**Upper Tribunal**
**(Immigration and Asylum Chamber)**

Appeal Number: HU/24699/2018
HU/24701/2018

**THE IMMIGRATION ACTS**

| **Heard at Field House, London** | **Decision & Reasons Promulgated** |
|---|---|
| **On 29 January 2020** | **On 13 February 2020** |

**Before**

**UPPER TRIBUNAL JUDGE SMITH**

**Between**

**(1) NALIA [S]**
**(2) [V A]**

Appellants

**And**

**ENTRY CLEARANCE OFFICER**

Respondent

**Representation:**
For the Appellants: Ms K Wass, Counsel instructed by SH Solicitors Ltd
For the Respondent: Ms A Everett, Senior Home Office Presenting Officer

**DECISION AND DIRECTIONS**

**BACKGROUND**

1. By a decision promulgated on 16 December 2019, I found an error of law in the decision of First-tier Tribunal Judge Fowell promulgated on 7 August 2019 dismissing the Appellants' appeals against the Respondent's decision dated 22 November 2018 as upheld by the Entry Clearance Manager on 24 February 2019 refusing their human rights claim. That claim was made in the context of an application by the Appellants to join their husband/father, Mr [A] ("the

Sponsor"), in the UK. My error of law decision is appended hereto for ease of reference.

2. As a result of the error of law which I found, I set aside Judge Fowell's decision and gave directions for the filing of further evidence should either party wish to do so. The Appellants filed one item of additional evidence which I come to below. They had already filed a bundle of evidence to which I refer below as [AB/xx] and a supplementary bundle to which I refer below as [ABS/xx].

3. The only reason for refusal of entry clearance under the Immigration Rules ("the Rules") which remains is the failure of the Appellants and the Sponsor to meet the minimum income threshold requirement ("the MIR"). However, although it is relevant whether the Appellants can meet the Rules, the only issue for me is whether the decision refusing entry clearance is unlawful under the Human Rights Act 1998, in this case whether the decision breaches Article 8 ECHR. The Appellants are the wife and child of the Sponsor and it is accepted that they are in a genuine and subsisting relationship with each other.

**EVIDENCE AND SUBMISSIONS**

4. I have before me a statement signed by the Sponsor and dated 23 May 2019 in which he sets out the details of what he says was then his employment. At the time, he says, he was employed by BQC West Bromwich Ltd, working approximately 50 hours per week and was in receipt of an annual gross salary of £27,548.04. He says that this is confirmed by the wage slips, a letter from his employer and bank statements. The MIR applicable in this case is £22,400.

5. The Respondent did not accept that the Sponsor was employed as he claimed. The reasons are set out in the original entry clearance decision as follows:

> "We have attempted to verify your sponsor's employment. As part of your application your sponsor and your sponsor's employer were interviewed. During these interviews there were discrepancies in the amount of hours your sponsor works and how your sponsor found his job, your sponsor's employer was unsure if your sponsor was interviewed even although your sponsor's employer is your sponsor's direct manager. This leads me to doubt the credibility of your sponsor's employment details. As a result I am unable to rely on this document as evidence of you and your sponsor's ability to meet the financial requirements of the Immigration Rules. I therefore refuse your application under paragraph EC-P.1.1(d) of Appendix FM of the Immigration Rules (E-ECP.3.1)"

That decision was upheld by the Entry Clearance Manager for essentially the same reasons with some additional reasons given.

6. I accept as Ms Wass pointed out that the Respondent has failed to provide any record of the interviews which are said to have taken place. However, the Sponsor does not deny that those interviews took place nor that discrepancies exist. In this regard, he says the following at [7] and [8] of his statement:

> "7. In relation to the telephone call to my employer I understand that this was taken on approximately 8 November 2018 at 12:30pm. My employer confirmed that the telephone call was taken during his lunch break and he was therefore away from his desk/PC. In addition to this my employer is in a very busy position as he employs 11 people including myself.
> 8. It therefore is admitted that my employer could not recall every detail with such accuracy including how the Sponsor obtained his employment given that the interview which was over a significant period of time. The information provided by my employer was given to the best of his ability and he believes that he assisted the ECO the best he could when providing such evidence."

What the Sponsor there says is borne out also by a letter dated 4 December 2018 from Mr Naveed Hussain ([AB/5]).

7. Although I accept that the reason the Respondent did not accept that the employment was genuine depends on discrepancies in interviews, the record of which I do not have, this is an issue for me to decide on the evidence before me (as Ms Wass accepted). As I come to later, whether or not the previous employment was genuine is not the end of the matter as the Sponsor has since changed his employment and I have to consider the issue as at date of the hearing. However, the genuineness or otherwise of the Sponsor's previous employment with BQC would indicate whether he was able to meet the Rules previously and may therefore have some bearing on the proportionality issue.

8. The reason that Judge Fowell found the employment not to be genuine are set out at [7] of my error of law decision. Although I did not preserve that reasoning as I accepted that the Judge had failed to take into account a document which may have a bearing, as is evident from what I say at [11] and [12] of my error of law decision, the points made by Judge Fowell are cogent ones.

9. I begin with the main concern which relates to the Sponsor being paid in cash. The Sponsor claimed that he was paid monthly in cash on an annual salary of £27,548.04. That equates to a net monthly salary of about £1800 according to the Sponsor's payslips. I note that those are electronically generated payslips. They provide the Sponsor's national insurance details and national insurance and income tax is shown as deducted (although for some reason, those dated January to March 2019 show the deductions as zero). The payslips state the payment method as "cash".

10. The Sponsor's bank statements in the period March 2018 to May 2019 also show deposits of sums of £1800 per month (although not in August 2018). In August 2018, there are five deposits on the same date equating to that amount. However, that only serves to underline the difficulty that, as cash deposits, there is no indication as to the source of those deposits. In that regard, I note that the bank statements also show other large cash deposits which are unexplained, and it is also worthy of note that the money paid in is often paid out shortly thereafter to various persons which do not all appear to be payments for living expenses and the such like.

11. I turn then to the other evidence. The Sponsor has produced his P60s for the year ending April 2018 and April 2019. He has also produced a HMRC letter dated 21 May 2019 which sets out the income which HMRC has recorded as paid to the Sponsor. That provides the following details:

    Tax year ended 5 April 2015

    BQC (Dudley) Ltd – employed 5 March 2012 to 30 April 2016 – pay £12,203, tax £438.80

    DWP (JSA) – 10 November 2014 to 14 December 2014 – no pay or tax noted

    Tax year ended 5 April 2016

    BQC (Dudley) Ltd – employed 5 March 2012 to 30 April 2016 – pay £5491, tax £0

    Tax year ended 5 April 2017

    BQC (Dudley) Ltd – employed 5 March 2012 to 30 April 2016 – pay £499, tax £0

    Tax year ended 5 April 2018

    BQC Leicester Ltd – employed 1 September 2017 to 31 October 2018 – pay £14,121, tax £522.40

    Tax year ended 5 April 2019

    BQC West Bromwich Ltd – employed from 1 November 2018 – pay £9,797, tax £0

    BQC Leicester Ltd – employed 1 September 2017 to 31 October 2018 – pay £32,140, tax £4,649.20

    Red River Ltd – employed 13 August 2018 to 24 August 2018 – pay £39, tax £0

    I accept that the figures for year ended April 2018 and April 2019 are consistent with the P60s issued by BQC Leicester Ltd and BQC West Bromwich Ltd as to the amount paid and income tax paid. What is odd though is the lack of any payroll number on either of the P60s. The PAYE references as shown on the P60s are those of the employer and not the employee. It is also not clear why no tax was deducted by BQC West Bromwich Ltd from the Sponsor's pay from 1 November 2018 to the end of that tax year. Indeed, if the figures quoted by HMRC are correct, the tax paid appears low.

12. The Respondent's bundle also includes documents submitted by the Sponsor previously which includes a P45 showing the end of his employment with BQC Leicester Ltd on 31 October 2018. His total pay to date on that document is shown as £16,070.38 and tax deducted as £1,830.40. Those figures are consistent with those given on his payslip for October 2018 also contained within the Respondent's bundle (which also appears at [AB/14]). It differs however from the figure given in the P60 for the 2018/19 tax year and from the information given by HMRC as to that tax year.

13. At the hearing before me, the Sponsor produced only one additional document, being a letter from Mr Nabeel Hussain of BQC West Bromwich Ltd dated 28 January 2020. That is not in the form of a witness statement including any statement of truth. Mr Hussain said that he could not attend the hearing before me due to "prior work commitments". He does not say what those are. He says only that he is the Managing Director of BQC West Bromwich Ltd. He does not

explain why that prevents him attending a hearing nor why he did not produce a witness statement.

14. In his letter, Mr Hussain confirms, as I come to below, that the Sponsor ceased working for BQC West Bromwich Ltd in September 2019 and no longer works for the company. He confirms that the Sponsor was working "approximately 50 hours per week" but that this "often varied". He says that the employment was full time and paid in cash. He does not explain why that was. He says that any doubts about the employment could have been checked with the company's accountants or the tax office and that personal visits could have been made by the Respondent. I note of course that this is an entry clearance case and the Respondent's decision maker is not based in the UK. In any event, the Sponsor no longer works for the company. Finally, Mr Hussain "kindly ask[s] that [the Sponsor's] wife and child be granted their visas as his employment from September 2017 to September 2019 was genuine employment as claimed".

15. I turn then to the Sponsor's new employment. He is now self-employed as a driver with Uber. He began this employment only in August 2019 and it was therefore accepted that he could not meet the requirements of Appendix FM-SE based on this employment as he would need to provide documents covering one full tax year or an average of two tax years, neither of which applies in this case. Ms Wass urged me to take account however of the earnings to date which, she said, extrapolated over an annual period would satisfy the applicable MIR threshold. It was also accepted by Ms Everett that, if I were satisfied that the Sponsor can now meet the MIR (even if he could not do so before), that is something I could take into account when considering Section 117B Nationality, Immigration and Asylum Act 2002 ("Section 117B") as to the Appellants' ability to live in the UK without recourse to public funds.

16. The Sponsor gave oral evidence before me. He confirmed his earlier statement as to his previous employment with BQC. He said he had left the company's employment three to four months previously and was now working as an Uber driver. He had provided some bank statements showing payments made to him by Uber. He said that I could if I wished check with Uber as to his earnings. It is of course for the Appellants to produce evidence and not for this Tribunal, or indeed the Respondent to make out the Appellants' case for them.

17. The Sponsor confirmed that his current level of earnings is based on a working week of 70-72 hours worked over seven days each week. He has produced an Accountant's report at [ABS/40] which shows his turnover from 11 August 2019 to 20 November 2019 to be £17,188 and his cost of sales as £4,297 giving a gross profit of £12,891. From that figure are deducted expenses and fees of £5,384 (he is for example hiring his cab), leading to a net profit of £7,507. Ms Wass' point is that this figure, taken over a year would exceed the MIR.

18. The figures given for receipts are roughly matched by equivalent deposits into the Sponsor's bank accounts as follows:

17 July 2019: £377.90
24 July 2019: £607.88
7 August 2019: £593.50
14 August 2019: £618.07
21 August 2019: £631.27
29 August 2019: £523.24
4 September 2019: £713.86
11 September 2019: £621.47
18 September 2019: £520.73
25 September 2019: £526.13
2 October 2019: £549.79
9 October 2019: £567.36
16 October 2019: £509.12
23 October 2019: £906.80
30 October 2019: £1002.71

19. What is not explained however is why the Sponsor deposited £1800 cash into his account at the beginning of October 2019, suggesting that he was paid for the full month of September. Whilst I accept that he did not leave BQC until September 2019, it is difficult to see how he could be working long hours for Uber whilst still also working for BQC to the same extent. Although I accept that his earnings for Uber increased after September when he left BQC (so that he is now earning about £1,000 per week), he would still be working about half the hours he is now working (and therefore about 35 hours) in order to earn £500 per week whilst still, on his account, working for BQC as he did before, in other words 50 hours per week.

20. The Sponsor said that he was now earning approximately £1000 per week in his current job if he was busy but otherwise £800-900 per week. He said that he had changed jobs in order to gain his independence and so that he could work when he wanted and not when he did not want to work. As an employed person he had to work at certain times.

21. Turning then to the parties' submissions, Ms Everett relied on the points made in my error of law decision and previously as to the genuineness of employment. She submitted that the Sponsor had still failed to provide evidence to explain or clarify his previous employment. The further letter from Mr Hussain did not take matters any further.

22. Ms Everett did not challenge the genuineness of the Sponsor's current employment based on the documentary evidence now put forward. However, that evidence was insufficient to meet the evidential requirements within the Rules and she submitted that I could not be satisfied that the Appellants can meet the Rules on that evidence. The evidential requirements are, she said, there for a purpose to show that the relevant Rules can be met.

23. Although Ms Everett recognised that, in order to meet the evidential requirements of the Rules, the Appellants may have to wait to make a further application until the Sponsor has completed a sufficient period in his current employment (in practice until after April 2021), she submitted that, on the evidence, that did not render refusal disproportionate. The position is the same for a person who cannot yet meet the Rules as it is for a person who could but can no longer meet them (although that of course depends on me accepting that the Sponsor could meet the Rules based on his previous employment).

24. In relation to that last point, Ms Wass submitted that the position here is different. If I were to accept the genuineness of the Sponsor's previous employment, that is relevant to proportionality as the Respondent refused the Appellants' application on the basis that the employment was not genuine.

25. Turning then to the genuineness of the Sponsor's previous employment, Ms Wass submitted that I could be satisfied of that based on the HMRC letter. She was however constrained to accept that the information in the HMRC letter depended on what was reported to it by BQC. If the evidence from BQC is not accepted, then the HMRC letter does not take matters any further.

26. Ms Wass also submitted though that I could be satisfied of the genuineness of the Sponsor's previous employment based on the regular deposits into his bank account.

27. Although Ms Wass also submitted that the latest letter from the Sponsor's employer did assist, she recognised that this was not wholly consistent with the Appellants' case as it did not show the asserted increase in the Sponsor's salary to £32,000 and she also accepted that the payment by cash was still unexplained.

28. Ms Wass also submitted that it would make no sense for the Sponsor to change his job at the time he did if his past employment was not genuine as he had potentially prejudiced the Appellants' case. As I pointed out, there is of course an answer to that if the Sponsor's employers were not prepared to support him by giving evidence in person or by a witness statement attested to by a statement of truth.

29. As to the Sponsor's present employment, Ms Wass submitted that there is evidence that the Sponsor is earning what he says he is and that this is continuing income. On that basis, and based on the several sources of evidence, albeit for a lesser period than required by the Rules, she said that I could be satisfied that the Sponsor (and therefore the Appellants) meet the MIR. She said that the purpose of the MIR is that those coming to the UK should not become a burden on the State. That the Appellants could meet the MIR was therefore relevant to that issue (and in particular to Section 117B).

30. Although Ms Wass recognised that the evidence of the Sponsor's current employment does not cover a sufficient period to meet the evidential requirements of the Rules, she said that I could still be satisfied that the Sponsor

and the Appellants meet the MIR. She pointed out that, although there might be fluctuations in demand, the Sponsor is working in employment which is not transient. There is a continued demand for Uber drivers in what is a busy area (Birmingham). The demand is not subject to seasonal fluctuations. Work may vary but there is a current and consistent market.

31. Ms Wass confirmed that there is no evidence from either of the Appellants who are based abroad. She also confirmed that there is limited evidence from the Sponsor about his relationship and the effects of separation on the Appellants. However, she said that, if I were satisfied that the MIR is met (either based on the previous employment or current employment), that would render interference disproportionate as the Appellants would then meet the Rules. She submitted that it was disproportionate to require the Appellants to wait until April 2021 to make a further application.

## DISCUSSION AND CONCLUSIONS

32. I begin with the evidence as to the Sponsor's previous employment. I recognise that there is an evidential burden on the Respondent to establish deception. Although the Respondent has not made an express assertion that there is deception in this case or even that the documents are false, the intention is still the same. In essence, the Respondent is asserting that the documents have been contrived to show an employment which does not exist or at the very least earnings which are exaggerated in order to meet the MIR. I also accept that the Respondent has not supplied the interview records on which she relies in this regard. However, as Ms Wass accepted, it is for me to consider this issue based on all the evidence before me, both positive and negative.

33. I have set out at [11] and [12] of my error of law decision why I did not find errors of law in most of what was said by Judge Fowell as recorded at [7] of my decision. In particular, in my estimation, the payment by cash of monthly sums of £1800 requires some explanation. This is unusual to say the least in the absence of some explanation and is enough to raise an evidential case that the earnings were not genuine.

34. I accept that there is evidence from the employers that the Sponsor was earning the sums he said he did, although the latest letter does not show that his earnings had been increased more recently. However other than asserting that payment was made by cash (which is corroborated by the payslips), those letters do not explain why that was so. It is not said that the nature of the business is such that payment by cash was the norm. In that regard, the employer is said to employ another 11 persons. If they were all being paid by cash, that is likely to have required the business to withdraw and hold a large amount in cash on a particular day in the month in order to pay its staff. That would, again, be highly unusual, particularly in circumstances where the Sponsor told Judge Fowell that the nature of the company's business was online trading (see [13] of Judge Fowell's decision as recorded at [7] of my error of law decision).

35. I also note that all the evidence from the Sponsor's various employers is in the form of letters. There is no witness statement from either of the employers concerned and therefore no statement of truth as to what is said in the letters. Neither of the previous employers have attended either of the Tribunal hearings to give evidence notwithstanding that the genuineness of the employment was central to the Appellants' case. No adequate explanation has been given for the failure to provide a statement or attend. I can give little weight to the evidence of the employers and in any event their explanations are inadequate.

36. This is not a case where the Sponsor did not have a bank account and so had to be paid in cash. The employer was, according to the payslips, deducting and accounting to HMRC for PAYE income tax. That is corroborated by the HMRC letter. The company was therefore operating an electronic system for making payments (as is confirmed by the payslips). Why then would it make any sense to pay employees in cash? Also, why is it that the Sponsor's payslips and P60s show no payroll reference? It is also said that the Sponsor worked variable hours and yet his payslips show the same precise sum paid each month. Bizarrely, the sum paid to the Sponsor remains the same whatever the amount of the basic pay which does vary between months. For example, the payslips at [AB/9-22] show different amounts of basic pay which however result in an identical amount of net pay, due it appears to different amounts of income tax and national insurance deductions. There is also no explanation for the zero deductions of tax in the period January to February 2019 notwithstanding the previous earnings in that tax year.

37. There are also some discrepancies between the P60s and the information in the HMRC letter on the one hand and the payslips and P45 on the other. The P60 for the year ending April 2019 shows earnings of £32,140.76 with BQC Leicester Ltd whereas the P45 shows a figure of £16,070.38 as at October 2018 which bears no relation and at least requires some explanation which has not been given.

38. I do not consider the HMRC letter takes matters any further. That is based on what the Sponsor's employers have told HMRC and what they have paid to HMRC by way of income tax. It is not independent corroboration of those figures.

39. I accept that the Sponsor's bank statements show regular deposits of £1800 in cash. I accept that the figure is the same in each instance and consistent with the net pay in the payslips. However, because those deposits are made in cash, the source of that money is not shown. I accept that I could draw an inference based on the similarity in sums if there were not also unanswered questions about the other evidence on which the Appellants rely but, for the reasons I have already given, those unanswered questions remain.

40. In any event, the bank statements give further cause for concern. There are regular corresponding credits and debits of various sums on the same day or very shortly after deposits. That includes payments out from the deposits of £1800 in favour of other individuals. In some cases, those appear to be transfers between

the bank account to which the statement relates and other accounts held by the Sponsor, but the Sponsor has not provided statements for other accounts nor explained what are these movements of money.

41. As it is, in the account into which the Sponsor deposited the cash, the money deposited is rarely retained and for the most part, by the end of the month, the Sponsor has very little cash left. That is not of course of itself a reason for disbelieving that the deposits are genuine if the account shows regular outgoings which are readily explained. That is however not this case. Coupled with the concerns about the evidence taken from the payslips and tax documents, I am not satisfied by the Sponsor's explanation.

42. It follows from the foregoing that the Appellants have not met the evidential burden of explaining the matters raised by the Respondent. Whilst the legal burden of establishing deception remains on the Respondent throughout, for the reasons I have given, I am satisfied that the Sponsor's earnings from his previous employment are not genuine. It follows that the Appellants cannot establish that they meet the MIR based on those earnings.

43. I turn then to the Sponsor's current employment. I accept on the documents produced that the Sponsor is currently earning what he says he is. That is based on working 70-72 hours per week over seven days. Although I accept what Ms Wass says about continued demand for Uber services in the Birmingham area (even though I have no evidence about this from Uber or other sources), that does not mean that I accept that the Appellants can show that they meet the MIR.

44. As Ms Everett points out, and Ms Wass accepts, the Appellants cannot meet the evidential requirements. Those requirements require evidence provided over a specified period in order to demonstrate that the MIR threshold in the Rules is met. They do so in order that an applicant can demonstrate that the earnings in question are sustainable over a period. That is particularly so where the earnings are from self-employment which may fluctuate. Whilst it may well be the case that the demand for Uber does not fluctuate seasonally or more generally, that does not necessarily mean that the Sponsor will be able to or indeed will want to keep working the very long hours that he does currently. Of course, as he says, the point of being self-employed is to be able to work when he wants and not when he does not. However, there is insufficient evidence to show that he will want to or be able to continue to work at the current very high level that he is presently. Of course, if he is able to do so for the next year or so, the Appellants may well be able to make another application which will succeed. However, that is not a reason to waive the necessity for evidence at this point in time.

45. I turn then finally to what is the only real issue for me to determine, namely whether the decision to refuse the Appellants entry clearance is disproportionate and therefore breaches Article 8 ECHR. In this regard, I note

the almost complete absence of any evidence as to the interference caused by continued separation. The Sponsor says this in his statement:

> "11. As a British citizen I wish for my wife and daughter to join me in the UK. The fact that I have a child together with my wife proves that I am in a genuine and subsisting relationship with her and that I wish to permanently reside with them in the UK. This was not disputed in the refusal letter and based on my Article 8 rights to a private and family life this is the reason why I submitted an application for Entry Clearance for my wife and daughter to join me in the UK.
> 12. It would not be in the best interests of my daughter or for her welfare for this application to be refused as we do have the right to live together in the UK as a family unit.
> 13. I feel it would be harsh for this application for Entry Clearance to be refused for both Appellants when I, as the Sponsor of this application, meet the requirements outlined in the rules.
> 14. As a result of the refusal I feel that my life has been put on hold. I have not been able to have my wife and daughter join me in the UK and I have not been able to make any firm future plans."

46. The only other evidence that I have as to the Appellants themselves is contained in the application for entry clearance. That is extremely limited. The Second Appellant, the child of the Sponsor and the First Appellant, was born in 2014 and is now aged five years. She and her mother live in Pakistan. The application form shows that she has never been to the UK.

47. The First Appellant's application form records that she and the Sponsor married in Pakistan and that he returned to the UK in January 2014. He was not at that time earning enough for an application to be made. It is said that the Sponsor obtained "his first British passport" in July 2016 thereby indicating that he is a naturalised British citizen and not British by birth. I assume from what is said that he is also of Pakistani origin. Having obtained his British passport, the Sponsor moved to Ireland, it appears in order to make an application for an EEA family permit by exercising Treaty rights as a self-employed person there. It is said though that the application was taking too long and so it was withdrawn. The Sponsor is said to have returned to the UK in May 2017 to take up employment sufficient to meet the income requirements.

48. I begin with the best interests of the Second Appellant. I have no information about her other than what is in the application form. She is aged five years and is living with her mother in Pakistan. As such, she is outside the UK and strictly does not fall within the Section 55 duty to have regard to her best interests. I consider that for completeness. However, there is no information that the Second Appellant is not being looked after by her mother in Pakistan. I accept that a child's best interests generally are to live with both parents. However, I have no information that this is a strong requirement in favour of her coming to the UK in this case. In particular, I note that it is not said that she speaks English, she has never been to the UK and there is likely to be some disruption

caused to her by coming to live in a country which will be unfamiliar to both her and her mother.

49. The Appellants are unable to meet the Rules as they cannot satisfy the MIR. That is not a minor requirement of the Rules. It is intended to ensure that those coming to the UK can support themselves and integrate into life in the UK (see Section 117B (3)).

50. Moreover, the fact that the Appellants cannot meet all the eligibility requirements of the Rules is an important consideration in favour of the maintenance of effective immigration control. Although I accept that paragraph EX.1 of Appendix FM to the Rules does not apply in an entry clearance case, it is relevant to the proportionality issue that the Appellants have provided no evidence that they could not continue their relationship with the Sponsor in Pakistan. Although the Sponsor is now British, he is naturalised and apparently comes originally from Pakistan. He married the First Appellant in Pakistan.

51. When assessing Article 8 outside the Rules, I note that the Appellants have failed to provide evidence of the degree of interference with their family lives. There is no evidence as to the effect of continued separation. There is no evidence of the contact between the Appellants and the Sponsor. There is no evidence that family life cannot be continued as it has been now for some six years, based on whatever indirect contact and/or visits have occurred during that time. There is no evidence that the Sponsor could not join his family in Pakistan if he chooses to do so.

52. On the other side of the balance, I take into account the public interest. The maintenance of effective immigration control is important. That the Appellants are unable to meet the Rules albeit only in relation to one requirement is a relevant and important consideration when assessing proportionality.

53. As I have already concluded, whilst I accept that the Sponsor may in the future be able to meet the MIR based on his current employment, the evidence of that to date is not sufficient. Whilst it may well be the case that the family will be able to support itself following the Appellants' arrival without recourse to public funds, I am not satisfied on current evidence that this is the case. That factor is in any event at best neutral when looking at the public interest.

54. Balancing the factors in favour of the Appellants and on the limited evidence which I have as to interference with their family life and that of the Sponsor against the public interest, I am satisfied that the decision refusing entry clearance is proportionate. For that reason, the Appellants' appeals fail.

## CONCLUSION

**55.** For the above reasons, the Respondent's decision is not unlawful under the Human Rights Act 1998 as being contrary to Article 8 ECHR. The Appellants' appeals are therefore dismissed.

**DECISION**

**I dismiss the Appellants' appeals on human rights grounds.**

Signed Dated: 12 February 2020
Upper Tribunal Judge Smith

**APPENDIX: ERROR OF LAW DECISION**

**Upper Tribunal**
**(Immigration and Asylum Chamber)**

Appeal Number: HU/24699/2018
HU/24701/2018

**THE IMMIGRATION ACTS**

**Heard at Field House, London**
**On Monday 9 December 2019**

**Determination Promulgated**

……16 December 2019……

**Before**
**UPPER TRIBUNAL JUDGE SMITH**

**Between**

**(3) NALIA [S]**
**(4) [V A]**

Appellants

**And**

**ENTRY CLEARANCE OFFICER**

Respondent

**Representation:**
For the Appellants: Mr M Mustafa, Counsel, instructed by SH Solicitors Ltd
For the Respondent: Ms A Everett, Senior Home Office Presenting Officer

**DECISION AND DIRECTIONS**

**BACKGROUND**

1. The Appellants appeal against a decision of First-tier Tribunal Judge Fowell promulgated on 7 August 2019 ("the Decision") dismissing their appeals against the Respondent's decision dated 22 November 2018 as upheld by the Entry Clearance Manager on 24 February 2019 refusing their human rights claim. That claim was

made in the context of an application to join the Appellants' sponsor in the UK, Mr [A] ("the Sponsor"). The Sponsor is a British citizen. The Appellants, currently resident in Pakistan, are the Sponsor's wife and daughter respectively.

2. The only issue raised by the Respondent is whether the Appellants meet the minimum income requirement. Issue was taken with the Sponsor's claimed income. I will come on to the detail of that in due course. The Judge did not accept that the Sponsor was in genuine employment or that the documents he produced in support of the Appellants' case relating to that employment were genuine ([16]). He considered Article 8 ECHR but found on the evidence that the decision to refuse entry was proportionate.

3. The grounds can be sub-divided into two. The first challenges the Judge's findings concerning the credibility of the Sponsor's claimed employment. The second challenges the findings relating to the proportionality assessment under Article 8 ECHR.

4. Permission to appeal was granted by First-tier Tribunal Judge EM Simpson on 21 October 2019 in the following terms so far as relevant:

> "..2. Permission to appeal is granted because arguably as asserted in the permission grounds the Decision disclosed:
> (i) failure to have regard to and/or give weight to material evidence before them, namely HMRC letter of 21/05/2019 setting out its records of the British citizen sponsor's employment for the four tax years ending with 2018/2019;
> (ii) on the evidence before the judge, findings and conclusions reached appeared all round not reasonably open to them on material matters, specifically concerning the genuine basis of employment of the sponsor husband/father, more especially, judicial finding of the use of false documents by the sponsor (16,19), a matter of gravity for the parties, and one outwith the respondent's reasons for refusal of entry clearance, and reached in the absence of either supporting evidence from the respondent or testing under cross-examination;
> (iii) an overall inadequacy of careful reasoning on material matters, family life ties of the appellants and their UK sponsor, and therein materially the requisite S.55 best interests of the child assessment.
> 3. Arguable material error(s) of law disclosed."

5. The matters come before me to consider whether the Decision contains a material error of law and if I conclude that it does, either to re-make the decision or remit the appeal to the First-tier Tribunal for redetermination.

## DISCUSSION AND CONCLUSIONS

6. I can deal very shortly with the second of the grounds which I identified ([2(iii)] of the permission grant). Mr Mustafa did not address me on this and was right not to do so. The Judge considered the Article 8 assessment at [17] to [22] of the Decision. As the Judge observed at [19] of the Decision he had "no evidence or information

about Mrs [S] or her daughter" in order to conduct an "at large" proportionality assessment. The Second Appellant's best interests are considered at [22] of the Decision but as the Judge rightly observes, those are "not a trump card"; in any event he had no information about her beyond being told her age. As the Judge there noted "[a]lthough her educational and material circumstances may be improved by coming to the UK, it is also far from clear that her best interests are served by coming with her mother to a very different culture and environment." However, the Judge begins his assessment at [17] of the Decision with his finding from the previous section that "clearly the rules are not met". If there is an error in relation to the first of the grounds (paragraphs [2(i)] and [2(ii)] of the permission grant), that would potentially infect the Judge's Article 8 assessment.

7. I therefore turn to the first ground. The Judge's findings on the fact of the Sponsor's employment appear at [11] to [16] of the Decision as follows:

> "11. Mrs [S] has to prove her case on the balance of probabilities, and a good deal of evidence which might easily have been obtained in the case of genuine employment was not presented. Mr Hussain, for example, could have come to the tribunal or at least provided a witness statement explaining the errors in the telephone interview. In his absence another work colleague could have done so. Most businesses possess a quantity of business stationery, brochures or have a website to which attention could be drawn to show that it is a genuine business but here, even such basic information is almost entirely lacking.
> 12. There are two letters, one from BQC West Bromwich Ltd and the other from BQC Leicester Ltd. The letters have different layouts and there is no company logo on either. They are in slightly different format but each of them could easily be prepared as a Word document with little difficulty. Most surprisingly, neither of them have any website address or even email address with which to contact the company which are practically universal in organisations and have been for many years now. Nor is it at all clear from either of these documents what the company is or does, whereas most business stationery aims to explain that and convey a professional image.
> 13. This lack of email address or website is not, it appears, an oversight. Although Mr [A] told me that customers purchase items online, he could not direct me to any such website. As a manager in the business, presumably dealing with such orders, this is something he would be expected to know, and I regard that statement as particularly damaging to his credibility.
> 14. There is then the fact that he is paid in cash. I also hear cases in employment tribunals and am familiar with normal business practice, so cash payments of this sort are a further extremely surprising feature. Some weekly paid staff, particularly in shop or cash handling environments, may still be paid in cash, but it is quite outside my experience for anyone to be paid cash monthly, let alone a manager earning over £27,000 per year. The practical difficulties alone can easily be imagined. Most cash payments are taken from the till, but any given date is unlikely that there will be £1800 in cash in the till and so cash would have to be extracted at intervals and stockpiled. In practice any shop environment will reconcile the till each evening and deposit the cash at the bank, so in terms of security and certainty it would be far easier to arrange a monthly bank transfer.

> 15. One consequence of these cash payments is that it is in practice impossible to reconcile the bank accounts with these claimed payments. The bank statements show that £1800 is deposited from time to time but there are also many substantial withdrawals from the account which could equally indicate that money is simply being recycled to give the appearance of greater earnings.
> 16. Finally, the P60s and pay statements also suffer the lack of any payroll number or PAYE reference number, which would normally be expected. In short, looking at the evidence [in] the round, I [do] not accept that these documents are genuine or that the claimed employment exists. It follows that I have to find that Mr [A] is not a credible witness and that he has put forward false documents in support of his wife's appeal."

8. I can deal shortly with the general point made that the Sponsor was unaware that his credibility was in issue. First, as Ms Everett pointed out, the Respondent's decision could not be clearer. It says the following:

> "…We have attempted to verify your sponsor's employment. As part of your application your sponsor and your sponsor's employer were interviewed. During these interviews there were discrepancies in the amount of hours your sponsor works and how your sponsor found his job, your sponsor's employer was unsure if your sponsor was interviewed even although your sponsor's employer is your sponsor's direct manager. <u>This leads me to doubt the credibility of your sponsor's employment details.</u> As a result I am unable to rely on this document as evidence of you and your sponsor's ability to meet the financial requirements of the Immigration Rules…"
> [my emphasis]

Although, so far as I can see, the evidence from the interviews in the form of any notes is not produced by the Respondent, the letter from Mr Hussain mentions an interview with the Respondent and the Appellant deals with it in his statement.

9. Second, the assertion that the Appellant was not on notice as to credibility concerns at the hearing is without merit. The Respondent was unrepresented at the hearing, but the Judge asked questions which are noted at [7] to [9] of the Decision and which show that the Judge was concerned about the documents produced.

10. I can also deal shortly with a point made by Mr Mustafa that the Judge goes further than did the Respondent by finding that the documents produced are false ([16] of the Decision). I can see no contradiction between the Respondent's decision which is essentially that the documents are contrived in order to show an employment which does not exist and the Judge's findings that those documents are not genuine in the sense that they do not genuinely show what they purport to do. The fact that, if the Respondent had made an express finding that the documents were false, he could have refused also on suitability grounds is nothing to the point. That is to the Appellants' benefit not detriment (particularly since a conclusion by the Respondent that documents were false might impact on any future applications).

11. Moving on then to the specific points, I can see nothing wrong in principle with any of the issues taken by the Judge. Although Mr Mustafa said that the two businesses

did in fact have a website so it is not clear why one could not be found at the hearing, he accepted that one was not (see [8] of the Decision) and that this could not constitute an error of law. Moreover, it does not explain the Judge's concern that the letters did not include details of the website on the letterhead. Those do include a phone number so that the Respondent was able to contact the employer for verification but that does not answer the point that most if not all businesses nowadays have a method of contact via the internet and would show that on their letterhead. Nor can the Judge's reasoning regarding cash payments be impugned at least without some explanation by the Sponsor and/or his employer. The point made about PAYE references is also open to the Judge. The PAYE references on the P60s to which the Appellants draw attention in the grounds are the employer's reference and not the employee's reference.

12. There are probably further points which could be made. As I noted in the course of the hearing, the Sponsor was apparently paid £32,140.76 by BQC Leicester Ltd in the tax year to April 2019 and £9,797.77 by BQC West Bromwich Ltd. Those figures do not equate proportionately for the periods during which the Appellant was employed by each company (eight months in the first and four months in the second) whereas both companies give a figure for the Sponsor's pay which is the same (£27,548.04). Furthermore, the amount paid by BQC Leicester Ltd for the first eight months of that tax year exceeds the total annual pay. Mr Mustafa indicated on instruction that the Sponsor was unable to explain why that was so. That the companies issue electronically generated payslips, make tax and national insurance deductions from pay and issue official documents such as P60s also indicates that they have some form of payroll system which further underlines the Judge's concern about why they would pay the Appellant in cash in such circumstances.

13. There is however one document which, as Judge Simpson noted, and Ms Everett accepted, the Judge has failed to mention, and which was before him. That is a letter from HMRC dated 21 May 2019 which sets out the Appellant's employment history from 2014. The figures for 2019 are consistent with the P60s in the bundle. As Ms Everett pointed out, the letter does not indicate how HMRC has been provided with that information; whether by tax payments from the companies via PAYE or via self-assessment tax return. I also observe that there is a large jump in the Sponsor's income between the tax year ending 2018 and tax year ending 2019 (in other words around the time of the application). However, the Judge did at least need to deal with this document as it emanates from an independent source. That is an error of law.

14. Although when that document is considered alongside the other evidence, the outcome may be the same, I am unable to conclude that this is necessarily so. For that reason, I set aside the Decision.

15. As the Judge observed at [11] of the Decision, there is "a good deal of evidence" which the Appellants/Sponsor could obtain to show his employment with and income from BQC. As it is, having regard to the additional evidence which the Appellants seek to adduce, that might not be necessary now as it appears that the

Sponsor has changed employment and is now a self-employed taxi driver. That may well change the complexion of the case for better or worse. Since the appeals have to be considered as at date of hearing, however, they will need to be reconsidered on the up-to-date information.

**16.** I have given a direction below for any updated evidence to be provided within the next six weeks after which the appeals will be relisted for hearing before this Tribunal. I see no need to remit the appeals. The issue to be determined is a narrow one and the findings required are not extensive.

**CONCLUSION**

**17.** For the above reasons, I find an error of law in the Decision and I set that aside. I give directions for further evidence and relisting below.

**DECISION**

**The decision of First-tier Tribunal Judge Fowell promulgated on 7 August 2019 contains a material error of law. I set aside that decision. I make the following directions for a resumed hearing:**

1. **Within six weeks from the date when this decision is sent, either party may file with the Tribunal and serve on the opposing party any further evidence on which either of them relies.**
2. **The appeals are to be relisted before the Upper Tribunal on the first available date following six weeks from the sending of this decision with a time estimate of half day. An Urdu interpreter is to be booked for the hearing.**

Signed Dated: 12 December 2019

Upper Tribunal Judge Smith