



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: OA/09629/2013

**THE IMMIGRATION ACTS**

Heard at Field House  
On 14<sup>th</sup> April 2014

Determination Promulgated  
On 1<sup>st</sup> Aug 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE HARRIS

Between

MR VIPAN KUMAR  
(NO ANONYMITY ORDER MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mr V Makol, Legal Representative  
For the Respondent: Miss A Holmes, Home Office Presenting Officer

**DETERMINATION AND REASONS**

1. The Appellant is a citizen of India, born on 27<sup>th</sup> September 1988. The Appellant applied for Entry Clearance for the purpose of settlement as a spouse. The application was refused by the Entry Clearance Officer on 19<sup>th</sup> March 2013 on the grounds that the Appellant did not meet the requirements of Appendix FM of the Immigration Rules. The Entry Clearance

Officer was not satisfied that the Appellant's relationship with his sponsor was genuine or subsisting or that they intended to live permanently in the United Kingdom, nor was the Entry Clearance Officer satisfied that the Appellant or sponsor had provided any savings sufficient to meet the financial requirements.

2. The Appellant appealed and the appeal came before First Tier Tribunal Judge Khan sitting at Hatton Cross on 13<sup>th</sup> January 2014. In a determination promulgated on 3<sup>rd</sup> February 2014 the Appellant's appeal was allowed.
3. On 20<sup>th</sup> February 2014, the Secretary of State lodged grounds of appeal to the Upper Tribunal. Those grounds noted that the sponsor and the Appellant now had a young daughter and that the Immigration Judge had taken into consideration the best interests of the child. The Secretary of State submitted that the child was not born at the date of the Entry Clearance Officer's decision, and contended that the Immigration Judge had erred materially in law by taking into consideration the best interests of the child, which had rendered the proportionality assessment to be flawed. It was submitted that the Immigration Judge could only take into consideration the circumstances as they were at the date of the Entry Clearance Officer's decision, even when considering the Appellant's Article 8 rights.
4. Further, it was contended that the Appellant did not meet the financial requirements and that there were no savings to make up the shortfall. The Secretary of State argued that the Immigration Judge had failed to give adequate reasons for finding that the Appellant's Article 8 rights would be breached and had failed to give adequate consideration to the Secretary of State's policies.
5. On 12<sup>th</sup> March 2014, First Tier Tribunal Judge Sommerville granted permission to appeal. Judge Sommerville noted that the background was not in issue, but that the sponsor could not meet the maintenance requirements of Appendix FM but that the First Tier Tribunal Judge had allowed the appeal on human rights grounds relying on the authority of *MM [2013] EWHC 1900*. He considered the grounds to be arguable. It is agreed by both parties that the reference at paragraph 6 in the grant of permission to the effect that the grounds are without merit is in fact a typographical error and that what the learned Judge meant was that the grounds do have merit.
6. It is on that basis that the appeal comes before me. The Secretary of State appears by her Home Office Presenting Officer Miss Holmes. The Appellant appears by her legal representative Mr Makol. Mr Makol is familiar with this matter, having appeared before the First Tier Tribunal. This is of course an appeal by the Secretary of State. However, for the purpose of continuity throughout all proceedings in this matter, Mr Kumar is referred to as the Appellant and the Secretary of State as the Respondent.

## **The Facts**

7. Whilst I acknowledge that I am considering whether or not there is an error of law in the decision of the First Tier Tribunal, it is in this instant case relevant to set out certain basic facts. Judge Khan in granting the appeal found the sponsor to be a credible and consistent witness and accepted the genuineness of the relationship between her and the Appellant. The Appellant's application for settlement had been dated 21<sup>st</sup> December 2012. The Notice of Refusal was dated 19<sup>th</sup> March 2013 and the appeal came before the First Tier Tribunal Judge against the Notice of Refusal on 13<sup>th</sup> January 2014. Against that background it is relevant to note that the sponsor gave birth to a child Jessica on 25<sup>th</sup> August 2013. It is consequently fair

to state that at the date that the application was made, it is highly probable that neither the Appellant nor the sponsor were aware that she was pregnant. Further, there would be no additional evidence submitted before the Entry Clearance Officer at the time that the Entry Clearance Officer made his decision, but when grounds of appeal are lodged to the First Tier Tribunal the sponsor's pregnancy was disclosed and it was averred that this would be further proof of the genuine and subsisting relationship, something which was accepted by Judge Khan in the First Tier Tribunal.

### **Submissions**

8. Miss Holmes reminds me of the provisions of Section 85A of the Nationality, Immigration and Asylum Act 2000 setting out the matter to be considered when new evidence is considered by a Tribunal and to the right of appeal generally to be found under Section 82(2)(b) so far as it relates to an immigration decision and the refusal of Entry Clearance. She submits that as a result of consideration of the relevant sections of the 2002 Act, the Judge should not have taken into account the interests of a child, as there was no child around, nor consequently should the interests of the child have been considered pursuant to Article 8 because clearly it would have been impossible for the Entry Clearance Officer to have done so. Miss Holmes contends that it was conceded that the Appellant cannot meet the financial requirements in the new Immigration Rules as the threshold is £18,600. She also does not seek to challenge paragraph 25 of the First Tier Tribunal Judge's determination whereas as a matter of fact he finds the sponsor is earning £15,806 and at some stage of 2012/2013 her earnings went up to over £18,600. That apart Miss Holmes does no more than reiterate the grounds of appeal and asked me to find that there is a material error of law.
9. Mr Makol accepts that the correct date for the evidence to be considered is the date of the Entry Clearance Officer's decision, but that the circumstances for the First Tier Tribunal actually appertain to the date of decision namely that a child has been conceived but not born, and that the correct approach may well have been the matter to have been returned to the Entry Clearance Officer to consider afresh, but that the Judge was perfectly entitled to take the stance that he did.
10. Mr Makol further points out that it was conceded that the strict financial figure set out in the current Immigration Rules could not be met by the Appellant at the date of hearing, and that thereafter it is appropriate to look at the genuineness/subsistence of the marriage/relationship under Article 8 and the fact that a child has now been born. He reminds me that the First Tier Tribunal Judge found the sponsor to be credible and that it is necessary to look at this matter on the balance of probability. He acknowledges that the best interests of the child were therefore not before the First Tier Tribunal, and therefore for the Judge to have dealt with it may well have been an error of law, but it is not material and that the Judge has gone on to consider all aspects properly to make proper conclusions.

### **The Law**

11. Errors of legislative interpretation, failure to following binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial consideration, reaching irrational conclusions on fact or evaluation give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.
12. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an

Immigration Judge to fail to deal with every factual issue of argument. Disagreement with an Immigration Judge's factual conclusion, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence which was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because an Immigration Judge concludes that the story told is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

## Findings

13. This is a category of case that comes about very rarely, namely a scenario where at date of application there was no child of the family, but at date of appeal there was. The Appellant cannot be criticised for her approach. The sponsor is employed by the NHS and it is accepted that she cannot meet the requirements of the financial threshold of £18,600 imposed by the new Immigration Rules. It is important to look at the manner in which the Judge addressed this case. Firstly, he has looked at the position that the case was refused by the Secretary of State, firstly on the ground that the Secretary of State was not satisfied that the relationship was genuine and subsisting and that the parties intended to live permanently together. He has found having heard her evidence that he, on the balance of probabilities, disagrees with that and that that is bolstered by the birth of Jessica. It is important to note at paragraph 23 of the First Tier Tribunal Judge's determination has merely said that the genuineness and subsistence of that relationship between the couple is assisted by the further evidence of Jessica's birth, but that having heard the evidence in the round, he was satisfied that there was a genuine and subsisting relationship. He found the sponsor's testimony to be credible. That was a decision he was entitled to make and therefore whilst he may have erred in giving due consideration to the best interests of the child, I do not find that it is material to the outcome. The alternative would have been to have remitted this matter back to the Secretary of State and to have prolonged a process which would lead to the current scenario.
14. Further, so far as the financial position of the sponsor was concerned, it is accepted that she lost income whilst on maternity leave. The Judge has given a full and detailed analysis of the leading authority of *MM* and thereafter gone on to make findings at paragraph 25 that it would be disproportionate to keep the family unit separated because the sponsor's earnings were below £18,600 at the date of application. That was a finding that the Judge was entitled to make and that he heard the evidence, reasoned it through and made his decision.
15. I acknowledge that between the hearing of this matter and the handing down of this determination the Court of Appeal has handed down Judgment in *MM [2014] EWCA Civ 985*. The Court of Appeal was not expounding new law but saying what it always was. This is not an appeal under the Immigration Rules but Article 8.
16. In such circumstances the decision of the First Tier Tribunal discloses no material error of law and the appeal of the Secretary of State is dismissed and the decision of the First Tier Tribunal is upheld.

**Decision**

17. The decision of the First Tier Tribunal discloses no material error of law and the appeal of the Secretary of State is dismissed
18. The First Tier Tribunal Judge did not make an Order pursuant to Rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. No application is made to vary that Order and none is made.

Signed: D N Harris

Dated: 31 July 2014

D N Harris  
Deputy Upper Tribunal Judge