



IAC-AH-DP-V1

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

Appeal Number: VA/00576/2015

THE IMMIGRATION ACTS

Heard at Birmingham On 12th April 2016	Centre City	Tower	Decision Promulgated On 25th April 2016	&	Reasons
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Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

ENTRY CLEARANCE OFFICER - ABU DHABI

Appellant

and

**SAMI ULLAH KHAN
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr D Mills, Senior Home Office Presenting Officer
For the Respondent: No representation

DECISION AND REASONS

Introduction and Background

1. The Entry Clearance Officer (ECO) appeals against a decision of Judge Meyler of the First-tier Tribunal (the FtT) promulgated on 2nd July 2015.

2. The Respondent before the Upper Tribunal was the Appellant before the FtT and I will refer to him as the Claimant.
3. The Claimant is a male citizen of Pakistan born 27th April 1985 who in December 2014 applied for entry clearance to the United Kingdom as a family visitor.
4. The Claimant indicated that he wished to visit his wife Nasim Gul (the Sponsor) who is a British citizen, and also his son who was born in the United Kingdom on 25th May 2012. The Claimant indicated that he and his wife had married in Pakistan on 18th July 2011.
5. The Claimant submitted with his application a letter from his wife dated 14th November 2014 inviting him to stay with her in the United Kingdom for “up to one month during my maternity after labour”.
6. The ECO refused the application on 5th January 2015 with reference to paragraph 41(i) and (ii) of the Immigration Rules, not being satisfied that the Claimant genuinely intended only a short visit to the United Kingdom, and not being satisfied that he would leave at the conclusion of his visit. The ECO did not accept that the Claimant had given an accurate account of his circumstances which in the view of the ECO, undermined the credibility of the Claimant’s application and the statements that he had made in connection with his application.
7. The Claimant appealed to the FtT, requesting that his appeal be decided on the papers, rather than at an oral hearing. In brief summary the Claimant contended that he had given an accurate account of his circumstances in Pakistan and that he satisfied paragraph 41 of the Immigration Rules, and in addition relied upon Article 8 of the 1950 European Convention on Human Rights (the 1950 Convention). In relation to Article 8 the Claimant contended;

“My partner has the right to have her husband’s support in her time of need and my children have the right to spend at least one month with their father.”
8. The application was reviewed by an Entry Clearance Manager in the light of the appeal, but the decision to refuse entry clearance was maintained.
9. The FtT considered the appeal on the papers as requested. The FtT recognised that the Claimant had a right of appeal limited to consideration of human rights, and therefore considered Article 8 of the 1950 Convention.
10. The FtT noted that the ECO had attempted to contact the Sponsor without success and that there had been no further evidence from the Sponsor since the date of decision. The FtT noted in paragraph 16 that there was no evidence to explain the reason for the separation between the Claimant and Sponsor and there was no evidence confirming that family life was actually enjoyed between the parties. Neither was there any explanation

as to why family life could not be enjoyed in the same manner as previously, with the parties living separately, nor was there any explanation as to why the Sponsor could not visit the Appellant in Pakistan. The FtT observed that cohabitation is not a pre-requisite for the enjoyment of family life, but in this case there is a very considerable geographical separation as well as a lack of cohabitation and no explanation for that separation.

11. The FtT found that there was no evidence that the marriage subsisted, or that there were any emotional ties between the parties, and no evidence that the Claimant enjoys close personal ties with the Sponsor. The FtT found in paragraph 24;

“Were it not for the children, I would have dismissed this case without hesitation.”

12. However the FtT went on to find in paragraph 21;

“However the law requires me to accept that there is a family life bond between the Appellant and his two children, who are third parties to this appeal but nonetheless affected by the decision. It is not in dispute that the marital union was genuine and lawful nor is it in dispute that both children are born of the marital union. I therefore accept that family life is engaged between the Appellant and his two children in the UK.”

13. The FtT went on to allow the appeal under Article 8 taking the view that Article 8 was engaged by reason of a family relationship between the Appellant and his two children, and that to refuse entry clearance denied the two children any contact with their biological father and was therefore disproportionate.

14. The ECO applied for permission to appeal to the Upper Tribunal. In summary it was contended that the FtT had failed to give adequate reasons for findings on a material matter.

15. It was contended that the FtT erred in proceeding to undertake a proportionality assessment, without having made a reasoned finding that there is family life between the Claimant and Sponsor. It was submitted that the FtT had erred in paragraph 25 by referring to the “existence of presumed family bonds between father and children”, the ECO submitting that such a presumption is not sufficient to engage Article 8.

16. It was also submitted that the FtT had erred in paragraph 23 by finding that the Sponsor may encounter difficulties if she visited Pakistan, as she is a British citizen of Afghan origin, and women face discrimination in Pakistan. It was submitted that this amounted to speculation, and there was no evidence to support this assertion.

17. Permission to appeal was granted by Upper Tribunal Judge Martin on 8th October 2015, and directions were given that there should be an oral

hearing before the Upper Tribunal, to ascertain whether the FtT had erred in law such that the decision must be set aside.

The Upper Tribunal Hearing

18. There was no attendance on behalf of the Claimant. Notice of the hearing had been given both to the Claimant and Sponsor at the last address notified to the Tribunal, and the notices of hearing had been issued on 9th March 2016. I considered rule 38 of the Tribunal Procedure (Upper Tribunal) Rules 2008 which states that if a party fails to attend a hearing, the Upper Tribunal may proceed with the hearing if satisfied that the party has been notified of the hearing or that reasonable steps have been taken to notify the party of the hearing, and it is in the interests of justice to proceed with the hearing.
19. I was satisfied that proper notice of the hearing had been given, and that it was in the interests of justice to proceed and consider the FtT decision, taking into account that entry clearance had been refused as long ago as 5th January 2015, and the FtT decision had been promulgated on 2nd July 2015.
20. I heard submissions from Mr Mills who submitted that the FtT had erred in paragraph 21 by finding that the law required the FtT to accept a family life bond between the Appellant and his two children. Mr Mills submitted that the correct position is that there is a presumption of family life between a parent and a child, but the burden of proof, so far as engagement of Article 8 is concerned, rests upon the individual claiming that family life exists. The evidence before the FtT did not prove this. Mr Mills submitted therefore, that the FtT should have found, due to the lack of evidence, which was commented on by the FtT, that Article 8 was not engaged.
21. In the alternative, if the FtT was correct to find that family life was engaged between the Claimant and his child, the FtT had erred by falling into speculation, when considering proportionality.
22. I was asked to set aside the decision of the FtT, and to re-make it, by dismissing the Claimant's appeal.
23. I reserved my decision.

My Conclusions and Reasons

24. In my view the FtT was correct to find that the Claimant had not established family life between himself and the Sponsor, and gave adequate reasons for this conclusion, and referred appropriately to the lack of evidence.
25. I accept the submission made by Mr Mills that the FtT fell into error in paragraph 21, by recording that the FtT was required by law to accept that there is a family life bond between the Appellant and his two children.

26. Having considered all the papers submitted to the Tribunal, I can find no evidence to indicate that the Claimant and his wife have two children. There is a birth certificate confirming that the Claimant's son was born in the United Kingdom on 25th May 2012, and there is reference to the Sponsor being pregnant, but there is no evidence to indicate that another child was born at the date of refusal of entry clearance, which was 5th January 2015. In an appeal against refusal of entry clearance, it is the circumstances appertaining at the date of refusal that must be considered.
27. The ECO has not disputed that the Claimant has a child in the United Kingdom, but it is for the Claimant to prove that family life exists between himself and the child. The fact that an individual is the biological parent of a child does not necessarily mean that family life exists.
28. I accept that AG (Eritrea) [2007] EWCA Civ 801, confirms (paragraph 28);

"That while an interference with private or family life must be real if it is to engage Art.8(1), the threshold of engagement (the 'minimum level') is not a specially high one."
29. Even though the threshold of engagement is not especially high, the burden in this case, is on the Claimant to establish family life with his child. The FtT, in fact, directly points to an absence of evidence, which is why it was found that family life did not exist between the Claimant and the Sponsor. There is no satisfactory evidence of any form of contact between the Claimant and his son, and no evidence that they have physically met. The FtT noted in paragraph 19 that there did not appear to be any close personal ties between the Claimant and his children, and commented that there may be plans to create such close personal ties in the future. In my view, the FtT was correct to note the absence of close personal ties and the absence of evidence of contact and communication, and therefore should have found that the Claimant had not discharged the burden of proving that family life existed between himself and his son. I conclude that the FtT materially erred in believing that the law required an acceptance that there was family life between a parent and a biological child, and therefore the decision is set aside.
30. I re-make the decision by dismissing the Claimant's appeal. I do so because the Upper Tribunal confirmed in Adjei [2015] UKUT 0261 (IAC) that the first question to be addressed in an appeal against refusal to grant entry clearance as a visitor where only human rights grounds are available is whether Article 8 of the ECHR is engaged at all. If it is not, which will not infrequently be the case, the Tribunal has no jurisdiction to embark upon an assessment of the decision of the ECO under the rules and should not do so.
31. The Claimant has had ample opportunity to produce evidence to demonstrate that family life is engaged. There has been no further evidence from the Sponsor since her letter of invitation in November 2014. The Claimant has specifically requested that his appeal be considered by

the FtT on the papers rather than at an oral hearing. The Claimant has not responded to the grant of permission to appeal to the Upper Tribunal, and has made no attempt to submit any further evidence to the Upper Tribunal, and again there was no attendance on behalf of the Claimant before the Upper Tribunal.

32. I accept that the evidence that has been submitted indicates that the Claimant has a son in the United Kingdom, who is a British citizen and who was born in this country. There is however no satisfactory evidence to indicate that there has ever been any contact between the Claimant and his son, and because of the lack of satisfactory evidence, I am not satisfied that Article 8 is engaged on the basis of family life between the Claimant and his son. The findings of the FtT to the effect that there was insufficient evidence to prove family life between the Claimant and the Sponsor are preserved.

Notice of Decision

The decision of the FtT contained an error of law and was set aside. I substitute a fresh decision. The Claimant's appeal is dismissed.

Anonymity

The FtT made no anonymity direction. There has been no request for anonymity made to the Upper Tribunal and I see no need to make an anonymity direction.

Signed

Date: 13th April 2016

Deputy Upper Tribunal Judge M A Hall

TO THE RESPONDENT FEE AWARD

The Claimant's appeal is dismissed. There is no fee award.

Signed

Date: 13th April 2016

Deputy Upper Tribunal Judge M A Hall