Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/09003/2015

THE IMMIGRATION ACTS

Heard at Birmingham Employment Centre	**Decision & Reasons Promulgated**
On 4th May 2017	**On 23rd May 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MRS FAZEENA BEGUM
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER - ISLAMABAD

Respondent

Representation:

For the Appellant: Mr Z Jafferji (Counsel)
For the Respondent: Mrs H Aboni (Senior HOPO)

DECISION AND REASONS

1. This is an appeal against a determination of First-tier Tribunal Judge Jerromes, promulgated on 1st August 2016, following a hearing at Birmingham Sheldon Court on 26th July 2016. In the determination, the judge allowed the appeal of the

Appellant on Article 8 ECHR grounds. The Respondent subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a female, a citizen of Pakistan, who was born on 28th May 1996. She appealed against the decision of the Respondent Entry Clearance Officer dated 20th May 2015 refusing her application to join her sponsoring husband, who is present and based in the United Kingdom, and whose name is Sajid Hussain. The said decision of the ECO was upheld by the Entry Clearance Manager on 20th August 2015.

The Appellant's Claim

3. The Appellant's claim, in relation to the decision letter against her, is that her husband does earn the requisite £18,600 for the financial threshold requirement, because there was evidence before the decision maker that for the twelve months preceding the application the Sponsor earned a total of £18,825.15, from a variety of separate sources. The main ones here are the income from Gentino Casino and from William Hill.

The Judge's Findings

4. The judge concluded that he was satisfied that the Sponsor's employment with Gentino Casino started from 9th February 2015, and therefore showed only an income for less than six months ago prior to the application being made on 2nd March 2015. The Appellant's income from Ladbrokes was £351, and from Gentino Casino was £795, and from Recruitment Base was £8,750 gross. There was a letter from William Hill dated 17th December 2014 to the effect that the Sponsor's annual gross salary was £10,284.67. But the judge concluded that the payslips from William Hill (excluding 27th February 2014 as this fell outside the relevant period) showed a gross income of only £7,622.83. He went on to say that the payslip for March 2014 (if there was one) was not included and therefore there was only evidence of income from William Hill during the relevant period of £7,622.83.

5. The judge then applied the Supreme Court case in **Mandalia [2015] UKSC 59**. This case, however, raised the question of the decision maker having to invoke the evidential flexibility policy where information could be forthcoming in relevant respects, but the judge went on to conclude that,

> "I am satisfied that requesting the missing payslip for March 2014 from William Hill would be of no avail as based on the Sponsor's usual monthly salary from William Hill, it is extremely unlikely this March salary would meet the shortfall of £1,081.17" (see paragraph 23).

With this, the judge concluded that the Appellant could not satisfy the Immigration Rules.

6. He then went on to consider the position under Article 8 and, applying the case of **Razgar**, and the five step approach there, and concluded that it would not be disproportionate to disallow the appeal on Article 8 grounds, even if there was a British citizen child, Junaid, born of the parties, because he was free to enter the UK at any time and live with the Sponsor, who lived with his mother and sisters, and they would assist in looking and caring for Junaid.

Grounds of Application

7. The grounds of application state that the judge erred at paragraph 22 of her determination by excluding the Appellant's total income from his employment with William Hill from February 2014 until February 2015, or even up to 31st January 2015. This is because Appendix FM-SE makes it clear that,

> "Where this Appendix requires the applicant to provide specified evidence relating to a period which ends with the date of application, that evidence, or the most recently dated part of it, must be dated no earlier than 28 days before the date of application".

Given that the Appellant's application was made on 2nd March 2015, and as specified evidence was required in this case relating to a period ending with a date of the application, that evidence could be no earlier than 28 days before the date of the application. The Appellant's salary from William Hill for February 2014 and March 2014 should have been included in the calculation and the Appellant's income would then be claimed as £8,928.65. There would be no shortfall.

8. Second, the ECO himself had not stated that the March 2014 wage slip was missing (paragraph 5 of the determination) and the judge should not have held this against the Appellant.

9. Third, if the judge had added the Sponsor's income for February and March 2014 to the total for the relevant year for William Hill then there would also have been no shortfall.

10. On 2nd November 2016, permission to appeal was granted on the basis that (a) it was arguable that the judge failed to take into account that evidence could be dated no earlier than 28 days before the date of the application. It was further arguable that the relevant period was therefore 1st February 2014 to 1st February 2015. Moreover, it was arguable that the judge should have noted that the March 2014 wage slip had not been missing from the application made to the ECO.

11. On 29th November 2016, a Rule 24 response was entered to the effect that the judge's calculations had led him to find that the relevant income was only £17,518.33, and this fell below the £18,600 requirement.

Submissions

12. At the hearing before me on 4th May 2017, Mr Jafferji, appearing on behalf of the Appellant, submitted that fundamentally, he would now place reliance upon the

Supreme Court judgment in **MM (Lebanon) [2017] UKSC 10**, which was decided on 22nd February 2017, because in that case the Supreme Court held that the Immigration Rules did not actually cater for the Section 55 BCIA 2009 obligation to promote the "best interests" of the child, who was overseas, because in the instant case, the child, Junaid, was living overseas in Pakistan with his mother, and if the Appellant could not meet the financial requirement test of showing that her sponsoring husband earned £18,600, then she would be barred from returning to the UK with her child, whose "best interest" could not be safeguarded. Second, although permission had been granted in this case on the basis that the March 2014 wage slip does not appear to have been missing from the application before the ECO, he, Mr Jafferji, had not himself seen that March 2014 wage slip, although he would have to say, that if the ECO had not raised the point, then it was not open to the judge to raise it without notice at the hearing, so as to catch the Sponsor unawares with a new issue. Third, the case of **Mandalia [2015] UKSC 59** saw the Supreme Court emphasise that where a single document, in a sequence of other documents, was missing, then the evidential flexibility policy enabled a decision maker to make a request for the documentation that was missing to be traced. The wage slip for March 2014 could certainly have been relevant, on a freestanding consideration outside the Immigration Rules, to the issues that the judge had to determine.

13. For her part, Mrs Aboni submitted that she would rely upon the Rule 24 response. Permission was only granted on the basis that the March wage slip had not been regarded as an issue by the ECO, but was made one by the judge, without notice being given to the Appellant. However, this did not matter because the Appellant could not, in any event, succeed because even with the March 2014 wage slip, the Sponsor's wages would suffer a shortfall of £1,081.17 (see paragraph 23 of the determination). Second, the ECO had properly rejected the wage slip from William Hill because the Sponsor's employment with William Hill ended in December 2014.

14. In reply, Mr Jafferji submitted that the judge did not think that the William Hill employment was relevant, and wrongly excluded a consideration of the 27th February 2014 wage slip (see his paragraph 22 of the determination), but this was the last payslip from William Hill, and it would have been within the twelve month period, and if the ECO did not treat the March 2014 wage slip as being missing, then if all the existing wage slips had been taken into account, the financial threshold requirement would have been satisfied. On the worst case scenario, only one payslip from a series of payslips was missing and a request for further information, in accordance with the policy on evidential flexibility, should have been made, and this would have been entirely in accordance with what the Supreme Court stated in **Mandalia**.

Error of Law

15. I am satisfied that the making of the decision by the judge involved 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.

16. First, the judge excluded the 27th February 2014 wage slip (see paragraph 22) which was within the period that was relevant, because the Rule states that the evidence should be dated no earlier than 28 days before the date of the application, and the relevant period stood at 1st February 2014 to 1st February 2015.

17. Second, the suggestion that the William Hill payslip of December 2014 could properly be excluded because at that time the Sponsor had ended his employment there, is untenable because it demonstrated the Sponsor's employment at a time no earlier than 28 days before the making of the application.

18. Third, insofar as there is an issue relating to the missing March 2014 wage slip, this was not raised by the ECO, so that one natural inference must have been that it was not missing in the documentation before the original decision maker at the post overseas. Another inference, of course is, that if it is only a single wage slip that is missing, from a list of other wage slips, then it is easily retrievable by a request for further information in accordance with the policy on evidential flexibility, and the failure to do that, particularly in circumstances where it may have been known to have existed at some point, disadvantaged the Appellant unnecessarily.

19. Finally and no less importantly, against this particular background, the strictures of the Supreme Court in **MM (Lebanon) [2017] UKSC 10** need taking on board, namely, that the Immigration Rules do not advance the objectives of the "best interests" provisions as set out in Section 55 of the BCIA 2009, where the child in question is living overseas. Put another way, if the child, Junaid, had been in the UK, and was a British citizen, it is not unlikely that the Secretary of State would not have given consideration to exercising discretion in his favour.

20. This is because the Immigration Directorate Instruction – Family Migration – Appendix FM, Section 1.0(b) gives important guidance at 11.2.3 under the heading, "would it be unreasonable to expect a British citizen child to leave the UK?", which is to the effect that

> "Save in cases involving criminality, the decision maker must not take a decision in relation to the parent or a primary carer of a British citizen child where the effect of that decision would be to force that British child to leave the EU, regardless of the age of that child".

In the circumstances, it is at least conceivable that the evidential flexibility policy should have been considered with respect to a single March 2014 missing wage slip, which is to say nothing of the 27th February wage slip not having been taken into account.

Re-Making the Decision

21. I have remade the decision on the basis of the findings of the original judge, the evidence before her, and the submissions that I have heard today. I am allowing this appeal only to the limited extent that it is remitted back to the First-tier Tribunal, to be determined by a judge other than Judge Jerromes under Practice Statement 7.2(b)

because the nature or extent of the judicial fact-finding which is necessary in order for the decision in the appeal to be remade is such that, having regard to the overriding objective in Rule 2, it is appropriate to remit the case to the First-tier Tribunal.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. I remake the decision as follows. This appeal is allowed to the extent that it is remitted back to the First-tier Tribunal, to be determined by a judge other than Judge Jerromes under Practice Statement 7.2(b).

No anonymity direction is made.

The appeal is allowed.

Signed Date

Deputy Upper Tribunal Judge Juss 22nd May 2017