Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/07418/2015

THE IMMIGRATION ACTS

Heard at Birmingham Employment Centre	**Decision & Reasons Promulgated**
On 6th October 2017	**On 31st October 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MRS MERZIA MIRZAKHIL
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER - ISLAMABAD

Respondent

Representation:
For the Appellant: Mr R Martin (Counsel)
For the Respondent: Mrs H Aboni (HOPO)

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Obhi, promulgated on 5th January 2017, following a hearing at Birmingham Sheldon Court on 8th December 2016. In the determination, the judge allowed the appeal of the Appellant, whereupon the Respondent Secretary of State subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me. For the avoidance of doubt the reference to the Appellant is a reference to the Appellant as she was below, and the reference to the Respondent is to the Secretary of State as was the case in the Tribunal below.

The Appellant

2. The Appellant is a female, a citizen of Pakistan, who was born on 23rd February 1989. She appealed against the decision of the Respondent Entry Clearance Officer dated 25th August 2015, refusing her application to join her Afghan national husband in the UK, Abdul Bashir. The Notice of Refusal raised concerns regarding the Appellant's income, the relationship, and the concern that the Appellant may have given false information in her application.

The Appellant's Claim

3. The Appellant claimed that the relationship was genuine, that no misrepresentation had been made, and that her husband, Abdul Bashir, worked on a permanent contract with Universal Care Services Limited earning there equivalent of £9,572.29 for the last six months, which would give him a projected income of £19,144.58 per annum. The Entry Clearance Officer was forwarded a contract of employment, bank statements from the Halifax Bank, receipts of his salary into that account.

The Judge's Findings

4. The judge took into account that a letter from the Universal Care Services Limited, dated 10th September 2015, explained that the Sponsor was paid an allowance, which was not shown on the P60, and which was a non-taxable allowance for travel, time/fuel. This amount of £1,335.15 for the year in question, would have brought the Sponsor's income up to £9,572.29 for six months and £19,144.58 for the year. The judge held that the "non-taxable" allowance could not be included in the calculation of the Sponsor's income.

5. Nevertheless, the judge proceeded to allow the appeal on the basis that, in circumstances where the Appellant did not use false representations in her application, and in circumstances where the information provided by HMRC was not itself accurate, the Sponsor was working for UK Haircut Limited, earning between 22nd September 2014 and 1st March 2015, a total sum of £1,365. This was for five and a half months. An income earned in the twelve month period prior to the application, which was for a job that he was doing at the same time as his other main occupation, was therefore additionally also available.

6. The judge went on to state that, all those calculations, could even if it is assumed that he worked for five months with UK Haircut Limited, that would equate to £3,276.00 for twelve months and £16,473.00 from his income from Universal Care Services". This would make, according to the judge's calculations, "a total in that twelve month period of £19,749.00" (see paragraph 24). The judge went on to state that, "there is no dispute that the Appellant's husband "meets the minimum threshold now, therefore even though he gave up his work for UK Haircut Limited, it is significant to note that he continues to meet the minimum requirement throughout his employment" (paragraph 25).

7. In allowing the appeal, the judge stated that the ECO in Islamabad did not have information relating to the Sponsor's work with UK Haircut Limited. The information obtained from HMRC was not accurate. The judge concluded that the Appellant and her husband had "done their best to address the issues raised by the ECO" and that it was the case that "they have suffered a lot of hardship and distress in trying to deal with these matters, the Sponsor had to go to Pakistan in order to get his marriage registered in Afghanistan, at great personal financial cost" (paragraph 28).

8. The appeal was allowed.

Grounds of Application

9. The grounds of application from the Secretary of State are to the effect that the judge had wrongly combined the Sponsor's income over a twelve month period (at paragraph 24) by observing that the Sponsor worked for UK Haircut Limited for five and a half months and at Universal Care Services for twelve months, prior to the application. However, the Sponsor had only worked for five and a half months for UK Haircut Limited. He had not worked for the full twelve months. The actual income for the twelve month period prior to the application, for the tax year 2014 to 2015, was £7,556.93. The fuel allowance had rightly been disallowed by the judge. The judge had accordingly erred. Moreover, the fact that the Sponsor's salary now purported to be over the £18,600 threshold was irrelevant because the date of the decision was the relevant date for deciding whether the requirements of the Immigration Rules could be met.

10. On 11th August 2017, permission to appeal was granted by the Tribunal. It was ruled that the decision of the judge was not in accordance with paragraph 13(A) of Appendix FM-SE of the Immigration Rules, and not in accordance with paragraphs 13(B) and 15 of the appendix.

Submissions

11. At the hearing before me on 6th October 2017, the Respondent was represented by Miss H Aboni, a Senior Home Office Presenting Officer, and the Appellant was represented by Mr R Martin, of Counsel. Miss Aboni relied upon the Grounds of Appeal. She submitted that the Appellant had only worked for just over five months. It was wrong on that basis to assume what his income would have been over a twelve month period of time. Only the actual sum earned should have been taken into consideration. She submitted that it was, of course, proved that this was a human rights appeal (see paragraph 28 of the determination), but even so, the judge could not allow the appeal under human rights law, if the Appellant had not met the requirements of the Immigration Rules at the time of the decision of the ECO.

12. For his part, Mr Martin submitted that there were two questions before this Upper Tribunal. First, whether there was an error made by the judge. Second, whether that error was a material error. The judge had given consideration to the Appellant's income from two separate sources, namely, from Universal Care Services (with

respect to which the information was before the ECO), and from UK Haircut Limited (with respect to which the information was not before the ECO). If one now added the income from the two sources, which one knew to have been in existence at the time of the decision, the Sponsor would have been earning £17,838. This was a shortfall of only £763, from the £18,600 income that had to be shown. Had the Sponsor known that his non-taxable allowance for travel, time/fuel of £1,335.15 could not be taken into account, in the calculation of his yearly income, he would have carried on working for another two months, and not stopped after five and a half months with UK Haircut Limited, which was a decision that he only took because he thought that his non-taxable fuel allowance would have been taken into account by the decision maker.

13. In reply, Miss Aboni submitted that a miscalculation on the finances was a material error of law. The Appellant could not satisfy the minimum income threshold requirement under the Immigration Rules. I should make a finding of an error of law, but a consideration of Article 8 ECHR still needed to take place, given that this was a human rights appeal.

No Error of Law

14. I am satisfied that the making of the decision by the judge did not involve the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision and remake the decision. My reasons are as follows.

15. First, this is a case where the only error made by the judge is to extrapolate from the Appellant's five and a half months of working (which is undisputed) with UK Haircut Limited, into a period of twelve months working (which the Appellant did not do), but this was in the context of a human rights appeal. Here, the Appellant, at the time of the hearing referred to the minimum threshold requirement (see paragraph 25), and the Sponsor's explanation for not having continued working for UK Haircut Limited, for the remaining six and a half months, to complete the full taxable year, was that he had been "wrongly advised by the solicitors at the time that he could use the additional allowance" (paragraph 23), which was his travel and fuel allowance. Otherwise, there was no reason for the Sponsor not to have carried on working, particularly given that his purpose in so doing was to enable him to reach the £18,600 minimum threshold requirement, so that he could sponsor his wife to come to the UK.

16. Secondly, the ECO did not have information with respect to the Sponsor's earnings from UK Haircut Limited at the time of the decision so that that decision was wrong on the financial side of things in any event, together with the decision that the Appellant could not have been validly married because a national of a different country had married in Pakistan (see paragraph 27 of the determination).

17. Third, the ECO also, at the time of the decision, had a situation where the information obtained from HMRC was not accurate, although as the judge properly accepts, the ECO was not to be blamed for this. As against all of this, it was relevant to any Article 8 ECHR evaluation, that, "this Appellant and her husband have done

their best to address the issues raised by the ECO" and that, "they have suffered a lot of hardship and distress in trying to deal with these matters, the Sponsor had to go to Pakistan in order to get his marriage registered in Afghanistan at great personal financial cost" (paragraph 28), as the judge found as a matter of fact.

18. In these circumstances, the factual error that the judge made with respect to the Appellant's earnings from UK Haircut Limited, which was only for a period of five and a half months, would not in a human rights appeal, have resulted in a different decision, when that decision eventually came to be made, on the basis of the Appellant's right to family life, in what was held by the judge to be a genuine marriage, where the Sponsor at the time of the hearing met the minimum financial threshold test, and would continue to do so in the future.

Notice of Decision

There is no material error of law in the original judge's decision. The determination shall stand.

No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge Juss 30th October 2017