Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/02777/2012
OA/02778/2012

THE IMMIGRATION ACTS

Heard at George House, Edinburgh	**Determination Promulgated**
On Wednesday 12 June, 2013	**On Thursday 27 June, 2013**

Before

THE PRESIDENT, THE HON MR JUSTICE BLAKE

Between

ENTRY CLEARANCE OFFICER, ISLAMALBAD

Appellant

and

TASNEEM AKHTAR
AHC (A MINOR)

Respondent

Representation:

For the Appellant: Mr A Mullen, Home Office Presenting Officer
For the Respondent: Mr M Shoaib, Solicitor

DETERMINATION AND REASONS

1. This is the appeal of the Secretary of State from a decision of Judge Mc Grade sitting in the First-tier Tribunal dated 4 February 2013. For the

sake of convenience I will refer to the appellants before him (now the respondents) as the claimants. The claimants are the wife and minor child of a British citizen sponsor resident in Scotland. They applied to join the sponsor in an entry clearance application that was refused on 9 January 2012. Two points were taken in that refusal decision, first that false statements had been made to support the application and accordingly that refusal was mandatory applying Paragraph 320 of HC 395; and second that in the light of all the information the Entry Clearance Officer was not satisfied of the ability of the sponsor to maintain claimants adequately without recourse to public funds.

2. In the entry clearance application dated 3 November 2011 the claimants said that the sponsor was employed by a company identified as Killuminati Ltd of Glasgow and had been so employed since 13 April 2010. The application stated that the monthly income after tax was £650 but there were also supplementary sources of income by means of sponsorship by the sponsor's brother in the sum of £250 a month and a carers allowance paid to the sponsor in the sum of £55 per week to enable him to care for his mother. Various documents were produced to support these statements including the sponsor's bank statements with the Bank of Scotland and a number of wage slips from Killuminati Ltd showing a gross monthly pay of £656 yielding a net pay of £650 after income tax and national insurance had been deducted. There was also a P60 end of year certificate for the Tax Year 2010 to April showing gross Pay was £8,111 and deductions of £324.

3. The entry clearance officer made verification checks upon earnings and on 7 December 2011 was satisfied to a higher degree of probability, that the result was adverse. The report reveals that, "according to information provided by other Government Departments the claimed employment is not as stated thus in the light of the information provided by OGD the documents provided in support of the claimed employment are considered not genuine."

4. The claimants appealed and the matter came before Judge Mc Grade on 4 February 2013. Unfortunately there was no representation by the Secretary of State at that appeal. At this stage the judge heard from the sponsor who had produced a letter from the HMRC confirming that they had a record of the sponsor's employment for the financial year ending 5 April 2012. The sponsor had understood that the reason why there was no record for the earlier year was because he did not earn sufficient income to pay tax although as the judge pointed out the P60 was not consistent with that proposition.

5. At paragraph 13 of his ruling the judge looked at three possible explanations for the evidence. The first was that the HRMC had made a mistake in its records; the second that the sponsor was never employed in 2010 to 2011; the third was that sponsor was in employment but

> "failed to remit the sums due by way of tax and national insurance contributions to HMCR but produced documents suggesting that tax had been paid. Whichever of these explanations is correct it must follow that false representations by way of false information had been made in relation to the application."

6. The judge went on to find that he accepted that the sponsor was in employment at the material time and at the date of the hearing before him and was able to maintain his dependents adequately without recourse to public funds. Notwithstanding his inability to comply with the rules by reason of the finding of false documentation, he allowed the appeal on the basis of Article 8 concluding that it would be disproportionate to refuse the claimant's admission to the United Kingdom to join their husband/father in all the circumstances of this case.

7. The Secretary of State appealed against the Article 8 ruling of the judge submittting that the balance between public interest and the interest of the claimants had not been properly performed in the light of the primary findings. Permission to appeal was granted by the First-tier Tribunal on 25 January 2013 and in due course the matter was listed before me.

8. On 5 June 2013, shortly before the hearing, Mr Shaoib for the claimants served a bundle of documents including a fresh witness statement from the sponsor that explained that all the information provided in support of the entry clearance application was accurate and that he had been issued with a P60 by his former accountant, Mr Javid, upon whom he relied to remit the monies to the Revenue. It should be pointed out that the sponsor was a director of Killuminaiti Ltd. The statement continued that he only became aware that the Revenue had had no communication with his company when he received the refusal of the entry clearance application and the matter had been sorted out.

9. There is also a letter from AS Accounting Services dated 25 January 2012 with some supporting evidence stating that the tax and National Insurance contributions payable in respect of the sponsor are now up to date.

10. At the outset of the appeal I asked Mr Mullen to identify what was the false document or representation upon which the Secretary of State relies. He referred me to the document verification report and the P60. Mr Mullen indicated that he did not wish to cross-examine the sponsor about his most recent witness statement that explained how the document came into being and recognised that following the decision of the Court of Appeal in A v Secretary of State for the Home Department [2010] EWCA Civ 773 6 July 2010 he would be in difficulty in sustaining the submission that the claimant and the sponsor had

been guilty of deliberate misrepresentation of the financial position so as to come within the definition of false representations under the rules.

11. Mr Mullen further accepted that in the light of the other findings of the judge, if there were indeed no false representations used in the entry clearance application, then the other requirements of the rules that satisfied and entry clearance should have been granted.
12. In these circumstances I did not need to hear from the claimants and indicated that the claimants' overall appeal had been successful. I now give reasons for that decision.

13. In my judgment, Judge Mc Grade erred in his conclusions in accepting the Entry Clearance Officer's case that false representation had been used. The burden of proving such a contention falls on the party that alleges it, in this case the ECO. The verification check report is summary in the extreme and unhelpful. It does not state which document has been verified and why it has been found to be false. However, in substance, the relevant document was P60 which is a document issued by the employer Killuminati Ltd to the employee stating the deductions that had been made from wages in the tax year ending the 5 April, 2011. I see nothing in any of the material upon which the ECO relied to suggest that the P60 was false in the sense of either being forged or that it contained false information in the sense that no deductions from wages had in fact been made during the course of the year.

14. What the inference from the initial enquiries with the HMRC would have indicated is that the employer had not paid the deductions over to the Revenue. But there is no statement in the certificate to the effect that payment had been made to the Revenue merely that the deductions had been made from the gross salary of the employee. As far as an employee is concerned that is the information upon which he needs to rely both when completing his own tax return required to make one and to identify the level of his net earnings in the context of immigration application.

15. Accordingly, the judge's third hypothesis in this case did not suffice to amount to finding of a false document. If there had been any false representation by the employer about the tax status of their employee, a further inquiry would have been necessary to establish whether the sponsor as both employee and director was aware of it. In any event, Mr Mullen is correct in accepting on the present state of the evidence that he could not establish that the sponsor or the claimants were party to false representations within the meaning of the rule as clarified by the Court of Appeal in A v Secretary of State for the Home Department.

16. In these circumstances I find there is an error of law by the judge in his assessment of the claim under the Immigration Rules.

17. I can well understand how a difficult issue would indeed arise if the judge had found that the claimant and sponsor were party to deliberate deception to misrepresent earnings but nevertheless should be admitted applying Article 8 of the ECHR, but on this analysis that issue does not arise in this case.

18. The result is that I remake the Judge's decision by allowing the appeal under the Immigration Rules, and setting aside the decision in so far as it relates to Article 8 ECHR. However, in substantive terms this means that the entry clearance officer's appeal is dismissed because any error made by the judge in the Article 8 assessment would not have been material or dispositive on the appeal.

19. The sponsor confirmed that he is still in employment and able to support his wife and child without recourse to public funds within the meaning of Paragraph 281 of HC395 that is to say the maintenance requirement of the rules that preceded 9 July 2012 amendments.

20. In those circumstances I remake the claimants' appeal by allowing it under the rules and directing that an entry clearance be issued forthwith upon receipt of this determination to the parties.

21. It is unfortunate that a wife and a young child have been kept apart for the seventeen months that they have since the date of the decision in question. With respect to the entry clearance officer, greater focus on which document was alleged to be false and why would undoubtedly have been of benefit to all concerned in this unfortunate appeal.

Signed

Date 26 June 2013

Chamber President of the Upper Tribunal