Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/16719/2017

THE IMMIGRATION ACTS

Heard at Priory Courts, Birmingham	**Decision & Reasons Promulgated**
On 17th January 2019	**On 5th February 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

YAMIKANI [J]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Miss H Masih of Counsel instructed by Braitch Solicitors
For the Respondent: Mrs H Aboni, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction and Background

1. The Appellant is a citizen of Malawi born [~] 1978 making him 40 years of age at the date of hearing. He appeals against a decision of Judge Courtney (the judge) of the First-tier Tribunal (the FtT) promulgated following a hearing on 7th June 2018.

2. The Appellant entered the UK as a visitor on 9th November 2016 with leave to enter and remain until 10th April 2017. On 5th April 2017 he applied for leave to remain on the basis of family life with his wife Margaret [J] and their daughter born [~] 2015.

3. The application was refused on 18th November 2017. The appeal was heard by the FtT on 7th June 2018.

The First-tier Tribunal Hearing

4. The judge noted that the Appellant had been refused a visa on 18th May 2015 when he had applied to join the Sponsor for settlement in the UK. The Appellant then applied for a visit visa on 14th August 2015 indicating that he intended to visit the Sponsor and his newborn child and that he would return to Malawi after six months. The judge found that the Appellant had practised deception in his application for entry clearance on the basis that he had not intended to return to Malawi.

5. The judge therefore found that the Respondent had correctly relied upon S-LTR.4.2 of Appendix FM in refusing the application.

6. The judge also found that the Appellant could not satisfy Appendix FM because his application for leave to remain was made while he was in the UK as a visitor and therefore he could not satisfy E-LTRP.2.1. The judge also found that the Appellant could not satisfy paragraph 276ADE(1) and therefore his appeal must be considered under Article 8 of the 1950 European Convention outside the Immigration Rules. The judge found that the Appellant had established a genuine and subsisting relationship and had established family life together in the UK. The judge found that the Appellant has a genuine and subsisting parental relationship with his daughter who is a British citizen.

7. The judge found, at paragraph 28, that it was in the child's best interests, although not overwhelmingly so, to remain in the UK with both her parents as part of a family unit.

8. The judge found at paragraph 33 that the Sponsor earned £19,310.09 in the last financial year and therefore earned more than the minimum annual income requirement. At paragraph 35 the judge found that it would not be unreasonable to expect the Sponsor to relocate to Malawi as she had been born in that country and lived there until the age of 22, coming to the UK in November 2008.

9. The judge accepted that at the date of hearing the Sponsor was fourteen weeks pregnant. The judge concluded that the Appellant could return to Malawi and make an application for entry clearance. The judge found at paragraph 41 "that the legitimate aim of proper immigration control outweighs the right of the Appellant to respect for his family and private life in the UK on the basis claimed."

10. The judge dismissed the appeal under Article 8 of the 1950 European Convention.

Permission to Appeal

11. The Appellant applied for permission to appeal to the Upper Tribunal. Permission to appeal was granted by Judge Gibb and I set out below, in part, the grant of permission which summarises the grounds seeking permission;

> "2. The grounds which were in time, complain that the judge erred in
>
> (1) treating the Appellant as a visitor,
>
> (2) his finding of deception on original entry as a visitor,
>
> (3) his approach to derivative right to reside,
>
> (4) failing to consider the impact of the entry clearance option on the Appellant's child, and the impact of the deception finding on any future application,
>
> (5) not considering the significance of the pregnancy, and
>
> (6) not considering section 117B(6) of the 2002 Act.
>
> 3. The first and third grounds appear to me to be misguided. The others do raise legal points that justify further consideration. At [17] the judge notes that the Appellant's failure to return in itself raised a deception issue, but it is arguable that the finding that the account was not one that could reach even a minimal level of plausibility was not one open on the evidence, and given the serious consequences it remained the case that the burden was on the Respondent to show deception at the date of application and entry. Although the section 117B(6) question is set out at [24] it is arguable that the judge did not answer it or consider the impact of the answer on the public interest question."

The Upper Tribunal Hearing

12. Miss Masiah relied upon the grounds, the grant of permission, and her skeleton argument. It was submitted that the judge erred in finding that the Appellant had deceived the Entry Clearance Officer. There had been a change of circumstances following the grant of entry clearance, and there was no evidence of deception and the judge was wrong to find otherwise, and had failed to follow the principles in Shen [2014] UKUT 236 (IAC). It was submitted that the Respondent had not submitted any evidence to counter the explanation given by the Appellant. It was contended that the judge had erred by failing to engage with the Sponsor's oral evidence that she had looked for alternative jobs with flexible working hours. It was contended, regarding deception, that the judge had given insufficient reasons.

13. With reference to Article 8 it was submitted that the judge had erred by not following a "balanced" approach. The judge had failed to consider when accepting that an entry clearance application would be decided in 60 days, the adverse finding in relation to deception, which would affect the entry clearance application. The judge had failed to take into account the Sponsor's pregnancy when considering separation of the family, and the impact of separation on the child.

14. The judge had materially erred by failing to consider section 117B(6) of the Nationality Immigration and Asylum Act. It was submitted that the judge's proportionality assessment was materially flawed by reason of the failure to consider section 117B(6).

15. Mrs Aboni submitted that the judge had provided adequate reasons for findings made. The judge had correctly considered the best interests of the British child. It was not perverse to make a finding that the Sponsor would return to Malawi. It was accepted that the judge had not made a finding on section 117B(6) but it was submitted that this was not a material error. In the absence of a material error I was asked to find that the decision of the FtT should stand.

16. In response Miss Masiah submitted that the failure to consider section 117B(6) adversely affected the balancing exercise carried out by the judge when considering proportionality.

17. I indicated that I intended to reserve my decision to reflect upon the submissions in relation to error of law. Both representatives submitted that if an error of law was found, which was material, the decision could be remade by the Upper Tribunal on the basis of the evidence that had been before the FtT, and there would be no need for a further hearing.

My Conclusions and Reasons

Error of Law

18. The decision of the FtT is comprehensive and has been prepared with considerable care, but I am persuaded that the judge erred in law for the following reasons.

19. I find the judge erred when considering the issue of deception. The judge correctly set out the principles to be followed in Muhandiramge [2015] UKUT 00675 (IAC). The first stage is that there is an evidential burden on the Secretary of State where deception is alleged. This requires that sufficient evidence be adduced to raise an issue as to the existence or non-existence of a fact in issue.

20. The second stage, assuming that the first stage is satisfied, is that the Appellant has an evidential burden of raising an innocent explanation, by providing an account which satisfies the minimum level of plausibility.

21. The third stage arises if the Appellant has raised an innocent explanation. The burden is then on the respondent to show that the Appellant's innocent explanation is to be rejected. I find the judge was entitled to conclude that the initial evidential burden on the Secretary of State had been satisfied. It was relevant that the Appellant had been refused a visa on 18th May 2015, when he had applied to join the Sponsor in the UK as her spouse. He then applied for a visit visa on 14th August 2015 indicating that he intended to return to Malawi. He arrived in the UK on 9th

November 2016, and made an application to remain on 5th April 2017, shortly before his leave as a visitor expired on 10th April 2017.

22. In my view the error of law is in paragraph 17 in which the judge concludes that the Appellant has not discharged the evidential burden of raising an account which satisfies the minimum level of plausibility. I do not find that the judge has adequately explained why this is the case. There appears to be little consideration of the length of time that had elapsed. The spousal visa was refused on 18th May 2015, and the application for leave to remain was made on 5th April 2017, almost two years later. The Appellant provided an explanation, as did the Sponsor, which was that the Appellant initially intended to visit but when he came to the UK, the Sponsor took up full-time employment, and the Appellant became the full-time carer for the child. His emotional bond with the child increased, and it was because of this, and following legal advice, that he was entitled to make an application, that the Appellant made an application for leave to remain, which would enable him to carry on caring for the child and the Sponsor to maintain her employment and to satisfy the minimum income requirements.

23. My view is that the judge failed to fully engage with that explanation, which only had to satisfy the minimum level of plausibility. The burden of proving deception, which is a serious issue, should then have switched back to the Respondent.

24. I also conclude that the judge erred in considering Article 8. The judge did not err in finding that the best interests of the child would be to remain in the UK.

25. The error was to fail to consider paragraph 117(6) of the 2002 Act. There is reference to section 117(6) at paragraph 24, but the judge does not consider it, and makes no finding as to whether it would be reasonable to expect a British child to leave the UK.

26. The judge does, at paragraph 35, find that it would be reasonable to expect the Sponsor to relocate to Malawi, but makes no specific finding in relation to the British child.

27. I find that this amounts to a material error, as it means that the balancing exercise, when considering proportionality is flawed.

28. For the reasons given above, I find that the decision is unsafe and must be set aside.

Remaking the Decision

29. The factual matrix is that the Sponsor originates from Malawi and has indefinite leave to remain in the UK. She has resided in this country since 2008. The Appellant is a citizen of Malawi who arrived in the UK as a visitor on 9th November 2016 and prior to his leave as a visitor expiring, applied for leave to remain relying upon family life with the Sponsor and their daughter.

30. The daughter is 3 years of age, she will be 4 in April 2019. She is a British citizen. The Appellant and Sponsor married in Malawi on 9th January 2015.

31. There is reference in the FtT decision to the Sponsor being pregnant. Very sadly the baby did not survive, and a funeral took place on 5th September 2018.

32. In considering this appeal the general rule is that the burden of proof is on the Appellant on a balance of probabilities. There are however particular provisions referred to earlier, in relation to deception.

33. I have taken into account all the documentary evidence. The Respondent's bundle has Annexes A-F, and I have also considered the Grounds of Appeal to the FtT, the Appellant's bundle comprising 451 pages, additional evidence submitted under rule 15(2A) of the 2008 Procedure Rules, which relates to the death and funeral of the baby, and skeleton arguments prepared on behalf of the Appellant.

34. Considering firstly deception, I find the evidential burden on the Respondent has been satisfied, taking into account that the application for entry clearance as a visitor was made shortly after a spousal visa had been refused. It is therefore questionable whether when he made his entry clearance application as a visitor, he intended to return to Malawi after six months.

35. I do however find that the Appellant has raised an innocent explanation which satisfies the minimum level of plausibility. I note that he was not interviewed by the Respondent. I do find the length of time that elapsed to be relevant. I also find it plausible, that although the Appellant did intend to return when he made his entry clearance application, circumstances changed when in the UK, and he formed an emotional bond with his daughter, for whom he is the primary carer while the Sponsor is at work. That I find understandable, and therefore in my view the burden switches back to the Respondent to prove on a balance of probabilities that the innocent explanation must be rejected.

36. I do not find that the Respondent has submitted evidence to prove that the innocent explanation must be rejected. I have already referred to the lack of an interview. I do not find that evidence has been submitted by the Respondent which proves on the balance of probabilities, that the Appellant when he made his entry clearance application never intended to return to Malawi. I therefore conclude that S-LTR.4.2 does not apply in this appeal.

37. I conclude that the Appellant cannot satisfy the requirements of Appendix FM in relation to family life because he cannot satisfy the immigration status requirements at E-LTRP.2.1 as he was in the UK as a visitor when he made his application for leave to remain. This means that EX.1 cannot be considered.

38. I do not find that the Appellant can satisfy paragraph 276ADE(1)(vi) of the Immigration Rules. To succeed the Appellant must prove that there are very significant obstacles to his integration into Malawi. He has not satisfied the burden of proof. He is a citizen of Malawi. He has lived in Malawi for the majority of his life. He and the Sponsor married in Malawi in 2015. There are no language or cultural difficulties. In considering paragraph 276ADE(1)(vi) I follow the guidance in Treebhawon [2017] UKUT 0013 (IAC) in which it was found that mere hardship,

mere difficulty, mere hurdles, mere upheaval and mere inconvenience, even where multiplied, are unlikely to satisfy the test of very significant obstacles.

39. In relation to integration I follow the guidance in Kamara [2016] EWCA Civ 813. At paragraph 14 it is explained that there must be a broad evaluative judgment. It must be considered whether an individual is enough of an insider in terms of understanding how life in the society in the country of return is carried on. The individual must have the capacity to participate in life in that country and have a reasonable opportunity to be accepted there and operate on a day-to-day basis. The individual must be able to build up within a reasonable time a variety of relationships to give substance to their private or family life.

40. The Appellant has not provided any satisfactory evidence to indicate that he could not re-establish himself in Malawi. He has not provided any satisfactory evidence to indicate that he could not find employment or accommodation. This is not a case where there are any medical issues which could not be dealt with satisfactorily in Malawi. The Appellant fails to satisfy paragraph 276ADE(1)(vi).

41. Although I have found that the Immigration Rules cannot be satisfied, this does not automatically mean that the appeal must fail. I must consider whether there are any exceptional circumstances which would mean that refusing leave to remain would result in unjustifiably harsh consequences for the Appellant, Sponsor, or their daughter. It is clear that Article 8 is engaged. The FtT found this to be the case and that finding has not been the subject of any challenge. There is clearly family life between the Appellant, Sponsor and their daughter. I accept that the Appellant has also established a private life since his arrival in the UK in November 2016.

42. Although I find a genuine and subsisting relationship between the Appellant and Sponsor, I must follow the guidance in TZ (Pakistan) [2018] EWCA Civ 1109 at paragraph 31 which indicates that I must consider whether there are insurmountable obstacles to the Appellant and Sponsor carrying on family life outside the UK. This is the case even though I am considering the position outside the Immigration Rules.

43. Insurmountable obstacles means very significant difficulties which would be faced by an applicant or their partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for them. The evidence in this case does not indicate that insurmountable obstacles exist. Both the Appellant and Sponsor are citizens of Malawi. They would have no language difficulties if they returned. They have family and friends in Malawi. As previously stated in relation to the Appellant, no satisfactory evidence has been submitted to indicate that they would have difficulties in finding accommodation and employment.

44. The best interests of the child are a primary consideration and would be served by remaining in the UK with both parents. This does not however mean that the appeal must be allowed. The best interests of a child can be outweighed by other considerations.

45. I must have regard to the considerations in section 117B of the 2002 Act. The maintenance of effective immigration control is in the public interest. It is relevant that the Immigration Rules cannot be satisfied.

46. It is in the public interest that a person seeking leave to remain can speak English. The Appellant can speak English. This is a neutral factor in the balancing exercise.

47. It is in the public interest that a person seeking leave to remain is financially independent. This means financially independent of the state. The Appellant is financially independent in that sense, and this is another neutral factor in the balancing exercise.

48. Little weight should be placed on a private life established when a person is in the UK with a precarious immigration status. The Appellant's immigration status has always been precarious. I find that it is appropriate to place little weight upon the private life that he has established.

49. I then consider section 117B(6) which is set out below;

> In the case of a person who is not liable to deportation, the public interest does not require the person's removal where –
>
> (a) the person has a genuine and subsisting parental relationship with a qualifying child, and
>
> (b) it would not be reasonable to expect the child to leave the United Kingdom.

50. I follow the guidance in SR (Pakistan) [2018] UKUT 334 (IAC) to the effect that the question of whether it would not be reasonable to expect a child to leave the UK in section 117B(6) does not necessarily require a consideration of whether the child will in fact or practice leave. I have also considered KO (Nigeria) [2018] UKSC 53. The question of whether it is reasonable to expect a child to leave the UK must be decided without considering the immigration history of the parents. The reasonableness of the child leaving the UK is to be considered on the basis that the facts are as they are in the real world, so that if one parent has no right to remain, but the other does, or if both parents have no right to remain that is the background against which the best interests assessment is conducted. The ultimate question is whether it is reasonable to expect the child to follow the parent with no right to remain to their country of origin.

51. The Appellant's daughter is a qualifying child because she is a British citizen. The question therefore is whether it would not be reasonable to expect the child to leave the UK.

52. I take into account the Respondent's guidance on this point published on 19 December 2018. At page 68 of that guidance, it is stated that in relation to a qualifying child,

> "The starting point is that we would not normally expect a qualifying child to leave the UK. It is normally in a child's best interest for the whole family to remain together, which means if the child is not expected to leave, then the parent or parents or primary carer of the child will also not be expected to leave the UK."

The child is very young. In ZH (Tanzania) [2011] UKSC 4, it was decided that the fact that a child is British is a weighty consideration and is of particular importance, although not a trump card.

53. If the child had to leave the UK, she would be living in a country where she would not be able to exercise her rights as a British citizen. She would in effect be deprived of the benefits of British citizenship. I am satisfied that the child could because of her young age, adapt to life in Malawi. I do however find it particularly important, that this would mean that she would not be able to exercise her rights as a British citizen in the UK, having been born here. Taking into account that the Respondent accepts that the starting point for a qualifying child is that the child would not normally be expected to leave the UK, and taking into account the importance of British citizenship, I find in this case, that it would not be reasonable to expect the child to leave the UK.

54. It therefore follows from that finding, that the public interest does not require the Appellant's removal.

55. I take into account that in this case there is no criminality alleged. I have found that the Appellant satisfies the suitability requirements contained within Appendix FM. The Sponsor's income satisfies the minimum annual income requirements set out in Appendix FM. I therefore conclude that the public interest does not require the Appellant's removal. There would be no useful purpose served by the Appellant returning alone to Malawi and making an entry clearance application. I find that the appeal falls to be allowed with reference to section 117B(6) and Article 8 of the 1950 Convention.

Notice of Decision

The decision of the FtT contained an error of law and was set aside. I substitute a fresh decision.

The appeal is allowed on human rights grounds with reference to Article 8 of the 1950 Convention.

No anonymity direction was made by the FtT. There has been no request made for anonymity to the Upper Tribunal and I see no need to make an anonymity direction.

Signed Date 25th January 2019

Deputy Upper Tribunal Judge M A Hall

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal I have considered whether to make a fee award. I make no fee award. The appeal has been allowed because of evidence considered by the Upper Tribunal which was not before the initial decision-maker.

Signed Date 25th January 2019

Deputy Upper Tribunal Judge M A Hall