1(d).

4. In the notices of appeal it was stated that the first appellant had taken an English language test with a provider who was approved at the time of the test, on 6 January 2011. The provider was only removed from the list after that date and the respondent did not notify the first appellant of its removal. Further, the respondent had not raised the issue of English language ability in its refusal of the application previously made by the first appellant. The first appellant ought to have been given a fair opportunity to prove her ability by a second test with an approved provider.

5. Further, the appellants maintained that the ECO was wrong in his assessment of the documents relating to the income of the appellants' husband/father. The payslips provided recorded a monthly gross income of £2,166. Thus, the sponsor's income was £26,000 excluding overtime. Including overtime, the sponsor's income was £29,000. Payslips, bank statements and a letter from the sponsor's employer were provided.

6. The appellants also maintained, in the alternative, that the refusals infringed their rights under article 8 ECHR.

7. Following a hearing at Hatton Cross on 12 November 2013 Judge of the First-tier Tribunal Steer dismissed the appeals under the Immigration Rules and under Article 8 ECHR.

8. Her conclusions are at paragraphs [21] to [31] of her determination. She dealt, first, with the sponsor's income. It was not apparently argued before her that all of the specified documents required regarding the sponsor's income had not been provided. Rather, that the evidence about his claimed income was unsatisfactory. She noted the requirement for the sponsor of a spouse and two children to have a gross annual income of at least £24,800. She noted the sponsor's evidence that he earned £26,000 per annum. However, such was at variance with the evidence of his

employer, London Car Rentals Ltd and their accountants who maintained that he was earning £29,000 per annum. He could not in his oral evidence explain this difference.

9. Further, the judge noted gross pay amounts detailed in a letter from HMRC dated 10 September 2013 which referred to total gross pay for the tax year 2010/11 of £15,422, for the tax year 2011/2012 of £4,633, and for the tax year 2012/2013 of £19,083. She concluded on this matter that '*Given the discrepancy in the evidence of Mr Hotak and his employer and their accountant, and the discrepancy with the records of gross pay provided by HMRC*' she was not satisfied that Mr Hotak '*has a gross annual income of at least £24,800 as required*' [21].

10. Turning to E-ECP.4.1 and the requirement to pass an English language test the judge found that the first appellant with the application did provide a test certificate from a provider that was approved at the time of the test. The respondent did not advise the first appellant that the provider had been removed from the list of approved providers prior to making its decision.

11. The judge found that the failure to inform the first appellant breached the duty of common law fairness and that as a result, that part of the decision was not in accordance with the law. However, as the application could not succeed in relation to the financial requirement it failed under the Immigration Rules.

12. Turning to consider article 8 ECHR, having found that there was family life between the sponsor, his wife and children and that the decision to refuse entry clearance amounted to interference with the right to respect for that family life of sufficient gravity as to engage the article, the judge advanced to proportionality. She attached '*significant weight*' to the public end of maintenance of immigration control. She continued: '*There was no evidence that the Second and Third Appellants had applied to register as British citizens. They gave their nationality as Afghan in their application*'. She stated that they have been living with their mother in Afghanistan since birth, that their father provides for them financially so that they have a good standard of living, that he is in regular contact with them and visits them: '*As a result of the decisions they will remain living with their mother, supported by and in contact with, their father*' [31]. For these reasons the judge concluded that the refusal to grant entry clearance was not disproportionate.

13. The appellants sought permission to appeal which was granted on 5 March 2014.

14. At the error of law hearing, Mr Saeed adopted his grounds. First, it was obvious that the children (the second and third appellants) were British citizens. Their father, the sponsor, had become a British citizen by naturalisation before their births. The result was that they should not have been included as dependents for the purpose of calculating the gross income required to be shown by the sponsor. It was regrettable that this had been missed by everyone, from the appellants and the ECO to the representatives and judge at the First-tier Tribunal hearing. Whilst it was clear that there had been discrepancies in the evidence about the amount of the sponsor's

income, the HMRC letter, the genuineness of which there was no reason to doubt, showed that the sponsor was earning above the amount for the admission of his wife.

15. Mr Saeed's second point was that in considering article 8 the judge failed to have regard to the best interests of the children.

16. Mr Avery's position was that it was not an error of law for the judge not to have found that the children were British citizens. They had been described as Afghani citizens in their application forms. Further, the evidence of income was unsatisfactory including the HMRC letter particularly in light of its format and colour and the fact that the reference number was that of the appellants' solicitors.

17. Neither party sought to address me on the law in respect of the citizenship point. In considering this matter I note that the children (the second and third appellants) are described in their application forms as citizens of Afghanistan, who were born there. However, a person born outside the UK on or after 1 January 1983 is a British citizen at birth, if at the time of the birth, either parent is a British citizen *'otherwise than by descent'* (s.2(i)(a) British Nationality Act 1981). Whether a person is a citizen '*otherwise than by descent'* or *'by descent'* depends upon how they obtained their citizenship in the first place. A person is a British citizen '*otherwise than by descent'*, in general, if they are a British citizen by birth, adoption, registration or naturalisation in the UK.

18. The facts in this regard are not disputed. The children's father Mr Hotak is a British citizen by naturalisation in July 2007. His children with the first appellant, his wife, were born in 2008 and 2010. I conclude that the children are British citizens.

19. That such was so was, unfortunately, missed by the appellants' advisors at the stage of the application, in the grounds of appeal and in submissions before the First tier Tribunal.

20. It was however a matter that was before the judge having been mentioned by the sponsor. In his statement (22 July 2013) he stated at paragraph 10 '*I wish to remind the court that my two children are British citizens. However I did not apply for their British passports'*.

21. It seems clear that the judge was aware of that evidence as she stated (at [31]):

> '*There was no evidence that the Second and Third Appellants had applied to register as British citizens.'*

22. As British citizens at birth automatically, I do not see there to be a requirement for registration. They do not require entry clearance but simply a British passport.

23. In misdirecting herself on the law the judge erred. The consequence was that the income requirement for a sponsor with a foreign national spouse was £18,600 and not the requirement for a sponsor and two children (£24,800).

24. The judge (at [21]) was not satisfied that the sponsor has a '*gross annual income of at least £24,800, as required*'. She reached that conclusion because of the discrepancy between the evidence of the sponsor who claimed he was earning £26,000 a year and his employer and accountants who said it was £29,000 a year. Also the discrepancy with HMRC records which showed gross pay of £19,083 for the tax year 2012/13. The judge does not appear to have made a finding on the genuineness of the HMRC document or on what amount the sponsor was earning.

25. The error was material because it is not clear that the judge would have reached the same adverse decision about the adequacy of the sponsor's income had she realised that it was the lower amount of £18,600 that needed to be considered.

26. I set aside the determination and proceed to remake it.

27. Mr Avery sought to cast doubt on the HMRC letter because it was addressed to the solicitor. Also, he suggested that the format and colour of the letter was not as it should be. I do not find merit in that submission. I accept the claim that the sponsor had authorised his solicitors to contact HMRC. There is a letter, with proof of postage, from the solicitors to HMRC in that regard. Nothing was put before me to support the claim that the format and colour were dubious. I am satisfied that I can rely on the contents of the HMRC letter.

28. That letter shows that the sponsor earned more than the required £18,600 in the tax year 2012/13. The refusal decision is dated 16 October 2012. I consider that the tax letter throws light on the sponsor's financial situation at date of decision and as such it is evidence that relates to the circumstances existing at the date of decision.

29. I conclude that the appellants satisfy the income requirements under Appendix FM. The First-tier Tribunal Judge's conclusion on the English test issue, namely, that the decision was not in accordance with the law was unchallenged, and, thus, stands.

Decision

The decision of the First-tier Tribunal contained a material error of law. That decision is set side and remade as follows:

The appeal is allowed to the extent that the decision of the Respondent was not in accordance with the law.

No anonymity directions made.

Signed Date 27.06.2014

Upper Tribunal Judge Conway