



IAC-FH-NL-V1

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

Appeal Number: IA/09937/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 14 January 2016**

**Decision & Reasons Promulgated
On 10 February 2016**

Before

UPPER TRIBUNAL JUDGE FINCH

Between

**RABIA QAYYUM
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms D Ofei-Kwatia, Counsel instructed by JS Solicitors
For the Respondent: Ms S Sreeraman, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant, who was born on 24 April 1986, is a national of Pakistan. She is married to Aqueel Ahmed, who is a British citizen. They initially met in the United Kingdom in March 2007 and the Appellant returned here in 2009 to visit him. She came into the United Kingdom again in August 2013, as a visitor, and whilst she was here they decided to marry. This marriage was not approved of by her parents but was by his parents. They entered into an Islamic marriage on 6 October 2013 and a civil marriage on 30 October 2013. She then applied on 21 November 2013 for leave to remain as the spouse of a person settled in the United Kingdom.

This application was refused on 11 February 2014 as she had been a visitor when she made the application and, therefore, did not have the necessary immigration status to meet the requirements of Appendix FM to the Immigration Rules. In addition, she did not have evidence of a sufficient level of English. It was also asserted in the refusal that she did not meet the exceptions of EX.1 of Appendix FM. She appealed on 25 February 2014. No grounds of appeal were submitted at that point but they were submitted subsequently.

2. Her appeal was heard on 21 January 2015 but the decision was not promulgated until 24 July 2015. First-tier Tribunal Judge Hamilton dismissed her appeal and she appealed against this decision on 1 August 2015. First-tier Tribunal Judge Colyer granted permission to appeal on 2 November 2015 and the Secretary of State made a Rule 24 response on 2 December 2015.
3. The grounds of appeal are quite wide-ranging but today the Appellant's Counsel has relied upon general assertions which you can derive from the grounds. She says that First-tier Tribunal Judge Hamilton erred in law by prioritising EX.1(b) of Appendix FM which relates to a genuine subsisting marriage with a spouse or partner over EX.1(a) which looks at genuine and subsisting relationships with a child. In this case at the date of decision the Appellant was the mother of a British child.
4. The Home Office Presenting Officer argued that the First-tier Tribunal Judge had correctly directed himself to some of the law but it is my view that it was the manner in which he addressed the totality of the evidence which was crucial. The fact that he firstly looked at the Appellant's situation coloured the approach when considering the situation of the child because once he had found there were no insurmountable obstacles to the Appellant returning to Pakistan for a short period to apply to re-enter the United Kingdom, he presumed that it was reasonable for the child to accompany her. Nowhere in the determination did she address herself in any detail to *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 11 or to Section 55 of the 2009 Act. At most he states at paragraph 69 of his determination that "I am taking the best interests of the appellant's daughter as a primary consideration" and that he bore in mind that she should not be punished because her parents have chosen to try to circumvent the Immigration Rules.
5. But then in paragraph 69 of his decision he notes that there is a danger, which was recognised in the ECHR case of *Jeunesse v The Netherlands* Application No. 12738/10, that some parents may use their children as a means of circumventing immigration control and that states are entitled to expect that individuals will comply with the Immigration Rules that apply to them. However, I noted that when the Appellant applied for leave to remain as a spouse she did not have any children. She was pregnant at that time but there was no child who was a British child. It is also clear from the rest of the determination that the fact that the First-tier Tribunal Judge had concluded that the Appellant had conspired to get round the

Rules did colour how he looked at the rights of the daughter and nowhere does he consider the child's rights as a British child. The Home Office Presenting Officer referred to *EV (Philippines) & Others v Secretary of State for the Home Department* [2014] EWCA Civ 874 but much of this case related to the need for children to remain here to complete their education and no such argument was raised in the current appeal. The key case that should have been considered in some detail was *ZH (Tanzania)* because there was a British father and a British child and a mother who had applied for further leave when she was legally in the United Kingdom, albeit as a visitor. She did not have a poor immigration history, and following *ZH (Tanzania)*, the starting point should have been a consideration of the benefits which accrue to a British citizen which include access to a settled existence, to medical treatment and other services and this was not addressed by the Judge.

6. I have also been referred to the case of *Treebhawon and others (section 117B(6))* [2015] UKUT 00674 (IAC) in relation to Section 117B of the Nationality, Immigration and Asylum Act 2002 and I find that the Judge had also not given sufficient weight to sub-section 117B(6). I note that in *Treebhawan* the Honourable Mr. Justice McCloskey found that "in Section 117B(6) public interest prevails over the public interest identified in Sections 117B(1) to (3)". For those reasons I find that First-tier Tribunal Judge Hamilton did make material errors of law and I remit the case to be re-heard by a First-tier Tribunal Judge other than First-tier Tribunal Judge Hamilton.

Notice of Decision

7. I allow the Appellant's appeal.
8. I remit her appeal to the First-tier Tribunal to be heard *de novo* by a First-tier Tribunal Judge other than First-tier Tribunal Judge Hamilton.

Signed

Date 2 February 2016

Nadine Finch
Upper Tribunal Judge Finch