Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/49659/2014**

THE IMMIGRATION ACTS

Heard at Birmingham
On 19 January 2016

Decision and Reasons Promulgated
On 27 January 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

Mr RUHUL AMIN MISBAH
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr I Hussain, solicitor, Syeds Law Office
For the Respondent: Ms C Johnstone, Senior Home Office Presenting Officer

DECISION AND REASONS

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge A W Khan promulgated on 13 April 2015, which dismissed the Appellant's appeal on all grounds.

Background

3. The Appellant was born on 15/06/1984 and is a national of Bangladesh. The appellant entered the UK on 12 February 2010 with leave to enter as a Tier 4 student valid until 30 June 2011. The respondent granted leave to remain as a student until 15 September 2014. On 11 September 2014 the appellant applied for leave to remain in the UK as the spouse of a person present and settled in the UK. On 5 November 2014 the respondent refused the application.

The Judge's Decision

4. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge A W Khan ("the Judge") dismissed the appeal against the Respondent's decision.

5. Grounds of appeal were lodged and on 9 June 2015 Designated Judge Zucker gave permission to appeal stating *inter alia*

> "2. Whilst I do not exclude any of the grounds, the grounds include the submission that the Judge was wrong to find that disability living allowance used for the purpose of maintaining the appellant and sponsor, but paid to the sponsor by the state for the benefit of the sponsor's sister, could not be relied upon.
>
> 3. The grounds are arguable."

The Hearing

6. (a) Mr Hussein, for the appellant, moved the grounds of appeal, & referred me to the skeleton argument lodged for the purposes of the appeal. He told me that the original decision raised three material issues. The first was that it was not accepted that the appellant and sponsor were parties to a subsisting marriage. He told me that, at the hearing, the respondent conceded that the marriage subsists. The second material issue related to a bank statement covering a 12 month period showing payment of carer's allowance and disability living allowance, and the third was a refusal by the respondent to include the sponsor's sister's entitlement to disability living allowance ("DLA") as part of the calculation of the sponsor's income.

(b) Mr Husein reminded me that at [18] and [22] of the decision, the Judge found that the appellant and sponsor are parties to a subsisting marriage, and that the necessary bank statements have been produced.

(c) Mr Husein argued that the Judge's decision that the sponsor's sister's entitlement to DLA does not form part of the sponsor's income is a material error of law. He argued that because the sponsor was her sister's appointee for DWP purposes, she was entitled to spend her sister's benefit in any way she saw fit. He told me that it is a matter of fact that the majority of the money

received by the sponsor as payment of her sister's DLA is applied to the care and maintenance of the sponsor and the appellant. He argued that expenditure is consistent with the purpose of DLA payments because it is money spent in the best interests of the sponsor's sister, because it is in the best interests of the sponsor's sister that her carer (the sponsor) is adequately provided for.

(d) Mr Hussein noted that the Judge had considered EX.1 and found that there are no insurmountable obstacles to family life continuing out-with the UK. He argued that in the particular circumstances of this case that finding is irrational. He argued that the Judge has given incorrect weight to material facts, and that the Judge had failed to acknowledge that at the date of hearing the sponsor was pregnant and approaching full term. He argued that the decision disclosed a false logic in identifying insurmountable obstacles. Mr Hussein argued that the Judge further erred in law in failing to carry out an article 8 proportionality assessment out-with the rules, and in failing to give the appellant credit for factors set out in section 117B the 2002 Act.

(e) Mr Husein urged me to set aside the judge's decision and substitute a decision in the appellant's favour

7. Ms Johnstone, for the respondent, told me that the decision does not contain errors of law material, or otherwise. She told me this case is distinguishable from the case of MK (Somalia) v ECO Ethiopia [2007] EWCA Civ 1521, because it is neither the sponsor not the appellant was entitled to DLA, but the sponsor's sister, and the sponsor was obliged to spend DLA benefit money in the best interests of her sister not apply that money to her own needs & the needs of her husband. She relied on the case of KA (Pakistan) [2006] UKAIT 00065, and argued that when the sponsor's sister's DLA entitlement fell from the equation, the funds available to the sponsor and appellant fell short of the income support equivalent. She told me that the Judge was correct to consider EX.1 and that his consideration of section 117B of the 2002 Act in his overall proportionality assessment could not be faulted. She urged me to dismiss the appeal.

Analysis

8. The central plank of the appellant's argument is that because his sister-in-law is in receipt of DLA and becasue that money is paid to the sponsor as his sister-in-law's appointee, then the calculation of sums available to the sponsor and the appellant should include that DLA payment. In a sense it is argued that the appellant benefits from third-party support.

9. The flaw in the appellant's argument is that the weight of evidence indicates that his sister-in-law does not know that the benefit to which she is entitled is used to support the appellant. There is no dispute that the sponsor is her sister's appointee for DWP purposes. The appellant's sister-in-law receives DLA because she has a learning difficulty. That learning difficulty prevents her from managing her own affairs, and so the sponsor is her appointee. Because the sponsor is her sisters appointee DLA benefits are paid into the sponsor's bank account.

10. The fact that DLA benefits are paid into the sponsor's bank account does not entitle either the sponsor or the appellant to help themselves to those funds. The DLA benefits are paid into the sponsor's bank account because the sponsor is her sisters appointee. The appellant's solicitor relied on extracts from the DWP website which explained that DLA is paid to an appointee who must use the money in the best interests of the person entitled to that money. In law, an appointee is a person who is acting in a fiduciary capacity. To some extent the evidence of the use of the DLA benefit payments is irrelevant. The determinative question is "*whose money is the DLA benefit?"*

11. The only answer to that question is that the DLA benefit forms part of the sponsor's sister's income, not the income of the sponsor or the appellant. Even though the sponsor is the appointee for her sister, the benefit forms part of the sponsor's sister's income.

12. In Yarce (adequate maintenance: benefits) [2012] UKUT 00425 (IAC) the Tribunal reconfirmed that the requirement to show that a person or persons can be maintained (or will maintain themselves) "adequately" without recourse to public funds has long been a requirement of the immigration rules. It continues to be a requirement for various categories of person in the amended rules that came into force in July 2012. In order to establish that maintenance is "adequate" under the rules as in force before 9 July 2012, an applicant needs to show that the resources available will meet or exceed the relevant income support level set by the United Kingdom government (KA (Pakistan) [2006] UKAIT 00065). A similar requirement is to be found in the definitions of "adequate" and "adequately" in paragraph 6 of the rules as amended in July 2012.

13. In MK (Adequacy of maintenance – disabled sponsor) Somalia [2007] UKAIT 00028 the Tribunal held that, for the purpose of assessing adequacy of maintenance by reference to state benefits, the standard amount of Income Support, or Jobseeker's Allowance is the starting point for the able bodied: KA and others (Adequacy of Maintenance) Pakistan [2006] UKAIT 00065 applied. Where a sponsor has disabilities it should be assumed that enhanced benefits, such as a higher rate of Income Support, or Disability Living Allowance, have been awarded out of necessity and are not available to support dependants coming from abroad. In AM (3rd party support not permitted R281 (v)) Ethiopia [2007] UKAIT 00058 the Tribunal reaffirmed MK (Adequacy of maintenance – disabled sponsor) Somalia [2007] UKAIT 00028.

14. Paragraph 6 HC 395 states that public funds, to which recourse must not be had, include attendance allowance ('AA'), severe disablement allowance ('SDA'), carer's allowance ('CA'), disability living allowance ('DLA'), personal independence payment ('PIP'), a social fund payment and child benefit ('CB'). These are forbidden by s.115 Immigration and Asylum Act 1999 to 'a person subject to immigration control,' except in prescribed circumstances.

15. In MK (Somalia) v ECO Ethiopia [2007] EWCA Civ 1521 Sedley LJ in the Court of Appeal said that "*although DLA is calculated by reference to the*

claimant's need for care and for assistance with mobility, it is unrelated to her means and once in her hands is legally hers to spend or save as she chooses."

16. In Mohd Shabir (01/TH/2897) a case which involved a Sponsor in receipt of income support and disability living allowance, the Tribunal acknowledged that, in certain circumstances, disability living allowance may be sufficient to maintain two people - perhaps where it could be shown that savings had been made. However, the Tribunal confirmed that it was "*quite insufficient to establish that there is adequate maintenance available merely by saying - the amount I am getting is more than the minimum amount required to maintain two. One has to look at the circumstances of an individual case."*

17. It is argued that the DLA payment amounts to third-party support but there is no evidence to indicate that the sponsor's sister knows what happens to the DLA payments. There is no evidence to indicate that the sponsor's sister has consciously elected to donate her DLA payments to the sponsor and the appellant. The weight of reliable evidence indicates that because the sponsor is her sisters appointee, she receives the money in her fiduciary capacity and has a duty to account to her sister for the use of that money. The evidence that was before the First-tier indicates that it is the sponsor (not her sister) who has decided that she and the appellant would find the money useful. There is no reliable evidence to indicate that the person who is entitled to the DLA payment has decided to contribute the money to the appellant and sponsor.

18. The result is that the DLA benefit payments belong not to the appellant nor to the sponsor, but form the income of the sponsor's sister. The Judge was therefore correct to discount the level of DLA payments from the calculation of the funds available to the appellant and sponsor.

19. It was argued that the appellant that an incorrect approach is that was taken to EX.1 because the Judge found that there are no insurmountable obstacles to family life continuing outside the UK. At [29] and [30] the Judge gives detailed consideration to EX.1. At [29] he finds that the appellant cannot benefit from the provisions of EX.1, and at [30] he sets out an *Esto* position. Mr Hussein argued before me that the findings of the Judge are irrational and failed to take account of the sponsor's pregnancy. There is no merit whatsoever Mr Hussein's submissions. [30] contains a detailed analysis of the circumstances that the appellant and sponsor find themselves in, of their network of family support, and acknowledges the advanced state of the sponsor's pregnancy.

20. The findings at [29] to [30] are findings which were well within the range of findings which could competently be made by the Judge on the evidence placed before him. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue under argument. Disagreement with an Immigrations Judge's factual conclusions, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Rationality is a very high threshold and a conclusion is not irrational just

because some alternative explanation has been rejected or can be said to be possible.

21. Finally, it was argued that the Judge failed to give full effect of section 117B of the 2002 Act. It is argued that there are factors set out in section 117B which weigh in the appellant's favour, and that the Judge did not give the appellant credit for those factors.

22. In AM (S 117B) Malawi [2015] UKUT 260 (IAC) the Tribunal held that the statutory duty to consider the matters set out in s 117B of the 2002 Act is satisfied if the Tribunal's decision shows that it has had regard to such parts of it as are relevant.

23. In Forman (ss 117A-C considerations) [2015] UKUT 00412 (IAC) it was held that the public interest in firm immigration control is not diluted by the consideration that a person pursuing a claim under Article 8 ECHR has at no time been a financial burden on the state or is self-sufficient or is likely to remain so indefinitely. The significance of these factors is that where they are not present the public interest is fortified.

24. Between [31] and [35] the Judge clearly considers section 117 of the 2002 Act in its entirety. Between [33] and [35] the Judge clearly acknowledges the factors which weigh in the appellant's favour. He then carries out a flawless balancing exercise before coming to the conclusion that the balance is in favour of the respondent, not the appellant. In reality, what is argued for the appellant amounts to no more than an expression of dissatisfaction with the findings competently made by the Judge. The findings made by the Judge are findings which were realistically open to him to make. The arguments advanced for the appellant do not identify a material error of law.

25. In Shizad (sufficiency of reasons: set aside) [2013] UKUT 85 (IAC) the Tribunal held that the Upper Tribunal would not normally set aside a decision of the First-tier Tribunal where there has been no misdirection of law, the fact-finding process cannot be criticised and the relevant Country Guidance has been taken into account, unless the conclusions the judge draws from the primary data were not reasonably open to him or her.

26. The Judge carefully considered each strand of evidence placed before him. He carefully records the submissions that were made and then, after correctly directing himself in law, makes reasoned findings of fact before reaching conclusions which were manifestly open to the Judge to reach.

27. I find that the Judge's decision, when read as a whole, sets out findings that are sustainable and sufficiently detailed and based on cogent reasoning.

CONCLUSION

28. No errors of law have been established. The Judge's decision stands.

DECISION

29. The appeal is dismissed. The decision of the First-tier Tribunal stands.

Signed Date 22 January 2016

Deputy Upper Tribunal Judge Doyle