



IAC-AH-KEW-V1

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

Appeal Number: OA/12619/2014

**THE IMMIGRATION ACTS**

**Heard at Bradford**

**On 1 February 2016**

**Decision & Reasons  
Promulgated  
On 13 April 2016**

**Before**

**UPPER TRIBUNAL JUDGE CLIVE LANE**

**Between**

**ENTRY CLEARANCE OFFICER - LAHORE**

Appellant

**and**

**FAISAL AFZAL  
(ANONYMITY DIRECTION NOT MADE)**

Respondent

**Representation:**

For the Appellant: Mrs R Pettersen, a Senior Home Office Presenting Officer  
For the Respondent: Ms Hashimi, instructed by Whitefield Solicitors Limited

**DECISION AND REASONS**

1. I shall refer to the respondent as the appellant and to the appellant as the respondent (as they appeared respectively before the First-tier Tribunal). The appellant, Faisal Afzal, was born on 10 June 1977 and is a male citizen of Pakistan. The appellant applied for entry clearance to the United

Kingdom for settlement as the partner of a person present or settled here. His application was refused by a decision of the Entry Clearance Officer (ECO) on 8 September 2014. He appealed to the First-tier Tribunal (Judge Mensah) which, in a Decision and Reasons promulgated on 10 June 2015 allowed the appeal on Article 8 ECHR grounds. The Secretary of State now appeals, with permission, to the Upper Tribunal.

2. It is common ground between the parties that the appellant was unable to meet the requirements of the Immigration Rules. Indeed, Judge Mensah [9] noted that,

The sponsor accepts that she cannot meet the specified documents required within the Rules because her job with HRA Brothers Limited was not paid into her bank account but instead was paid cash and she did not deposit the entire wage into her bank but says she used the money for her day-to-day expenses.

3. Notwithstanding that finding, the judge went on to find that there were exceptional circumstances such that the appeal should be allowed under Article 8 ECHR. Before the First-tier Tribunal, the appellant relied upon *Mostafa (Article 8 in Entry Clearance)* [2015] UKUT 112. Referring to that case [11], the judge noted that it “made clear when assessing proportionality under Article 8 the ability of the appellant to satisfy the Rules was capable of being a weighty [factor].” The judge accepted “undisputed documentary evidence” that the sponsor was in fact earning in excess of the financial minimum and that she had failed to “pay the total sum from her employment with HRA Brothers into her bank account because she used some of the money on day-to-day expenses.” The judge noted that the sponsor had rectified that difficulty as from September 2014 “when she received the decision.” Concluding her analysis at [12], the judge said,

I do not consider it proportionate to force [the appellant and sponsor] to now re-apply and file the same documents as are before me and can see no material benefit or public interest in forcing them to do so. However I can see that to force them to do so would delay their union and therefore interfere with the family life (*sic*)

4. I find that the judge erred in law such that her decision falls to be set aside. I have reached that decision for the following reasons. First, I find that the judge has misapplied *Mostafa*. An ability of an appellant to satisfy the Immigration Rules may well be a “weighty factor” in determining proportionality under Article 8 but in the present appeal the appellant did not meet the requirements of the Immigration Rules; in particular, he could not meet the Rules as to specified documents. Secondly, it is not clear in this out of country application why the judge has taken into account post-decision evidence such that the appellant and sponsor have, in effect, persuaded the judge that they could meet the specified documents requirements of the Immigration Rules (see the “rectification” of the sponsor’s physical arrangements referred to at [11]). Further, having regard to the Court of Appeal judgment in *SS (Congo)* [2015] EWCA

Civ 387, there was no analysis by the judge as to whether family life may be enjoyed outside the United Kingdom. Finally, the reason given by the judge for allowing the appeal on Article 8 grounds (that is, because it would not be reasonable to “force them to ... delay their union and therefore interfere with the family life.”) is not apposite. I accept Mrs Petterson’s submission that, as soon as the appellant and sponsor realised that they were failing to comply with the specified documents requirements in September 2014, they could have made a fresh application for entry clearance rather than pursue a lengthy appeal through the Tribunal system. They have, therefore, been kept apart by their own conduct and not that of the Secretary of State.

5. In the circumstances, I set aside the First-tier Tribunal’s decision. Further, in the light of the findings and observations which I have set out above I re-make the decision dismissing the appeal under the Immigration Rules and on Article 8 ECHR grounds.
6. Finally, I record that Miss Hashimi raised a preliminary issue at the Upper Tribunal hearing. She was concerned that the grant of permission by Judge Rintoul referred, in the headings to the decision, to a different appellant. I am not satisfied that that is any more than a typographical or template error and has no impact whatever upon the validity on Judge Rintoul’s grant of permission.

### **Notice of Decision**

The decision of the First-tier Tribunal which was promulgated on 10 June 2015 is set aside. I re-make the decision. The appellant’s appeal against the decision of the Entry Clearance Officer dated 8 September 2014 is dismissed under the Immigration Rules and on Article 8 ECHR grounds.

No anonymity direction is made.

Signed

Date 2 April 2016

Upper Tribunal Judge Clive Lane

I have dismissed the appeal and therefore there can be no fee award.

Signed

Date 2 April 2016

Upper Tribunal Judge Clive Lane