Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/01900/2013

THE IMMIGRATION ACTS

Heard at North Shields	**Determination Promulgated**
On 9 July 2014	**On 3 November 2014**

Before

UPPER TRIBUNAL JUDGE DEANS

Between

M K

Appellant

and

ENTRY CLEARANCE OFFICER - DHAKA

Respondent

Representation:

For the Appellant: Mr G Brown of Counsel, instructed by David Gray, Solicitors
For the Respondent: Mr P Mangion, Home Office Presenting Officer

DETERMINATION AND REASONS

1) This is an appeal with permission against a decision by Judge of the First-tier Tribunal Holmes dismissing an appeal against refusal of entry clearance as a spouse. This appeal was heard on 7 April 2014 against a refusal decision of 21 November 2012. There was an earlier appeal in August 2011 against a refusal decision of 30 November 2010.

2) The appellant is a national of Bangladesh. The sponsor is both a British citizen and a national of Bangladesh. At the time of the refusal decision the sponsor and the appellant had no children together but on 28 February 2014 the sponsor gave birth to a son.

3) There were two reasons given by the respondent for the refusal decision of 21 November 2012. The first of these was that the appellant did not have a satisfactory qualification in the English language and the second that the sponsor and the appellant would not be able to support themselves adequately without recourse to public funds, in terms of paragraph 281 of the Immigration Rules. The application was considered under paragraph 281, having been made on 5 July 2012. By the time of the appeal before the First-tier Tribunal, the respondent accepted that the appellant did have the required level of qualification in English and this was no longer in issue in the appeal. The sole issue therefore for the Judge of the First-tier Tribunal to consider under the Immigration Rules was that of maintenance.

4) The judge found that the sponsor was wholly dependent upon state benefits. At the date of the decision appealed against she received £82.60 per fortnight by way of Employment and Support Allowance. The judge accepted that it was more likely than not that she also received Housing Benefit and Council Tax Benefit although these benefits were not the subject of documentary evidence. At the same date, 21 November 2012, the judge found that the Income Support rate for a married couple both over 18 was £111.45, to which was added the family premium of £17.40 to make a minimum requirement of £128.85 per week. Having regard, in particular, to the sponsor's bank statements, the judge was not satisfied that the sponsor had given an accurate or complete explanation of her financial affairs but found that the income she received in benefits was less than the Income Support rate for a married couple.

5) The judge had before him medical evidence relating to the appellant which appeared to show that she had mild learning difficulties and suffered from moderate depression. She had previously been married from 1992 until 2004. There were 4 children from the first marriage but it seems that they were taken into the care of the local authority. The sponsor blamed the breakdown of her marriage upon physical abuse she suffered at the hands of her ex-husband. The sponsor was married in 1992 in Bangladesh but entered the UK in 1995 to live with her husband, who was a British citizen.

6) The judge took into account a job offer made to the appellant. This was an offer of employment in the kitchen of a restaurant called "Saathi", the owner of which was a company called Dulabhai Ltd. The judge had to consider whether this was a genuine offer of employment. The judge noted that this offer had been before the previous Tribunal in the appeal in August 2011.

7) The judge noted that the company concerned operated two restaurants and two take-away businesses in Northumberland but the only financial information disclosed was a VAT return for the period from May to July 2013. This did not answer the question of whether the company could afford to extend a genuine offer of employment to the appellant at the date of decision.

8) The judge heard evidence from the director of Dulabhai Ltd. In his evidence he said the business was always short of staff and the vacancy remained open. The judge

nevertheless found the vacancy had not been offered at a wage higher than the national minimum wage, and had not indeed been advertised either at a job centre or elsewhere. He had given evidence in the previous appeal in August 2011. The director said the vacancy had never been filled since then and that it continued to exist. He acknowledged that when he first made the offer he had never spoken to the appellant but he had since spoken to him by telephone. He said that as well as receiving the minimum wage for a 37 hour week, the appellant would get a share of tips and this could amount in an average week to £250 in cash to be shared out.

9) The judge found the vacancy was not genuine. If the business could either in 2011 or subsequently genuinely afford to employ someone to fill that vacancy it was absurd to suggest that it would still be held open for the appellant to take 3 years later. The appellant had an earning capacity but unemployment in the north east of England was high, even within the Bangladeshi community. The appellant would appear to have few transferable skills and would be bound to experience a period of unemployment before he found work.

10) Upon finding that the offer of employment was not a genuine offer the judge found that the appellant could not meet the maintenance requirements of paragraph 281(v).

11) The judge then went on to consider Article 8 with reference to the appellant and the sponsor's child. The judge noted that all 4 of the sponsor's previous children had been taken into care, even though at the time the sponsor was living with her first husband. This appeared to point to the sponsor being at least a source (if not the source) of risk to the safety of those children. Upon the limited evidence available, having regard to these circumstances, the judge could not make any findings as to the best interests of the child. The judge accepted that the appellant and the sponsor were married but both the appellant and the sponsor knew at the time they entered into the marriage that in order to live together in the UK the appellant would need to obtain entry clearance. The sponsor had dual nationality and was capable of visiting and living in Bangladesh in safety should she choose to do so. Her parents continued to live in Bangladesh in the family home, which was next door to the family home of the appellant. At the date of decision she did not have contact with her children. The sponsor was able to travel to Bangladesh to visit the appellant whenever she chose to do so and the couple and their child would appear to be able to live there together if they chose to do so. The refusal decision was not disproportionate.

Submissions

12) In his submission at the hearing before me Mr Brown relied on the application for permission to appeal. According to this, the director's evidence before the First-tier Tribunal was that recruiting through the community was more reliable in his experience than using other methods. The job centre did not yield the calibre of employee that he was looking for. It was submitted that the Judge of the First-tier Tribunal did not engage with this evidence. The director had explained why he considered the appellant was a suitable candidate.

13) The second ground of the application was that the sponsor had now given birth to the appellant's child. The judge's decision was not consistent with the case of Chikwamba [2008] UKHL 40. The child was British and it was in her best interests to remain in the UK. She should be able to grow up in a household with both parents. The Judge of the First-tier Tribunal did not take into account the birth of the child, particularly in light of the vulnerability of the sponsor and the fact her children had previously been taken into care.

14) At the hearing Mr Brown said he would expand upon these grounds. He confirmed that the sole issue under the Immigration Rules was that of maintenance. In relation to the evidence of the director, the judge had found that the vacancy had not been filled. In making this finding the judge did not appreciate the nature of the evidence of the director. Reference was made to a letter of 12 November 2013 from the director, which was before the First-tier Tribunal (page 9 of the appellant's bundle). This pointed out that the job on offer to the appellant had been done by two temporary students. The evidence was that the post had been covered by two people and no full time employee had been appointed. Reference was also made to an earlier letter dated 19 June 2012 from him (page 139 of appellant's bundle) and a letter dated 17 December 2012 (page 230). Nowhere did the judge deal with this evidence, which was material. The judge appeared to have been under a misapprehension that the work had not been covered but it had been covered by two people on a temporary basis.

15) Although Mr Brown acknowledged that this was not in the application, he further submitted that the judge had disregarded the evidence of the sponsor's brother. A letter from him dated 22 June 2012 indicated that he had given the sponsor £1000 as a gift (page 171 of the appellant's bundle). This evidence was material and should have been addressed.

16) Mr Brown continued that there was sufficient material in the application and the oral submissions to show that the judge's findings on maintenance were unsafe.

17) The second issue was Article 8. The judge had suggested the appellant's child could travel to Bangladesh. At the same time the judge had raised the issue of whether social services were concerned with the child's welfare. If there was an order by social services in respect of the child this would be an insurmountable obstacle to her travelling. The evidence before the First-tier Tribunal on this point was silent. Mr Brown questioned whether it was open to the judge to make findings about the child's ability to travel. A proper assessment was required of the best interests of the child. The judge's treatment of Article 8 was erroneous.

18) On behalf of the respondent, Mr Mangion referred to the letter from Mr Ahad of 12 November 2013. It was not clear from this letter whether the temporary students who were providing cover were doing the work of one full time employee or not. The judge had pointed out at paragraph 27 that it was absurd if the director had been looking for someone to fill the vacancy for two years and had not succeeded in doing so. In

relation to Article 8, it was not for the judge to consider whether there were any orders for the care of the child but up to the appellant to make his case. The appellant had been represented by experienced counsel. The points raised in the application were minor. The judge was entitled to find the appellant would face a period of unemployment.

19) Mr Mangion appeared to accept that it would be in the best interests of a British child to have her father with her but he pointed out that it was possible for the father to make a further application. The issue was whether any period of delay would be disproportionate. There was also the question of whether the child was likely to be taken into care. The judge had looked at these issues in paragraphs 44 and 49. There was no evidence from the local authority before the judge.

20) In response Mr Brown pointed out there had been no specific consideration by the judge of the letters to which he had referred. The director had been telling the truth in his oral evidence when he said he had not filled the full time post. The judge did not consider this aspect of the evidence.

Discussion

21) I note that the Judge of the First-tier Tribunal heard oral evidence from the director. He found this evidence unsatisfactory for two main reasons. The first was the difficulty he had in believing that the job in the kitchen of the Saathi restaurant had been available for the appellant since August 2011, when the director gave evidence previously before the First-tier Tribunal. The evidence he gave in April 2014 was that this vacancy had never been filled and continued to exist after a period of nearly 3 years. The judge was entitled to find that this assertion lacked credibility.

22) The second main issue with which the judge was concerned was the financial viability of the director's business. He had no evidence before him in relation to the ability of the business to employ and remunerate the appellant.

23) In response Mr Brown referred to the three letters from the director specified above. Reference was also made in the application to extracts from his oral evidence.

24) To what extent do the letters from the director assist the appellant's case? The letter of 12 November 2013 (item 9), on which Mr Brown placed considerable store, states that the vacancy in November 2013 was being covered by two temporary students. This suggests, far from the vacancy not having been filled, as the director said in his evidence at the hearing, the vacancy was filled, even if not on a permanent basis. Although the director in his letter refers to the students as being "temporary" it is not clear what was meant by this in the context of employment law.

25) In addition, the director asserts in the letter that it would be "more financially viable for one person to fulfil the role". There is no reasoning in support of this assertion. The director's oral evidence quoted in the application for permission to appeal seems

to indicate a preference to recruit restaurant employees from abroad rather than from within the UK but that personal preference is was not a matter to which the Judge of the First-tier Tribunal was required to have regard when considering whether this job offer represented a genuine vacancy. The judge found on the evidence before him that the vacancy was not genuine and there is nothing in the evidence to which I was referred by Mr Brown to suggest that the judge was not entitled to make this finding. It is correct that the judge did not refer to the three letters from the director cited by Mr Brown but the judge was not required to refer to every item of evidence, particularly when he had heard oral evidence from the witness who wrote the letters.

26) As I have indicated, I do not consider that the letter of 12 November 2013 assists the appellant and the question of whether the vacancy was genuine or not is not assisted by the assertion that there was a vacancy having been repeated three times by the director in correspondence as well as in his oral evidence. The judge was entitled to make the finding which he did in relation to the vacancy and did not misconstrue or disregard the evidence in so doing.

27) Mr Brown raised a further point about the support offered by the sponsor's brother by way of a gift of £1000. I note that in the determination, at paragraph 22, the judge recorded that the sponsor's bank statement showed an unexplained deposit of £500 on 23 February 2012. The judge indicated that the sponsor's bank statement suggested that she was living well within the amount of benefits that she was receiving. The judge was clearly aware of the possibility of third party support and directed himself correctly with regard to this at paragraph 9 of the determination in terms of the Immigration Rules at the date of the application for entry clearance. The gift of £1000 referred to by Mr Brown would not be adequate to make up the shortfall in the sponsor's income and it does not appear to have been submitted before the First-tier Tribunal that it would do so. Again I find the evidence to which Mr Brown has referred in his submission would not have materially affected the judge's conclusions.

28) The final issue concerns Article 8 and the birth of the sponsor and the appellant's child. Here the judge's decision as to the best interests of the child is entirely clear. At paragraph 49 of the determination the judge states that on the very limited evidence available he cannot make any finding to the best interests of the child. The judge had previously noted, at paragraph 45, that the sponsor in her evidence denied that she had her own social worker although she accepted that one was appointed before the baby was born and that social services had taken an interest in her since they learned she was pregnant and had taken an interest in her baby. She said in her evidence that a social worker had been appointed to the child and she was to attend on 9 April 2014 at a meeting with social services. This meeting would have taken place two days after the hearing before the First-tier Tribunal.

29) The judge had before him evidence about the sponsor's medical conditions and the difficulties she had had coping with her previous children. In these circumstances the judge was entitled to draw attention to the limited nature of the evidence before him as to the best interests of the child. At the date of the hearing the child was 5-6 weeks old.

In the normal course of events the judge was entitled to suppose that there would have been involvement with the baby's welfare not only by medical services but also by social services. The sponsor herself acknowledged there was social work involvement but there was no evidence from the local social work department. In these circumstances it was proper for the judge to conclude that he could not make any finding as to the best interests of the child.

30) For the purposes of attempting to establish an error of law, the appellant has concentrated on the judge's comments as to whether the sponsor and the child would be able to travel to Bangladesh. Mr Brown submitted that the child would not be able to do this if there was any care or protection order made in respect of her but there was no evidence before the First-tier Tribunal of any such order, although evidence relating to this is now available. Mr Mangion acknowledged that it would normally be expected that a child would be brought up by both parents but in the circumstances of this appeal the child has never had a direct relationship with her father. Article 8 requires respect for family life but this is subject to the interests of effective immigration control and the test of proportionality. The judge considered the issue of proportionality and for the reasons which he gave he found on the evidence before him that the refusal of entry clearance was not disproportionate. There is nothing in the application for permission to appeal or in Mr Brown's submission which shows that this assessment contained an error of law. I should add that I was not addressed by either party on whether the birth of the child could be taken into account by the judge, in terms of s 85A(2) of the 2002 Act, according to which in an appeal against entry clearance the Tribunal may consider only the circumstances appertaining at the time of the decision.

31) There was additional evidence available for the purpose of the hearing before the Upper Tribunal, although no application for its admission was made under rule 15(2A). This additional evidence included a set of accounts for Dulabhai Ltd for the period ending 31 December 2013. There were also letters about benefits and tax credits for the sponsor, as well as a medical report on the sponsor's child and a letter dated 17 June 2014 from the Social Work Department of Newcastle City Council.

32) None of this evidence was before the First-tier Tribunal and it becomes material only if it can be shown that there was an error of law in the decision of the First-tier Tribunal such that the judge's decision should be set aside. I have not found any such error.

33) Finally, I note that the judge referred in his determination to the case of MM [2013] EWHC 1900 (Admin). Since the hearing before the First-tier Tribunal this case has been considered by the Court of Appeal and reported under the name MM (Lebanon) [2014] EWCA Civ 985. The Judge of the First-tier Tribunal clearly took the view that the decision of the High Court would not materially affect the outcome of the appeal and indeed the subsequent decision of the Court of Appeal indicates that the judge was entitled to take this view.

34) The position is that the Judge of the First-tier Tribunal was entitled to make the findings which he did, in relation to both the issue of maintenance and the nature of the supposed job vacancy for the appellant, as well as in relation to Article 8. Whether a different decision might be reached in relation to the best interests of the sponsor's child based on evidence which is now available, or which may become available, is not a matter within the scope of the current proceedings.

Conclusions

35) The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

36) I do not set aside the decision.

Anonymity

37) The First-tier Tribunal made an order for the anonymity of the proceedings and I continue that order (pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008).

Signed Date: 3 November 2014

Judge of the Upper Tribunal