



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

Appeal number: IA/09760/2015

THE IMMIGRATION ACTS

Heard at Manchester

**Decision and Reasons
Promulgated**

On November 23, 2015

On November 26, 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MR IMRAN KHAN
(NO ANONYMITY DIRECTION MADE)**

Respondent

Representation:

Appellant

Mr Harrison (Home Office Presenting Officer)

Respondent

No attendance

DECISION AND REASONS

1. Whereas the original respondent is the appealing party, I shall, in the interests of convenience and consistency, replicate the nomenclature of the decision at first instance.
2. The appellant, citizen of Pakistan applied to vary his leave to enter or remain as the partner of a person present and settled in the United Kingdom on December 22, 2014. On February 20, 2015 the respondent

refused the application and issued directions for his removal pursuant to Section 47 of the Immigration, Asylum and Nationality Act 2006. The appellant appealed this decision on March 10, 2015 under section 82(1) of the Nationality, Immigration and Asylum Act 2002.

3. The appeal came before Judge of the First-tier Tribunal Gurung-Thapa on June 3, 2015 and she allowed the appellant's appeal under Section EX.1 of Appendix FM of the Immigration Rules on the basis the appellant's wife had just given birth to their child who was a British citizen.
4. The respondent sought permission to appeal that decision on June 24, 2015 on the grounds the Tribunal had approached this issue incorrectly. Permission to appeal was granted on October 20, 2015 by Judge of the First-tier Tribunal Simpson who concluded at paragraph [4] that all grounds were arguable.
5. On November 17, 2015 the appellant's solicitors advised the Tribunal that the appellant no longer pursued this application as he had submitted a fresh application based on the birth of the child.
6. The First-tier Tribunal did not make an anonymity direction and pursuant to Rule 14 of The Tribunal Procedure (Upper Tribunal) Rules 2008 I see no reason to make an order now.

ERROR IN LAW

7. Mr Harrison pointed out that a substantial part of the permission concerned itself with article 8 whereas the grounds were concerned with the Rules. He submitted that the Tribunal had erred in allowing the appeal under Section EX.1 of Appendix FM because when the application had been submitted the appellant could not satisfy the Rules and, in particular, Section E-LTRPT 2.2 that required the child to have been born at the date of application. As the child was only born on June 3, 2015 (six months later) then the Tribunal had erred in allowing the appeal.
8. There was no attendance by the appellant's solicitors save they had excused themselves from the hearing on November 17, 2015.

DISCUSSION AND FINDING

9. The appellant had submitted an application under the Rules to remain as a partner. The Tribunal did not actually consider that application when it dealt with the matter in its decision promulgated on June 17, 2015 albeit heard on June 3, 2015.
10. The Tribunal instead took into account evidence submitted after the hearing date that the appellant's child was now born and allowed the appeal under Section EX.1 on the basis the child was British and that he had a genuine and subsisting parental relationship with it.

11. This approach was incorrect bearing in mind the application was to remain as a partner and the respondent had not had any opportunity to consider the changed basis of the application. Under the Rules the relevant date is the date of application and whilst post application evidence could be adduced this evidence would not alter the basic requirement of the Rules.
12. I am satisfied there was a material error in law and I set aside the earlier decision under the Rules. The Tribunal had not considered the appeal under paragraph 276ADE HC 395 or article 8 ECHR.
13. In normal circumstances I would have proceeded to consider the matter further but I have before me a letter from the appellants' solicitors attaching a statement from the appellant withdrawing his appeal on the basis he has submitted a fresh application as a parent.
14. Rule 17 of the Tribunal Procedure (Upper Tribunal) Regulations 2008 allows a party to give notice of the withdrawal of its case, or any part of it. The Tribunal has a discretion to give consent. In light of the letter and statement I give my consent to the withdrawal by the appellant of his pending appeal.

DECISION

15. There was a material error and I set aside the earlier decision.
16. I allow the appellant to withdraw his appeal.

Signed:

Dated:




Deputy Upper Tribunal Judge Alis

FEE AWARD

I make no fee award as the appellant withdrew his appeal.

Signed:

Dated:



Deputy Upper Tribunal Judge Alis